

CITY OF LINCOLN CITY

SPECIAL CITY COUNCIL MEETING AGENDA

MONDAY MARCH 16, 2020 11:45 AM

11:45 AM - The Lincoln City Council of City of Lincoln City will hold a Special Meeting Lincoln City Council in the Council Chambers, 801 SW Highway 101 - 3rd Floor, Lincoln City, OR 97367.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired, for a hearing impaired device, or for other accommodations for persons with disabilities, should be made at least 48 hours in advance of the meeting to Cathy Steere, City Recorder, 541-996-1203.

The Lincoln City Council reserves the right to add or delete items as needed, change the order of the agenda, and discuss any other business deemed necessary at the time of the meeting.

All information for this meeting is available at [www.lincolncity.org](http://www.lincolncity.org) under "Agenda, Packets & Video". This meeting will be televised live on Channel 4. For additional rebroadcast times, please consult the Channel 4 guide on the hour. If you wish to speak on an agenda or non-agenda item, please sign up on the sheet near the entrance door to the Council Chambers. You will be called to speak during the "Public Comment" section. Comments or testimony on agenda items listed under "public hearing/public comment" will be taken at that time.

- A. CALL TO ORDER
- B. ROLL CALL
- C. PLEDGE OF ALLEGIANCE
- D. CONSENT AGENDA - NONE
- E. COMMENTS FROM CITIZENS PRESENT ON AGENDA/NON-AGENDA ITEMS
- F. PUBLIC HEARINGS/PUBLIC COMMENT
- G. ORDINANCES - NONE
- H. RESOLUTIONS - NONE
- I. SPECIAL ORDER OF BUSINESS
  - 1. Decision To Accept Or Reject Attempted Land Use Appeal
- J. CITY MANAGER/CITY ATTORNEY REPORTS
- K. ACTIONS, IF ANY, BASED ON WORK SESSION OR EXECUTIVE SESSION

- L. ADDITIONAL COMMENTS FROM CITIZENS PRESENT ON NON-AGENDA ITEMS**
- M. ANNOUNCEMENTS FROM COUNCIL**
- N. ADJOURNMENT**

# Council Communication

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## Decision to accept or reject appeal

Meeting Date: March 16, 2020      Primary Staff Contact: AnneMarie Skinner  
 Department: Planning Department      E-Mail: ASkinner@lincolncity.org  
 Secondary Dept: Planning Department      Secondary Contacts: Richard Appicello  
 Approval: Ronald F Chandler      Estimated Time: 5 minutes

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### Question:

Should the attempted appeal of a conditional use approval granted by the Planning Commission be summarily dismissed by the City Council for failure to meet the mandatory appeal requirements specified in LCMC 17.76.040.C.?

### Staff Recommendation:

Staff recommends the Council summarily dismiss the appeal.

### Authority:

Lincoln City Municipal Code (LCMC)17.76.040 B and C provide as follows:

B. Decision of Planning Commission. A decision of the planning commission concerning a quasi-judicial land use matter may be appealed to the city council by a party to the hearing by filing an appeal within 10 calendar days of the mailing of the order. **The notice of appeal filed with the city shall contain the information outlined in subsection (C) of this section.** For purposes of this section, “party” refers to the applicant and any person who appeared orally or in writing at the hearing.

The city council may by motion call up a decision of the planning commission on a quasi-judicial land use application, review of which shall be in the form of an appeal reviewed de novo or on the record as the council determines appropriate. The motion shall set the date, time, and place of hearing.

C. Information Required. A request for appeal of a planning commission decision **shall contain:**

1. An identification of the decision sought to be reviewed, including the date of the decision;
  
2. A statement of interest of the person seeking review including that the person was a party to the initial proceedings and appeared orally or in writing before the planning commission;
  
3. The specific grounds relied upon for the review, **including a statement that the criteria against which review is being requested were addressed at the planning commission hearing.**

**(emphasis added)**

**Background:**

A request to appeal a condition of approval of a conditional use permit approval was submitted to the Planning & Community Development Department on February 24, 2020, within 10 days of the mailing of the final order. LCMC Chapter 17.76 regulates appeals. LCMC 17.76.040.A regulates appeals of decisions made by the planning director. LCMC 17.76.040.B regulates appeals of decisions made by Planning Commission. The appellant attached a copy of LCMC 17.76.040.A. to the appeal - this section is inapplicable as it applies only to appeals of decisions of the Planning Director. The correct sections are LCMC 17.76.040.B and C.

Pursuant to LCMC 17.76.040.B and C, a request for appeal of a Planning Commission decision **shall contain:**

- 1. An identification of the decision sought to be reviewed, including the date of the decision;**

The appellant identifies the decision and the date of the decision in the submitted request, so this requirement is met.

- 2. A statement of interest of the person seeking review including that the person was a party to the initial proceedings and appeared orally or in writing before the Planning Commission;**

The appellant is the same individual who appeared orally before the Planning Commission, so this requirement is met.

- 3. The specific grounds relied upon for the review, including a statement that the criteria against which review is being requested were addressed at the Planning Commission hearing.**

The appellant states the specific grounds relied upon for the review. However, at the Planning Commission hearing, the appellant failed to address the criteria against which the review is being requested, either orally or in writing. In other words, the appellant is requesting to appeal one condition of approval to which he expressed no objection before the Planning Commission. The condition of approval was clearly stated in the written staff report, which was emailed to the appellant prior to the hearing. The condition was verbally addressed by staff at the public hearing. The appellant did not question staff about the condition prior to the hearing or at the hearing. The appellant did not request that the Planning Commission remove the condition. In fact, the appellant did not allude to the condition at all, even during the intervening weeks between the hearing and the approval of the final order.

Chairperson Kroen made the following statement at the beginning of the public hearing:

*“Failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to LUBA, the Land Use Board of Appeals, on that issue. Failure of the applicant to raise constitutional or other issues related to proposed conditions of approval with sufficient specificity to allow the decision maker to respond to the issue precludes any action for damages in Circuit Court. Prior to the end of this hearing, any person who participated may request a continuance to provide additional testimony, argument or evidence or request that the record be left open to submit additional written testimony, argument, or evidence.”*

The applicant did not raise any issues, constitutional or otherwise, related to the proposed

condition of approval that is now being appealed. The applicant did not request a continuance or request that the record be left open.

The Code language is mandatory; both LCMC 17.76.040.B and C state that the appeal “shall contain” the items specified. The Council’s legislative enactment states that the appellant must identify where the issue was raised before the Planning Commission. Staff does not believe that it can ignore the language of Council’s legislative enactment and simply process the appeal as if the mandatory language of the code means nothing. Staff is of the opinion that the requested appeal does not meet the requirements of the code for a valid appeal; specifically, the appellant did not provide in the appeal submittal a statement explaining how the appellant addressed the issue at the Planning Commission hearing. Notably, after review of the record, it is clear to staff that the statement cannot be provided because, in fact, the appellant did not address the issue at the hearing or in the record.

### **Council Options:**

Option 1: The City Council interprets the language of its own code to be mandatory and jurisdictional. Specifically, when the words of the code state that:

**a request for appeal of a Planning Commission decision shall contain ...**

**The specific grounds relied upon for the review, including a statement that the criteria against which review is being requested were addressed at the Planning Commission hearing.**

City staff is without authority to process an appeal which fails to contain in a timely appeal submission, the code required statement identifying where in the record of the Planning Commission decision the appellant raised the issue. The City Council twice identified the submittal requirements of LCMC 17.76.040.C. in the Code as required for an appeal of a Planning Commission decision [See LCMC 17.76.040.B & C.] The script, consistent with the Municipal Code and state law, advises all parties to raise or waive all issues.

Option 2: The City Council interprets the language of its own code to be non-mandatory.

Staff may process the appeal.

### **Financial Impact**

Refund of submitted appeal fee.

### **Potential Motions:**

1. Motion to summarily reject the appeal consistent with the Council's interpretation of its own code as set forth in Option 1.
2. Motion to approve Option 2 and process the appeal. The appeal will be held on the record unless the Council determines the appeal will be held "de novo." See 17.76.040.D.(7).