



CITY OF
PORTLAND, OREGON

OFFICE OF THE CITY ATTORNEY

Tracy Reeve, City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax: (503) 823-3089

June 3, 2015

INTEROFFICE MEMORANDUM

TO: Commissioner Nick Fish

FROM: Tracy Reeve *SRR*
City Attorney

SUBJECT: Proposed Legislative Change to Zoning Code

You have asked for an opinion on the proposed legislative change to the zoning code initiated by the Bureau of Planning and Sustainability (BPS). The proposed change would allow the transport of propane by pipe across an environmental zone on property owned by the Port of Portland to be operated by Pembina. The Planning and Sustainability Commission (PSC) recommended approval of the code change effective upon execution of an agreement between the Port and the City addressing environmental and other impacts. There is no quasi-judicial land use application pending; this is a legislative matter.

You have asked whether the City Council is legally obligated to hold a hearing on the PSC's report and recommendation. Title 33 of the zoning code provides in relevant part that:

33.740.020 Commission Review

E. Commission recommendation and decision.

2. If the ... Commission reviewing a legislative action recommends approval, a report and recommendation will be forwarded to City Council.

33.740.030 City Council Consideration

A. Hearing scheduled. The City Auditor will schedule a public hearing....

C. Council decision. At the conclusion of its hearing, the Council may adopt, modify, or give no further consideration to the recommendation. If the decision is to adopt a Code or policy change which was originally authorized by ordinance, the Council must enact its decision by ordinance.

Title 33 thus provides that the PSC will forward its report and recommendation to the City Council and that the Auditor will schedule a hearing. Both of these things occurred. Title 33 also contemplates, but does not explicitly mandate, that the Council will hold a hearing. Typically the way this occurs is that the Commission-in-Charge of BPS files the PSC report and recommendation with the Auditor in accordance with Title 3 and the Auditor

June 2, 2015

Page 2 of 2

places it on the Council Agenda. In this instance, after the report and recommendation was forwarded by the PSC, a hearing was scheduled by the Auditor but the Commissioner-in-Charge (the Mayor) elected not to place the matter on the Council Agenda. We are not aware of any previous situation where the Commissioner-in-Charge elected not to place a report and recommendation of the PSC on the Council Agenda, nor are we aware of any previous City interpretation of Title 33 on this question.

Should Pembina or the Port bring a mandamus action to require the City Council to hold a hearing, it is possible that a court might conclude that there is a mandatory obligation to do so. On the other hand, Title 3 provides that matters will only be placed on the Council Agenda (the legal mechanism for bringing a matter before Council) if one or more Council members or the Auditor introduces and signs the item. We believe Title 33 and Title 3 can be read together to mean that the Auditor's mandatory obligation is merely to schedule a hearing (which occurred here) and that no elected official has a mandatory duty to actually place the item on the Council Agenda. Under this interpretation, there is no mandatory obligation to hold a hearing. We are not able to predict with certainty how a court might rule on the issue.

You have asked whether a City Council decision in this matter would be appealable. Under the zoning code, the Council is free to adopt, modify or give no further consideration to the PSC's recommendation. A decision to adopt or modify the zoning code change would be a final land use decision appealable to the Land Use Board of Appeals. ORS 197.615(3) and 197.830(9). On the other hand, a decision by the Council to give no further consideration to the legislative proposal would not be appealable. ORS 197.620(1).

TPR/ks