



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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## NOTICE OF ADOPTED AMENDMENT

October 24, 2006

TO: Subscribers to Notice of Adopted Plan  
or Land Use Regulation Amendments

FROM: Mara Ulloa, Plan Amendment Program Specialist

SUBJECT: City of Newport Plan Amendment  
DLCD File Number 004-05



The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. A copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures\*

### **DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: November 9, 2006**

This amendment was submitted to DLCD for review 45 days prior to adoption. Pursuant to ORS 197.830 (2)(b) only persons who participated in the local government proceedings leading to adoption of the amendment are eligible to appeal this decision to the Land Use Board of Appeals (LUBA).

If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

**\*NOTE: THE APPEAL DEADLINE IS BASED UPON THE DATE THE DECISION WAS MAILED BY LOCAL GOVERNMENT. A DECISION MAY HAVE BEEN MAILED TO YOU ON A DIFFERENT DATE THAN IT WAS MAILED TO DLCD. AS A RESULT YOUR APPEAL DEADLINE MAY BE EARLIER THAN THE ABOVE DATE SPECIFIED.**

Cc: Gloria Gardiner, DLCD Urban Planning Specialist  
Laren Woolley, DLCD Regional Representative  
James Bassingthwaite, City of Newport

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D L C D NOTICE OF ADOPTION

This form must be mailed to DLCD within 5 working days after the final decision per ORS 197.610, OAR Chapter 660 - Division 18

(See reverse side for submittal requirements)

DEPT OF

OCT 20 2006

LAND CONSERVATION AND DEVELOPMENT

Jurisdiction: City of Newport Local File No.: 1-CP-05/4-Z-05\*

(If no number, use none) \*4-Z-05 portion withdrawn by applicant.

Date of Adoption: October 16, 2006\* Date Mailed: October 19, 2006

(Must be filled in) \*signed on October 18, 2006

Date the Notice of Proposed Amendment was mailed to DLCD: September 28, 2005

- Comprehensive Plan Text Amendment
Land Use Regulation Amendment
New Land Use Regulation
Comprehensive Plan Map Amendment
Zoning Map Amendment
Other: portion withdrawn

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached."

Amendment to Comprehensive Plan Ocean Shoreland Map through error amendment to remove Park and Outstanding Natural Area designation from subject property that is Commercial/C-1 designated property no longer within OPRD ownership...

Applicant withdrew portion of application including request to amend Comp Plan Land Use Map to change about 6.51 acres from High Density Residential to Commercial and to amend Zoning Map to change about 6.51 acres from R-4 to C-3 and 2.25 acres of C-1 to C-3.

Plan Map Changed from: Park & Outstanding to no Park & Outstanding Natural Area
Zone Map Changed from: Natural Area designation to designation

Location: Assessor's Map 11-11-17-DB Tax Lot 18 Acres Involved: approximately 11.02 acres
Specify Density: Previous: 1800 (near SW 32nd and Highway 101) New: ---

Applicable Statewide Planning Goals: 2

Was an Exception Adopted? Yes: No: x

DLCD File No.: 004-05 (14714)



Did the Department of Land Conservation and Development receive a notice of Proposed

Amendment **FORTY FIVE (45) days prior to the first evidentiary hearing.** Yes: \* No:

\*mailed in time for DLCD to receive notice.

If no, do the Statewide Planning Goals apply.

Yes:  No:

If no, did The Emergency Circumstances Require immediate adoption. Yes:  No:

Affected State or Federal Agencies, Local Governments or Special Districts: City of Newport,

DLCD, ODOT, South Beach Urban Renewal District (City of Newport)

Local Contact: James Bassingthwaite Area Code + Phone Number: (541) 574-0626

Address: 169 SW Coast Highway

City: Newport Zip Code+4: 97365-4713

## ADOPTION SUBMITTAL REQUIREMENTS

This form **must be mailed** to DLCD **within 5 working days after the final decision**  
per ORS 197.610, OAR Chapter 660 - Division 18.

1. **Send this Form and TWO (2) Copies of the Adopted Amendment to:**

**ATTENTION: PLAN AMENDMENT SPECIALIST  
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
635 CAPITOL STREET NE, SUITE 150  
SALEM, OREGON 97301-2540**

2. Submit **TWO (2) copies** the adopted material, if copies are bounded please submit **TWO (2) complete copies** of documents and maps.
3. **Please Note:** Adopted materials must be sent to DLCD not later than **FIVE (5) working days** following the date of the final decision on the amendment.
4. Submittal of of this Notice of Adoption must include the text of the amendment plus adopted findings and supplementary information.
5. The deadline to appeal will be extended if you submit this notice of adoption within five working days of the final decision. Appeals to LUBA may be filed within **TWENTY-ONE (21) days** of the date, the "Notice of Adoption" is sent to DLCD.
6. In addition to sending the "Notice of Adoption" to DLCD, you must notify persons who participated in the local hearing and requested notice of the final decision.
7. **Need More Copies?** You can copy this form on to **8-1/2x11 green paper only** ; or call the DLCD Office at (503) 373-0050; or Fax your request to:(503) 378-5518; or Email your request to [Larry.French@state.or.us](mailto:Larry.French@state.or.us) - **ATTENTION: PLAN AMENDMENT SPECIALIST.**



**CITY OF NEWPORT**  
**ORDINANCE NO. 1894**

**AN ORDINANCE AMENDING ORDINANCE NO. 1621 (AS AMENDED) OF  
THE CITY OF NEWPORT, OREGON, TO AMEND THE NEWPORT  
COMPREHENSIVE PLAN OCEAN SHORELANDS MAP**

**WHEREAS**, an application for a Comprehensive Plan map error amendment was made by applicant Home Depot, USA, (Investor's XII, property owner) on September 14, 2005, to correct an error to the Comprehensive Plan Ocean Shorelands Map to remove a "Park and Outstanding Natural Resource Boundary" designation from property (currently identified as Tax Lot 1800 of Lincoln County Assessor's Tax Map 11-11-17-DB) that had been previously redesignated from Public to Commercial by the City Council of the City of Newport in 1996 in Ordinance No. 1757 (approving File No. 4-CP-96) which occurred at the request of the property owner in 1996 with the support of the Oregon State Park and Recreation Department as part of a land trade between the subject property owner and the Oregon State Park and Recreation Department,

**WHEREAS**, the Planning Commission of the City of Newport, after providing the required public notification including the notification to the Department of Land Conservation & Development, held a public hearing on November 14, 2005, and November 28, 2005, and deliberated on December 12, 2005, on the proposed amendment (Newport File No. 1-CP-05) in conjunction with other land use requests submitted by the applicant, for the purpose of reviewing the proposed Comprehensive Plan map error amendment and providing a recommendation to the City Council,

**WHEREAS**, the above said public hearing was held in accordance with the appropriate provisions of the city ordinances, and, after due deliberation and consideration of the proposed change, the Planning Commission, by a unanimous vote, did recommend approval of the proposed Comprehensive Plan map error amendment; and

**WHEREAS**, the City Council of the City of Newport, after providing the required public notification, held a public hearing on September 5, 2006, regarding the question of the proposed Comprehensive Plan map error amendment (Newport File No. 1-CP-05), and voted unanimously in favor of adoption of the proposed amendment, after considering the recommendation of the Planning Commission, the Planning Staff Reports and attachments, and the evidence and argument presented at the public hearing, and directed staff to prepare an ordinance and findings,

**NOW, THEREFORE, THE CITY OF NEWPORT ORDAINS AS FOLLOWS:**

**Section 1.** The City Council adopts the findings contained in Exhibit "A" in support of approval of the requested Comprehensive Plan map error amendment to remove a "Park and Outstanding Natural Resource Boundary" designation on the Comprehensive Plan Ocean Shorelands Map from the subject property currently identified as Lincoln County Assessor's Map 11-11-17-DB Tax Lot 1800.

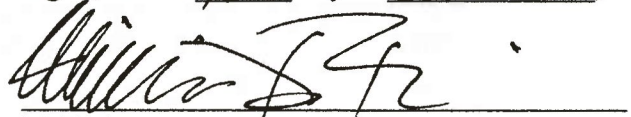


**Section 2.** Ordinance No. 1621 (as amended) is amended to amend the existing Comprehensive Plan Ocean Shorelands Map by removing the "Park and Outstanding Natural Resource Boundary" designation on the Ocean Shorelands Map from the subject property currently identified as Lincoln County Assessor's Map 11-11-17-DB Tax Lot 1800 as illustrated in Exhibit "B" which contains the existing Ocean Shorelands Map involving the subject property and the Ocean Shorelands Map as amended by this ordinance..


Introduced and passed on first reading in a regular meeting of the City Council of the City of Newport, Oregon, held on the 18<sup>th</sup> day of September, 2006.

Passed on second reading, placed for final passage, and adopted by the City Council of the City of Newport, Oregon, on the 16<sup>th</sup> day of October, 2006.

Approved by the Mayor of the City of Newport, Oregon, on the 16<sup>th</sup> day of October, 2006.

  
MAYOR

ATTEST:

  
CITY RECORDER



## EXHIBIT "A"

File No. 1-CP-05

### FINDINGS OF FACT

1. A request for a Comprehensive Plan map error amendment to the Newport Comprehensive Plan Ocean Shorelands Map to remove the current "Park and Outstanding Natural Area Boundary" designation from Assessor's Tax Map 11-11-17-DB Tax Lot 1800 was submitted by applicant, Home Depot USA, Inc., 370 Corporate Drive North, Tukwila, WA 98188 (Trina Whitman, WRG Design, Inc., 5415 SW Westgate Dr., Ste. 100, Portland, OR 97221, authorized agent) (Investors XII, 525 NW Second St., Corvallis, OR 97230, property owner) on September 14, 2005, in conjunction with other land use requests involving property located on Assessor's Map 11-11-17-CA Tax Lots 200, 2703, 3200, 3300, 3500, 3501, and 3600, Assessor's Map 11-11-17-DB Tax Lot 1800, and Assessor's Map 11-11-17-DC Tax Lot 1400. The other requests included: (1) a minor amendment to the Comprehensive Land Use Plan Map of the City of Newport to change the designation of a 6.51 acre tract of land lying west of the unopened portion of the SW Abalone Street right-of-way and a 0.54 acre portion of the SW Abalone Street right-of-way from "Residential" to "Commercial" (originally part of File No. 1-CP-05); (2) an amendment (originally File No. 4-Z-05) to the Zoning Map of the City of Newport to change the designation of a 6.51 acre tract of land lying west of the unopened portion of the SW Abalone Street right-of-way from R-4/"High Density Multi-Family Residential" and to change a portion of the SW Abalone Street right-of-way to C-3/"Heavy Commercial" and to C-1/"Retail and Service Commercial", and to change a 2.25 acre portion of Assessor's Tax Map 11-11-17-DB Tax Lot 1800 from C-1/"Retail and Service Commercial" to C-3/"Heavy Commercial"; (3) a proposed vacation (originally File No. 1-SV-05) of a segment of the unopened portion of SW Abalone Street right-of-way from the north right-of-way line of the unopened portion of the SW 33<sup>rd</sup> Street right-of-way to the north property line of Assessor's Map 11-11-17-CA Tax Lot 200 with a proposed relocation of the right-of-way approximately 225 feet east of the current location; and (4) approval of a tentative subdivision plat (originally File No. 3-SUB-05) to create 8 lots with a proposed subdivision name of "Newport Depot." File Nos. 1-CP-05 and 4-Z-05 were deemed complete on September 28, 2005, and File Nos. 1-SV-05 and 3-SUB-05 were deemed complete on October 11, 2005.

2. The applicant requested a Comprehensive Plan map error amendment to the Newport Comprehensive Plan Ocean Shorelands Map to remove the current "Park and Outstanding Natural Area Boundary" designation from Assessor's Tax Map 11-11-17-DB Tax Lot 1800. Tax Lot 1800 had been previously in the ownership of the Oregon State Park and Recreation Department (OPRD) and designated "Public" on the Comprehensive Plan Land Use Map but was traded by the OPRD for 52.02 acres of other "Commercial" designated property adjacent the South Beach State Park in 1996 (and the 52.02 acres was subsequently redesignated from "Commercial" to "Public" in 2003 as part of the adoption of the 2003 South Beach State Park Master Plan in File No. 1-CP-03/2-CP-03). Tax Lot 1800 was redesignated from "Public" to "Commercial" in 1996 as part of the property trade by OPRD in File No. 4-CP-96 (adopted by Ordinance No. 1757), but the Ocean Shorelands Map overlay indicating park ownership was apparently not removed at that time.



3. Prior to the City Council public hearing and after the Planning Commission finished the Commission public hearing process, the applicant, by letter dated July 7, 2006, withdrew all but the Comprehensive Plan map error amendment from the previous set of land use applications for a proposed Home Depot store.

4. The Planning Commission reviewed the error amendment request in conjunction with the other land use requests previously submitted by the applicant. In regard to the error amendment, the Planning Commission makes a recommendation to the City Council. The Planning Commission held public hearings on November 14, 2005, and November 28, 2005, and on December 12, 2005, deliberated and voted to recommend approval of the error amendment request, as well as recommending approval of the withdrawn requests with conditions of approval related to portions of the request that have been withdrawn. Additionally, as the Planning Commission was the approval authority for the subdivision request, the Commission approved that request with conditions of approval as well. The subdivision request was subsequently appealed by Ray Hunt (represented by Wallace Lien) but the subdivision request was ultimately withdrawn by the applicant prior to the appeal being heard by the City Council.

5. Upon acceptance of the applications, the Community Development Department mailed a combined notice of the proposed land use requests, including the comprehensive plan error amendment, on October 24, 2005, to property owners within the distances required to receive such notice for the applicable requests by the Newport Zoning Ordinance, and to various city departments, agencies, and public utilities. The notice referenced the criteria by which the application was to be assessed. The notice required that written comments on the application be submitted by 5:00 p.m., November 14, 2005. Comments could also be submitted during the course of the public hearing. The notice was also published in the Newport News-Times on November 4, 2005. The affidavit of mailing and proof of publication were entered into the record during the course of the Planning Commission hearing on November 14, 2005.

6. A public hearing before the Newport Planning Commission was held on November 14, 2005. At the Planning Commission public hearing on November 14, 2005, on the proposed request, Richard Kilbride, Chair of the Planning Commission, read the statement of rights and relevance prior to opening the public hearing. Chair Kilbride also requested disclosures of ex-parte contact, bias, or conflict of interest from the Planning Commissioners. All commissioners declared that they had read the articles and letters to the editor in the Newport News-Times. No objections to a Planning Commissioner hearing the application or to the Planning Commission jurisdiction were made. The applicable criteria were read. Written submissions received prior to the public hearing, which were entered into the record, included a letter from Michele Ottmar (758 NW Cottage St., Newport, OR 97365) on November 14, 2005, a letter from Debra Dypold (138 NE 56<sup>th</sup> St., Newport, OR 97365) on November 14, 2005, a letter from John deTar of ODOT (3700 SW Philomath Blvd., Corvallis, OR 97333), and a letter from Philip Hartog (PO Box 686, South Beach, OR 97366) on November 14, 2005. Additionally, the affidavit of mailing notice, the proof of publication, and the full application materials, including all original and full-size maps, were entered into the record. At the hearing, the Planning Commission received a report from staff. The Planning Commission Planning Staff Report with Attachments is hereby



incorporated by reference into the findings. The Planning Commission Planning Staff Report Attachments included the following:

- Attachment "A" – Applicant Request (1-CP-05/4-Z-05/1-SV-05)
- Attachment "A-1" – Applicant Request (3-SUB-05)
- Attachment "A-2" – Applicant Request (additional findings on 3-SUB-05)
- Attachment "A-3" – Proposed SW Abalone Street Plan
- Attachment "A-4" – Conceptual Utility Plan
- Attachment "A-5" – Existing Conditions Map (Applicant Exhibit A/EX-1)
- Attachment "A-6" – Zoning Map (Applicant Exhibit A/EX-2)
- Attachment "A-7" – Conceptual Site Plan (Applicant Exhibit A/EX-3)
- Attachment "A-8" – CPA and Zone Change (Applicant Exhibit A/EX-4)
- Attachment "A-9" – Abalone Street Vacation (Applicant Exhibit A/EX-5)
- Attachment "A-10" – Tentative Plan Map (Applicant Exhibit A/TP-1)
- Attachment "A-11" – Kittelson August 2005 TIA (Applicant Exhibit E)\*
- Attachment "A-12" – Abalone Street Vacation Signatures (Applicant Exhibit F)
- Attachment "A-13" – Abalone Street Information
- Attachment "A-14" – Hovee August 2004 Economic Study (Applicant Exhibit G)
- Attachment "B" – Public Hearing Notice and Map
- Attachment "B-1" – News-Times 11/4/05 Article
- Attachment "B-2" – News-Times 9/16/05 Article
- Attachment "C" – Zoning Map of Area
- Attachment "D" – TSP Comp Plan Table 1
- Attachment "D-1" – TSP Figure 3
- Attachment "D-2" – TSP Comp Plan Table 2
- Attachment "E" – Ordinance No. 1757 (approving File No. 4-CP-96)
- Attachment "E-1" – Ocean Shorelands Map
- Attachment "E-2" – Enlargement of Ocean Shorelands Map
- Attachment "F" – C-1 Zone Uses
- Attachment "F-1" – C-3 Zone Uses
- Attachment "F-2" – R-4 Zone Uses
- Attachment "F-3" – Intent of Zoning Districts
- Attachment "F-4" – C-3 Zoning along N. Highway 101
- Attachment "F-5" – C-3 Zoning along Highway 20
- Attachment "F-6" – I-1 Zone Uses
- Attachment "G" – O-95-29 Tsunami Hazard Map
- Attachment "H" – ORS Chapter 271 Vacations Section
- Attachment "I" – NSO Design Standards
- Attachment "J" – TPR (OAR 660-012-0060)

\*Note: To reduce paper usage, the data sheets that comprise the Appendices in the report were not attached. The Appendices were available at the Community Development Department and were available at the public hearing.

The Planning Commission also received testimony from the following on behalf of the applicant:

Glenn Amster, Lane Powell, 1420 5<sup>th</sup> Ave. Ste. 4100, Seattle, WA 98101  
Brad Smith, Galloway, Romero & Associates, 5350 DTC Parkway, Greenwood Village, CO 80111  
Chris Bremer, Kittelson & Assoc., 510 SW Alder Ste. 700, Portland, OR 97205  
Paul Dennis, E. D. Hovee & Co., LLC/Cascade Planning Group, 2408 Main St., Vancouver, WA 98666

The Planning Commission also received testimony from the following proponents:

Mark Jones, 321 NE 57<sup>th</sup>, Newport, OR 97365  
Lill Patrick, 547 SW 7<sup>th</sup>, Newport, OR 97365  
Gregory Carpenter, 5806 NW Rhododendron, Newport, OR 97365

from the following interested party:

Dr. George Boehlert, Oregon State University Hatfield Marine Science Center, 2030 SE Marine Science  
Dr., Newport, OR 97365

and from the following opponents:

Gary Cook, 370 SW 29<sup>th</sup> St., Newport, OR 97365  
Rick Bartow, 3617 SE Elm St., Newport, OR 97365  
Alice Warner, 321 SE 35<sup>th</sup> St., Newport, OR 97365  
Chuck Kirk, 923 SE Bay Blvd., Newport, OR 97365  
Joyce Gaffin, PO Box 530, South Beach, OR 97366  
Thomas Gravon, PO Box 1427, Newport, OR 97365  
Andrew Rodman, 758 NW Cottage, Newport, OR 97365  
Don Andre, 902 SW Mark St., Newport, OR 97365  
Nyla Jebousek, PO Box 542, Newport, OR 97365  
Dawn Grafe, 1510 NE Sturdevant, Toledo, OR 97391  
Mark Camara, 485 N. Main St., Toledo, OR 97391

During the course of the public hearing on November 14, 2005, a request by Joyce Gaffin was made to hold the public hearing open to allow for more public input. The public hearing was continued to the November 28, 2005, Planning Commission meeting, with a change to the beginning time to 6:00 p.m., of the otherwise regularly scheduled Commission meeting. The minutes of the November 14, 2005, meeting are hereby incorporated by reference into the findings.

7. Prior to the continued public hearing on November 28, 2005, additional written submissions were received from the following:

Philip Hartog, PO Box 686, South Beach, OR 97366  
Rita and Warren Jordan, South Beach, OR 97366 (no address given)  
Chuck Kirk, 923 SE Bay Blvd., Newport, OR 97365  
Joyce Gaffin, PO Box 530, South Beach, OR 97366  
George Boehlert, OSU HMSC, 2030 SE Marine Science Dr., Newport, OR 97365  
Jerry and Arlene Gibson, Newport, OR 97365 (no address given)  
Ray Hunt, Ace Hardware, PO Box 397, Waldport, OR 97394  
Sam Johnson, 4907 N. Beaver Creek Rd., Seal Rock, OR 97376  
Kent Leslie, 3720 NE Megginson St., Newport, OR 97365



Kitty Bone, PO Box 120, Seal Rock, OR 97376  
Michael and Kathryn Gentzkow, PO Box 38, South Beach, OR 97366  
Audrey Colombe, 7737 E. Five Rivers Rd., Tidewater, OR 97390  
Patricia Lewis, PO Box 675, South Beach, OR 97366  
Janet Elizabeth Johnson, 556 NE 20<sup>th</sup> Pl., Newport, OR 97365  
Irene Miller, 315 SW 30<sup>th</sup>, Newport, OR 97365  
Sue Martini, 6464 SW 11<sup>th</sup> St. #4, Newport, OR 97365  
Wallace Lien, 1775 32<sup>nd</sup> Pl. NE, Ste. A, Salem, OR 97303-1674

Mr. Hunt's submission also included a number of petitions signed by individuals and businesses entitled "Building Trade/Home Improvement Industry Petition to Oppose Home Depot". These items were entered into the record. At that hearing, Commissioner Kilbride again requested disclosures of the Planning Commission. Commissioner Eisler disclosed that she had received a message on her home phone in opposition to the request. The Commissioners also declared that they had read the articles in the Newport News-Times. Commissioner McEntee, absent from the November 14, 2005, public hearing, disclosed that he had listened to the tapes of the November 14, 2005, meeting and was able to participate in tonight's hearing. No objections to Commissioner McEntee participating in the public hearing were made. The minutes of the November 28, 2005, public hearing are hereby incorporated by reference into the findings. The Commission heard testimony from the following on behalf of the applicant:

Glenn Amster, Lane Powell, 1420 5<sup>th</sup> Ave. Ste. 4100, Seattle, WA 98101.  
Brad Smith, Galloway, Romero & Assoc., 5350 DTC Parkway, Greenwood Village, CO 80111.  
Matt Hugart, Kittelson & Assoc., 510 SW Alder, Portland, OR 97205.

The Commission heard testimony from the following proponents:

Phil Hutchinson, Newport Chamber of Commerce, 316 NE 6<sup>th</sup> St., Newport, OR 97365.  
George Abel, 525 SW 2<sup>nd</sup> St., Corvallis, OR 97333.

The Commission heard testimony from the following opponents:

Thomas Gravon, PO Box 1427, Newport, OR 97365.  
Chuck Kirk, 923 SE Bay Blvd., Newport, OR 97365.  
Wallace Lien, 1775 32<sup>nd</sup> Pl. NE Ste. A, Salem, OR 97303.  
Melinda McCombe, a resident outside city limits (address not given).  
Janet Webster, 113 SE Bay Blvd., Newport, OR 97365.  
Alice Warner, 321 SE 35<sup>th</sup> St., Newport, OR 97365.  
Joyce Gaffin, PO Box 530, South Beach, OR 97366.  
Sara DeRischebourg, 315 SW 29<sup>th</sup> St., Newport, OR 97365.  
Nyla Jebousek, PO Box 642, Newport, OR 97365.  
Andrew Rodman, 758 NW Cottage, Newport, OR 97365.  
George Meyer, 941 NW Lanai Lp., Seal Rock, OR 97376.

8. A request was made by Wallace Lien per letter dated November 28, 2005, for the Commission to continue the November 28, 2005, public hearing and Mr. Lien cited to ORS 197.763 as requiring the Commission to grant a continuance if new evidence was submitted at the November 28, 2005, public hearing. City of Newport Community Development Director Bassingthwaite reviewed with the Planning Commissioners the ORS 197.763 provisions requiring the

Commission to allow for an opportunity to respond to new written evidence at a continued public hearing and the applicant's ability to respond with final written argument for at least seven days after the record is closed. The Commission left the record open for an additional seven days and allowed the applicant seven days following the close of the record to respond.

9. The record was held open for seven days to receive written testimony until 5:00 p.m. December 5, 2005. During that time, additional written submissions were received from the following:

Don Causey, PO Box 12488, Salem, OR 97309  
Rob Aldridge, 474 SE Hwy. 101, Depoe Bay, OR 97341  
Sheila Meyer, 941 NW Lanai Lp., Seal Rock, OR 97376  
George Meyer, 941 NW Lanai Lp., Seal Rock, OR 97376  
Wallace Lien, 1775 32<sup>nd</sup> Pl. NE, Ste. A, Salem, OR 97303-1674  
Sally Carr, Newport, OR 97365 (no address given)  
John Tharp, Newport Business Plaza, 2925 SE Ferry Slip Rd #52, Newport, OR 97365  
Carla Perry, PO Box 832, Newport, OR 97365  
Richard Hall, PO Box 199, South Beach, OR 97366  
Sondra Bernhardt, 282 SE Penter Ln., Newport, OR 97365  
Thomas Gravon, PO Box 1427, Newport, OR 97365  
Alice Warner, 321 SE 35<sup>th</sup> St., Newport, OR 97365  
Joyce Gaffin, PO Box 530, South Beach, OR 97366  
Woody Ouder Kirk, 2844 SW Brant, Newport, OR 97365  
Richard Diaz, PO Box 1270, Newport, OR 97365  
Dyanne Cline-Brooks, 217 SW 29<sup>th</sup>, Newport, OR 97365  
Glenn Amster, 1420 Fifth Ave., Ste. 4100, Seattle, WA 98101-2338  
Nyla Jebousek, PO Box 542, Newport, OR 97365

Additional petitions entitled "Building Trade/Home Improvement Industry Petition to Oppose Home Depot" were also received. Mr. Amster's response also included a proposed modified site plan to address concerns raised by having two street entrances accessing onto the road at the north end of the subject property by changing the configuration of the tentative plan to provide for only one street connection at the existing SW Abalone Street connection. A planning staff memorandum by Community Development Director James Bassingthwaite addressing various issues raised by Wallace Lien in his November 28, 2005, letter was also submitted during the seven days. Following the seven days, the applicant was given seven days to provide a rebuttal. A rebuttal was received on December 12, 2005.

10. The Planning Commission held their deliberation on the Comprehensive Plan map error amendment and the other land use requests at the meeting of December 12, 2005. The minutes of the December 12, 2005, meeting are hereby incorporated by reference into the findings. The Planning Commission voted to recommend approval of the requested land use actions, including the comprehensive plan error amendment, to the Newport City Council.

11. The setting of the date for the public hearing before the Newport City Council on the land use requests was continued several times by the Newport City Council at the request of the applicant by motion of the City Council at regularly scheduled City Council meetings. Following



the withdrawal of all but one of the land use requests, the City Council set the date at the City Council meeting of July 17, 2006, for the Comprehensive Plan error amendment public hearing to be held on September 5, 2006.

12. A public hearing before the Newport City Council was held on September 5, 2006. The minutes of the September 5, 2006, Council meeting are hereby incorporated by reference into the findings. At the City Council public hearing on September 5, 2006, on the proposed request, Mayor William Bain, read the statement of rights and relevance prior to opening the public hearing. Mayor Bain also requested disclosures of ex-parte contact, bias, or conflict of interest from the City Councilors. Councilor Bertuleit disclosed that he owned property in the South Beach area. No objections to a City Councilor hearing the application or to the City Council's jurisdiction were made. The applicable criteria were read. Additionally, the affidavit of mailing notice, the proof of publication, and the full set of materials related to the application, including all original and full-size maps, were entered into the record. At the hearing, the City Council received a report by staff. The City Council Planning Staff Report with Attachments is hereby incorporated by reference into the findings. The City Council Planning Staff Report Attachments included letters to the City Council or in regard to the City Council hearing received prior to the City Council hearing from Wallace Lien (1775 32<sup>nd</sup> Pl. NE Ste. A, Salem, OR 97303) dated August 23, 2006, and Edna Kennel (2750 SW Coho Street, Newport, OR 97365) dated December 20, 2005, and the following attachments:

- Attachment "A" – Applicant Findings on Map Error Amendment (1-CP-05)
- Attachment "A-1" – Applicant Letter of Withdrawal
- Attachment "B" – Council Public Hearing Notice and Map
- Attachment "B-1" – DLCD 45 Day Notice
- Attachment "B-2" – ORS 197.610
- Attachment "B-3" – ORS 197.175
- Attachment "C" – Zoning Map of Area
- Attachment "D" – TSP Comp Plan Table 1
- Attachment "D-1" – TSP Figure 3
- Attachment "D-2" – TSP Comp Plan Tables 2 and 4
- Attachment "D-3" – TPR (OAR 660-012-0060)
- Attachment "E" – Ordinance No. 1757 (approving File No. 4-CP-96)
- Attachment "E-1" – Ocean Shorelands Map
- Attachment "E-2" – Enlargement of Ocean Shorelands Map
- Attachment "F" – C-1 Zone Uses
- Attachment "F-1" – Intent of Zoning Districts
- Attachment "G" – O-95-29 Tsunami Hazard Map
- Attachment "H" – Lien 8/23/06 Letter
- Attachment "H-1" – Kennel 12/20/05 Letter

The following individuals testified at the public hearing before the City Council:

On behalf of the applicant:

Glenn Amster, from the law firm of Lane Powell, 1240 Fifth Avenue, Seattle, Washington, appeared on behalf of Home Depot USA, Inc. He reported that Home Depot is working on a new application that will better meet the City's objectives, but that this map error amendment would need to go forward regardless of the developer.

**Opponents/Other Interested Parties:**

Richard Bartow, 3617 SE Elm Street, South Beach, OR, 97365 reported that he is concerned with tsunami issues in the area.

Juergen Eckstein, a South Beach resident (no address given), inquired as to whether there was actually an error in this matter, and if there are any alternatives to the map correction. Eckstein also inquired as to whether the records of previous proceedings are public and noted that he has failed to look into the public record of this matter.

Gary Cook, 370 SW 29<sup>th</sup> Street, South Beach, OR, 97365, stated that he was neither for nor against the request. He reported that at one time this property was designated as an outstanding natural area. He inquired as to why this matter wasn't addressed earlier, and it was noted that the error was discovered during the review of the Home Depot application.

Dennis Fry, 126 NW Cottage Street, Newport, OR 97365 reported that he has property in South Beach. He asked several questions regarding the history of the subject property and the map error. He recommended not correcting the map error.

Nyla Jebousek, P.O. Box 642, Newport, OR 97365, asked many questions of Bassingthwaite, and suggested that no error was made. She apologized for being unprepared.

Ed Cameron, 113 NW Coast Street, Newport, OR 97365, inquired as to whether the City would be liable if the City Council decides that an error has not been made.

Anna Francis, 1224 SW Abbey Street, Newport, OR 97365, inquired as to the definition of "highest and best use."

Debra Diebold, 138 NE 56<sup>th</sup> Street, Newport, OR, 97365, asked several zoning questions.

The City Council voted unanimously to find that the applicant had met the criteria for an error amendment and directed staff to prepare an ordinance and findings for adoption by the City Council.

13. Staff reported the following facts in connection with the requested Comprehensive Plan error amendment application:

- A. **Plan Designations:** Commercial on Comprehensive Plan Land Use Map. "Park and Outstanding Natural Area" on Comprehensive Plan Ocean Shorelands Map.
- B. **Zone Designation:** C-1/"Retail and Service Commercial".
- C. **Surrounding Land Uses:** Existing commercial, industrial, marine and educational/public uses exist to the south, east, and northeast of the overall site. Land to the north and west contains vacant lands and existing residential developments. The South Beach State Park is located to the south, west and northwest of the subject property. See Planning Staff Report Attachment "C" (Zoning Map of Area).
- D. **Topography and Vegetation:** Generally flat with coastal vegetation and Scotch broom growing on the property.
- E. **Existing Buildings:** None.
- F. **Utilities:** All are available to the site.
- G. **Development Constraints:** None known. (Note: Property is not located within



the tsunami inundation zone pursuant to the Oregon Department of Geology and Mineral Industries Open File Report O-95-29 for use with the Oregon Revised Statutes (ORS) 455.446 and 455.447 provisions. See City Council Planning Staff Report Attachment "G" (O-95-29 Tsunami Hazard Map)).

- H. **Past Land Use Actions:** File No. 4-CP-96 (Comprehensive Plan and zoning map amendment changing Tax Lot 1800 from a Public/"P-1" designation to a Commercial/"C-1" designation).
- I. **Notification:** Notification of the comprehensive plan map (including the error amendment) and zoning map amendments (File No. 1-CP-05 and 4-Z-05) was mailed to the Department of Land Conservation and Development (DLCD) on September 28, 2005, in conformance with the DLCD post-acknowledgment plan amendment requirements (See City Council Planning Staff Report Attachment "B-1"). Notification to surrounding property owners, to city departments, and to public/private utilities/agencies (including DLCD) for the Planning Commission public hearing on the four land use applications (including the error amendment) was mailed on October 24, 2005. The notice was a consolidated notice of land use applications and included information regarding each of the four land use requests. The October 24<sup>th</sup> notice was mailed to all property owners identified in at least one of the notification areas for any of the four land use requests. See City Council Planning Staff Report Attachment "B" (Public Hearing Notice and Map). Notification distances established under the Newport Zoning Ordinance (No. 1308, as amended) (NZO) Section 2-6-1.030 (B) (2) are 300 feet for Comprehensive Plan map amendments, 200 feet for Zoning map amendments, as specified in ORS 271.080 (2) for street vacations, and 150 feet for subdivision applications. The notice of public hearing before the Planning Commission was also published in the Newport News-Times on November 4, 2005.

With the withdrawal of a portion of the requests, the notice of the public hearing before the City Council of the remaining request was mailed on August 16, 2006, to surrounding property owners within 300 feet of the subject property of the comprehensive plan error amendment, to public/private/utilities/agencies (including DLCD), and, as a courtesy, to those who had participated in the Planning Commission hearing process. The notice contained a detailed explanation of the request, as well as identification of the withdrawn requests. See City Council Planning Staff Report Attachment "B" (Council Public Hearing Notice and Map). Notice of the City Council hearing was also published in the Newport News-Times on August 25, 2006.

- J. **Applicable Criteria:** The applicable criteria for a Comprehensive Plan map error amendment are:

1. An error was made in the establishment of a map designation or boundary;
2. The correction of the error by the amendment of a map designation or boundary is necessary to resolve an issue created by the error.

## CONCLUSIONS

After consideration of the application material submitted, the Planning Staff Reports and Attachments, and the testimony and evidence in the record, the City Council concludes as follows in regard to the requested comprehensive plan map error amendment:

1. The general focus of the comments received regarding the proposed land use requests were generally on Home Depot as an entity, the suitability of the proposed Home Depot at the proposed site, or primarily involved the land use applications involving the proposed Comprehensive Plan map change from High Density Residential to Commercial (originally part of File No. 1-CP-05), the proposed zoning map amendment (File No. 4-Z-05) and the proposed street vacation (File No. 1-SV-05).
2. In regard to the alleged notification issues raised by Mr. Lien during the Planning Commission hearings and the notification issues raised in Mr. Lien's August 23, 2006, letter regarding the notice for the City Council public hearing, the City Council was provided the material submitted before the Planning Commission as well as the minutes from the Planning Commission hearings and deliberations, and the City Council concludes that notification prior to the Planning Commission hearing and the City Council hearing was sufficient and that Mr. Lien and his client(s) had had ample opportunity to participate in the public hearing process based on the December 5, 2005, memo from the City of Newport Community Development Director, the December 5, 2005, letter from Glen Amster, and the City Council Planning Staff Report. Moreover, as the applicant has withdrawn all but one of the land use requests and as another notice of the City Council hearing on the remaining request for a Comprehensive Plan error amendment was provided, the City Council finds that the issues raised by Mr. Lien before the Planning Commission regarding the Planning Commission notice are no longer relevant as the Planning Commission provided ample opportunity for additional public participation as documented by the Planning Commission minutes and the findings of fact above. The City Council concludes that the subsequent notice provided for the City Council public hearing met the requirements for notice and that the City Council public hearing provided additional opportunities for participation at which neither Mr. Lien nor Mr. Hunt did not appear in person or submit additional written material regarding the applicable criteria. Even so, the City Council concludes as follows in regard to the specific notification issues raised by Mr. Lien at the Planning Commission hearing and in regard to the issues raised by Mr. Lien regarding the notice for the City Council hearing:
  - A. In general, the failure to provide appropriate notice can be a procedural error that can be corrected at a subsequent hearing. In this instance, even if notice was not accurately provided for the Planning Commission hearing, the error can be corrected with the notice for the City Council hearing. The Planning Commission public hearing regarding the comprehensive plan amendments, zoning map amendments and street vacation was for the purpose of reviewing the applications and making a recommendation to the City Council. Prior to the City Council public hearing, the applicant withdrew all but one of



the land use requests. The City Council hearing was a new public hearing on the proposed comprehensive plan map error amendment (File No. 1-CP-05), at which new parties could appear and new evidence and testimony could be submitted regarding the request.

B. While Mr. Lien has asserted a number of technical errors in the public hearing notice on pages 2 and 3 of his November 28, 2005, letter, Mr. Lien has not identified any authority or requirement that the Planning Commission had to renotice the land use applications before deliberating, especially where the City will be holding additional public hearings on the comprehensive plan, zoning map, and street vacation requests before making a final decision. Additionally, the Planning Commission has provided additional opportunity for public comment and testimony following the first public hearing on November 14, 2005, by continuing the public hearing to November 28, 2005, and by leaving the record open for seven days (at the request of Mr. Lien) for an opportunity to respond to new written testimony from the November 28, 2005, public hearing.

C. Mr. Lien in his November 28, 2005, letter identifies two primary areas of issues that he contends with absolute certainty that the notice of public hearing was flawed. Mr. Lien claims that "Large Blocks of Neighbors Were Not Notified" and that "Notice Language was Insufficient". It is also important to note that Mr. Lien, who represents Mr. Ray Hunt of Waldport, OR, did not assert that his client was entitled to notice nor does he assert that his client has not been able to participate in the public hearing process. Additionally, Mr. Lien does not assert that neither he nor his client(s) were unaware that the proposed notice involved land use applications submitted for the purpose of constructing a Home Depot on the site. To the contrary, Mr. Hunt has apparently been aware of the Home Depot land use applications as the petitions entitled "Building Trade/Home Improvement Industry Petition to Oppose Home Depot" submitted into the record on behalf of Mr. Hunt on November 28, 2005, (with fax dates on the petitions as early as November 16, 2005), clearly reference the opposition to the "land use applications of Home Depot to put a store in South Beach (File Nos. 1-CP-05/4-Z-05/1-SV-05/3-SUB-05)".

D. In response to the first issue, "Large Blocks of Neighbors Were Not Notified", the City Council concludes that Mr. Lien is incorrect in a number of his asserted claims. First, the following tax lots are apparently identified in Mr. Lien's map attachment to the November 28, 2005, letter as those 18 tax lots that he has circled which included Assessor's Map 11-11-17-CA Tax Lots 1501, 1502, 1503, 1700, 1701, 1800, 1900, 2000, 2600, 2800, 2801, 2802, 2803, 3100, 3700, 4400, 4401, and 4402. Mr. Lien asserts that notice of the comprehensive plan amendment (File No. 1-CP-05) should have been mailed to property owners within 300 feet of all the property involved with the set of land use applications. Mr. Lien relies on applicant's Exhibit 4 as the basis for his claim that "Large Blocks of Neighbors Were Not Notified". Part of Mr. Lien's assumption is incorrect in that the applicant provided property owner notification lists for each of the

requested applications, but the Exhibit 4 map for the notification area included only the notification area for the comprehensive plan and zoning map amendment areas based on the property involved in those requests. The applicant apparently based their notification lists for the land use applications on the property involved in each of the land use requests and the distances for notice required for each of those requests, rather than taking the largest distance for notification from all the property combined in the land use requests as Mr. Lien apparently did. While it appears that there are two different approaches used in calculating the notification measurement distances, however, for the purpose of providing notice, the important consideration is whether or not notice was provided if it was required to be provided, or if notice was not provided, whether or not an opportunity to participate in the process has been precluded.

1. In relation to the Tax Lots Mr. Lien claims were not provided notice, based on the Assessor's records and the Affidavit of Mailing Notice, the following owners of 11 of the Tax Lots Mr. Lien claims were not notified, were in fact notified:

Joyce Gaffin (Tax Lot 2000), Wesley Woods (Tax Lot 2600), Oregon State Parks and Recreation Dept (Tax Lot 2800), Kalberor Hotel Supply (Tax Lots 2801 and 2802), Investor's XII (Tax Lots 2803, 3100, 3700, 4400, 4401, 4402)

2. In regard to Assessor's Map 11-11-17-CA Tax Lot 1700 and 1701 (owned by Melissa Cooper), based on a measurement using the Assessor's Map 11-11-17-CA (not the composite maps used by the applicant and Mr. Lien), those two Tax Lots are not within the 300 foot notice distance for the comprehensive plan map amendments (which is the largest of the notification distances for the applicant's land use requests). A portion of Assessor's Map 11-11-17-CA with a scale of 1" = 100' with lines drawn from the northwest corner of Tax Lot 2703 (which is included as part of the subdivision request) at three inches (300 feet) attached to the December 5, 2005, Community Development Director memorandum illustrates that the property is not within the 300 foot notification distance (even as asserted by Mr. Lien). Those Tax Lots are also not within the 150 foot notification distance required for a tentative subdivision plat application. As Mr. Lien's composite Assessor Map attachment was not to scale, it is hard to verify whether his measurement on that map is accurate, but does not appear to be so.

3. In regard to Assessor's Map 11-11-17-CA Tax Lots 1501, 1502, and 1503 owned by (Don Causey/DRC Enterprise), those properties would be within the 300 foot notice distance (if Mr. Lien's assertion that the notice distance is 300 feet from the portion of the Investor's XII property included in the subdivision but not the comprehensive plan amendment) and were not provided notice as Mr. Causey was not on the list of property owners to be provided notice supplied by the applicant. However, for the tentative subdivision plat request, the required notification distance is 150 feet and Mr. Causey's property is not within that



distance. Additionally, Mr. Causey had an opportunity to discuss the proposed requests with City staff and a written letter clarifying from him his opinion on the applications and his opinion on the effect on the neighborhood. Mr. Causey's written statement (as owner of Tax Lots 1501, 1502, and 1503) dated 11/30/05 was received on November 30, 2005.

4. In regard to Assessor's Map 11-11-17 CA Tax Lots 1800 and 1900 (owned respectively by Warren & Tomi Derischbourg and Sara Derischbourg Trust (Warren Derischbourg Trustee)), these properties (which have a street address of 315 SW 29<sup>th</sup> Street based on the City's addressing map) again would be within the 300 foot notice distance (if Mr. Lien's assertion that the notice distance is 300 feet from the portion of the Investor's XII property included in the subdivision but not the comprehensive plan map amendment) but not within the 150 foot notification distance required for the tentative subdivision plat approval. However, those providing public testimony at the November 28, 2005, Planning Commission meeting included Sara Derischbourg of 315 SW 29<sup>th</sup> Street.

5. Even if Mr. Lien is correct in his assertion (based on his reading of how the notification distance should be applied) that 18 Tax Lots were not included in the original notification area identified in applicant's Exhibit 4 map, it appears based on the above that those properties included owners who were actually notified (11 Tax Lots), owners that are not within the 300 foot distance (2 Tax Lots), and owners who have had knowledge of the proposed request as evidenced through participation in the hearing process either in person or in writing (5 Tax Lots).

E. In regard to the public hearing notice language issues for the Planning Commission notice raised by Mr. Lien in his November 28, 2005, letter, and again in his letter of August 23, 2006, regarding the City Council hearing notice, the City Council concludes as follows:

1. ORS 197.763(3) (referred to as the "20 day notice") provides the requirements for notice in a quasi-judicial land use action. Mr. Lien is correct that the notice is required to list the zoning ordinance and comprehensive plan criteria, or in the case of the tentative subdivision plat, from the subdivision ordinance. ORS 197.763(3)(b) states that the notice must:

"List the applicable criteria from the ordinance and the plan that apply to the application at issue"

Similarly, NZO Section 2-6-1.030(A)(4) states that the notice must:

"List the applicable criteria from the Zoning Ordinance and the Comprehensive Plan"

Although the ORS 197.763(3)(b) language is clear that the notice must list the applicable criteria from the ordinance and the plan, nowhere does the ORS 197.763(3)(b) language specify that criteria found in a state administrative rule or statute are also required to be listed in addition to that in the zoning ordinance or comprehensive plan. The NZO Section 2-6-1.030(A)(4) also specifies that the criteria to be listed are from the Zoning Ordinance and Comprehensive Plan, not from a state administrative rule or statute. Mr. Lien in his November 28, 2005, letter asserts that the Transportation Planning Rule (TPR) (a state administrative rule) is a criterion, but nowhere does Mr. Lien cite to any authority or requirement other than the ORS 197.763(3)(b) language. This is an important distinction as Mr. Lien appears to be claiming that the failure to list the TPR as a criterion is a violation of ORS 197.763(3)(b). Listing the TPR as a criterion, however, is clearly not a requirement under the plain language of either ORS 197.763(3)(b) or NZO Section 2-6-1.030(A)(4).

2. The City Council concludes that listing of the provisions of ORS 197.610 et seq in the notice is not required. Mr. Lien in his assertions appears to be confusing two separate notice provisions. The provisions of ORS 197.610 apply to the local government notice sent to the Department of Land Conservation and Development (referred to as the "DLCD 45 day" notice) for an amendment to an acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation. The provisions do not apply to the 20 day notice required under ORS 197.763(3). Again, Mr. Lien identifies no authority or requirement for the listing of the ORS 197.610 provisions in the 20 day notice. Mr. Lien also asserts that Housing Goal (10) or Transportation Goal (12) are directly applicable to the application and should be listed in the 20 day notice. However, other than that assertion, Mr. Lien does not identify with any specificity as to why, how, or which portions of those two goals, are applicable to this set of applications.

3. In regard to Mr. Lien's assertion on ORS 197.175(2)(e), the City Council concludes that this provision does not involve a notice requirement.

D. The City Council concludes that the public hearing notice for the Planning Commission complied with the ORS 197.763(3)(a) and NZO Section 2-6-1.030(A)(6) provisions. ORS 197.763(3)(a) states that the notice shall: "Explain the nature of the application and the proposed use or uses which could be authorized". Similarly, NZO Section 2-6-1.030(A)(6) states that the notice shall contain: "An explanation of the nature of the application and the proposed use or uses which could be authorized, if applicable." The public notice provided explains the request by Home Depot and the nature of each of the land use requests. The nature of the comprehensive plan amendments are clearly explained, the nature of the zone changes requested are clearly explained, the nature of the street vacation request is clearly explained, and the nature of the subdivision request is clearly explained. As for the "proposed use or uses which could be authorized" provision, the ORS 197.763(3)(a) and NZO Section 2-6-1.030(A)(6) provisions both involve the type



of notice that is required for land use applications. For example, the ORS 197.763 section states that: "The following procedures shall govern the conduct of quasi-judicial *land use* hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a *land use* decision and shall be incorporated into the comprehensive plan and land use regulations;" [emphasis added]. Logically, as these notice provisions involve the notice requirements for land use hearings and decisions, it would seem that the reference to "proposed use or uses" in each of these provisions is to the land use or uses being proposed that is/are the subject of the notice required by those sections. Each of the applicant's proposed land use requests that could be authorized by the approval of either the Planning Commission or City Council are identified in the public notice. See the Planning Commission Planning Staff Report Attachment "B" (Notice of Public Hearing and Map). For example, the subdivision land use request for a tentative subdivision plat, if approved by the Planning Commission, would authorize an 8 lot subdivision use of the property.

1. Apparently, Mr. Lien believes that each of the permitted and conditional uses in a zone change also needs to be specified. Mr. Lien, however, does not provide an explanation or citation to authority as to why in addition to the proposed land use actions that are the subject of the land use hearing for which a land use decision is to be made, additional use information involving the uses permitted outright and conditionally in the zones is needed. Without more explanation or citation to authority, the City Council does not have enough information to accept Mr. Lien's interpretation or application of the notice provision requirements. The land use applications involving zoning map changes only involve the potential Home Depot portion of the property and the notice does identify the Home Depot as the applicant. While it is possible to argue about what exactly the ORS 197.763(3)(a) and NZO Section 2-6-1.030(A)(6) language requires in the way of description of use to be included in the notice, Mr. Lien does not contend that neither he nor his client were unaware that the applications involved the siting of the Home Depot on the property. To the contrary, the documentation submitted by Mr. Lien and Mr. Hunt on November 28, 2005, appear to illustrate that Mr. Lien and Mr. Hunt were aware that the Home Depot land use applications involved the siting of a Home Depot store on the site.

2. In regard to the specific assertion that Mr. Lien discusses regarding the "large outside pads" not having a proposed use stated, the City Council concludes that it was because the original application did not involve approval of proposed buildings for those outside pads. There are proposed land use requests involving the Comprehensive Plan map error amendment land use, the street vacation of a portion of SW Abalone and the use of that property for the relocation to the east of that right-of-way, and the inclusion of that portion of the property with the tentative subdivision plat use. The property on the "large outside pads" is designated Commercial on the existing Comprehensive Plan Land Use Plan map and is designated C-1/"Retail and Service Commercial" on the Zoning map and

the applicant has not requested that the zoning map designation of C-1 be changed. Moreover, the City Council concludes that as the applicant has withdrawn all but one of the application requests, the issue raised by Mr. Lien in regard to the notice of the Planning Commission public hearing is no longer relevant as the Comprehensive Plan map error amendment request is the only remaining request.

F. The City Council concludes that "Raise it or waive it" principle was included in the public notice for the Planning Commission hearing. As discussed at the public hearing on November 28, 2005, the public notice contained a "raise it or waive it" provision (need to identify issues with sufficient specificity or appeal is precluded on those issues) in the public notice section under "Testimony" that Mr. Lien admitted at the public hearing would satisfy the "raise it or waive it" provision concern cited in his November 28, 2005, letter. See the Planning Commission Planning Staff Report in Attachment "B" (Public Hearing Notice and Map).

3. Mr. Wallace Lien (attorney on behalf of Mr. Ray Hunt and other Newport residents) in his letter dated August 23, 2006, raised a few issues in regard to notice of the City Council public hearing on the Comprehensive Plan map error amendment in which Mr. Lien also makes a number of unsupported assertions and in which many of his primary assertions appear to be incorrect assertions based on the plain language of the statutes to which Mr. Lien cites for authority.

A. Similar issues regarding ORS 197.763(2)(b) (NOTE: Mr. Lien appears to be actually referring to ORS 197.763(3)(b), not (2)(b) based on the context of his letter) were previously raised before the Planning Commission regarding public notice for the Commission meeting by Mr. Lien and were addressed in the City Council conclusions above. In regard to the asserted notice issues discussed in the August 23, 2006, letter, staff completed a thorough analysis of the ORS 197.763(3)(b) issue and other notice issues similarly raised by Mr. Lien before the Planning Commission in a memorandum dated December 5, 2006, for the Planning Commission. As in the staff memorandum to the Planning Commission, actually setting forth the applicable language demonstrates that there is no ORS 197.763(3)(b) issue. ORS 197.763(3) (referred to as the "20 day notice") provides the requirements for notice in a quasi-judicial land use action. ORS 197.763(3)(b) states that the notice must:

*List the applicable criteria from the ordinance and the plan that apply to the application at issue.*

Similarly, NZO Section 2-6-1.030(A)(4) states that the notice must:

*List the applicable criteria from the Zoning Ordinance and the Comprehensive Plan.*



Although the ORS 197.763(3)(b) language is clear that the notice must list the *applicable criteria from the ordinance and the plan*, nowhere does the ORS 197.763(3)(b) language specify that criteria found in a state administrative rule, state statute, and/or statewide planning goal are also required to be listed in addition to that in the zoning ordinance or comprehensive plan. The NZO Section 2-6-1-.030(A)(4) also specifies that the criteria to be listed are from the Zoning Ordinance and Comprehensive Plan, not from a state administrative rule or statute. The applicable Comprehensive Plan criteria for the error amendment request are clearly identified in the public notice for the City Council hearing. See City Council Planning Staff Report Attachment "B". As there is no proposed change in the Newport Zoning Map involved in the Comprehensive Plan map error amendment, there is no zoning ordinance criteria. Mr. Lien's unsupported assertion that state requirements are required to be listed in the notice under ORS 197.763(3)(b) is clearly not consistent with the plain language of ORS 197.763(3)(b).

B. In regard to ORS 197.175 (see Planning Staff Report Attachment "B-3") as cited by Mr. Lien in his August 23, 2006, letter, ORS 197.175(2) (b) states that:

If its [a city's or county's] comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

As the City's existing comprehensive plan and land use regulations have been acknowledged (including the Comprehensive Plan map error amendment process), the City appears to be obligated under the plain language of ORS 197.175(2)(d) to make this land use decision under the City's acknowledged plan error amendment process. As for the proposed error amendment, until it becomes final and acknowledged through the post-acknowledgement plan amendment process, it would appear to be considered an unacknowledged plan amendment, and therefore ORS 197.175(2)(e) may be applicable (for any land use or limited land use decision subject to the unacknowledged amendment) as it states that the City shall:

Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment.

C. Additionally, the City Council concludes that there does not appear to be an applicable approval criteria from the Statewide Planning Goals for the proposed Comprehensive Plan map error amendment. Neither Mr. Lien nor Mr. Hunt in the letter dated August 23, 2006, provided any further information as to which Statewide Goals, if any, that they believed applied to the Comprehensive Plan map error amendment. Nor did Mr. Lien or Mr. Hunt appear to testify at the public hearing held by the City Council on August 23, 2006. As the proposed error amendment seeks to rectify an error made in the adoption of Ordinance No. 1757 regarding the designation of the subject property to a Commercial/C-1 designation on the Comprehensive Plan map and Zoning map, the City Council finds that there does not appear to be a Statewide Planning Goal or rule that is

relevant to the proposed error amendment that would serve as an approval criterion. In regard to the Applicable Statewide Planning Goals identified on the DLCDC Notice of Proposed Amendments, the City Council concludes as follows:

1. Statewide Planning Goal 2: Statewide Planning Goal 2 (Land Use Planning) does not contain specific application approval criteria, but establishes a minimum general level of process/procedure that must be followed in revisions to comprehensive plans and states in part that: "All land-use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances." As the proposed amendment is going through a public process, and if approved, will be adopted by ordinance by the City Council, the City process will be in conformance with Statewide Planning Goal 2.

2. Statewide Planning Goal 9: Statewide Planning Goal 9 (Economic Development), likewise, does not contain specific application approval criteria, but general policy requirements for Comprehensive Plans, including a requirement that comprehensive plans for urban areas shall: "3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies." In a portion of the original land use requests (now withdrawn), the applicant was utilizing both existing City economic section policies and Statewide Planning Goal 9 to demonstrate that the proposed change of Residential to Commercial was consistent with those general policies.

3. Statewide Planning Goal 10: Statewide Planning Goal 10 (Housing), likewise, does not contain specific application approval criteria, but a general policy statement regarding: "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density." Because a portion of the application (now withdrawn) had proposed redesignating some residential land to commercial land, the applicant included analysis of the impact on the proposed change with the City's existing adopted Goal 10 residential land inventory.

4. Statewide Planning Goal 12/Transportation Planning Rule: Statewide Planning Goal 12 (Transportation) requires, in part, that cities adopt transportation system plans. The City of Newport adopted the current Transportation System Plan (TSP) (which was the June 1997 version of the plan) in 1999 pursuant to



Ordinance No. 1802. The June 1997 TSP contained identified transportation improvements for the City of Newport as well in the area of the subject property. See Planning Staff Report Attachment "D" (TSP Comp Plan Table 1), Attachment "D-1" (TSP Figure 3) and Attachment "D-2" (TSP Comp Plan Tables 2 and 4). As the applicant was proposing as part of the application requests a proposed change in Comprehensive Plan designations from Residential to Commercial for the purposes of developing a Home Depot, the Transportation Planning Rule (TPR) (which is an administrative rule (OAR 660-012) implementing Statewide Planning Goal 10) might have been applicable. However, the TPR does not automatically apply to all Comprehensive Plan map or Zoning map designations and the triggers when the TPR requirements need to be applied are established in OAR 660-012-0060. See Planning Staff Report Attachment "I". Moreover, OAR 660-012-0060 (1)(a) appears to contain specific language to allow correction of map errors without triggering the TPR requirement when it states that: "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan)." In the request for the error amendment, the Council by adoption of Ordinance No. 1757 (approved in 1996) already determined that the public facilities, including transportation, were sufficient for the change to a Commercial/C-1 designation for the subject property. It is clear from the findings accompanying Ordinance No. 1757 that the intent was to create a usable commercial designation for the subject property.

5. Statewide Planning Goal 17: Statewide Planning Goal 17 (Coastal Shorelands) does not contain any criteria for approval of this proposed error amendment (and none of the Implementation Requirements 1-6 appear to be applicable), even though the proposed error amendment is within the coastal shorelands planning area (which was why it was referenced in the DLCD 45 day notice) (Note: the area is referred to in the Comprehensive Plan as the Ocean Shorelands map). Implementation Requirement # 6 (which contains language regarding vacation of rights of way that provide access to or along coastal waters) and is implemented through NZO Section 2-4-12-005, was discussed by the applicant in regard to the proposed vacation of a portion of SW Abalone Street (which vacation request has subsequently been withdrawn).

D. In regard to Mr. Lien's concern about DLCD notification raised in the August 23, 2006, letter, the City Council concludes that DLCD was notified regarding the Comprehensive Plan amendments on September 28, 2005, in compliance with the ORS 197.610 post-acknowledgement procedures requirement (referred to as the "45 day notice"). See City Council Planning Staff Report Attachment "B-1" and "B-2". The proposed Comprehensive Plan map error amendment was included as part of the set of amendments noticed to DLCD on September 28, 2005. Once the 45 day notice has been given, no further notice to DLCD is required under ORS 197.610. See City Council Planning Staff Report Attachment "B-2" for the actual language of ORS 197.610.

1. Moreover, the City Council concludes that under the Oregon Administrative Rules (OAR) adopted to carry out ORS 197.610 through 197.625, OAR 660-018-0010, in regard to "Final Hearing on Adoption" portion of the DLCD 45 date notice form, no new notice is required to be submitted even if the final hearing on adoption is continued or delayed. OAR 660-018-0010 states in part that: "If a final hearing on adoption is continued or delayed, following proper procedures, the local government is not required to submit a new notice under OAR 660-018-0020." The initial Planning Commission public hearing was continued following proper procedures, the establishment of the City Council public hearing date was continued at City Council at public meetings following appropriate procedures at the request of the applicant.

2. The City Council also concludes that notice (the 20 day notice) may also be provided to DLCD (in quasi-judicial applications) at the discretion of the applicant under ORS 197.763 (1)(c) which states that:

*At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.*

No objections by the applicant to the ORS 197.763 (1)(c) provision of notice DLCD were made and the City has provided the "20 day" notice to DLCD for both the Planning Commission hearing and the City Council hearing as identified in the affidavits of mailing of notice.

E. In regard to Mr. Lien's assertions in the August 23, 2006, letter regarding alleged requirements to renotice, the City Council concludes that Mr. Lien does not provide any support for his contentions. As discussed above, the public notification provided meets the requirements for public notice. The area residents entitled to receive notice in addition to others were therefore properly apprised of the proceeding and had the ability to participate in the process. As the Comprehensive Plan map error amendment was a part of the land use applications originally filed, the public has been on notice regarding the Comprehensive Plan map error amendment since at least the first public notice was mailed for the Planning Commission hearing on October 24, 2005. The applicant's findings addressed the Comprehensive Plan map error amendment and the Planning Staff Reports for both the Planning Commission and the City Council also addressed the Comprehensive Plan map error amendment. In response to similar notice assertions raised by Mr. Lien at the Planning Commission hearing, Mr. Glenn Amster (from the law firm of Lane Powell) representing the applicant, by letter dated December 5, 2005, provided the following information, including citations to the relevant case law supporting Mr. Amster's analysis, regarding the sufficiency of the notice for the Planning Commission hearing that support the City Council's conclusions:

At approximately 4:30 P.M. on the day of the continued public hearing in this matter, Mr. Wallace Lien submitted a letter in opposition to the application on behalf of Home Depot's competitors.



Among other things, Mr. Lien alleges that the notice of the public hearing was flawed. In our response to the public testimony prior to the close of the public hearing and even without the opportunity to examine these allegations in detail, we were able to point out numerous errors in Mr. Lien's contentions. Further analysis indicates his arguments are based on significant factual mistakes, as well as misstatements of the law.

The Planning Commission should not be intimidated by Mr. Lien's allegations of improper notice. Even if they were accurate, which they are not, he does not allege, let alone demonstrate, harm to any party. Therefore, there is no error: "LUBA may not reverse or remand a land use decision unless there has been a showing of prejudice to the 'substantial right of the petitioner.'" Or. Laws 1979, Ch. 772, Section 5(4)(a)(B)." *Lee v. City of Portland*, 57 Or. App. 798, 806 (1982). For example, in *Leathers v. Marion County*, 144 Or. App. 123, 133 (1996), the Court found that although notice was inadequate, there was no prejudice: "LUBA concluded that the problems with the notice were not prejudicial, because respondents were not frustrated in their ability to effectively participate. Under the facts of this case, we agree with LUBA."

The same may be said of the proceedings before the Planning Commission. All parties were given ample opportunity to participate in the public hearing, and Mr. Lien has not alleged otherwise. Under the standards enunciated by LUBA, notice was sufficient.

4. In regard to the criteria for a Comprehensive Plan map error amendment as established by the Newport Comprehensive Plan, the City Council concludes as follows:

A. In regard to the first criteria (An error was made in the establishment of a map designation or boundary), the Comprehensive Plan Ocean Shorelands Map (on page 53 of the Comprehensive Plan) currently shows a portion of the site (Tax Map 11-11-17-DB, Tax Lot 1800) within the Ocean Shorelands Overlay subsection entitled "Park and Outstanding Natural Area Boundaries." See City Council Planning Staff Report Attachment "E" (Ocean Shorelands Map). The boundary is difficult to read on the reproduced version of the Comprehensive Plan Shorelands Map (which may have been a factor in why the error was made). An enlargement of a portion of the master used for the Ocean Shorelands Map illustrating the designation on Tax Lot 1800 was included in the record as City Council Planning Staff Report Attachment "E-1". The park overlay designation under NZO Section 2-5-7.050 (B) (1), precludes residential, commercial or industrial development. The City Council concludes that the failure to remove the "Park and Outstanding Natural Area Boundaries" designation reflects an error that was made during the previous amendments to the Comprehensive Plan Map and Zoning Map in Ordinance No. 1757 (file No. 4-CP-96) (approved in 1996) for the following reasons:

1. In Ordinance No. 1757, the Comprehensive Plan map and Zoning Map designations for this property were amended, changing the Comprehensive Map designation from Public to Commercial and the Zoning Map designation from P-1/"Public Structures" to C-1/"Retail and Service Commercial". The Ordinance was not appealed, and therefore became an acknowledged part of the Comprehensive Plan. As explained in detail in the findings in Exhibit "A" for Ordinance No. 1757, the rezone of Tax Lot 1800 was necessary to complete the exchange of property with the Oregon Parks and Recreation Department, which would receive 52.02 acres of commercially designated property (which has since been rezoned to a public



designation in File No. 1-CP-03/2-CP-03 as part of the adoption of the 2003 South Beach State Park Master Plan) to expand the South Beach State Park in exchange for the approximately 12 acres of publicly designated property in Tax Lot 1800. According to the findings in Ordinance No. 1757 adopted by the City Council for approving the rezone of Tax Lot 1800, Tax Lot 1800 was described as follows: "The subject parcel was given to OPRD by the Oregon Department of Transportation and had been declared by OPRD as not suitable for development as a part of the state park system in the foreseeable future considering surrounding uses and its isolation from any other OPRD owned tracts in the area." See City Council Planning Staff Report Attachment "E" (Ordinance No. 1757 – page 8 of Exhibit "A"). The intent was to "restore approximately 12 acres of undeveloped property to the city's limited inventory of privately owned commercial property available for development which is a necessity in any growing city." See City Council Planning Staff Report Attachment "E" (Ordinance No. 1757 – page 8 of Exhibit "A").

2. To allow for commercial use on Tax Lot 1800, it appears that a deed restriction imposed by Lincoln County (which had apparently originally conveyed the property to the State of Oregon with the deed restriction) limiting use of Tax Lot 1800 for park and right-of-way purposes only had to be removed as noted in the Quitclaim Deed included as part of the Ord. No. 1757 Exhibit "A" findings. The findings for Ordinance No. 1757 clearly demonstrate that the intent of the change to a Commercial/"C-1" designation was to allow for commercial use of Tax Lot 1800. See also City Council Planning Staff Report Attachment "F" and "F-1" on the C-1 zone. As the "Park and Outstanding Natural Area Boundaries" designation precludes commercial use under the NZO Section 2-5-7.050 (B) (1), changing the Comprehensive Plan land use map and Zoning map designations to Commercial/"C-1" without amending the Comprehensive Plan Ocean Shorelands Map as well was an error in the establishment of the Commercial/"C-1" designation of Tax Lot 1800.

B. In regard to the second criterion (The correction of the error by the amendment of a map designation or boundary is necessary to resolve an issue created by the error.), the City Council concludes that the applicant is requesting the Comprehensive Plan map error amendment to correct the error by removing the parcel from the Comprehensive Plan Map designation "Park and Outstanding Natural Area Boundaries," thus resolving an inconsistency between the Comprehensive Plan Map and the Zoning Map created by a previous land use action in File No. 4-CP-96 designating the property with a Commercial/"C-1" designation. As NZO Section 2-5-7.050 (B) (1) precludes commercial uses within "Park and Outstanding Natural Area Boundaries", the removal of the designation is necessary to meet the intent expressed in Ordinance No. 1757 in designating Tax Lot 1800 for commercial use but which is currently not possible due to the error made in designating Tax Lot 1800 for commercial use without removing the overlay precluding commercial use.



## OVERALL CONCLUSION

Based on the staff reports, the application material, and other evidence and testimony in the record, the City Council concludes that the request for a Comprehensive Plan map error amendment complies with the applicable criteria for a Comprehensive Plan map error amendment and is hereby **APPROVED**.

# OCEAN SHORELANDS

