

## POULSBO CITY COUNCIL MEETING OF SEPTEMBER 16, 2015

### MINUTES

**PRESENT:** Mayor Erickson; Councilmembers Henry, Lord, McGinty, Musgrove, Nystul, Stern, Thomas.

Staff: Planning Director Berezowsky, Senior Associate Planner Boughton, City Engineer Kasiniak, Parks & Recreation Director McCluskey, Risk Manager Purves, IT Manager Stenstrom, City Clerk Stephens

Also present: City Attorneys Jim Haney and Angela Summerfield

### MAJOR BUSINESS ITEMS

- \* \* \* Minutes of August 12, 2015 City Council Meeting
- \* \* \* Minutes of August 19, 2015 City Council Meeting
- \* \* \* Set Public Hearing for 2016 Revenue Sources
- \* \* \* Whitford/Strand - Appeal of Hearing Examiner Decision
- \* \* \* Lodging Tax Funding Policies
- \* \* \* Authorization to Proceed with an Appraisal for the Marine Science Center and the Klingle Properties
- \* \* \* ~~Front Street (Austin) Waterfall Discussion~~ - Removed

#### 1. **CALL TO ORDER AND PLEDGE OF ALLEGIANCE**

Mayor Erickson called the meeting to order in the Council Chambers at 7:00 PM and led the Pledge of Allegiance.

#### 2. **AGENDA APPROVAL**

Addition of 6f, a request regarding the Lindvig Bridge troll painting. Councilmember Lord requested the minutes of August 19th be pulled for a correction.

**Motion:** Move to approve the agenda as amended.

**Action:** Approve, **Moved by** McGinty, **Seconded by** Thomas.

Motion passed unanimously.

### **3. ► COMMENTS FROM CITIZENS**

Bill Austin, city resident, spoke to the history of the Marine Science Center and its closure years ago.

Mike Regis, city resident, stated the 4th Avenue road is in need of repair and requested any repairs occur after the First Lutheran Lutefisk dinner on October 17th.

### **4. ► MAYORS REPORT AND COUNCIL COMMENTS**

Councilmember Lord commented on the success of the grand opening of the new Maritime Museum and Chamber of Commerce Visitors Center and stated that the Poulsbo Historical Society (PHS) volunteers have made a world-class museum.

Councilmember Thomas stated that he also enjoyed the grand opening of the Maritime Museum. Thomas encouraged Poulsbo citizens to support Fishline.

Councilmember Musgrove agreed the grand opening of the new Maritime Museum was very successful and the PHS volunteers have created terrific exhibits. Musgrove noted membership in the PHS is good for all three museums supported by the Society.

Councilmember Henry stated he was very impressed with the exhibits at the new Maritime Museum and is proud of the work the volunteers have accomplished.

Councilmember Stern noted that the Chamber of Commerce was instrumental in the opening of the Maritime Museum/Visitors Center. Stern announced the first offsite Kitsap County Commissioners meeting scheduled in the Poulsbo Chambers was forced to be cancelled due to unknown complications. Mayor Erickson noted that there will be future County Commissioner meetings in Poulsbo as well as on Bainbridge Island where action will be taken once county-wide TV coverage issues are resolved. Stern noted that the Kitsap Regional Coordinating Council will meet at the Clearwater Convention Complex on November 12th.

### **5. ► CONSENT AGENDA**

Mayor Erickson noted that Councilmember Lord requested agenda item b be pulled for a correction and asked if it could be handled easily. Lord responded that, when she reported attending Chief Seattle Days, she was emphasizing that she was representing all members of Council at the ceremony honoring Chief Seattle.

**Motion:** Move to approve Consent Agenda item a; and item b as amended.

The items listed are:

- a. Minutes of August 12, 2015 City Council Meeting
- b. Minutes of August 19, 2015 City Council Meeting

**Action:** Approve, **Moved by** McGinty, **Seconded by** Musgrove.  
Motion passed unanimously.

## 6. BUSINESS AGENDA

### a. **Set Public Hearing for 2016 Revenue Sources**

**Motion:** Move to set the public hearing for October 4, 2015, at 7:15 PM to review revenue sources for the 2016 Budget.

**Action:** Approve, **Moved by** Nystul, **Seconded by** McGinty.  
Motion passed unanimously.

### b. **Whitford/Strand – Appeal of Hearing Examiner Decision**

Mayor Erickson introduced City Attorney Angela Summerfield of Ogden Murphy Wallace, and stated that Summerfield would serve as City Attorney regarding procedures for the appeal. The Mayor asked staff to introduce themselves. City Attorney Haney stated he would be representing city staff during the proceeding. Planning Department staff introduced included: Senior Planner Karla Boughton, the project planner for the Whitford/Strand Preliminary Plat and Shoreline Substantial Development Permit, and Director of Planning and Economic Development Barry Berezowsky.

City Attorney Summerfield explained to Council that the appeal is of a Type III Hearing Examiner Decision which approved the Whitford/Strand Preliminary Plat and Substantial Development Permit with conditions. Summerfield noted that the appeal is a quasi-judicial matter before Council and the requirements of the

Appearance of Fairness doctrine must be met. Summerfield provided a brief overview of the appeal proceeding and City Councils responsibilities and explained the Councils decision must be made on the Hearing Examiners record only. Summerfield stated Council would be hearing two requests from the appellants during the appeal process—the first will be whether or not to strike portions of the citys brief, which is before Council, and the second request is to extend the time thats allowed for testimony. Summerfield noted the citys code allows ten minutes per side and the appellants have requested thirty minutes for their presentation with a ten-minute rebuttal.

City Attorney Summerfield continued that, once those two decisions are made, Council will hear the oral presentations of both sides. After the presentations, Council will move into their deliberations and make a decision regarding the appeal. Summerfield stated that, as Council deliberates, they will be looking for whether or not the appellant has shown that the Hearing Examiner made a material error of fact or law. Summerfield added that what that means is a mistake was made that would change the outcome of the decision made by the Hearing Examiner. Summerfield stated Council has three options before them if they make a decision this evening: 1) to uphold the decision of the Hearing Examiner; 2) to uphold the Hearing Examiners decision in part and reverse it in part; or 3) to reverse the decision of the Hearing Examiner in its entirety. Summerfield stated that any decision made this evening would be the preliminary decision and staff would bring forward a resolution with Findings of Fact and Conclusions of Law for Councils final decision on the appeal.

Summerfield described the Appearance of Fairness doctrine and added that the appeal must not only be fair in substance but must appear to be fair. Summerfield asked if there were any Councilmembers who were aware of any conflict of the Appearance of Fairness doctrine and added that any Councilmembers recusing themselves must leave the Council Chambers during the deliberations. Councilmember Stern announced he would recuse himself from the proceeding due to a business relationship with the appellant. Stern left the Council Chambers. Councilmember Musgrove stated that he has a relative who has been casually shopping for real estate in the area and one of the properties adjoins the property under discussion. Councilmember Lord disclosed that she contacted city staff with questions regarding the procedure that would be followed for the appeal as well as the location of reference documents. Lord added that all her questions had been answered by staff.

City Attorney Summerfield asked the following questions of Council: 1) Does anyone have ownership or an interest in the property of the appeal? 2) Does anyone stand to gain financially or lose financially depending on the outcome of tonight's hearing? and 3) Is there anyone who, for whatever reason, feels they cannot be fair and objective during this hearing? The Councilmembers answered "no" to all questions.

City Attorney Summerfield asked if anyone in attendance, either for the appellants side or the city's side, had any objection to any of the Councilmembers remaining at the table during deliberation of the appeal. No one in attendance voiced an objection.

Mayor Erickson stated the first item for City Council to decide was the Appellants Objection to Legal Brief in Support of Hearing Examiners Decision. City Attorney Summerfield noted that Council has been provided with the appellants objection as well as the city staffs response to the objection and briefly described the objection raised by the appellants. Summerfield explained that the city's contract with the Hearing Examiner requires the city to defend the Hearing Examiners decisions except in those specific situations where the city itself has challenged the decision. Summerfield added that the question before Council is whether the city has actually challenged the Hearing Examiners decision for the Whitford/Strand project. Council indicated they had reviewed the city's brief. Summerfield added Council must decide whether the city should move forward in defense of this action or determine that the city does not have to defend the Hearing Examiners decision. Summerfield stated the city's position is that the contract with the Hearing Examiner requires the city to defend the action since the city itself has not challenged the decision.

Council/City Attorney Summerfield discussion included: 1) whether there is a legal precedence to establish that the appellants challenge is valid on its own merit without a challenge by the city; 2) the city's contract with the Hearing Examiner requires the city to defend the Hearing Examiners action unless the city itself challenges the decision; 3) there is no basis for determining the city has challenged the decision; 4) if Council accepts oral testimony regarding the challenge from one side, it must also accept testimony from the other side; 5) nothing in the closed record indicates the city has made a formal challenge of the Hearing Examiners decision; 6) the appellants say the city does not have to defend the Hearing Examiners decision, however, staff believes the contract does require the city to

defend the decision; 7) a motion will need to be made that the appeal will move forward and the city will defend the action if that is the decision of Council; 8) the appellants are challenging the city's contractual requirement to defend the Hearing Examiners decision based on two memos presented by the City Attorney in response to a remand order and request for legal briefs; 9) the appellants believe that staff has challenged the decision so cannot be required to defend the decision; 10) the disagreement of the city staff does not qualify as a formal challenge of the Hearing Examiners decision; 11) the Hearing Examiner had made no decision at the time the memos were written; 12) in responding to the Hearing Examiners notice of pending closure of the record and remand order, the City Attorney made no challenge but simply observed a redesign would be difficult to make so staff had no suggested Conditions of Approval or rationale to recommend; 13) staff stood by earlier recommendations to the extent they could be incorporated as conditions in the Hearing Examiners decision; 14) staff is entitled to submit written or oral pro or con argument in an appeal; 15) staff fully supported the Hearing Examiners authority in interpreting the city's code; and 16) the brief in support of the Hearing Examiners decision is expressly authorized and was submitted on behalf of the city.

**Motion:** Move to disagree that Sections III.C, III.D and III.E of the city staffs "Brief in Support of Hearing Examiners Decision" should be stricken and allow the city staffs legal brief to stand in full.

**Action:** Approve, **Moved by** Lord, **Seconded by** Henry.

Motion passed unanimously. Councilmember Stern recused.

Mayor Erickson stated the second item for City Council to decide is the request from the appellants to extend their oral arguments to thirty minutes with an additional ten-minute rebuttal. PMC 19.01.060.E establishes that oral argument is limited to ten minutes, but the City Council may allow additional time when the complexity of the appeal issues or arguments require additional time. Council discussion included: 1) the only testimony allowed is that submitted in prior venues; 2) the oral argument presented must not contain new information; 3) a suggested compromise of twenty minutes per side; 4) there should be a formal motion allowing the appellants and city staff each twenty minutes for the oral presentations; 5) twenty minutes would allow fifteen minutes for the presentation and five minutes of rebuttal; and 6) a clarification that the twenty minutes would be the total time to be used as they choose.

**Motion:** Move to agree to twenty minutes for each party for oral arguments. The appellant may reserve a portion of this allotted time for rebuttal.

**Action:** Approve, **Moved by** Thomas, **Seconded by** Nystul.

**Discussion:** 1) fifteen minutes goes by very quickly; 2) twenty minutes total time for each side may be too restrictive; 3) each side should have at least thirty minutes with a portion to be for rebuttal; and 4) a friendly amendment to change from twenty to thirty minutes per side.

**Amendment to Motion:** Move to amend the motion to allow thirty minutes.

**Action:** Approve, **Moved by** Lord, **Seconded by** Nystul.

**Vote:** Motion passed (**summary:** Yes = 4, No = 2, Recused = 1).

**Yes:** Lord, Musgrove, Nystul, Thomas.

**No:** Henry, McGinty.

**Recused:** Stern.

**Motion as Amended:** Move to agree to thirty minutes for each party for oral arguments. The appellant may reserve a portion of this allotted time for rebuttal.

**Action:** Approve, **Vote:** Motion passed unanimously. **Recused:** Stern.

**Appellants Oral Arguments:** Mr. Hayes Gori, representing the appellant Central Highlands Incorporated, expressed his objection to Ms. Summerfield sitting as the City Attorney for the city since she also works for Ogden Murphy Wallace. Gori stated his concern that he had not been told Summerfield would be a substitute attorney for the city and added that it appeared to him to be a conflict of interest or, at the very least, an appearance of unfairness, since both attorneys are with the same firm. Gori noted that he wanted his objection on the record.

Mr. Gori stated that he would address two of the issues raised in the appeal. First, the wetland in question, Wetland B, is not regulated under the Poulsbo Municipal Code (PMC), Section 16.20.215, because it is a drainage ditch. Gori added that the evidence in support of this fact is overwhelming. All the experts who have been on site have determined that the water feeding Wetland B, and the whole basin south of SR305 for that matter, comes from the highway runoff and Baywatch Development runoff. Furthermore, there's no ground water in Wetland B that is perking up and feeding Wetland B. Second, the Hearing Examiners decision that the Critical Areas Ordinance (CAO 16.20) does not authorize impact and mitigation of Wetland B. Gori stated that is a striking finding on the part of the Hearing Examiner and not supported by law, practice, or otherwise. Gori added the finding

has profound potential implications for the City of Poulsbo if its endorsed by Council. Gori stated that it is important to note that, if Council rules in favor of the applicant, no matter the basis for ruling in favor of applicant, the applicant will perform the mitigation that it has proposed in its application. Gori noted that Central Highlands Incorporated has a good reputation and is very concerned with the environment.

Mr. Gori addressed the burden of proof discussed briefly by City Attorney Summerfield when she addressed finding a material error of fact or law on the part of the Hearing Examiner. Gori stated that material error of fact or law is not defined in the PMC and expressed his belief City Attorney Haney set the bar too high in his brief indicating it would need to be an error or flawed decision that affects the outcome of the hearing. Gori stated the material error would not have to go to the ultimate outcome but there could be a plat condition that is particularly onerous whether financially or otherwise. Gori shared his belief that the appellant has materiality in this case. Gori stated that, even though the Hearing Examiner styled his decision as an approval with conditions, the reality is that the decision is an effective denial since a redesign of the plat with an 80-foot buffer would take up about 40% of the property making the project financially unviable. Gori added that the record shows city staff could not make a suggestion regarding this condition as there was no precedent for such a dramatic redesign. Gori stated the error is material, even if not viewed as an effective denial, because the additional effort, time, and costs of the redesign required by the condition effectively says "start over" for a project that has already been in the works for more than two years.

Mr. Gori displayed page 23 of Exhibit #5 from the record, an overview of the subject property, and described the lay of the land with the steep runoff from the overflow of the detention pond for the Baywatch Development and the highway runoff through the Christianson and the Whitford estate properties. City Attorney Haney asked what exhibit Gori was discussing. Gori responded it was not an exhibit from the record but rather a summary of evidence in the record. Gori stated the exhibit was illustrative and no new evidence was being submitted. Mayor Erickson asked again which exhibit was being displayed and stated that, if the exhibit is not in the binder of the record, it is not allowed during the appeal. Gori responded that the PMC says no new "evidence" and stated that he is not submitting new evidence but simply illustrating evidence from various exhibits already in the record. Mayor Erickson stated that the appeal is a closed record hearing and requested Gori take down the exhibit he was displaying. Gori stated that a number of wetland specialists have visited the property, have completed delineation of the

wetlands and the wetland was listed by some as a Category IV wetland and by others as a Category III wetland. Also, as an indication of the disagreement even among experts regarding wetlands, on December 31, 2013, representatives of the Department of Ecology visited the site and gave the wetland an even different delineation from those previously mentioned. Gori stated that an important point to keep in mind is that the southern-most portion of Wetland B is about 240 feet from Liberty Bay placing it outside the 200-foot shoreline jurisdiction area. Gori summarized that his first issue is that Wetland B is not regulated because it is a drainage ditch. Mr. Gori addressed Haneys contention that regulation of Wetland B was not argued before the Hearing Examiner. Gori stated that the record is replete with discussion of Wetland B and whether it is road construction related or drainage ditch related, all of which was discussed before the Hearing Examiner. Gori stated that there is a detailed analysis indicating Wetland B was due to road construction and is now a drainage ditch and the record is filled with opinions regarding Wetland B. Gori stated that it is important for Council to keep in mind that the applicant never endorsed the staff report or accepted it or conceded any issue regarding this project. Gori added that the applicant had a discussion with the Hearing Examiner during the public hearing regarding the regulatory status of wetlands as a drainage ditch. When the Hearing Examiner submitted his remand order and while the record was still open, the applicant filed a Notice of Appeal, which was dated June 25th , with issues one and two being regulatory status. The appeal was later rescinded because the Hearing Examiner rendered a final report.

**Point of Order:** Councilmember Lord noted that the Notice of Appeal being addressed by Mr. Gori is not in the closed record and stated that, when she asked staff about the notice, she was told the document had been rescinded so was not part of the official record. Mayor Erickson requested that Gori stick to what is in the record so the process is not compromised. Gori stated that the Notice of Appeal should have been part of the record since it was filed while the record was still open.

Mr. Gori continued his oral presentation by stating that it is virtually unanimous by all experts who have been onsite that Wetland B is due to drainage issues and is simply a drainage ditch. Gori added that the aerial photos of the property over time support that decision. Regarding the second issue, the interpretation of the CAO, Gori stated that the Hearing Examiner is an absolute liar and added that the Hearing Examiners interpretation of the CAO is not in line with federal, state, or city law and is quite unprecedented. Every entity that has reviewed this application and proposed mitigation, other than the Hearing Examiner, has approved the

mitigation, including the city's wetland specialist and staff.

Mr. Gori indicated that the Hearing Examiner spends a great deal of time and tries to lean on the Growth Management Act (the GMA) as a reason why Wetland B can't be impacted and mitigated whereas, in reality, the GMA contemplates and gives discretion to local jurisdictions to impact and mitigate critical areas. If a local jurisdiction decides to do that, compensatory mitigation is required. The GMA also makes it clear nothing is inviolate when it comes to growth management—there is to be give and take all in the interest of promoting responsible growth. A critical distinction is that the purpose of the GMA is to preserve the function of wetlands rather than simply to protect all wetlands. Gori stated that the body of law from as far back as The Clean Water Act of 1972 from federal, state, and local jurisdictions as well as case law provides the local authority with the ability to mitigate impacts to critical areas without having to explicitly state everything in their CAO. Gori expressed his belief that the CAO is a regulatory rather than prescriptive ordinance which means that a developer can make a proposal and the city will review the CAO to ensure compliance. Gori stated that the Hearing Examiner went wrong right off the bat by asking the question, "Show me where, in the CAO, it says that the city can impact a regulated Category III wetland?" That would not be included in the CAO. Gori noted the Hearing Examiner identified only seven specific circumstances in the CAO that would permit a developer to impact and mitigate a wetland. Gori stated that the potential impact to the city of such an interpretation is staggering and provides absolutely no discretion on the part of the city regarding wetland impacts and mitigation. Gori added that such an interpretation of the CAO could negatively impact the city's growth and urged Council not to let the Hearing Examiner's interpretation stand.

Mr. Gori stated that City Attorney Haney went beyond his charge of defending the Hearing Examiner in the brief when he talks about mitigation sequencing and added that this has never been an issue. Gori added that, in fact, the applicant went to great lengths to provide mitigation sequencing including purchasing the adjacent property. As a final point, Gori noted that the proposed mitigation goes above and beyond that required by code. Gori stated that the applicant has proposed about 25% more mitigation than is required and, on top of that, has proposed enhancement and a conservation easement entered into with the Department of Fish & Wildlife. Gori noted that he would reserve the final five minutes of his time for rebuttal.

At a request for clarification regarding the three attorneys present, Mayor Erickson stated that two attorneys are from the firm of Ogden Murphy Wallace and added that City Attorney Summerfield is present to guide on process only and to ensure the process proceeds according to law while City Attorney Haney is present to represent staff in the appeal and support the Hearing Examiner. The Mayor stated that the third attorney, Mr. Hayes Gori, represents the appellant. Summerfield clarified she has had no substantive discussions with Mr. Haney or the appellant regarding the plat that is subject to the appeal. Summerfield added that she had superficial discussions with Mr. Gori.

**City Staff Oral Arguments:** City Attorney Haney thanked Council for accepting the brief in support of the Hearing Examiners decision. Haney stated that he has had no substantive discussions with City Attorney Summerfield regarding the matter. Haney explained that he would concentrate on the same two issues addressed by Mr. Gori—whether or not Wetland B is a regulated wetland or a drainage ditch and the Hearing Examiners interpretation of the Poulsbo Critical Areas Ordinance (CAO) of not allowing the wetland to be filled. Haney made a preliminary comment regarding the burden of proof stating that it is the burden of Central Highlands Inc. to prove to Councils satisfaction that the Hearing Examiners decision is wrong. Haney noted that, at the end of the proceedings tonight, Council must ask, based on the Hearing Examiners record alone, “Has Central Highlands proven the Hearing Examiner was wrong in his decision?”. Haney stated his belief that, once the evidence has been reviewed, Central Highlands will not have met its burden of proof and the Hearing Examiners decision will be upheld. Haney described the citys CAO and whether Wetland B would be a regulated wetland under the ordinance. Haney addressed Central Highlands argument that Wetland B should be a non-regulated wetlands since it is a drainage ditch which is not regulated and the decision should be overturned. Haney noted that the applicant never made this argument to the Hearing Examiner during the hearing process and, thus, there is nothing in the record to substantiate this argument. While the information is buried in the record and was discussed with staff, it was never argued before the Hearing Examiner and therefore should not be considered. The Hearing Examiner, however, did deal with the issue. Haney presented his first exhibit, a copy of PMC 16.20.215.b, which he stated is not in the record but is verbatim out of the Poulsbo Municipal Code (PMC). When challenged, Haney stated that, while the entire PMC was not actively made part of the Hearing Examiners record, Council must base its decision on the PMC and, therefore, Council should review the provisions of the city code. When a challenge was considered, Mr. Gori stated he had no objection to the PMC exhibit being

allowed.

In continuing to address PMC 16.20.215.B, City Attorney Haney stated that Subsection B.1 states that wetlands that were created intentionally from a non-wetland site that were not required to be constructed as mitigation for adverse wetland impacts are not regulated. In order to meet the requirements of Subsection B.1, it has to be a wetland that was intentionally created from a non-wetland site. There is no evidence in the record before Council that Wetland B was intentionally created by anyone from any non-wetland site. Haney stated that the first question to be asked is: "Was this wetland intentionally created from a non-wetland site?". Haney noted that this definition is taken directly from the state Growth Management Act RCWs regarding critical areas regulations. (RCW 36.78.030.21) Whether the wetland was created by a culvert under SR305 or whether it was fed by runoff from a ditch that extends from that culvert, there is no evidence that this wetland was intentionally created.

City Attorney Haney showed the second exhibit, a copy of the plat map, and noted that it appears in the record as Exhibit 10 in the binder. Haney identified the location of Wetland B on the plat map and noted that the smaller diamond-shaped area in the upper right hand corner is the wetland. Haney noted that Wetland B is approximately 714 square feet in size.

City Attorney Haney's third exhibit, Exhibit 11 in the Hearing Examiners record, was a communication from the Department of Ecology (DOE) to the city indicating that the DOE did not do a delineation of the wetland as earlier indicated but did visit the site and review the record. Haney identified the location of the Whitford/Strand property in relation to SR305, the Christianson property and Liberty Bay. Haney noted that the photo in the exhibit was taken in 1977 and the wetland existed at that time.

City Attorney Haney requested the next exhibit be displayed which was a larger version of the same photograph taken in 1977 and noted that this exhibit is from the report submitted by the city's wetland expert (Exhibit 7 in the record). Again, Haney noted the location of Liberty Bay at the bottom of the screen, SR305 towards the middle of the exhibit and the Baywatch development towards the top of the exhibit with the subject property in the middle section of the exhibit, with an arrow pointing to Wetland B. Haney stated that, what these photos indicate that is relative to the exemption he pointed out previously, is that the wetland was in existence in 1977 and that, despite what the applicant has argued, the wetland was

not created by any hand-dug drainage ditch by a property owner north of the subject property. Haney added that Wetland B pre-existed the hand-dug ditch that was dug somewhere between 1994 and 2004. Haney expressed agreement with the Central Highlands premise that water runs downhill, however, there was no defined drainage ditch in 1977 but simply a natural drainage course. Haney stated that the city's technical memorandums indicate there are hydric soils in the area which underlie Wetland B and have been in place for more than twenty years. Haney noted that hydric soils are the kind of soils pertinent to wetlands.

City Attorney Haney expressed agreement also that the size of the wetland has changed over the years due to changes in the hydrology of the area and added that the wetland on the site was much larger in 1977. Haney stated that the change in size of the wetland does not change the fact that the wetland has been there for many years—at least since 1977. As one last point on the ditch argument, Haney stated that, by any definition of a “ditch”, water sheet-flowing downhill, across the Christianson property and on down to Liberty Bay is not a ditch.

City Attorney Haney addressed the next exhibit on the screen, which was the PMC section once again, and stated that a previous argument was that the wetland was unintentionally created as the result of the construction of a road, street, or highway. Haney expressed disbelief that a wetland could be created intentionally from a non-wetland site and also created unintentionally as the result of construction of a road.

City Attorney Haney pointed out that the Department of Ecology (DOE) described in their letter (shown as Exhibit 11 in the record) how they view the unintentional creation of a wetland by a roadway. Haney stated there is no impoundment of water in the aerial photos onto the Whitford/Strand property causing a wetland to be created. Because of that, the exemption does not apply. In Figure 2, Exhibit 13, you can see that Wetland B is not upland of any roadway so does not meet the definition of the exemption. Haney further noted that the photos showing the wetland were from 1977 which was before the Baywatch Development.

City Attorney Haney presented his last exhibit, PMC 16.20.240.A, Wetland Mitigation Requirements, and stated that Mr. Gori has argued the Hearing Examiner misinterpreted the city code. Haney noted that the Hearing Examiner does have the ability to interpret the city code and that part of his job is to interpret the CAO. Haney stated that the Hearing Examiner is not bound by other interpretations of the code either by staff or the Army Corps of Engineers or even

the city attorneys. Haney noted that, in this case, the Hearing Examiner started with the proposition that there's nothing in the city's CAO that authorizes applicants to fill any wetland they want as long as there is mitigation. The Hearing Examiner also looked at two express positions that allow the filling of a wetland—whether this was a regulated or unregulated wetland and whether it was an isolated wetland—and determined it was a regulated wetland and not an isolated wetland and, thus, should not be filled. Haney noted that, because the Hearing Examiner rejected both express positions, he was left with nothing in the city's code that would allow the filling of Wetland B, even though the applicant and staff argued that the code would allow mitigation measures for the proposal to fill Wetland B. Haney stated the Hearing Examiner rejected that argument and determined that city code allows the filling of a wetland under very narrow circumstances. These circumstances are addressed in PMC 16.20.240.A.

City Attorney Haney noted that Subsection B and beyond, describe what must be done if a wetland is filled and this section of the code provides a mitigation sequence which begins with determining whether the filling of the wetland can be avoided by modifying the project. If the project can't be modified, the developer would move to the next section which directs the applicant to minimize the impact on the wetland in order to still have an economically viable project. If that can't be accomplished, then and only then, does the applicant move on to filling the wetland and providing mitigation. Haney noted that the point is an applicant cannot bring forward a plan to fill a wetland and provide mitigation simply because it will allow more lots to be included in the development. Haney stated that, while there was some indication of mitigation sequencing in the reports, it was not discussed or argued by the applicant before the Hearing Examiner. Haney stated that Central Highland did not go through the mitigation sequencing in the proper order to mitigate the wetland. Haney noted that the Hearing Examiner could have interpreted the code the way the applicant encouraged him to interpret it, in fact, city staff supported that interpretation and urged the Hearing Examiner to make that determination at the hearing. Haney noted that staff's interpretation was a plausible interpretation of the city's code and he submitted a brief in support of that interpretation. Haney noted the Hearing Examiner had a different interpretation of the code which states you cannot fill a wetland unless there is an express provision that authorizes you to do so or unless you demonstrate mitigation sequencing has been accomplished. When confronted with two opposed but plausible interpretations, the Hearing Examiner asked himself, "What is the purpose and policy behind the regulation?" That question brought him to the GMA. Haney noted that, contrary to what Mr. Gori said the GMA directs during

his presentation, the GMA requires you to protect and preserve wetlands. Haney stated that is a hallmark requirement of the GMA and added that it is such an important requirement of the GMA that the GMA requires enactment of critical areas regulations (a Critical Areas Ordinance) for the protection of wetlands, steep slopes, and geologically hazardous areas before adopting the other requirements of the GMA. Haney described the Hearing Examiners deliberations and stated that his conclusions were reached based on the requirements to protect the critical areas. After reviewing the record, staff believes the Hearing Examiners conclusion is reasonable and is within the range of interpretation that a reasonable person could reach within the requirements of the code. Haney noted that the other interpretation is plausible as well. For that reason, staff decided not to appeal the Hearing Examiners interpretation of the code and staff is before Council defending that interpretation. Haney stated that staff urges Council to uphold the Hearing Examiners decision and hold that the Hearing Examiner got it right and did not make any material error.

At 8:39 PM Mayor Erickson recessed the meeting for a two-minute break. Mayor Erickson reconvened the regular meeting at 8:41 PM.

**Rebuttal:** In rebuttal, Mr. Gori stated that it is Councils job on appeal to determine whether or not the Hearing Examiner got it right. Gori added that, until the city determined that it had a contractual requirement to support the Hearing Examiners decision, staff agreed with the applicants interpretation. Gori stated that PMC 16.20.210, Wetland Categories, identifies a chain of command to follow through federal, state, and local jurisdictions for the delineation of wetlands. Gori added that Poulsbos code indicates it will identify and delineate wetlands in accordance with the federal delineation manual and applicable regional supplements and the state DOE rating system for wetlands. Gori summarized that the city has committed itself by way of the PMC to following the chain of command that has been set up by state and federal regulations.

Mr. Gori submitted a permit from the US Army Corps of Engineers (Exhibit 12 in the record) and stated that the permit authorizes the filling of Wetland B. Mr. Gori noted that this would be federal authorization in the chain of command. The letter indicates compliance with federal and state requirements and adds that no further coordination with the state DOE is required to fill the wetland and mitigate as proposed. Gori re-iterated that the City Attorney and city staff flip-flopped their position due to contractual requirements with the Hearing Examiner. Gori read from City Attorney Haney's brief in defense of the Hearing Examiners decision as

follows, ".As should be clear from the above sequence, the filling of wetlands and the provision of compensatory mitigation in the form of replacement wetlands offsite is something which is to be allowed only where a project cannot avoid the impact altogether or minimize it by limiting the scope of the development. If the developer can show that impacts are unavoidable and cannot be minimized, only then do the mitigation replacement ratios in PCM Table 16.20.240 come in to play." Gori stated that is the applicants position and added that the applicant is trying to make the best possible effort to minimize the impact to the critical areas while creating a viable project. Gori stated that mitigation sequencing was accomplished by the applicant. Gori noted there are at least two full pages in the record which include the mitigation sequencing steps. Gori stated it is not true to say mitigation sequencing was not done by the applicant and added that there was no reason to argue the mitigation sequencing before the Hearing Examiner as it was not at issue because the applicant and city staff had agreed on the process and the documentation was in the record. Gori summarized that the Hearing Examiners decision is a drastic departure from status quo and cannot be sustained by Council and added that it is a material error of law.

Mr. Gori displayed Exhibit 7 from the record depicting three photos from 2007 (showing no wetland in evidence-hydrology and vegetation are missing), from 2009 and from 2013. Gori stated that these photos show dramatically that the area is simply sheet drainage from above when the water is not diverted. Mr. Gori stated that the position of the applicant is that the wetland is unregulated.

The oral arguments concluded at 8:47 PM.

Mayor/Council/staff deliberation included: 1) a request for clarification of the process and the decision the Council must make; 2) Council can uphold the Hearing Examiners decision, uphold in part and reverse in part, or reverse the Hearing Examiners decision and provide findings for their decision; 3) having considered everything presented, it is Councils responsibility to decide on the points of appeal as to a material error of fact or law; 4) in order to provide the Findings of Fact and Conclusions of Law, Council should review each of the issues in making their decision on the appeal; 5) procedurally, a question as to whether Council is limited or has various options available; 6) a review of the five issues to be considered which were identified in the City Attorneys brief; 7) a review of PMC 16.20.215; 8) Council must concur with the Hearing Examiners decision unless there is a preponderance of evidence in support of overturning that decision; 9) the Hearing Examiner correctly determined that Wetland B is a regulated wetland and

not isolated; 10) the wetland was not created by road construction after July 1st of 1990, the definitive line drawn in the code for such a determination; 11) it appears from the documentation in the record that state and federal authorities had no issue with filling and replacing Wetland B; 12) confusion that the PMC, based on state and federal regulations, has a problem with filling the wetland when the other agencies had no problem; 13) the CAO is based on the GMA; 14) the issue is the Hearing Examiners determination of the city code definition of wetlands; 15) is the citys definition of the wetlands different from the state and federal definitions; 16) whether or not the wetland is regulated appears to depend on whose definition is used—state, federal, or the City of Poulsbo; 17) the city operates under the PMC; 18) a concern that all entities differed in their determination from that of the Hearing Examiner regarding Wetland B; 19) a concern that the PMC code is different from state and federal codes requiring a different answer regarding regulated wetlands; 20) a question of whether the Department of Ecology and the Army Corps of Engineers were in error in approving the proposal for Wetland B; 21) while it is held that the Hearing Examiner arrived at his conclusion based on the PMC, testimony was submitted in the record that the Hearing Examiner arrived at his decision based on GMA; 22) Council would have to determine the Hearing Examiner made an error to reverse his decision that Wetland B is regulated and not isolated; 23) while staff had supported filling the wetland, the Hearing Examiner determined Wetland B could not be filled per PMC 16.20 and that action by the Hearing Examiner does not mean a material error was made on his part; 24) the Hearing Examiner based his findings on the citys technical report; 25) the GMA directs development to “create no new harm”; 26) according to the DOE, offsite replacement wetlands are only successful about 50% of the time; 27) the question is, “when is it the right time to fill a wetland in Poulsbo?”; 28) the three steps in mitigation sequencing to determine when a wetland can be filled; 29) a concern that economic impact should be one of the parameters used to determine when a wetland can be filled; 30) Council is simply evaluating the process used by the Hearing Examiner in reaching his decision; 31) Council cannot decide to simply disagree with the decision if there is no error of law or material fact in reaching the Hearing Examiners decision; 32) the Hearing Examiners alternative conditions would require a redesign of the project; 33) in his Findings, the Hearing Examiner provided guidance for a redesign and protection of Wetland B; and 34) Council must go by the record and the rule of law and has an obligation to uphold the contractual agreement with the Hearing Examiner to support his decisions.

Based upon Councils deliberation and discussion of the record presented by the appelland and city staff and identified in the City Attorneys brief, Council made

their determination on the following five issues:

- 1) **Did the Hearing Examiner err in determining that Wetland B is a regulated wetland under PMC 16.20.215?** *Council agreed the preponderance of evidence indicates the Hearing Examiner made a plausible interpretation of the code and did not err in determining that Wetland B is a regulated wetland.*
- 2) **Did the Hearing Examiner err in determining that Wetland B is not a small isolated wetland under PMC Table 16.20.230.A?** *Council concurred that there was no error in determining Wetland B is a regulated and isolated wetland.*
- 3) **Did the Hearing Examiner err in determining that PMC 16.20 does not authorize Wetland B to be filled even if mitigation is provided?** *Council concurred there was no material error based on staffs agreement with the proposed wetland mitigation so, based on the closed record before them, there was no error by the Hearing Examiner in determining that Wetland B could not be filled.*
- 4) **Did the Hearing Examiner err in determining that the conditions set forth in the City of Poulsbo staff report could not be adopted given the Hearing Examiners decision that Wetland B is a regulated wetland and does not meet the definition of a small isolated wetland?** *Again, based on the record before them, Council concurred there was no error by the Hearing Examiner in rejecting the staff report because he determined that Wetland B is a regulated and isolated wetland.*
- 5) **Did the Hearing Examiner err in imposing any other condition on the Whitford/ Strand Preliminary Plat and Shoreline Substantial Development Permit Approval?** *Council concurred the Hearing Examiner made no error in imposing any other condition on the project.*

**Motion:** Move to uphold the decision of the Hearing Examiner in its entirety and adopt the Hearing Examiners Findings and Conclusions.

**Discussion:** Councilmember Henry noted that it is not required that Council agree with the Hearing Examiners decision only that, based on the record, they determine no error was made. Councilmember Musgrove expressed his concern that, based on the information provided, Council has received contradicting

statements supposedly based on the record and, as far as he is concerned, all the information needed to make a substantive determination as to whether there was an error by the Hearing Examiner is not available. Councilmember Lord described the extensive research of the record she completed in her effort to understand the appeal.

**Call for the Question: Action:** Approved, **Moved by** Lord, **Seconded by** McGinty.

Motion passed unanimously. Stern recused.

City Attorney Summerfield reminded Council that the matter continues to be quasi-judicial until the resolution and findings are adopted and should not be discussed

**c.  Lodging Tax Funding Policies**

**Motion:** Move to adopt a policy of the City Council, that the Lodging Tax Advisory Committee will forward its 2016 recommendations directly to the City Council.

Councilmember Stern rejoined the Council meeting.

**Action:** Approve, **Moved by** Nystul, **Seconded by** Musgrove.

Motion passed unanimously.

**Motion:** Move to request that the Lodging Tax Advisory Committee, when making funding recommendations for 2016, include a contingency list of any recommendation awards which are in excess of allowable funding which they believe might be funded when the yearend cash balance for 2015 is known and the City Council will decide on these when the cash balance is known without requiring any further deliberations of the Lodging Tax Advisory Committee.

**Moved by** Nystul, **Seconded by** McGinty.

**Discussion:** Council briefly discussed the reasons for submitting a contingency list to Council and determined additional research and information was needed regarding the matter.

**Action:** Councilmember Nystul withdrew his motion; McGinty withdrew his second.

**d. ► Authorization to Proceed with an Appraisal for the Marine Science Center and the Klinge Properties**

Mayor Erickson presented a parcel map of the Marine Science Center, and noted that a portion of Anderson Parkway is currently included with the facility. The Mayor explained the need for an updated appraisal for the Marine Science Center as well as a clear title removing the portion of Anderson Parkway on the parcel map. The Mayor requested approval for \$7,500 to obtain the appraisal and lot line adjustment and to also obtain an appraisal for the Klinge property.

**Motion:** Move to authorize the Mayor to proceed with appraisals for the Marine Science Center and Klinge properties, with a conditioned appraisal for the Marine Science Center property to be for the current use for marine science and education; and direct staff to prepare a Budget Amendment.

**Action:** Approve, **Moved by** Stern, **Seconded by** Lord  
Motion carried unanimously.

**e. ► Front Street (Austin) Waterfall Discussion**

Removed from agenda.

**f. ► Lindvig Bridge Mural Funding**

Mayor Erickson stated the artist would like to paint murals on both sides underneath Lindvig Bridge as well the troll on the bridge. The additional cost would be \$2,500.

Council concurred to increase the contract by \$2,500.

**7. ► COUNCIL COMMITTEE REPORTS**

Public Safety/Legal: Councilmember Thomas reported: 1) the Behavioral Health Specialist who will work for the city and the court has been identified; 2) a discussion

of Police overtime funding for special events; 3) the new police motorcycle is coming; 4) a review of the City Prosecutors budget; 5) the city has been lawsuit free for fourteen months; 6) the drafting of a proposed emergency ban of fireworks in the event of extreme fire danger; and 7) Police Officer Dave Shurick was selected as the Crisis Intervention Team Officer of the Year for 2015 for the State of Washington.

Finance/Administration: Councilmember Thomas reported: 1) a discussion of the transportation benefit district concept and neighborhood street improvements; 2) review of the Clerks/Legislative Budget; 3) Police overtime for special events was discussed; and 4) a recommendation of the base line adjustment request from the Police Department for the coming year and research for permanent funding.

#### 8. ► DEPARTMENT HEAD COMMENTS

None.

#### 9. ► CONTINUED COMMENTS FROM CITIZENS

Bill Austin, city resident, expressed his support of the Marine Science Center (MSC) and stated that pretty soon Western Washington University would be taking over the MSC. Austin added that it is important to continue marine science education on the site.

#### 10. ► COUNCILMEMBER COMMENTS/BOARD/COMMISSION REPORTS

Mayor Erickson stated the decision Council made regarding the Whitford/Strand Preliminary Plat and Shoreline Substantial Development Permit appeal is very important.

Councilmember Musgrove noted there will be a special Finance/Administration Committee Meeting held on September 23, 2015 to cover discussion on budget items.

#### 11. ► ADJOURNMENT

**Motion:** Move to adjourn at 9:58 PM.

**Action:** Approve, **Moved by** Stern, **Seconded by** Henry.

Motion passed unanimously.

Rebecca Erickson, Mayor

ATTEST:

Rhiannon Fernandez, City Clerk, CMC

*Respectfully prepared and submitted by Sherry White*