

POULSBO CITY COUNCIL MEETING OF JUNE 24, 2020 (via remote attendance)

MINUTES

PRESENT: Mayor Erickson; Councilmembers Livdahl, Lord, McGinty, McVey, Musgrove, Phillips, Stern.

Staff: City Clerk Fernandez, Planning Director Boughton, City Attorney Haney, representing City staff and Hearing Examiner.

Special Guests: Cindy Baker, appellant; Mike Brown, applicant; Katie Kendall, attorney representing applicant; Kristina Nelson-Gross, attorney representing City Council.

MAJOR BUSINESS ITEMS

* * * Vanaheimr SSDP and SPR – Appeal of Hearing Examiner Decision

1. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Mayor Erickson called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

2. AGENDA APPROVAL

Motion: Move to approve the agenda as presented.

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

Motion carried.

3. BUSINESS AGENDA

a. Vanaheimr SSDP and SPR – Appeal of Hearing Examiner Decision

Mayor Erickson abstained from the hearing because she was directly involved in the sale of the building, so for the appearance of fairness she turned the meeting over to Deputy Mayor McGinty.

Deputy Mayor McGinty asked Acting City Attorney Kristina Nelson-Gross, visiting from the City of Sequim, to review the procedure and standards for tonight's appeal.

Acting City Attorney Nelson-Gross, said this is a closed record appeal proceeding. It is not a public hearing, there will be no new testimony or evidence taken. The matter before them is to be decided solely on the record that was presented before the Hearings Examiner, which was provided to the Council on February 24, 2020. The

decision must be made on the Hearing Examiner's record only. And the Hearing Examiner's decision will hold substantial weight and the decision shall only be overturned if his decision is not supported by a preponderance of the evidence or is clearly erroneous. Questions may be asked of the parties, but those are limited to the arguments made by counsel and the information contained solely in the record.

Acting City Attorney Nelson-Gross stated that the proceeding is a quasi-judicial proceeding and is governed by the Appearance of Fairness Doctrine. That is a rule of law that requires the decision makers to have not only a fair proceeding, but also the appearance of a fair proceeding. Ex parte communications and other indications that you may have had some involvement with this—it is intended for the parties to receive equal treatment and a fair process under the law. The decision makers cannot have any prejudgment of the issues or biases in favor of the proceeding for one party or another or have a conflict or otherwise be partial in any manner. Ex parte communication means any communications with the party outside of this proceeding. You will need to disclose any such communications if you have had them at this time. For the City Council's purposes, the Appearance of Fairness Doctrine became effective when this appeal was submitted to the City on a January 13, 2020.

Acting City Attorney Nelson-Gross asked if any councilmember needs to disclose anything that constitutes a conflict of interest or did anyone partake in ex parte communication as of January 13, 2020 to date. Hearing no disclosures, she announced that any party seeking to disqualify a councilmember on the basis of the violation of the appearance of fairness doctrine must raise a challenge as soon as it is known. Upon failure to do so, the doctrine may not be relied upon to invalidate the decision. The party seeking to disqualify the councilmember must state with specificity the basis of the disqualification. That concludes the appearance of fairness process.

Deputy Mayor McGinty explained that the appellant, Cindy Baker, will have 40 minutes for oral arguments, the applicant's legal counsel, Katie Kendall, will have 20 minutes for oral argument, and the City staff's attorney, Jim Haney will have 20 minutes for oral argument, then the appellant can have 10 minutes for a rebuttal. After all arguments and rebuttals, Council will begin questions and deliberations.

Appellant's Oral Arguments:

Appellant Baker said she appreciated the Acting City Attorney Nelson-Gross discussing the appearance of fairness and appreciates the Mayor abstaining from this hearing.

She shared Council's responsibilities, which included: City Council Rules of Procedure; ask questions if they don't understand the issues; if they don't and understand and a

citizen says the City is wrong, to contact a state expert; the City's Comprehensive Plan is their guide, it sets the goals for the City; it isn't necessary for them to make a decision today; and reviewed the types of decisions that could happen today (deny appeal, approval appeal, remand back to the Hearing Examiner with instructions, remand back to staff with instructions).

Appellant Baker shared where the appeal is in the process of the application. More possible steps are:

- Appeal to Shorelines Hearings Board (Part of site under Shoreline regulations. Sometimes can be entire site – SSDP Shoreline Substantial Development Permit)– approx. 21 days to submit
- Appeal to Kitsap County Courts - after decision from Shorelines Board

Appellant Baker shared what makes Poulsbo:

- Special, unique
- Small Downtown; only 0.3 miles long
- Preserved, not like other cities
- Easy to get to by vehicle, walking, boat, ferry
- Buildings in downtown -- mainly 1 and 2 story buildings (one exception, one building is 3 stories, rear of building is two stories above back street). All buildings fit bulk and scale design requirements except city hall and possibly one other building.

Appellant Baker wanted to present a Seattle Times article, which she would have shared at a regular Council meeting during citizen comments, and while acting City Attorney Nelson-Gross understands and appreciates Ms. Baker's position, she restated that no new testimony or evidence could be submitted.

Deputy Mayor McGinty reiterated that they can only base their decision on what was already presented.

Appellant Baker shared results an informal study, done by her and Lynn Myrvang, of why people come to Poulsbo, and they found that people come to Poulsbo because of views of Liberty Bay and the small, quaint Norwegian fishing village appeal. She said the Shoreline Law protects views from Fjord Drive to Liberty Bay. And she noted a previous study for the Comprehensive Plan that talks about maintaining the downtown as a small Norwegian fishing village.

She discussed her background and said she is familiar with what they are being asked to do here today. She was a SEPA Official for four jurisdictions.

She discussed why people come to Poulsbo:

- Views of Liberty Bay
- Special, small, quaint Norwegian fishing village
- She moved to Poulsbo 15 years ago; planned to move back
- If development starts to look like other cities, then city becomes nothing special. This development can be located easily out of downtown – where Albertsons used to be.

She is appealing the findings, conclusions, and decisions of the Hearing Examiner of the Vanaheimr Project from November 18, 2019 because she believes there are errors in law and fact in the State Environmental Policy Act, or SEPA, design standards, and goals of the Comprehensive Plan.

She said there were numerous communications with staff and Council about the project:

- Started in June 2015
- 8 letters sent to Poulsbo City Council
- Mentioned keeping Poulsbo the way the Comp Plan states
- Why is Fjord Drive so unimportant!
- Talking about changing to a bland city if development is approved
- Many other places to build this development – where Albertsons was, along SR305–evaluate these

She reviewed what SEPA is and what it does. It is the State Environmental Policy Act, under WAC 197-11. Every jurisdiction has to comply with SEPA, and the purpose is to fill the gaps in local codes to ensure all impacts are addressed. SEPA does apply to this project in terms of the views. She said SEPA documents belong to the City, not the developer. She wished to show the SEPA checklist.

The Applicant's attorney, Katie Kendall, noted for the record that they do not believe the City Council has jurisdiction to hear and decide these SEPA arguments. If the Council wants to hear the arguments, she does not object, but Ms. Baker did not file a SEPA appeal during the required administrative SEPA appeal timeframe. Because of that, she lost her right to appeal any SEPA issues.

Councilmember McVey asked if they could ask Ms. Baker why she did not respond to SEPA in the required time frame. Acting City Attorney Nelson-Gross reiterated that they are limited to the closed record.

Appellant Baker stated a lot of her appeal is on SEPA and documents not being written correctly.

Attorney Haney, representing City staff, said the City concurs with the applicant on this issue. As they pointed out in their brief, Ms. Baker did not appeal the SEPA determination, and under the State's Environmental Policy Act, a failure to appeal means that the SEPA determination cannot be challenged before the City Council tonight. Ms. Baker, in her appeal statement, advises that she believes the correct thing for the City to do is to withdraw SEPA, because it was done incorrectly. That issue is not before the City Council, because she did not appeal SEPA. That is their position and the applicant's position as well. If the Council wants to hear from the appellant and hear their discussion of SEPA after, they are willing to do that. They want the Council to understand that they do not concede that SEPA is a live issue before the Council.

Deputy Mayor McGinty asked Attorney Nelson-Gross if they were determining the Hearing Examiner decisions. As far as he understood, there was another time to appeal the SEPA.

Appellant Baker said she feels she needs to move forward with presenting the information on SEPA.

Acting City Attorney Nelson-Gross agreed with Deputy Mayor McGinty, and she stated that if the Council would like to direct Ms. Baker to the other portions of her argument that were before the Hearing Examiner, that would be appropriate at this time.

Appellant Baker stated that the SEPA was misinformed, there was misinformation on it. They would understand where that is coming from once they heard it.

Deputy Mayor McGinty said it was his understanding the SEPA is off the table tonight, and they do not have jurisdiction over it.

Appellant Baker said that is not the issue. SEPA was presented at the hearing, and there is misinformation in it that would cause someone not to file an appeal.

Acting City Attorney Nelson-Gross asked Appellant Baker if she filed a SEPA appeal.

Appellant Baker answered the issue is if you have misinformation, you are not going to file an appeal. She thinks it would be worth their while to hear.

Acting City Attorney Nelson-Gross said it appears that Ms. Baker has confirmed she did not appeal the SEPA, so it is up to them how they want to proceed.

Councilmember Musgrove reiterated that they were not there to consider SEPA; however, if there is information that relates to SEPA that is part of the Hearing Examiner's record, it would be the prerogative of the appellant to provide that if she desires.

Appellant Baker shared the aesthetics checklist turned into the City by the applicant. She shared the SEPA checklist guidance on aesthetics, and the staff made some specific statements on how SEPA does not deal with regulations in the Poulsbo City Code that deals with views. She said SEPA deals with views.

Appellant Baker wanted to share an email from a SEPA official that was not part of the record. Acting City Attorney Nelson-Gross said it would better suited to be discussed at some other time than at the hearing tonight.

She said Rice Fergus Miller's view analysis was incorrect because it shows the Vanaheimr building lower than Fjord Street. With the lack of factual data, no one would have objected to or appealed SEPA for the view impacts. It was explained to the Hearing Examiner but ignored.

She said the analysis showed which buildings' views would be impacted, and they needed to be mitigated, which they were not. She shared the view from her home.

She reviewed Chapter 18.88 Commercial Districts, which ensures projects are designed using consistent architectural design and scale of downtown. She said the rooftop amenities were not analyzed during the view assessment. Balconies would not fit the meaning. The bulk of the building should be proportional, but it is not.

Applicant's Oral Arguments:

Attorney Kendall, representing the applicant, SoundWest Holdings, said the project is on a 0.57-acre site, the former Police station, which is zoned commercial district C-1. The height limit in that district is 35 feet. Approximately a quarter of the property is located in the shoreline jurisdiction. The applicant has proposed a 3-story mixed-use building with approximately 1700 feet commercial space, 25 dwelling units, 2 hospitality units, and a 38 parking stalls. They would also construct a 2500-foot public access viewing area on the west side of the property. In response to City and public comments, this project evolved significantly over the course of two years and has been improved as a result. The goal of the design is to maintain a residential look to the building while incorporating downtown design character. It is a great

development for downtown Poulsbo. To address the impacts the building would have on the single-family neighborhood, the applicant focused on enhancing the architectural façade of the east building elevation along Fjord Drive, and reduced height of the building next to Fjord Drive. Along Fjord Drive NE, the structure will be 22 feet 6 inches high. It does go up to 33 feet 6 inches as the tallest part of the building, even though it is allowed to go up to 45 feet per the code.

The official process has been over two years, the applicant provided a view analysis, a detailed traffic impact report, and the City issued its mitigated determination of non-significance, or MDNS, under SEPA on August 23, 2019. There were seven mitigation measures, none related to views. No one appealed that determination, and no one submitted comments during that time frame. The City requires an administrative SEPA appeal under PMC 16.04.025.E, stating that SEPA must be challenged during that time frame. If you do not, you are then barred from further appeal under the administrative form.

Attorney Kendall noted that the property is in the shoreline environment, and it goes under the Type III permit process. The site plan review and shoreline substantial development permit were taken to the Planning Commission and approved by the Hearing Examiner. If no one had appealed, the Hearing Examiner's decision would have been the final say. Ms. Baker appealed, which is why the hearing is being held today. During review, the City staff recommended approval of the project, as did the Planning Commission. In October 2019, the Hearing Examiner conducted a public hearing on the project. The Hearing Examiner approved the project and found that substantial and credible evidence established that the applicant met its burden to prove the pending application satisfies all criteria for approval of a SSDP and requested site plan review. He also discussed the City's compliance with SEPA at that time as part of the administrative approval process.

Attorney Kendall noted Ms. Baker moved for reconsideration of the Hearing Examiner's decision, raising the SEPA claims she is raising today even though she never filed the SEPA appeal. The motion for reconsideration was denied by the Hearing Examiner on all issues and noted Ms. Baker was barred from raising SEPA appeal issues, because she failed to appeal during the code-provided appeal period.

Relating to Ms. Baker's claim as it relates to the SEPA claim for aesthetics and view, there is no jurisdiction to hear that, but they outlined in their brief, she failed to meet her burden to demonstrate that the City's decision to issue the MDNS was erroneous.

In the view analysis, it showed that certain views would be impacted. There is a memo from Mr. Haney that states that there are no common law rights to private views.

In response to Appellant Baker, Attorney Haney noted there are three memos in the record - two related to views and one on reconsideration, which went to the Hearing

Examiner (Attachments H 6 & 7 to the staff report which is record exhibit 2, and the third is in the reconsideration documents).

Attorney Kendall discussed the standard of review. It is a unique position being in an appellate role. Under the code, the Council has the authority to grant the appeal or grant the appeal with modifications only if the appellant proves the decision of the Hearing Examiner is not supported by a preponderance of the evidence or is clearly erroneous. The code provides that in all other cases, the appeal shall be denied. The City Council is also required to afford substantial weight to the Hearing Examiner's decision. Here it is the appellant's burden to prove why the Hearing Examiner's decision should be rejected or modified. Based on the appeal filing and what was heard tonight, the appellant has failed to provide any evidence to support her claims for reversal and does not meet her burden in demonstrating that the Hearing Examiner decision was clearly erroneous.

She stated that Ms. Baker is asking Council to rewrite its development regulations during this quasi-judicial proceeding, which is outside the scope of the Council's review. One issue she raised was the shoreline requirement for a view corridor for one acre or larger parcels, but this one is only .57 acres, so there is no view corridor required. Ms. Baker has argued that it should be ignored, and the council should look to statements of intent to protect all views in this general area.

She noted the commercial goals are outlined in the City's staff report. This project will enhance the public views through development, and the applicant changed the design to fit with Poulsbo standards. The height of the building is 33 feet 6 inches at its highest, even though they can build to 45 feet because of the parking garage. The applicant is asking the Council to deny the appeal.

City of Poulsbo's Oral Arguments

Attorney Haney, who is the staff's legal counsel, thanked Ms. Nelson-Gross for filling in for him as the City Attorney. He reiterated the burden of proof. He emphasized the clearly erroneous standard of giving the Hearing Examiner's decision substantial weight, and the Council shall not substitute its judgment for that of the Examiner. They must look at his judgment and give it substantial weight and overturn his decision, only if they find it is not supported by the evidence in the record, or if they find that his decision is clearly erroneous. They must be convinced that the Hearing Examiner made an error of fact or law. Regarding SEPA appeals, it is too late. He explained why SEPA appeals are required. Had anyone appealed the MDNS, the Hearing Examiner would have had to the opportunity to address any SEPA issues, hear evidence on SEPA issues, and would have had the opportunity on whether relief should be granted based on SEPA. Ms. Baker did none of these things and is trying to get the Council to substitute its judgement for the Hearing Examiner when she forewent that opportunity, which is inappropriate and the Council should not accept that invitation to do that.

As for aesthetics and views, he was asked by City staff whether property owners above the Vanaheimr project have common law right of view. He said the answer is no, one does not have a view unless one has a view easement. Ms. Baker has a false impression that they have a right to view, and if it is impacted, the city must mitigate it.

He said the City spent a lot of time and resources looking at the view issue. They consulted him, looked at the view study, and determined in issuing its MDNS that while seven views were impacted, there were positive view impacts, by allowing the public to come onto the property. Staff also considered that the zoning established by the code allows a 45-foot height limit because it provides underground parking. This building is 33 ft 6 in, 11.5 feet below the height limit under the code. The applicant recognized potential view impacts, and they scaled their project down accordingly. He added not every impact has to be mitigated under SEPA, only significant, adverse environmental impacts must be mitigated.

Attorney Haney pointed out that one of the alleged procedural errors was there was not enough public participation. The statute Ms. Baker cited applies to comprehensive plan and development amendments. However, a notice of application was published and sent to surrounding property owners asking for comments on the proposal, including Ms. Baker, which is in the record. There was a neighborhood meeting on April 26, 2017, and Ms. Baker attended. The SEPA MDNS was published and sent to all parties of record, where she could have commented but she did not. There was a public hearing with the Hearing Examiner, which was noticed, and many people testified, but Ms. Baker did not participate. Also, in the record are several emails, showing many opportunities to participate. The Planning Commission's procedural report was not posted on the website; however, the code only requires staff reports to be posted.

Attorney Haney pointed out that the Hearing Examiner's decision was late; normally, he is supposed to submit a decision within ten working days after the hearing. It was almost a month before his decision. The Hearing Examiner stated at the end of the meeting that he thought he needed more time to give this project justice, he said it would take about a month, and no one objected at the meeting. Attorney Haney asked if it were late, what would be the remedy?

Attorney Haney stated that there is no evidence that Ms. Baker's property value is being diminished by the project. Even if there were evidence, the mere fact that property values may fluctuate, that is not grounds for denying a project.

He respectively submitted that Ms. Baker has not proven any error in the Hearing Examiner's proceedings or the staff's handling of this project. The record is voluminous that was considered by the Hearing Examiner. Staff spent a lot of time

making sure this project was appropriately mitigated, that it met the City's codes and requirements, and it met the vision that has been established through the zoning that the Council has approved. They believe the project does that, there are no errors, and Ms. Baker has not demonstrated that the Hearing Examiner did not have enough facts to make a decision, or that he made an error of law or his decision as clearly erroneous. He asked that the Council uphold the Hearing Examiner's decision and deny the appeal.

Appellant's Rebuttal:

Appellant Baker rebutted that she does not want to change codes. She said the existing code allows the planning director to drop the building height to 25 feet, because the next-door neighbor was residential. Even with two stories, her view will go away completely. She stated that there were rumors that the appeal was all about her view, but she stated she also cares about what downtown Poulsbo is. She disagrees with Mr. Haney and Ms. Kendall. She said she was out of the country when there was the SEPA determination.

Council Deliberation:

Councilmember Stern understands the impacts and views are a big deal. Many years ago, he asked about view corridors, but the Council tabled it and did not discuss it again. He asked if there is a SEPA pre-emption with view corridors.

Attorney Haney answered that SEPA acts as an overlay to all regulations. SEPA gives Council authority to look at areas that are not strictly governed by its code. The City chose not to regulate view corridors, for the most part. There is a provision for properties larger than one acre in size, there is a provision for a view corridor. SEPA provides an overlay to have the authority to look at views. If this were a SEPA appeal, they would be required to look at the evidence. This is not a SEPA appeal; however, the City did consider views.

Planning Director Boughton stated that a view corridor requirement might be established in the Shoreline Master Program, but it is only for public views.

Councilmember Musgrove asked all three parties if the Hearing Examiner made his decision with missing, incomplete, or misrepresented information.

Appellant Baker answered that she did not think he took all the citizen comments into consideration. She does not believe he used all the information that he should have used.

Attorney Haney answered that the Hearing Examiner had lots of information in front of him, and he considered all that information. The Hearing Examiner said he had testimony from expert witnesses, he had a view corridor study, a number of expert reports, and within that expertise, he didn't have comparable evidence. He

acknowledged that he had public evidence, but some evidence was more credible than other evidence on certain issues.

Attorney Kendall concurred with Mr. Haney. Specifically, the Hearing Examiner's decision said all written comments are included as part of the record and were considered by staff if submitted before issuance of the staff report and/or were considered by the examiner if submitted any time before the end of the public hearing for this matter. He heard concerns of impacts on existing views and noted the staff analysis as well as the applicant's visual impact analysis. He weighed the evidenced on what he believed was most appropriate. She feels the hearing examiner had all the appropriate information before him to make his decision.

Hearing no further questions, Deputy Mayor McGinty reviewed the actions the Council may make tonight.

Motion: Move to deny the appeal by Cynthia Baker of the Hearing Examiner decision of the Vanaheimr SSDP and Site Plan, planning file P-05-18-17-02, and direct the Visiting City Attorney to prepare a resolution establishing findings and conclusions in support of this decision.

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

Discussion: Councilmember Lord many hours over the past months digging through the binders and reviewed everything twice. She found no conviction that the Hearing Examiner's decision was incorrect. She kept an open mind coming to tonight's meeting, expecting the appellant to convince her in her favor. She has not had any conviction that a mistake was made by the Hearing Examiner. He is supported by the evidence. Many hours of consideration were made by staff, the Planning Commission, and the Hearing Examiner. SEPA is off the table for this appeal. She supports the Hearing Examiner's decision.

Councilmember McVey also read the record twice. He was familiar with the project and attended the Hearing Examiner hearing. He sees no reason to say that the Hearing Examiner is in error or that there is any sort of problem with the decision he has made. Ms. Baker has not come close to meeting the burden of proof for him to reverse it.

Motion carried.

4. ADJOURNMENT

Deputy Mayor McGinty adjourned the meeting at 8:45 p.m.

Rebecca Erickson, Mayor

ATTEST:

Rhiannon Fernandez, CMC, City Clerk

DRAFT