City of Oak Harbor
City Council Meeting

Agenda for

March 22, 2011
6:00 p.m.

Oak Harbor City Council
REGULAR MEETING
Tuesday, March 22, 2011, 6:00 p.m.

Welcome to the Oak Harbor City Council Meeting

As a courtesy to Council and the audience, ***PLEASE TURN YOUR CELL PHONES OFF*** *before the meeting begins. During the meeting's Public Comments section, Council will listen to your input regarding subjects of concern or interest that are not on the agenda. For scheduled public hearings, please sign your name to the sign up sheet, located in the Council Chambers if you wish to speak. The Council will take all information under advisement, but generally will not take any action during the meeting. To ensure your comments are recorded properly, state your name and address clearly into the microphone. Please limit your comments to three minutes in order that other citizens have sufficient time to speak.* ***Thank you for participating in your City Government!***

CALL TO ORDER

INVOCATION Pastor Dave Johnson, First United Methodist Church

ROLL CALL

MINUTES 3/1/2011 Meeting, 3/9/11 Meeting, 3/9/11 Workshop

NON-ACTION COUNCIL ITEMS:

1. Public Comments.

COUNCIL CONSIDERATION AND ACTION ON THE FOLLOWING MATTERS:

2. Consent Agenda:

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   a. Noise Permit – Whidbey Island Tea Party.

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   b. Noise Permit – Island County National Day of Prayer Committee.

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   c. Surplus – Past Whidbey Island Marathon shirts and medals.

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   d. Excused Absence – Councilmember Rick Almberg from the 3/9/11 and 4/19/11 City Council meetings.
   e. Approval of Accounts Payable Vouchers (Pay Bills).

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3. Public Hearing and Final Ordinance – Adult Entertainment Facilities Overlay Zone Ordinance.

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4. 2011 Comprehensive Plan Amendment Docket.

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5. Construction Engineering Contract Authorization – Perteet, for SE Pioneer Way.

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6. PSE Relocation Agreement – SE Pioneer Way.
7. Executive Session on Pending Litigation – Alpine Village Inc v. City of Oak Harbor, et al. Island County Cause No. 11-2-00137-1.
8. City Administrator's Comments.
9. Council Members' Comments.
   - Standing Committee Reports
10. Mayor's Comments.

ADJOURN

If you have a disability and are in need of assistance, please contact the City Clerk at (360) 279-4539 at least two days before the meeting.

"Strive not to be a success, but rather to be of value."
- Albert Einstein

City Council Special Meeting
Tuesday, March 1, 2011, 6:00 p.m.
City Hall – Council Chambers

CALL TO ORDER Mayor Slowik called the meeting to order at 6:00 p.m.

INVOCATION Paul Orritt, St. Stephen's Anglican Church

ROLL CALL

Mayor Jim Slowik
Seven Members of the Council,
Rick Almberg
Jim Campbell
Scott Dudley
Beth Munns
Danny Paggao, Mayor Pro Tem
Jim Palmer
Bob Severns

Paul Schmidt, City Administrator
Margery Hite, City Attorney
Doug Merriman, Finance Director
Steve Powers, Development Services Director
Cathy Rosen, Public Works Director
Eric Johnston, City Engineer
Larry Cort, Project Specialist
Rich Tyhuis, Public Works Operations Manager
Rhonda Severns, Utility Services Coordinator
Rick Wallace, Chief of Police
Mark Soptich, Fire Chief
Mike McIntyre, Senior Services Director
Renée Recker, Executive Assistant to the Mayor

MINUTES

Motion: Councilmember Palmer moved to approve the 2/14/11 Special Meeting minutes; the motion was seconded by Councilmember Almberg.

VOTE ON THE MOTION: Councilmembers Almberg, Campbell, Dudley, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Munns abstained from the vote. The motion carried.

NON-ACTION COUNCIL ITEMS

Patrol Officer of the Year Award – Lisa Powers

Chief of Police Rick Wallace introduced and presented this award to Officer Lisa Powers. To be nominated for this award an officer must be one of four top officers, as measured by several categories that the Police Department uses to evaluate efficiency and activity in the Patrol Division. Once those four officers are identified, a series of surveys are sent out to different groups within the Department in order to rate how the officers interact with those groups. They were also asked to rate each officer in the areas of investigation, report writing, case management, and motivation. Officer Powers introduced her family and said that she could not do her job without the support of family, friends and the Department. Officer Powers said she was honored to wear the badge and work for the Oak Harbor Police Department and wants to keep doing great things for the City and Department. Mayor Slowik called for a short break at 6:10 p.m. so Council Members could individually thank Officer Powers. The meeting reconvened at 6:15 p.m.

Public Comments

Duane Dillard, 2150 SW Dillard Lane. Mr. Dillard talked about the Dillard sewer issue from four years ago and presented a petition for a gravity sewer L.I.D for the Driftwood Addition and surrounding sewer basin. The signatures on this petition represent 82% of the property owners.

Marc Goetz, 2164 SW Dillard Lane and Lynwood, WA resident. Mr. Goetz owns a home on Dillard Lane and talked about the hundreds of pages of testimony which were presented four years ago. Mr. Goetz distributed a binder of information to Mayor, Council Members and selected staff. This information was condensed over nine months' time and Mr. Goetz felt the property owners had not been fairly treated.

Dustin Amundson, 1215 Swantown, No. 53, Windmill Court. Mr. Amundson spoke with concern about Windmill Court's landlord's use of the local newspaper to express his intentions for this property. He is not following through with what he represented. Mr. Amundson cautioned the City to tread carefully if permits are not already approved and to check what is being said.

Mel Vance, P.O. 2882, Oak Harbor. Mr. Vance spoke about the ten year anniversary of the Nisqually earthquake along with the recent Christchurch earthquake in New Zealand. There is information on City, County, Red Cross and other organization websites – get trained and volunteer for disaster preparedness.

Gerry Oliver, 740 SE Pioneer Way. Mr. Oliver thanked Council Members who had been present for the Pioneer Way groundbreaking. It is an exciting time downtown; thanks for a great job.

With no other comments coming forth, Mayor Slowik closed this portion of the meeting at 6:20 p.m.

COUNCIL CONSIDERATION AND ACTION ON THE FOLLOWING MATTERS

Consent Agenda

A. Re-appointment – Community Police Advisory Board – Barbara Buchanan
B. Appointment to Planning Commission – Jill Johnson
C. Appointment to Marina Advisory Committee – Chris Skinner
D. Appointment to Marina Advisory Committee – Ken Hulett
E. Noise Permit – Irish Wildlife Parade
F. Noise Permit – March of Dimes
G. Standing Committee Format
H. City Council Meeting Continuance
I. Excused Absence – Councilmember Danny Paggao from the 3/22/11 Meeting
J. Approval of Accounts Payable Vouchers (Pay Bills)

Councilmember Dudley asked that Consent Agenda Items B, D, G, and H be removed for discussion.

Motion: **Councilmember Dudley moved to approve Consent Agenda Items A,C, E, F, I, and J with Consent Agenda Item J paying Accounts Payable check numbers 144881 – 144883 in the amount of $54,613.59, Accounts Payable check numbers 144884 – 144897 in the amount of $806.11, Accounts Payable check numbers 144898 – 144903 in the amount of $23,074.42, Accounts Payable check numbers 144904 – 145029 in the amount of $271,868.13, Payroll check numbers 94500 – 94530 in the amount of $599,931.46, and Payroll check numbers 94531 – 94558 in the amount of $42,751.09. The motion was seconded by Councilmember Campbell and carried unanimously.**

Item B, Appointment to Planning Commission, Jill Johnson
Councilmember Dudley spoke with concern about Ms. Johnson, as the Executive Director of the Chamber of Commerce, being appointed to the Planning Commission and if there is a conflict since the City hears the Chamber's annual report and provides $80,000 to the Chamber (through an agreement between the Chamber and City). Councilmember Dudley was concerned that Ms. Johnson might question staff recommendations regarding land use. Mr. Dudley stated that it may not legally be a conflict but there is that appearance. Councilmember Almberg did not recognize Ms. Johnson's Chamber employment as a conflict of interest noting that these appointments are advisory and not legislative positions. If this appointment is seen as a conflict then the same should be true for a major Pioneer Way property owner. Mr. Almberg supported Ms. Johnson's nomination. Councilmember Severns noted that, if Ms. Johnson had a problem with an issue before the Commission, she could recuse herself at that point. Mr. Severns also supported Ms. Johnson's nomination. Councilmembers Paggao, Campbell and Palmer had no concerns and supported her nomination. Councilmember Munns noted that Ms. Johnson does not work for the City and is responsible to the Chamber Board of Directors; she has the integrity to step back. Councilmember Munns also supported Ms. Johnson's nomination.

MOTION: **Councilmember Campbell moved to approve the recommendation to appoint Jill Johnson to the Planning Commission. The motion was seconded by Councilmember Almberg.**

Councilmember Dudley stated that he did not question Ms. Johnson's abilities.

VOTE ON THE MOTION: **Councilmember Almberg, Campbell, Munns, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Dudley opposed. The motion carried.**

Item D, Appointment to the Marina Advisory Committee, Ken Hulett
Councilmember Dudley noted that the fourth sentence in the agenda bill's summary statement stated that Mr. Hulett's term would commence in March 2010 and expire March 2013. This is a typographic error. Mr. Hulett's appointment will begin March 2011 and expire March 2014 and is a new appointment to the Marina Advisory Committee with a fresh term.

MOTION: **Councilmember Dudley moved to approve the recommendation to appoint Ken Hulett to the Marina Advisory Committee. The motion was seconded by Councilmember Severns and carried unanimously.**

Item G, Standing Committee Format

Councilmember Dudley spoke to the intent of the Open Public Meetings Act as discussed in AGO 2010 No. 9 and specifically the third paragraph of number two in that document's analysis: *"When a quorum of the City Council takes action at a standing committee meeting, a City Council meeting has occurred, and the City Council must provide notice of its meeting consistent with the Act. The standing committee meeting is a separate governing body from the City Council. It is not sufficient to rely on the notice that was provided for the standing committee meeting."* Councilmember Dudley felt that the City can be more open and referred to the March 4, 2010 Public Works Standing Committee meeting where, in addition to Council Standing Committee members Dudley, Almberg, and Paggao, Councilmembers Palmer, Severns, and Munns were also in attendance. Councilmember Dudley still believed the City was wrong and continued to recommend that standing committees be videotaped for Channel 10. Councilmember Almberg responded that this issue has been beat to death.

MOTION: **Councilmember Almberg moved to approve the motion amending Resolution No. 04-02, "Administration and Personnel Council Rules" to amend Rule No. 28 to provide notice of a Council quorum planning to attend a standing committee meeting. The motion was seconded by Councilmember Munns and carried unanimously.**

Item H, City Council Meeting Continuance

Councilmember Dudley had a procedural question regarding how members who are attending the Washington D.C. National League of Cities Congressional City Conference are chosen. Councilmember Dudley preferred that this selection process come before Council as an agenda item months in advance of this conference and Pentagon meetings. Mayor Slowik responded that this comment was off the subject since this evening's agenda bill addressed the continuance of the March 15, 2011 meeting to March 22, 2011.

MOTION: **Councilmember Munns moved to approve Resolution 11-03 which continues the March 15, 2011 Regular City Council Meeting to a Regular City Council Meeting on March 22, 2011. The motion was seconded by Councilmember Campbell and carried unanimously.**

Mayor Slowik introduced members of the Irish Wildlife Association who invited Council to attend and participate in the Irish Wildlife Parade on March 17, 2011.

Public Hearing and Final Consideration – Bond Ordinance, Marina Redevelopment Project, Phase 2 / Dredging

Councilmember Dudley asked to be and was recused from this agenda presentation. Finance Director Doug Merriman presented the ordinance relating to the Oak Harbor Marina providing for the issuance of approximately $2,560,000 par value of Limited Tax General Obligation (LTGO), 2011, of the City to provide part of the funds with which to pay the cost of making redevelopment improvements and dredging work to the Oak Harbor Marina; to fund a debt service reserve for the bonds herein authorized and to pay the costs of issuance and sale of such bonds; fixing the date, form, maturities, interest rates, terms and covenants of such bonds; establishing a bond redemption account and a construction account; and approving the sale and providing for the delivery of the bonds to Martin Nelson & Company of Seattle, Washington. Jim Nelson of Martin Nelson & Company was also in attendance. The Martin Nelson update on the Marina system financing is attached to these minutes as Exhibit A. Mr. Merriman noted that the City has now received a rating grade of "AA-" from Standard and Poor's which is five grades higher than the initial rating discussed during Council's January 18, 2011 meeting. Since the official rating report will not be available until March 2 or 3, 2011, the bond sale will need to be postponed.

Mayor Slowik opened the public hearing at 7:40 p.m. There were no comments but the public hearing was kept open.

Mr. Nelson and Mr. Merriman spoke to Council about the benefits of restructuring this bond, the terrific rating grade and lowered percentage rate, and the $600,000 savings in interest costs. Mr. Nelson thanked Mr. Merriman for the flexibility to wait for this favorable rating category and percentage rate. Mr. Nelson also thanked Mr. Merriman, Paul Schmidt, and Steve Powers for participating in the conference call presentation to Standard and Poor's.

Council Discussion

Discussion followed regarding the market for these bonds and investors' return and the weighted average yield rate. Mr. Merriman also re-explained the difference between revenue bonds and LTGO bonds and the minor market changes that could occur in this next week. This Council meeting and public hearing will be continued to March 9, 2011 for final consideration of the bond ordinance.

MOTION: Councilmember Munns moved to continue the public hearing and Council meeting for the purpose of taking action on March 9, 2011 at 5:00 p.m. Councilmember Palmer seconded the motion and the motion carried.

Mr. Dudley, who had recused, returned to the meeting.

Grant Agreement – Approval of EPA Grant Agreement for the Waste Water Treatment Plant (WWTP) Facility

City Engineer Eric Johnston presented this agenda bill. The City was specifically identified in federal legislation authorizing funding for the State and Tribal Assistance Grant Program, administered by the Environmental Protection Agency (EPA), as the recipient of a $198,400 grant for assistance with a water and waste water project. Representative Rick Larsen was instrumental in ensuring the City as a grant recipient under the program. In choosing a project for these grant funds, staff identified the Waste Water Facility Plan and eventual construction of a new facility as a good fit for the environmental permitting, documentation, and matching fund requirements of the grant. Accepting the EPA grant will result in requirements for a federal permitting process that may not otherwise be required for projects funded solely with local funding. The Waste Water Facility Plan process will likely have a federal nexus for an environmental permit regardless of the funding source. The scope of work with the consulting firm retained by the City for the facility plan anticipated this level of effort and is reflected in the scope of work currently underway. There is additional documentation related to grant management and financial record-keeping that will be required, however, given the eventual size and cost of the total project, the additional work is worth the effort.

Mayor Slowik called for public comments but there were none.

Council Discussion

Discussion followed regarding staff time, federal funding, cost-sharing, with note that unspent funds will remain in the City's Waste Water Fund.

MOTION: **Councilmember Almberg moved to authorize the Mayor to sign EPA Grant Agreement No. XP-00J27701-0. The motion was seconded by Councilmember Palmer and carried unanimously.**

2011 Radio Read Water Meters Purchase

Public Works Director Cathy Rosen presented this agenda bill. The Water Division requested authorization to purchase Model DS DIALOG 3G Drive-by Radio Read Water Meters as a continuation of the ongoing replacement program. The radio read meters by Master Meter will be purchased under a previously approved sole source determination (RCW 39.04.280 (1) (a) and City Resolution 07-07, as these meters are compatible with the existing water meters and meter reading system. In May 2005, the City Council approved the purchase of a Radio Read Water Meter Reading System by Master Meter as part of an eight-year program to change out all of the existing water meters in the City of Oak Harbor with radio read meters.

Mayor Slowik called for public comments.

Gerry Oliver, 947 NW Prow. Mr. Oliver asked if the system was reliable and if it reads electronically.

There were no other comments.

Council Discussion

Council asked Ms. Rosen to address Mr. Oliver's concerns. Ms. Rosen said that staff still has the ability to a manual meter read and parameters are established with the radio read system that "red flag" consumption above normal limits and allows staff to check the system. Council asked if customers can call for a meter check if their billing seems high (yes). The City can also see utility trends by using this system. Rich Tyhuis also spoke to Council about the benefits of this system and was asked about data on man hours for meter reading versus how monthly billing is now done. Ms. Rosen said she would get these statistics for Council. Manual meter reading used to require two weeks to read half of the City. With radio read metering and billing every month, the entire City can be done in a week. Council also asked about passing the costs savings on to water customers and changing the billing designation from cubic feet to gallons. Ms. Rosen noted that this would be costly since all meter registers would have to be changed out. Cost savings has reduced staff in the Water Division and that is reflected in the City's rates.

MOTION: **Councilmember Severns moved to adopt Resolution 11-04, the motion was seconded by Councilmember Munns and carried unanimously.**

Mayor Slowik asked Mr. Tyhuis to address water loss. Mr. Tyhuis talked about changing out the steel water mains and also that older meters lose their accuracy and tend to under-read. Converting to a radio read system over the last eight years (and this final replacement program is a year ahead of schedule) and the use of software to discover leaks has reduced water loss to one percent. Rhonda Severns is in charge of water efficiency and water conservation and has been diligent in these areas. Replacement of water mains has been another large factor in water loss reduction. Mayor Slowik noted that three years ago, the City was under ten percent in water loss and now is at one percent. With the completion of the Pioneer Way project, that will also help with water conservation.

Mayor and Council thanked and congratulated the entire Water Department for their work on this project.

Break

Mayor Slowik called for a five minute break at 7:15 p.m. and the meeting reconvened at 7:20 p.m.

Mitigation Proposal – For Pioneer Way Improvement Project

City Administrator Paul Schmidt presented this agenda bill which proposed an in-house, temporary contract employee (a communication specialist) to coordinate communication, marketing and promotion activities for the SE Pioneer Way corridor and help offset construction impacts. This coordination effort will include ongoing meetings with SE Pioneer Way businesses, the Chamber of Commerce, and the public.

The proposal includes:

- An eight (8) month employment contract for the communication specialist at $4,320 per month for 25 hours per week plus expenses – total of $45,000 (includes L&I, FICA, phone, computer, office supplies).
- A budget outline of suggested communication, promotion and marketing activities – total of $122,500.
- A program approach that includes four (4) separate key areas; Event Planning, Merchant Services, Access Logistics and Outreach Services .

Mr. Schmidt introduced Lesley McConnell who would be the communication specialist and would work with Larry Cort, Joe Stowell, and Rhonda Severns.

Mayor Slowik called for public comments.

Jill Schacht, 690 SE Pioneer Way, Casual House owner. Ms. Schacht was pleased to see that Council was considering a plan to include some marketing funds and the City had found someone qualified to help with marketing. Ms. Schacht urged Council to approve this approach.

Cathy Collantes, 670 SE Pioneer Way, Angelo's Café owner. Ms. Collantes also supported this marketing approach and asked Council to approve it.

Gerry Oliver, 740 SE Pioneer Way, G.O. Realty owner. Mr. Oliver supported this proposal but also noted that it is vital to know how the City is going to spend that money. Mr. Oliver felt the Ms. McConnell is well-qualified but did not think that $100,000 needs to be spent. Do not spend thousands of dollars on print marketing. There are different ways to approach marketing.

Kay Coolidge, 3021 Mt. Baker Circle, Popsie's owner. Ms. Coolidge felt that the Pioneer Way project is a great project but does not support print advertising. Ms. Coolidge does support a trolley.

Mel Vance, P.O. 2882. Mr. Vance agreed with Mr. Oliver and also talked about online social networks but also noted there are still a lot of people who don't use social media so more traditional marketing should not be neglected. Mr. Vance asked about the source for these marketing funds and was concerned that, if these funds come from roads funds, there are other roads in Oak Harbor that are in need. Mayor Slowik felt that economic development funds can cover this proposal.

Jill Johnson, Executive Director, Greater Oak Harbor Chamber of Commerce. Ms. Johnson liked the title of this proposal – mitigation. Is the marketing money like insurance? No, mitigation implies your best shot, shore up the hillside so rain doesn't take your home. For the merchants, it feels like a rainstorm. Need to shore up the hillside to protect your investment.

There were no other public comments.

Council Discussion

Discussion followed about the mitigation budget and how the amounts were assigned, the differences between Larry Cort's and Lesley McConnell's positions, language in the program approach document, and that it is a dynamic (not static) document.

Ms. McConnell addressed the Council, talked about her professional experience, how she will approach the four key program areas, and the legacy document that will help keep projects moving into the future. Both Ms. McConnell and Mr. Schmidt talked about other marketing efforts beyond print marketing, Ms. McConnell's work schedule, and the cost savings in comparison to earlier, proposed outreach proposals. Wayfinding and temporary signage were discussed, along with the clarification that public funds are not being spent for private marketing viewpoints or businesses.

Council discussion continued regarding the Chamber and merchants forming a marketing committee and Ms. McConnell's anticipated involvement, and the addition of "not-to-exceed $167,000" in the last paragraph of the resolution. Discussion regarding a termination clause was clarified (already referenced in the employment agreement).

MOTION: **Councilmember Munns moved to add "not-to-exceed" before $167,000 in the last paragraph of the resolution. The motion was seconded by Councilmember Campbell.**

VOTE ON THE MOTION: **Councilmembers Campbell, Dudley, Munns, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Almberg abstained from the vote. The motion carried.**

MOTION: **Councilmember Munns moved to approve Resolution 11-05, and the motion was seconded by Councilmember Campbell.**

VOTE ON THE MOTION: **Councilmembers Campbell, Dudley, Munns, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Almberg opposed. The motion carried.**

City Administrator's Comments

City Administrator Paul Schmidt talked about the need for a quorum on 3/9/2011 since tonight's meeting is not adjourned and the Marina's bond ordinance will be addressed for final consideration. The Waste Water Treatment Plant special meeting was mentioned along with the next Council meeting on 3/22/2011. Art proposals will come forward in May and the Marathon is coming up 4/9/2011 and 4/10/2011. Larry Cort gave the first of regularly-planned reports to Council about Pioneer Way. Dr. Cort also emails out weekly briefings which are very informative. A construction report can be coordinated with future mitigation reports. The City's downtown storefront office is up and running and staff have met with Strider, KBA, the sub-contractors, PSE, and other utility representatives – good discussions. There will be a two-phase approach to the construction effort: City Beach to Dock Street will kick off next week and will wind down about June. With the first of May, phase one will overlap into phase two – Dock Street to Midway Boulevard. The final months will focus on the Midway side of this project. Strider's construction trailer is onsite, erosion control is in place along with traffic devices and removed elements on the street. Discussion followed about proposed art and if, by waiting until May, the artists will have enough time. Mr. Schmidt noted that the main concern is understanding the art's site needs. Discussion followed about underground cabling and final costs. PSE's agenda bill

is planned for the 3/22/2011 Council meeting, but final costs are pending for Frontier. A timetable is being established for Frontier.
Dr. Cort can be reached at: lcort@oakharbor.org

Councilmembers' Comments
Councilmembers gave their respective standing committee and other board reports.

MOTION: **Councilmember Campbell moved to bring an update on where Dillard is today before Council on April 5, 2011. The motion was seconded by Councilmember Dudley.**

Councilmember Campbell talked about the NJRROTC fund-raising effort. Councilmember Munns discussed AWC's covenant in support of Washington State's military and their families which comprises the largest economy in our state. Mayor Slowik noted that this was not a small endeavor, mentioned Gov. Gregoire's supportive speech, and thanked Councilmember Munns for her substantial work on behalf of this covenant.
Councilmember Almberg talked about the culinary arts program at Oak Harbor High School and the fundraising dinner on 3/13/2011, 6:00 p.m., at the high school.
Councilmember Almberg will need to be excused from the 3/9/11 Council meeting and will submit an excused absence request.

Mayor's Comments
Mayor Slowik talked about the work being done for the Washington D.C. trip and the better news coming out of the Pentagon regarding the P-8. We hope to help mitigate that issue. NASWI has a hangar (hangar 6) which can be adapted to accommodate the P-8s and that effort is moving forward.

ADJOURN
This meeting was not adjourned and will be continued to March 9, 2011, at 5:00 p.m.

_____
Connie T. Wheeler
City Clerk

City Council Meeting
Wednesday, March 9, 2011, 5:00 p.m.
Continuation of the March 1, 2011 City Council Meeting and Public Hearing
Bond Ordinance – Marina Redevelopment Project

CALL TO ORDER Mayor Slowik called the meeting to order at 5:00 p.m.

ROLL CALL

Mayor Jim Slowik
Five Members of the Council,
- Jim Campbell
- Beth Munns
- Danny Paggao, Mayor Pro Tem
- Jim Palmer
- Bob Severns

Paul Schmidt, City Administrator
Margery Hite, City Attorney
Doug Merriman, Finance Director
Renée Recker, Executive Assistant to the Mayor

Councilmember Rick Almberg was excused from this meeting and Councilmember Scott Dudley was recused from this discussion and action.

Public Hearing and Final Consideration – Bond Ordinance 1600, Marina Redevelopment Project

Finance Director Doug Merriman led this presentation which was continued from the March 1, 2011 City Council meeting. This agenda bill presented an ordinance of the City of Oak Harbor, Washington, relating to the City's small boat harbor and marina; providing for the issuance of approximately $2,570,000 par value of Limited Tax General Obligation (LTGO), 2011, of the City to provide part of the funds with which to pay the cost of making redevelopment improvements and dredging work to the Oak Harbor Marina; to fund a debt service reserve for the bonds herein authorized and to pay the costs of issuance and sale of such bonds; fixing the date, form, maturities, interest rates, terms and covenants of such bonds; establishing a bond redemption account and a construction account; and approving the sale and providing for the delivery of the bonds to Martin Nelson & Company of Seattle, Washington. Mr. Merriman noted that the true interest cost (with fees) is now 4.03%, the bond rating is now "AA -" and there is a savings of $700,000 over the life of the bond. Mayor Slowik reopened the public hearing, but there were no public comments so the public hearing was closed. Council had no questions.

MOTION: **Councilmember Severns moved to pass Ordinance No. 1600 providing for the issuance of $2,570,000 par value LTGO bonds to provide funding for the Marina Redevelopment Project. The motion was seconded by Councilmember Palmer and carried unanimously.**

ADJOURN

With no other business coming before the City Council, the March 9, 2011 meeting as continued from March 1, 2011 was adjourned at 5:05 p.m.

Connie T. Wheeler
City Clerk

City Council Special Meeting and Workshop
Wednesday, March 9, 2011, 5:30 p.m.
Waste Water Treatment Plant Facilities Site Short List

CALL TO ORDER Mayor Slowik called the meeting to order at 5:30 p.m.

ROLL CALL

Mayor Jim Slowik
Six Members of the Council,
- Jim Campbell
- Scott Dudley
- Beth Munns
- Danny Paggao, Mayor Pro Tem
- Jim Palmer
- Bob Severns

Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Steve Powers, Development Services Director
Cathy Rosen, Public Works Director
Eric Johnston, City Engineer
Joe Stowell, Project Engineer
Renée Recker, Executive Assistant to the Mayor

Councilmembers Rick Almberg was not present and formally excused.

City Engineer Eric Johnston introduced Brian Matson, Carollo Engineers, Inc. who led this presentation and discussion with these points:

- Project Schedule Update
- Brief Review of Preliminary Alternatives
- Overview of Evaluation Process
- Proposed Alternatives and Sites
- Summary/Next Steps

After a series of meetings with the community and key stakeholders, the project team prepared a list of 13 preliminary alternatives located on 8 potential sites. Two treatment processes are under consideration: Membrane Bioractor (MBR), and Activated Sludge (AS). Preliminary alternatives have been developed and evaluated based on how they meet a range of specific objectives in four categories: Technical, Social, Environmental, and Financial. Four sites are proposed for further consideration: Windjammer Park, Old City Shops, Marina, and Beachview Farm. Mr. Matson's PowerPoint presentation and Mr. Johnston's project briefing document are attached to these minutes as Exhibit A and Exhibit B.

<u>Council Discussion</u>

Council asked about how the alternative numbers mesh with the site names.

1	Windjammer Park adjacent to the existing RBC Plant.
2a and 2b	The Marina site.
3	Old City Shops.
4	Beachview Farm which is west of town (Fakkema Farm).
5	Piece of Navy property located furthest to the east.
6	Site K.
7	The property adjacent to the City's existing shops facility.
8	Former Chevy dealership.

Discussion followed about the advantages and challenges of each site as detailed in the PowerPoint presentation. Specific questions followed regarding property acquisition, footprint size of MBR and AS facilities, if Windjammer Park's existing plant would be abandoned should another site be chosen (would still need a portion of this site to accommodate a pumping station), the viability of Beachview Farm with the challenge of pumping and piping from the outskirts of town for this facility, the benefits of MBR plants even though they are more expensive (8% to 10% higher) and that there is no question that MBR is considered the best technology, state requirements now and in the future, and mitigation needs if water is outfalled to environmentally-sensitive areas such as shellfish areas. With Beachview Farm, it would cost less to build parallel pipes back into Oak Harbor rather than mitigate for a West Beach outfall. Council also noted that Beachview Farm is in the county and getting through the county's approval process could be difficult. Mr. Matson noted that the team had not assigned any weight to each of these sites; just a pass/fail evaluation. Council would need to establish the sites' priority. Regarding costs associated with outfalling effluent into Crescent Harbor or Puget Sound, Mr. Matson noted that installing an outfall at West Beach would be three times the cost; possibly $6 million to install an outfall at West Beach. Discussion continued regarding Site K (the Copeland vacant lot, Bayshore Drive, and Pioneer Way). Mr. Matson talked about why this site, from a technical standpoint, did not meet the criteria:

- It is not adjacent to an existing conveyance system and not zoned for a treatment plant.
- It would have to be an MBR plant.
- Although socially satisfactory and avoiding impact on open space, there is neighborhood impact in the downtown core.
- It occupies a piece of property which could be used for commercial purposes.
- It did not achieve any of the financial objectives.
- Overall, Site K achieved the least amount of objectives.

Discussion followed about the cost to create aesthetically-pleasing plants, the overall cost of the program, and the difference in operational and maintenance costs between MBR and AS plants. Labor is relatively the same, but MBR requires a different type of employee since it is more automated. Chemical treatment is roughly the same and equipment replacement is more expensive for an MBR plant, but it has a smaller footprint. On the whole, MBR plants cost 8% to 10% more than AS plants. Discussion returned to Windjammer Park as an alternative since the plant is in place, the needed connection to Windjammer from the other three site alternatives, and the Windjammer Plan's recommendation to remove the plant from Windjammer Park. Mr. Matson noted that a pumping facility to serve another site would be much-reduced in size, but there would be some remaining infrastructure. Discussion continued about the Navy property, the Marina site including Navy and City property, and that an MBR plant might not be able to locate on Navy property. Long-term leasing of federal property, the federal acquisition process, federal surplusing, and federal land acquisition through a congressional act were discussed.

Discussion followed about Site H which is near Krieg Construction. Council asked about the timeline for a decision. Mr. Johnston noted that first, we need to say what is being considered and where (MBR versus AS at the locations), and then narrow these four potential sites to one site by August 2011. Council asked if there was a fifth site that ranked closely to these four sites. Mr. Johnston responded that all of the criteria are equally rated; as example, costs versus social impacts warrant an equal scoring. Looking at the Navy East site, a site by the new City shops, and the Chevy dealership – these sites were somewhat equal. The Marina site was less costly, but there are advantages to the Beachview Farm site. The new City shops site could require costly transport and landfill reclamation behind this site. The technical team consisting of staff, Navy representatives, and the consultant came to the same consensus regarding the four potential sites. Discussion followed about plant visits that Council and Mayor had made (AS plants in Vancouver and Edmonds, WA) odor control, use of solar (not viable in this cloudy climate), and energy recapture through biosolids. Beachview Farm could have a biodigester. The definition of brown field – taking down to bare dirt, was clarified.

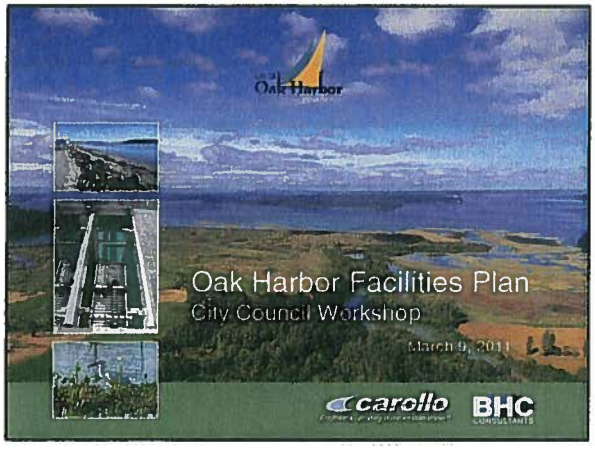
Wrapping up, Mr. Johnston noted that this subject will come back before Council with a resolution, there is a public meeting at Hayes Hall, Skagit Valley College on April 12th to allow the community to see designs and ask questions, and that there will be more stakeholder meetings, Navy involvement, and a return to Council in August or early fall. Presentations will continue before standing committees along with community mailings and surveys. The community is being encouraged to get involved.

Mayor and Council thanked Mr. Johnston and Mr. Matson for their comprehensive presentation.

ADJOURN
With no other discussion coming before Council, the workshop was adjourned at 6:55 p.m.

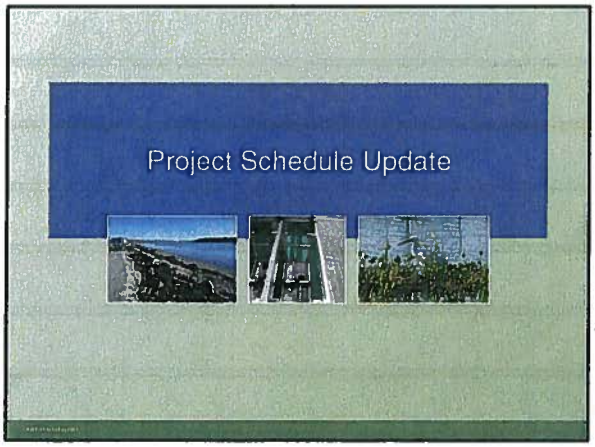
_____
Connie T. Wheeler
City Clerk

Exhibit A



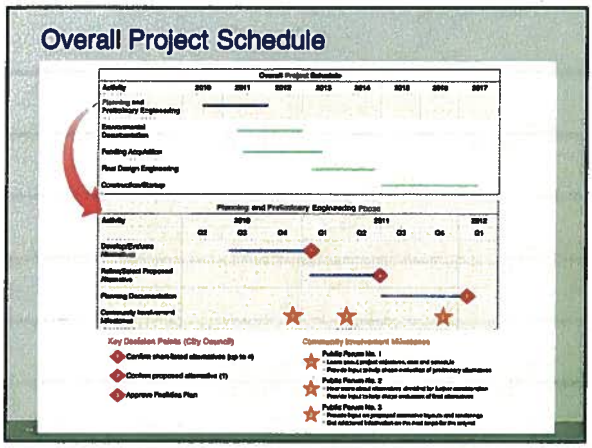
Agenda

- Project Schedule Update
- Brief Review of Preliminary Alternatives
- Overview of Evaluation Process
- Proposed Alternatives and Sites
- Summary/Next Steps

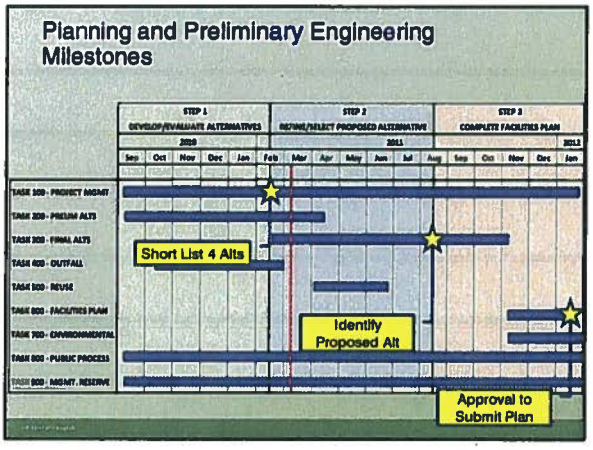


17

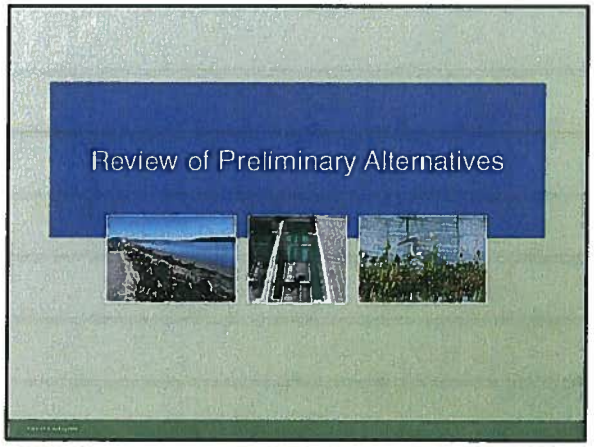
Overall Project Schedule



Planning and Preliminary Engineering Milestones

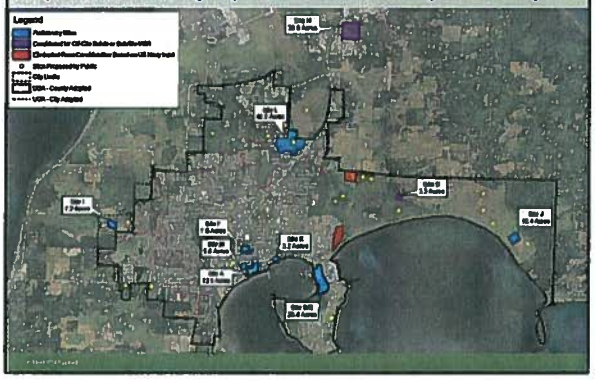


Review of Preliminary Alternatives

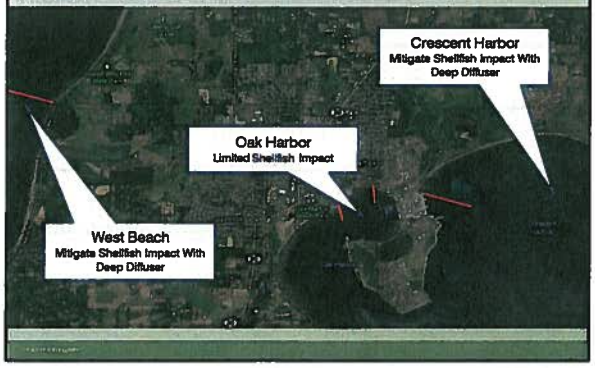


2 WWTP Process Options

8 Candidate Sites
(Public/US Navy Input + Technical Requirements)

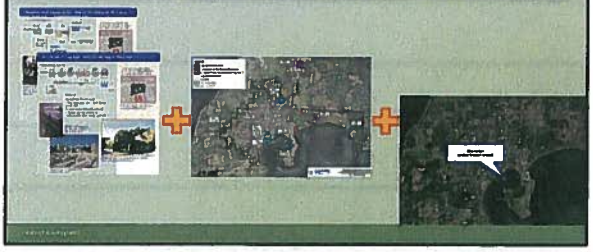


3 Candidate Outfall Locations



Matrix of Preliminary Alternatives
13 Alternatives, 8 Potential Sites

Alternative	1	2A/B	3A/B	4A/B	5A/B	6	7A/B	8
Site	A	B/E	F	I	J	K	L	M
Process	MBR	MBR/AS	MBR/AS	MBR/AS	MBR/AS	MBR	MBR/AS	MBR
Outfall	OH	OH	OH	OH	OH	OH	OH	OH



TBL+ Comparison of Alternatives

Technical and community objectives drive alternative selection

- Technical considerations:
  - Reliable, safe, efficient treatment facility to meet current and future regulations
- Community feedback:
  - Continue existing level of service
  - Control costs
  - Avoid open space/public impact
  - Implement a long-term solution

TBL+ objectives developed to match input

Technical	Financial	Social	Environmental
T1	F1	S1	E1
T2	F2	S2	E2
T3	F3	S3	E3

Environmental Objectives

E1 — Produce Best Water Quality
- Produce the best effluent quality (NTU, TSS, BOD) within a reasonable cost
- Produce "Class A" reclaimed water for beneficial reuse

E2 — Protect Environmentally Sensitive Areas
- Protect wetlands, streams, wildlife habitat, forests, and other critical areas *
- NOTE: Critical areas defined by OHMC

E3 — Minimize Carbon Footprint
- Pursue alternatives that emit the lowest levels of Greenhouse Gases (GHG) (or alternatives that are "reasonably close" to lowest GHG levels)

* Criteria matching Oak Harbor Comprehensive Plan

Social Objectives

S1 — Protect Public Health & Safety
- Minimize public and City staff exposure to toxics and chemicals
- Reliably meet NPDES permit requirements; provide for safe water quality

S2 — Preserve/Enhance Public Amenities
- Preserve existing undeveloped open spaces for public use *
- Protect important view corridors in the community *

S3 — Minimize Neighborhood Impacts
- Construct facilities to match the character of surrounding areas *
- Minimize public exposure to noise, odor, and truck traffic

* Criteria matching Oak Harbor Comprehensive Plan

Technical Objectives

T1 — Reliable Performance
- Select treatment processes with many years of proven service
- Design for adequate redundancy

T2 — Ease of Construction
- Avoid steeply sloped sites and/or sites with difficult access
- Avoid sites where acquisition/construction could cause excessive, costly delays *

T3 — Overall System Efficiency
- Maximize the amount of gravity flow to/from the new WWTP
- Minimize the amount of new conveyance infrastructure

* Criteria matching Oak Harbor Comprehensive Plan

Financial Objectives

F1 — Low Capital Cost
- Pursue alternatives that are lowest in cost (or "reasonably close" to low cost)
  NOTE: Considers WWTP, conveyance, and outfall costs

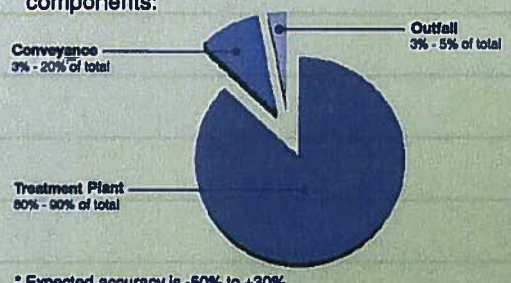
F2 — Low Life Cycle Cost
- Pursue alternatives that are lowest in cost (or "reasonably close" to low cost)
  NOTE: Considers capital cost and annual O&M cost for 20-year period

F3 — Protect Assets for Future Economic Development
- Avoid areas zoned for commercial/business use within downtown urban core *

* Criteria matching Oak Harbor Comprehensive Plan

Financial analysis focused on comparing relative cost of alternatives

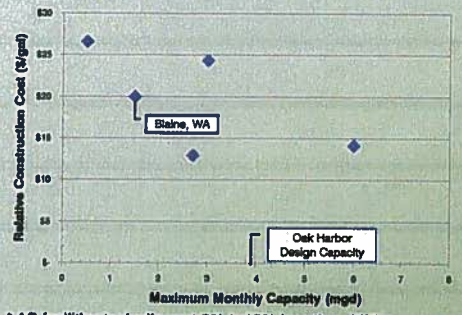
- "Conceptual level"* costs developed for 3 major components:



* Expected accuracy is -50% to +30%

22

"Unit cost" of treatment compared with multiple local MBR* projects as check

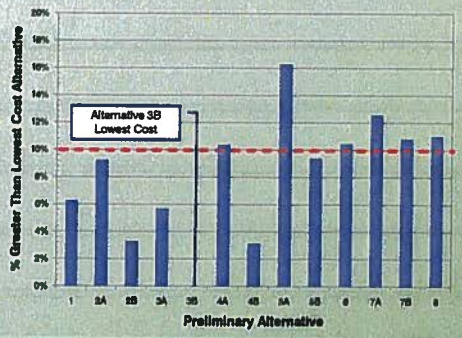


* AS facilities typically cost 8% to10% less than MBR

Other cost factors considered in comparative analysis

- Project Contingency: 30%
  - Accounts for planning level uncertainty
- Washington State Sales Tax: 8.7%
- Allied Costs (Engineering, Legal, Admin): 25%
  - "Soft" project costs not related to construction
- Escalation to Mid-point of Construction: 3% per yr
  - Assumes bidding in 2014

6 Alternatives are within 10% of lowest cost Alternative (3B)



Proposed Alternatives & Sites

Windjammer Park Site

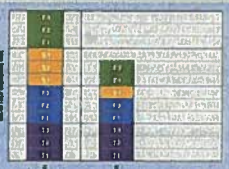
Alternative 1: MBR with discharge to Oak Harbor outfall

Advantages

- Low relative cost (~ 6% above lowest cost)
- Most efficient use of infrastructure

Challenges

- Facilities located in/near Windjammer Park



Marina Site

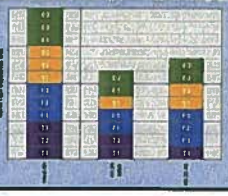
Alternative 2A/B: MBR/AS with discharge to Oak Harbor outfall

Advantages

- Low relative cost (3% to 9% above lowest cost)
- Avoids facilities in/near Windjammer Park

Challenges

- Inefficient use of infrastructure
- Marina impact (MBR) or US Navy property (AS)



24

Old City Shops Site

Alternative 3A/B: MBR/AS with discharge to Oak Harbor outfall

Advantages

- Low relative cost (0% to 6% above lowest cost)
- Avoids facilities in/near Windjammer Park
- Relatively efficient use of infrastructure

Challenges

- Places facilities in neighborhood area

Beachview Farm Site

Alternative 4B: AS with discharge to Oak Harbor outfall

Advantages

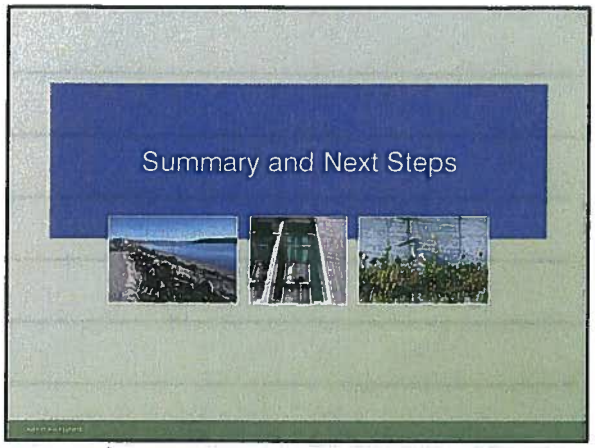
- Low relative cost (~ 3% above lowest cost)
- Avoids facilities in parks/neighborhood areas
- Opportunity for beneficial reuse of effluent

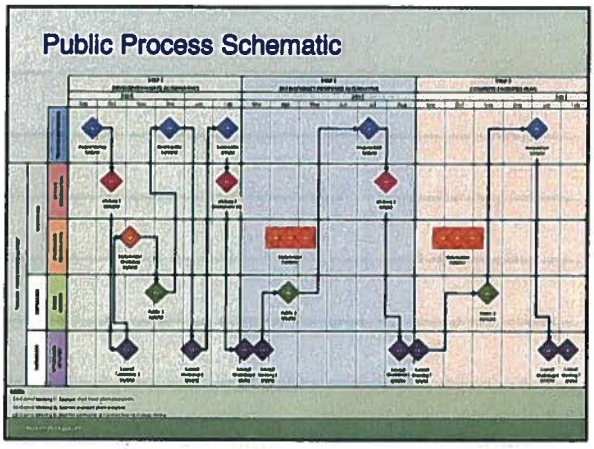
Challenges

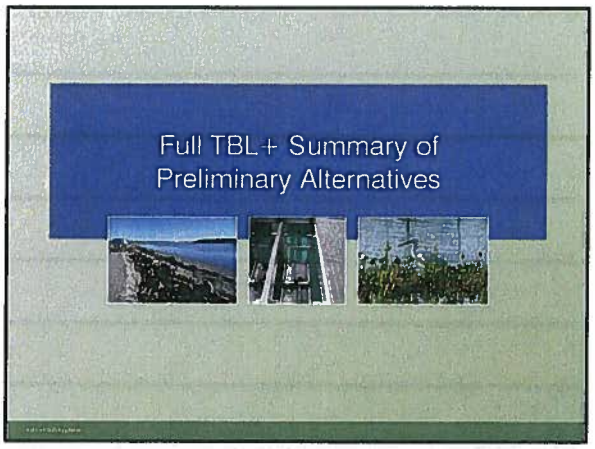
- Inefficient use of infrastructure

Sites Proposed For Further Evaluation

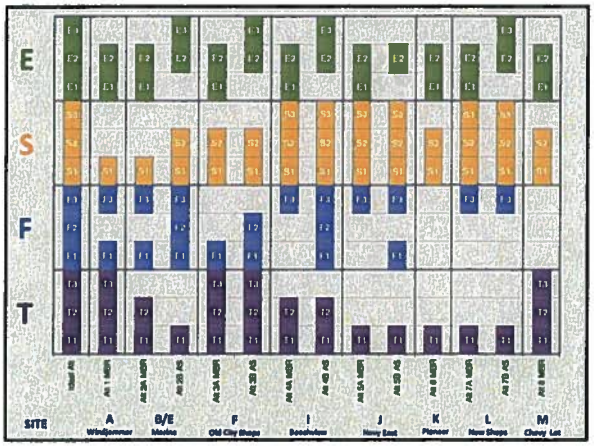
25


Summary and Next Steps


Public Process Schematic


Full TBL+ Summary of
Preliminary Alternatives

24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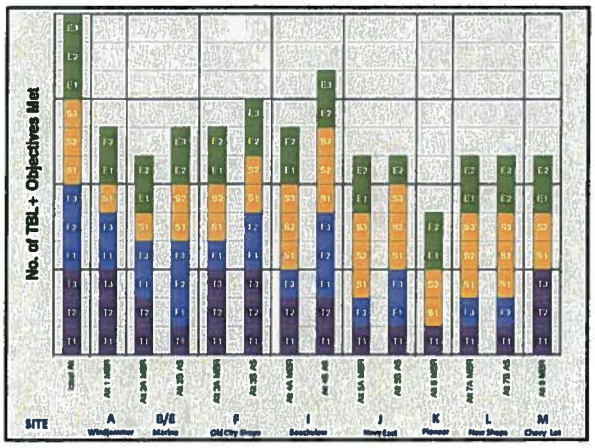
No. of TBL+ Objectives Met
SITE
A
B/E
F
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J
K
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M

City of Oak Harbor
Facilities Plan and Preliminary Engineering Project Briefing Document
March 9, 2011

Project Need: The City of Oak Harbor's wastewater utility provides service to approximately 24,000 people within its City limits, including approximately 4,000 people located on the US Navy's Seaplane Base. The City currently operates two wastewater treatment plants: a Rotating Biological Contactor (RBC) plant adjacent to a public park (Windjammer Park); and a lagoon plant on the Seaplane Base. For many years these two plants have reliably handled Oak Harbor's wastewater. While both plants meet current permit requirements, they are now nearing the end of their useful life. They also lack the technology to meet increasingly stringent water quality standards and the capacity to keep pace with anticipated population growth. The City is currently evaluating alternatives to replace these two aging plants with a modern wastewater facility that will provide reliable, cost effective wastewater service for its customers.

Project Objectives: In September 2010, the City initiated a planning process to meet the following objectives:

1. Provide continued reliable wastewater treatment service.
2. Meet high standards for water quality.
3. Allow phased expansion to meet future demands.
4. Deliver construction and operation of a new facility in a cost effective manner.

Alternatives Being Considered: Following a series of meetings with the community and key stakeholders, the project team prepared a list of 13 preliminary alternatives located on eight potential sites. Potential sites were selected considering public and stakeholder input, plus technical requirements (e.g. environmentally sensitive areas, geotechnical considerations, land use planning, etc). Two treatment processes are considered: membrane bioreactor (MBR), and activated sludge (AS). Preliminary alternatives were developed and evaluated based on their ability to meet a range of specific objectives in four categories: Technical, Social, Environmental, and Financial. Based on this evaluation, the following sites are proposed for further consideration:

1. Windjammer Park: This site is public open space owned by the City and located adjacent to the existing RBC treatment plant.
2. Old City Shops: This site is near Windjammer Park, and is comprised of approximately 2 acres owned by the City plus adjacent private property.
3. Marina: This site includes approximately 3 acres of City-owned property next to the existing marina, plus adjacent property on the Seaplane Base owned by the US Navy.
4. Beachview Farm: This site is located on a privately owned farm near the City limits, approximately 2.5 miles from the existing RBC plant.

Planning Level Costs: Conceptual level costs have been developed for each preliminary alternative, and used for comparing alternatives on a financial basis. Cost estimates will be refined throughout the planning process. Even the lowest cost alternatives will represent a significant investment for the City. Total project costs for treatment, conveyance, and outfall improvements may be in the range of $70M to $90M.

Project Schedule: The current Facilities Planning effort represents the first step in the project development process. The planning team will propose a final alternative in the summer of 2011. Following Council approval, engineering and environmental documents will be submitted for agency review in 2012. After design and construction phases the City desires to place a new wastewater facility into service in 2017.

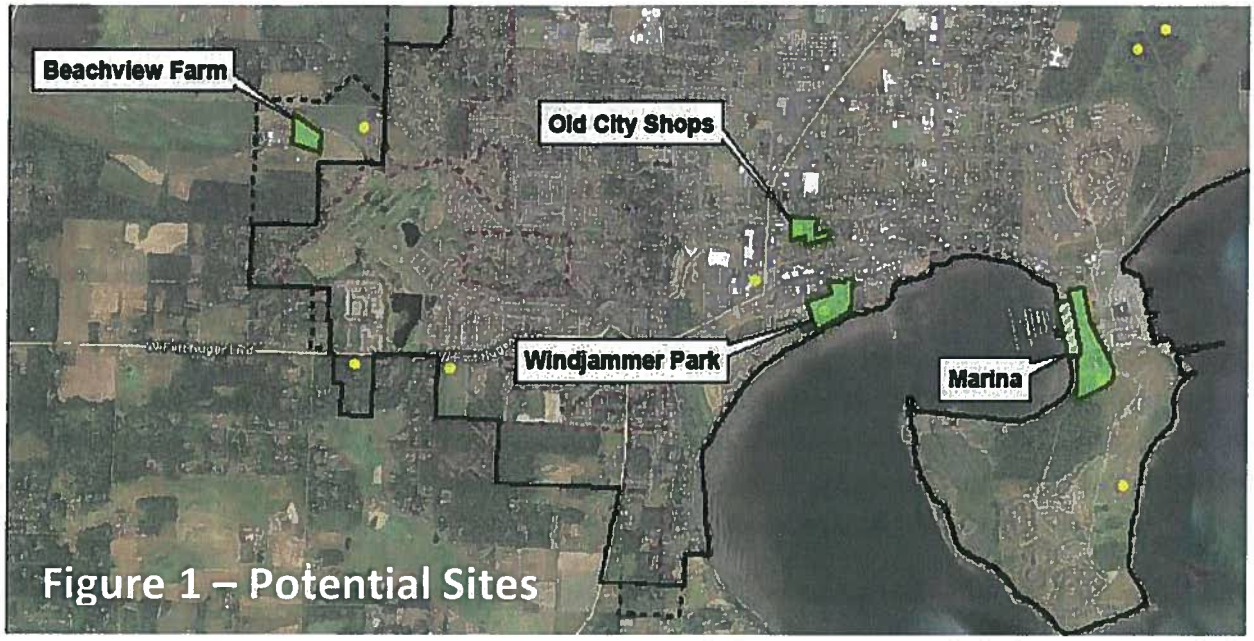
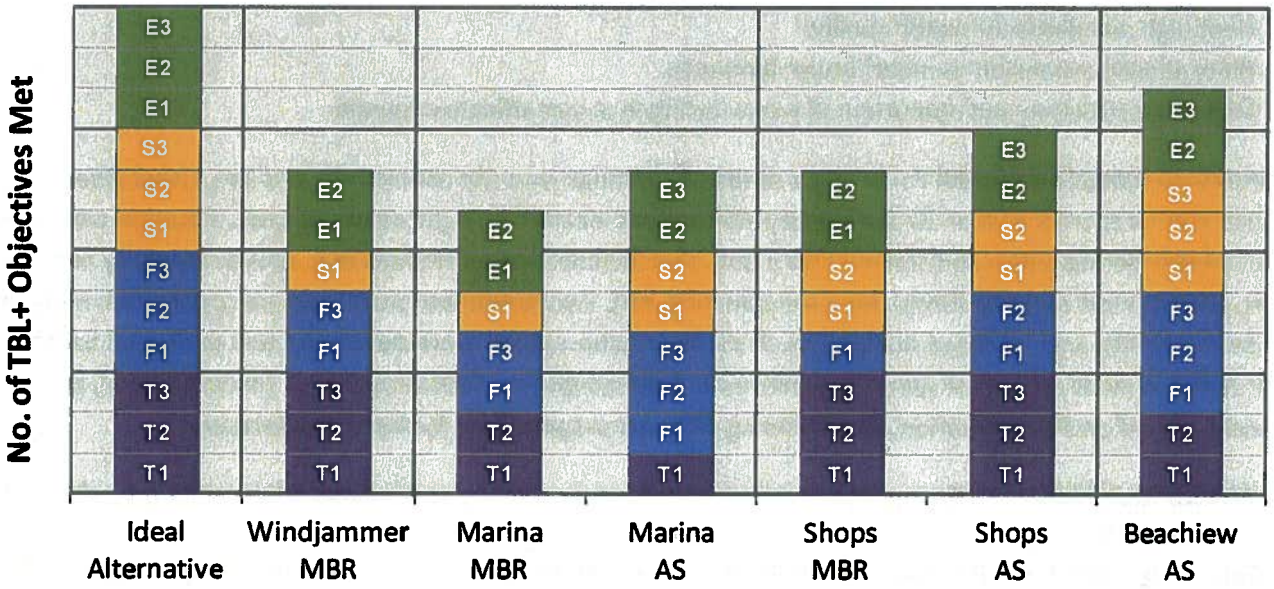


Figure 1 – Potential Sites



Site/Alternative	Advantages	Challenges
Windjammer MBR	• Low relative cost • Efficient use of infrastructure	• Facilities located in/near Windjammer Park
Marina MBR/AS	• Low relative cost • Avoids facilities in/near Windjammer Park	• Inefficient use of infrastructure • Marina impact (MBR) or US Navy property (AS)
Shops MBR/AS	• Low relative cost • Avoids facilities in/near Windjammer Park • Efficient use of infrastructure	• Facilities located in neighborhood area
Beachview Farm AS	• Low relative cost • Avoids facilities in parks/neighborhood areas • Opportunity for beneficial reuse	• Inefficient use of infrastructure

City of Oak Harbor
City Council Agenda Bill

Bill No. 1

Date: MARCH 22, 2011

Subject: **PUBLIC COMMENTS**

FROM: **Jim Slowik, Mayor**

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Margery Hite, City Attorney

SUMMARY STATEMENT

City Council will accept public comments for items not otherwise on the agenda for the first 15 minutes of the Council meeting. You may also speak to any of the consent agenda items.

City of Oak Harbor
City Council Agenda Bill

Agenda Bill No. NA 2A
Date: March 22, 2011
Subject: Noise Permit – Whidbey Island Tea Party

FROM: Paul Schmidt, City Administrator

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

_____ Jim Slowik, Mayor
DM Doug Merriman, Finance Director
MH Margery Hite, City Attorney, as to form

PURPOSE

The purpose of this agenda bill is to forward to City Council for review and approval a Noise Permit request received from the Whidbey Island Tea Party for amplified sound associated with a public interest rally.

AUTHORIZATION:

Oak Harbor Municipal Code (OHMC) 5.50.040(3)(g) provisions relating to Special Events requires compliance with noise ordinance regulations and laws. OHMC 6.56.030(2)(a) requires Council approval for a noise permit for sound amplification. As this event will include amplified sound, Council approval is required.

The City Council may grant a Noise Permit to deviate from the provisions of OHMC 6.56.030 if it is determined the activity and associated noise: 1) is not undertaken in disregard for the rights of others, or 2) is temporary, or 3) the activity creating the noise constitutes a program of a temporary nature for the benefit of the entire municipality or for the benefit of a charitable purpose.

SUMMARY STATEMENT:

The Whidbey Island Tea Party has submitted a Noise Permit request for amplified sound associated with a public interest rally scheduled for April 15, 2011 between the hours of 8:00 a.m. – 4:00 p.m. at Windjammer Park. The amplified sound will consist of a PA system and speakers for announcements.

The Application was reviewed by Fire, Police, and Public Works Departments. A condition of approval for the permit will be to face the speakers away from the campground area.

STANDING COMMITTEE REVIEW:

Not required.

RECOMMENDED ACTION:

Grant a noise permit for amplified sound to the Whidbey Island Tea Party.

ATTACHMENTS:

Noise Permit.

MAYOR'S COMMENTS:

CITY OF OAK HARBOR

NOISE PERMIT

Name of Organization:	Whidbey Island Tea Party
Location of Event:	Windjammer Park Gazebo and surrounding area
Date of Event:	April 15, 2011
Hours of Operation:	8:00 a.m. to 4:00 p.m.
Permitted Noise:	Amplified sound for microphone and speakers
Approval Conditions:	Face speakers away from the campground area
Date of City Council Approval:	

Issued this day of , 2011.

_____

Karen Crouch, Special Events Coordinator

This Noise Permit is limited to the date and time specified.

Please post this notice on site

City of Oak Harbor
City Council Agenda Bill

Agenda Bill No. 0/A 28
Date: March 22, 2011
Subject: Noise Permit – Island County National Day of Prayer Committee

FROM: Paul Schmidt, City Administrator

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Doug Merriman, Finance Director
Margery Hite, City Attorney, as to form

PURPOSE

The purpose of this agenda bill is to forward to City Council for review and approval a Noise Permit request received from the Island County National Day of Prayer Committee for amplified sound associated with a time of prayer and worship event.

AUTHORIZATION:

Oak Harbor Municipal Code (OHMC) 5.50.040(3)(g) provisions relating to Special Events requires compliance with noise ordinance regulations and laws. OHMC 6.56.030(2)(a) requires Council approval for a noise permit for sound amplification. As this event will include amplified sound, Council approval is required.

The City Council may grant a Noise Permit to deviate from the provisions of OHMC 6.56.030 if it is determined the activity and associated noise: 1) is not undertaken in disregard for the rights of others, or 2) is temporary, or 3) the activity creating the noise constitutes a program of a temporary nature for the benefit of the entire municipality or for the benefit of a charitable purpose.

SUMMARY STATEMENT:

The Island County National Day of Prayer Committee has submitted a Noise Permit request for amplified sound associated with a time of prayer and worship event scheduled for May 5, 2011 between the hours of 5:30 p.m. – 6:30 p.m. at Windjammer Park. The amplified sound will consist of a PA system with speakers, microphone and a keyboard.

The Application was reviewed by Fire, Police, and Public Works Departments. A condition of approval for the permit will be to face the speakers away from the campground area.

STANDING COMMITTEE REVIEW:

Not required.

RECOMMENDED ACTION:

Grant a noise permit for amplified sound to the Island County National Day of Prayer Committee.

ATTACHMENTS:

Noise Permit.

MAYOR'S COMMENTS:

CITY OF OAK HARBOR

NOISE PERMIT

Name of Organization:	Island County National Day of Prayer Committee
Location of Event:	Windjammer Park – Gazebo and surrounding area.
Date of Event:	May 5, 2011
Hours of Operation:	5:30 p.m. to 6:30 p.m.
Permitted Noise:	PA system with speakers, microphone and keyboard
Approval Conditions:	Face speakers away from the campground area.
Date of City Council Approval:	

Issued this day of , 2011.

_____

Karen Crouch, Special Events Coordinator

This Noise Permit is limited to the date and time specified.

Please post this notice on site

City of Oak Harbor
City of Oak Harbor
City Council Agenda Bill

Bill No. 9A 2c
Date: March 22, 2011
Subject: Surplus Whidbey Island Marathon Inventory.

FROM: Paul Schmidt, City Administrator PS

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
DM Doug Merriman, Finance Director
MH Margery Hite, City Attorney, as to form

PURPOSE

The purpose of this agenda bill is to request authorization to declare past Whidbey Island Marathon shirts and past Whidbey Island medals unusable and approve of their disposal as described below.

AUTHORITY

The authority to organize and regulate its internal affairs is granted to the City of Oak Harbor under RCW 35A.11.020.

SUMMARY STATEMENT:

On August 19, 2009, the City of Oak Harbor purchased the Whidbey Island Marathon from John Kaiser and Whidbey Island Marathon, L.L.C. Included in the associated Marathon Asset Purchase Agreement was past event shirts and volunteer shirts with a combined value of $950.00 [see Exhibit A]. The shirts are currently in storage at the Public Works facility. In an effort to realize the estimated value of the shirts and clear storage space, staff would like to offer the shirts for sale at the upcoming Whidbey Island Marathon Expo and possibly at the finish line of the Marathon.

With regard to establishing fair market value of the shirts, staff researched what other marathons have done with excess inventory and consulted with the City's Marathon Race Contractor. Staff has been advised it is standard practice to sell cotton short-sleeved past event shirts for $3.00 a piece or two for $5.00. The price of past tech fabric shirts would be increased to approximately $7.00 -$10.00 as established by similar marathons.

Although the past medals do not appear on the Marathon Asset Purchase Agreement, they were acquired along with other marathon-related equipment and are currently in storage. As medals are presented to marathon event finishers only, it is inappropriate to offer them for sale to non-participants. Therefore, it is staff's recommendation that a few examples of each year's medals

are held for display purposes and the remaining medals be destroyed. Staff made contact with medal dealers and the quality of medal is not appropriate for recycling.

RECOMMENDED ACTION:

Adopt Resolution No. 11-06 authorizing the sale of past Whidbey Island Marathon shirts and the destruction of past medals.

ATTACHMENTS:

Resolution 11-06
Marathon Asset Purchase Agreement

MAYOR'S COMMENTS:

RESOLUTION NO. 11-06

A RESOLUTION BY THE CITY OF OAK HARBOR DECLARING PAST WHIDBEY ISLAND MARATHON SHIRTS AND MEDALS UNUSABLE AND AUTHORIZING THEIR SALE AND/OR DESTRUCTION

WHEREAS, the City of Oak Harbor purchased the Whidbey Island Marathon in August, 2009; and

WHEREAS, past Whidbey Island Marathon shirts and medals are currently stored at Public Works; and

WHEREAS, the City has no known use for the past shirts and medals; and

WHEREAS, there is an opportunity for the sale of the shirts at the upcoming Whidbey Island Marathon Expo to be held April 10, 2011; and

WHEREAS, the funds received from the sale will be placed in the Whidbey Island Marathon revenue account; and

WHEREAS, as medals are presented to marathon event finishers only, it is inappropriate to offer them for sale to non-participants, therefore they should be destroyed.

NOW THEREFORE BE IT RESOLVED, the City Council of the City of Oak Harbor, Washington, declares:

1. Past-date Whidbey Island Marathon T-shirts are surplus to the City's needs.
2. Sale of past-date Whidbey Island Marathon T-shirts is in the City's best interest and should be undertaken where possible.
3. Proceeds from the sale of such T-shirts shall be placed in the Whidbey Island Marathon revenue account.
4. The destruction of past Whidbey Island Marathon medals is authorized.

PASSED by the City Council of the City of Oak Harbor and approved by its Mayor this 22nd Day of March, 2011.

CITY OF OAK HARBOR

_____
Mayor

ATTEST:

_____
City Clerk

City of Oak Harbor
City Council Agenda Bill

Bill No. d/A 2D
Date: March 22, 2011
Subject: Excused Absence Request
Councilmember Rick Almberg

FROM: Jim Slowik
Mayor

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

PA Paul Schmidt, City Administrator
Doug Merriman, Finance Director
MH Margery Hite, City Attorney as to form

PURPOSE

The purpose of this agenda bill is to present and approve Councilmember Rick Almberg's excused absence requests from the March 9, 2011 and April 19, 2011 City Council meetings. Councilmember Almberg submitted these requests immediately following the March 1, 2011 City Council meeting which was continued to March 9, 2011 to accommodate final consideration of the LTGO Bond for the Oak Harbor Marina, Phase 2/Dredging Project.

AUTHORITY

Per RCW 35A.12.060: *...A council position shall become vacant if the councilmember fails to attend three consecutive regular meetings of the council without being excused by the council.*

SUMMARY STATEMENT

Councilmember Almberg has submitted excused absence requests for the March 9, 2011 and April 19, 2011 Council meetings.

STANDING COMMITTEE REPORT

N/A

RECOMMENDED ACTION

Approve Councilmember Almberg's excused absences from the March 9, 2011 and April 19, 2011 City Council meetings.

ATTACHMENTS

None

MAYOR'S COMMENTS

City of Oak Harbor
City Council Agenda Bill

Agenda Bill No. 3
Date: March 22, 2011
Subject: Adult Entertainment Facilities Overlay Zone Ordinance -- Public Hearing

FROM: Steve Powers
Development Services Director

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Margery Hite, City Attorney, as to form

PURPOSE

This agenda bill presents an ordinance that if adopted will finalize the City's Adult Entertainment Facilities Overlay Zone code (which is currently an interim code). The proposed ordinance (Attachment A) would adopt the interim code as the City's final code. The resulting overlay zone is 18.7 acres in size with 9.7 acres zoned Planned Industrial Park and 9 acres zoned Industrial.

AUTHORITY

The current interim ordinance was adopted under the authority of RCW 36.70A.390 which allows cities to adopt interim zoning ordinances without first conducting a public hearing so long as a hearing is conducted on the interim ordinance within sixty (60) days of adoption.

BACKGROUND:

On March 23, 2010 the City Council adopted an interim ordinance regulating the location of adult entertainment facilities. As mentioned above, the City has the authority to adopt interim ordinances without first holding a public hearing so long as a hearing is conducted within sixty days of adoption. In accordance with RCW 36.70A.390, the City conducted the required public hearing on May 4, 2010 (within sixty days). This adoption of the interim ordinance established the Adult Entertainment Facilities Overlay Zone over certain properties located along Goldie Road.

RCW 36.70A.390 states that the interim ordinance is effective for a period no longer than six months but can be effective for up to one year if a work plan is developed for related studies providing for such a longer period. After the adoption of the interim ordinance staff began further review of adult entertainment zoning in the City; first with an internal review and then with the community and the Planning Commission. As this review progressed, it became clear

that it would not be completed before the interim ordinance expired. Consequently, the City Council adopted a work plan on September 7, 2010 to extend the interim ordinance for a six month period to March 23, 2011.

PLANNING COMMISSION REVIEW

The Planning Commission, in order to provide early and continuous public input into the process, opened a public hearing on the Adult Entertainment Facilities Overlay Zone on July 27, 2010. The hearing was continued to subsequent meetings: August 24th, September 28th, October 26th, November 23rd, and December 28th. These continuances allowed the Planning Commission the opportunity to review a variety of information related to the siting of adult businesses.

The staff report presented to the Planning Commission on October 26, 2010 includes the information that was discussed since the public hearing was opened in July 27, 2010. A copy of the Planning Commission report has been included as Attachment B to this agenda bill and provides the analysis to finalize the Adult Entertainment Facilities Overlay Zone. The minutes from the various Planning Commission hearings are attached as Attachment C. One public comment letter (Attachment D) was received during this process. An additional letter was received after the Planning Commission's recommendation was made. It is also included in Attachment D.

The report to the Planning Commission includes information on two legally accepted methods of locating adult uses – dispersed vs. concentrated and the pros and cons of both approaches. After the presentation of general information on this topic, the report narrows down the methodology best suited for Oak Harbor due to the physical layout of land uses in our community. The report also provides information on the distribution of the various land use classification and their percentages. Percentages of land available for development in the various land use classification is also provided to give an idea of the development potential in Oak Harbor. The most suitable area to locate these adult uses is identified by the process of buffering sensitive uses. This buffering process identifies the same three properties identified in the interim ordinance as suitable locations for adult entertainment facilities in Oak Harbor. The report then analyzes the developability of the properties to determine that the properties can be developed through the regular development process available to all properties in the city. The report to the Planning Commission concludes that the properties identified in the interim ordinance are the best locations in Oak Harbor to accommodate such uses and that they can be developed through the regular process available to all properties in the city without undue hardship. With respect to the adult entertainment facilities overlay zone, key findings include:

1. The Goldie Road corridor is the area most suitable to locate the adult entertainment facilities overlay zone given the land use layout in the city and the need to avoid locating adult uses near sensitive uses (residences, churches, schools and parks).
2. The 750 foot buffer utilized in the interim ordinance to determine the location and size of the overlay zone is the largest buffer that can be utilized and still retain a sufficient number of locations.
3. The 750 foot buffer is consistent with that used in other communities.

4. A review of the land use distribution identified by zoning category the number of parcels, the acreage, the percent of the total parcels and the percent of the total acreage.
5. Work on the UGA capacity analysis determined that the developability of a parcel is 'high' if the assessed land value of the property is 90% or greater that than the value of the structure.
6. Combining the above two points of information yields that 29.1 acres out of a total of 50 acres (58%) of Industrial zoned land is highly developable and 22.5 acres out of a total of 36.5 acres (62%) of Planned Industrial Park is considered highly developable. These totals are greater than the amount of similarly categorized C-3 (Community Commercial) zoned lands.
7. While the market value of developed and undeveloped properties varies with time and market conditions, industrial and planned industrial park properties are significantly less expensive that commercial properties.
8. The subject properties included within the interim overlay zone are located within a developing area and are either served or can be served by urban services and utilities.
9. No unusual development problems or characteristics were identified that would apply only to the subject properties and not to other similarly situated properties in the area.
10. There are no existing adult entertainment facilities in Oak Harbor. Since the adoption of the interim controls no applications seeking to establish an adult entertainment facility have been submitted to the City; from this it can be inferred that the size of the overlay zone can reasonably accommodate demand for such uses in the foreseeable future.

The Planning Commission also reviewed the existing interim ordinance language in Chapter 19.52 Adult Entertainment Facilities Overlay Zone and determined that no changes are necessary.

PLANNING COMMISSION RECOMMENDATION:

As mentioned above, the Planning Commission reviewed the analysis to locate adult entertainment facilities in Oak Harbor and the exiting interim ordinance language. The Planning Commission closed the public hearing on December 28, 2010 and recommended that the City Council adopt the interim Adult Entertainment Facilities Overlay Zone code as the final code.

STANDING COMMITTEE REVIEW:

This item was brought before the Governmental Services Standing Committee at their March 8, 2011 meeting.

ADDITIONAL INFORMATION

Additional staff analysis supporting the suitability of the interim overlay zone for use as the permanent overlay zone is contained in a separate staff memo dated March 10, 2011 (please see Attachment E). This memo concludes that designation of an overlay zone for adult entertainment facilities comprised of Industrial and Planned Industrial Park lands is the most appropriate manner to meet the practical, structural and locational needs of such establishments in Oak Harbor.

RECOMMENDED ACTION:

- Conduct public hearing on the ordinance.
- Adopt the Ordinance and finalize the Adult Entertainment Facilities Overlay Zone code.

ATTACHMENTS:

A. Draft Adult Entertainment Facilities Overlay Zone ordinance
B. Planning Commission report and attachments dated 10/22/10
C. Planning Commission minutes dated 7/27/10, 8/24/10, 9/28/10, 10/26/10, 11/23/10 and 12/28/10
D. Public comment letters dated 8/15/10 and 2/28/11
E. Staff memo to Mayor and City Council dated 3/10/11

MAYOR'S COMMENTS:

ORDINANCE NO.

AN ORDINANCE ADOPTING CHAPTER 19.52 TO THE OAK HARBOR MUNICIPAL CODE ENTITLED "ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE" TO ESTABLISH PERMISSIBLE LOCATIONS FOR ADULT ENTERTAINMENT FACILITIES

WHEREAS, on March 23, 2010, the City Council of Oak Harbor adopted Ordinance No. 1572, an interim ordinance in accordance RCW.36.70A.390, creating Oak Harbor Municipal Code Chapter 19.52 Adult Entertainment Facilities Overlay Zone to address permissible locations for adult entertainment facilities; and

WHEREAS, the City Council held a public hearing on May 4, 2010 which was within sixty days of the adoption of the interim ordinance in accordance with RCW36.70A.390; and

WHEREAS, on May 4, 2010 the City Council adopted Ordinance No. 1575, amending Ordinance No.1572 to delete certain C-3, Community Commercial zoned properties from the overlay zone and provide for greater buffers around residentially zoned properties; and

WHEREAS, on May 4th the City Council approved Resolution No. 10-12 affirming the City of Oak Harbor's compliance with the public hearing requirements of RCW 36.70A.390 and referring the interim ordinance to the Planning Commission for review and recommendation; and

WHEREAS, the Planning Commission of the City of Oak Harbor opened a public hearing on July 27, 2010 to facilitate early and continuous public input in the consideration of a final ordinance, said hearing being held and continued to August 24th, September 28th, October 26th, November 23rd, and December 28th; and

WHEREAS, a SEPA environmental checklist was submitted for the proposed code on November 9, 2010 with a notice of application period ending on November 24, 2010; and

WHEREAS, the City issued a SEPA Determination of Nonsignificance on the proposed code on December 1, 2010 with a 15 day comment period ending on December 20, 2010; and

WHEREAS, as required by RCW 36.70A.106, the City provided notice to the Department of Commerce on December 8, 2010 of the proposed final ordinance and received no substantive comments from the Department; and

WHEREAS, after due and proper notice on December 28, 2010 the Planning Commission closed the public hearing and forwarded a recommendation to the City Council that the interim Adult Entertainment Facilities Zone be adopted as the City's final ordinance.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

Section One. Findings of Fact. Based on the record submitted during the adoption of Ordinances 1572 and 1575, the public comments, and the experience of city officials of the city of Oak Harbor, the city council hereby enters the following findings of fact:

1. The findings of fact entered with the adoption of Ordinances 1572 and 1575 are hereby included by reference.

2. The revised interim ordinance (Ordinance 1575) identified three parcels as part of the adult entertainment facilities overlay zone: one (1) in the Industrial zone (9.08 acres) and two (2) in the Planned Industrial Park zone (9.78 acres).

3. Preliminary information pertaining the developability and availability of these properties for any proposed adult entertainment facilities included the following:
   a. While presently there are three total properties, there is the potential that these properties can be further developed to create additional building sites.
   b. All of the sites are capable of being served by city water and sewer.
   c. One of the PIP sites is partially developed, has two building pads available for construction, common storm drainage facilities have already constructed to serve the site and is in close proximity to city water and sewer services located in NE Goldie Street.
   d. The minimum lot size for PIP development is 20,000 square feet and the remaining PIP site is approximately 4.99 acres in size which makes the subdivision and/or development of up to ten additional lots possible.
   e. The site with Industrial zoning is approximately 9.08 acres in size, has frontage on NE Goldie Street, may be subdivided to create at least 9 individual building sites and has direct access to city water and sewer in NE Goldie Street

4. City staff and the Planning Commission studied the following aspects of the community and the identified properties to determine their suitability for comprising the community's adult entertainment facilities overlay zone: dispersed versus concentrated approach to adult use distribution, location suitability, community land use distribution (spatially and percentages) developability of properties in general, value of properties, the North Whidbey/Goldie Road corridor, and the developability of the interim ordinance properties. Based upon this supplemental analysis, the City Council adds the following factual findings:

   a. The Goldie Road corridor is the area most suitable to locate the adult entertainment facilities overlay zone given the land use layout in the city and the need to avoid locating adult uses near sensitive uses (residences, churches, schools and parks).
   b. The 750 foot buffer utilized in the interim ordinance to determine the location and size of the overlay zone is the largest buffer that can be utilized and still retain a sufficient number of locations for adult entertainment facilities.
   c. The 750 foot buffer is consistent with that used in other communities.
   d. A review of Oak Harbor's land use distribution determined, by zoning category, the total number of parcels, the total acreage, the percent of the total parcels and the percent of the total acreage for each zoning district in the city.

e. Combining the above two points of information yields the information that 58% of Industrial zoned land (29.1 acres) is highly developable and 62% of Planned Industrial Park zoned land (22.5 acres) is considered highly developable. These totals are greater than the amount of similarly categorized C-3 (Community Commercial) zoned lands.
f. While the market value of developed and undeveloped properties varies with time and market conditions, industrial and planned industrial park properties are presently significantly less expensive that commercial properties.
g. The subject properties included within the overlay zone are located within a developing area and are either served or can be served by urban services and utilities.
h. No unusual development problems or characteristics were identified that would apply only to the subject properties and not to other similarly situated properties in the area.
i. There are no existing adult entertainment facilities in Oak Harbor. Since the adoption of the interim controls no applications seeking to establish an adult entertainment facility have been submitted to the City; from this it can be inferred that the size of the overlay zone can reasonably accommodate demand for such uses in the foreseeable future.
j. Additional review of the community's land use characteristics determined that designation of an overlay zone for adult entertainment facilities comprised of Industrial and Planned Industrial Park lands is the most appropriate manner to meet the practical, structural and locational needs of such establishments in Oak Harbor. This additional review can be summarized as follows:
    1. An analysis of the City's adult entertainment business regulations and of the existing nightclubs in the community determined that an adult entertainment business would likely establish a structure that is approximately 10,850 square feet or more.
    2. Commercial development in Oak Harbor generally falls into one of three distinctive styles: large stand-alone retail establishments (100,000 square feet or more); small out-lots generally located in combination with other uses (5,000 to 6,000 square feet); and spaces in strip centers (2,000 to 6,000 square feet). Very few structures exist in the 8,000 to 10,000 square foot range. This means there are very few buildings of the size estimated above readily available.
    3. The general commercial market in Oak Harbor is fairly stable and consistent, with little turnover in the medium to large sized spaces, with higher turnover in the smaller, strip center spaces. These smaller spaces are likely too small to accommodate an adult entertainment facility. Recent examples can be found of business owners needing to construct buildings in the 10,000 square foot size or larger to suit their needs.
    4. A commercial lands analysis conducted by the City in 2006, found that a total of approximately 40 acres of additional undeveloped land with commercial zoning will be needed to provide sufficient capacity to serve the City's 2025 population projection. Since 2006, less than 20 acres of new commercial property has been created. This means that the community still has a deficit of approximately 20 acres to meet the full range of commercial activities. By extension, it is reasonable to assume that there would also be a shortage of

commercially zoned property to meet the needs of adult entertainment establishments.

5. An analysis of past land planning decisions, public infrastructure funding, and adoption of unique development standards for the North Whidbey Enterprise Area (where the overlay zone is located) find that the Enterprise Area is a location the community seeks to encourage development and that the industrial and planned industrial park zoned lands found in the overlay zone provide as good or better business development opportunities as do commercially zoned properties in Oak Harbor.

Section Two. There is hereby added a new Chapter 19.52 entitled "Adult Entertainment Facilities Overlay Zone" to Title 19 of the Oak Harbor Municipal Code to read as follows:

Chapter 19.52
ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE

Sections:

19.52.010 Purpose.
19.52.020 Application of chapter provisions.
19.52.030 Definitions.
19.52.040 Adult entertainment facilities overlay zone established.
19.52.045 Overlay zone map adopted.
19.52.047 Review required.
19.52.050 Adult entertainment overlay zone use restrictions.
19.52.060 Non-conforming uses.

19.52.010 Purpose. The purpose of this chapter is to establish an overlay district within which adult entertainment facilities may be located in such a way as to mitigate the adverse secondary effects associated with such facilities. Because of the adverse secondary effects of adult entertainment facilities, restrictions on location are necessary: to protect residents, especially sensitive uses such as schools, religious institutions, parks and residential neighborhoods, from crimes, nuisances and disturbances of the public welfare, peace and safety; to preserve property values; and to respect the place of neighborhoods, schools, religious institutions and parks in the city of Oak Harbor. It is not the intention of this ordinance to suppress any constitutionally protected speech or expression, but to provide sufficient alternative avenues of communication for adult entertainment uses at the same time as providing appropriate zoning and separation between adult entertainment facilities and potentially conflicting uses.

19.52.020 Application of chapter provisions. Adult entertainment facilities, as defined in OHMC 19.52.030(2), shall only be permitted within the Adult Entertainment Facilities Overlay Zone established herein. This chapter applies to all adult entertainment facilities located within the city of Oak Harbor.

19.52.030 Definitions. The following definitions shall apply to this chapter.

(1) "Adult entertainment" shall have the meaning set out in OHMC 5.20.020.

(2) "Adult entertainment facility" shall mean any commercial premises or club to which any patron is invited or admitted and where adult entertainment is provided on a regular basis or is provided as a substantial part of the premises activity.

(3) "Overlay zone" shall mean that portion of the Industrial zone and the Planned Industrial Park zone in which adult entertainment establishments may be located.

(4) "Potentially conflicting uses" shall mean schools, religious institutions, residential zones and parks established within the city of Oak Harbor as of the date of this ordinance. The term "potentially conflicting uses" shall also mean any such other uses which the city council shall determine require separation from adult entertainment facilities, provided that the addition of any such uses shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

19.52.040 Adult entertainment facilities overlay zone established. There is established an adult entertainment facilities overlay zone in the city of Oak Harbor. The adult entertainment facilities overlay zone shall overlay the Industrial zone and the Planned Industrial Park zone. It does not include certain portions of the Industrial zone and the Planned Industrial Park zone in which potentially conflicting uses were located at the time of adoption of this ordinance. The following exclusions from the Industrial zone and the Planned Industrial Park zones were applied to establish the adult entertainment facilities overlay zone:

(1) The adult entertainment facilities overlay zone removes a buffer of seven hundred fifty (750) feet around the existing potentially conflicting uses of schools, religious institutions, and parks.

(2) A further buffer removes seven hundred fifty (750) feet around existing areas zoned exclusively for residential uses – R-1, Single-Family Residential; R-2, Limited Multiple-Family Residential; R-3, Multiple-Family Residential; and R-4, Multiple-Family Residential.

19.52.045 Overlay zone map adopted. The adult entertainment facilities overlay zone map as attached hereto in Exhibit A is adopted as a pictorial description of the sole geographic areas within the city of Oak Harbor in which adult entertainment facilities are permitted. A copy of the adult entertainment facilities overlay zone map is on file with the city clerk and shall be available for public inspection and copying.

19.52.047 Review required. Upon permitting any use within the overlay zone, the Director shall review the remaining properties in the overlay zone to ensure adequate opportunities remain for the location of adult entertainment facilities within the Oak Harbor city limits.

19.52.050 Adult entertainment overlay zone use restrictions. To mitigate the adverse secondary effects associated with adult entertainment facilities, the following parking and lighting restrictions shall apply within the adult entertainment facilities overlay zone:

(1) Parking requirements. For adult entertainment facilities constructed after the effective date of this ordinance all parking must be visible from the public right-of-way. For adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance, all parking should be visible from the public right-of-way. In cases of adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance where this is not feasible, access to the parking shall be in as direct a route as possible from the public right-of-way and the parking area shall remain free and clear of visual obstructions at all times. Access to the exterior rear of the building shall be denied to any persons other than employees and public officials during the performance of their respective duties and tasks by means of a fence, wall or other device approved by the city building official. On-site parking shall be required and regulated in accordance with Chapter 19.44 OHMC. Parking shall be provided at a ratio of one (1) space for every three (3) seats, plus one (1) space for every two (2) employees on the largest shift.

(2) Lighting requirements. All on-site parking areas and premises entries of adult entertainment facilities shall be illuminated from dusk until one (1) hour past closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on the parking surface and/or walkways. In addition, all on-site lighting, including signs, shall comply with the shading and directional requirements of OHMC 19.28.010(4). An on-premises exterior lighting plan shall be presented to the city building official for approval prior to the operation of any adult entertainment.

19.52.060 Non-conforming uses. For purposes of this title, a "non-conforming adult entertainment facility" constitutes an adult entertainment facility which lawfully exists as an adult entertainment facility which receives non-conforming status by virtue of an order from a court of competent jurisdiction, or which lawfully existed as an adult entertainment facility prior to a change in the zoning which change does not permit an adult entertainment facility in its existing location and is maintained as an adult entertainment facility although it does not comply with the adult entertainment facility zoning requirements set forth in this chapter, or is an adult entertainment facility which lawfully existed prior to annexation by the city and is maintained after the effective date of annexation and does not comply with the adult entertainment facility zoning requirements set forth in this chapter.

(1) The location of a newly-established public park, permanent religious institution, or school within seven hundred fifty (750) feet or the establishment of a residential district within seven hundred fifty (750) feet of an existing adult entertainment facility shall not cause the existing adult entertainment business to be deemed a non-conforming use unless the city council makes a determination that the newly-established park, religious institution or school requires separation from adult entertainment facilities, and further provided that the exclusion of any such areas from adult entertainment facility zoning overlay shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

(2) Adult entertainment facilities which are non-conforming uses in the zone in which they are located and which are located within the city limits shall be discontinued within one

year of the date of becoming a non-conforming adult use business or upon the expiration of the leasehold period in existence as of the date of becoming a non-conforming adult entertainment facility, or upon the sale of the non-conforming adult entertainment facility, whichever occurs first. Adult entertainment facilities which are non-conforming as a result of annexation to the city shall be discontinued within one year of the date of annexation. Such non-conforming adult entertainment facility shall not be extended, expanded, enlarged or increased in intensity. Such prohibited activities (extend, expand, enlarge, increase in intensity) shall include:

(a) Extension of a non-conforming adult entertainment facility to any building or other structure or land area other than one occupied by such use as of the date of becoming a non-conforming adult entertainment facility.

(b) Extension of any specific type of non-conforming adult entertainment facility, as separately defined in OHMC 19.52.030(2), within a building or other structure to any portion of the floor area that was not occupied by that same type of adult entertainment facility as of the date of becoming a non-conforming adult entertainment facility.

(c) Operation of a non-conforming use in such manner as to conflict with, or to further conflict with if already conflicting as of the date of becoming a non-conforming adult entertainment facility.

(3) Any change in a non-conforming adult entertainment facility shall be to a use which is legally permitted within the zone in which it is located. In the event a non-conforming adult entertainment facility, or portion thereof, is changed to a use which is legally permitted within the zone in which it is located, then the structure or portion thereof which contained the adult entertainment facility cannot thereafter be used or reused for any type of adult entertainment facility. In the event a non-conforming adult entertainment facility building or structure is vacated, closed or abandoned for a period in excess of six (6) months, the structure shall not thereafter be used except in conformance with a use which is legally permitted within the zone in which it is located. A vacated, closed or abandoned non-conforming adult entertainment facility building or structure shall also be subject to the discontinuation provisions of OHMC 19.52.060(2).

(4) Repairs and alterations to a non-conforming adult entertainment facility building or structure shall be limited to nonstructural repairs and incidental alterations for normal maintenance and shall only be permitted to the extent necessitated by normal wear and tear. No structural alterations shall be allowed.

(5) A building or structure containing a non-conforming adult entertainment facility which is damaged or destroyed by fire, wind, earthquake or other natural disaster can be restored and the same use or occupancy continued or resumed provided the total cost of such restoration does not exceed fifty percent (50%) of the real valuation of the building or structure exclusive of foundations at the time of such damage provided that such restoration shall not extend the one (1) year discontinuation period established in OHMC

19.52.060(2). Restoration of a structure or building housing a non-conforming adult entertainment facility or moneys used therefore shall not be used as factors by the examiner when considering any request of a time extension made pursuant to subsection (6) of this section.

(6) In the event the owner of a non-conforming adult entertainment facility determines that the period set forth in subsection (2) of this section does not provide the adult entertainment facility with a reasonable period of amortization, then no later than one hundred eighty (180) days prior to the expiration of the period, the owner of a non-conforming adult entertainment facility shall make application to the city land use hearing examiner for an extension of time. Accompanying the application shall be a fee in the amount of Seven Hundred Twelve Dollars ($712.00) and detailed information addressing the below-listed factors to be considered by the hearing examiner. In determining whether or not to grant the extension, the hearing examiner shall determine whether or not the harm or hardship to the non-conforming adult entertainment facility outweighs the benefit to be gained from the public from termination of the use. Factors to be considered by the hearing examiner include the location of the business in relation to sensitive land uses such as schools, parks, churches, residential zone(s), etc., initial capital investment, investment realization to date, life expectancy of the investment, the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease, or whether a reasonable alternate use of the property exists. The action of the hearing examiner shall be in accordance with the review process as described in Chapter 18.40 OHMC for a Review Process III.

(7) Within thirty (30) calendar days of becoming a non-conforming adult entertainment facility, the non-conforming adult entertainment facility shall provide the city's development services director with copies of its current leasehold document(s) which sets forth their existing leasehold time period or, in the case of a non-leasehold interest, the city's development services director shall be provided other documents which show record of ownership.

Section Three. Severability. If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

Section Four. Finding of Emergency. The City Council finds as follows:

1. The interim adult entertainment facilities overlay zone as adopted under Ordinance 1575 will expire on March 23, 2011.
2. In the absence of a finding of emergency, there would be a gap in time during which inconsistent uses could be established in the adult entertainment facilities overlay zone, threatening public welfare and the integrity of the City Council's determinations herein.
3. In order that there be no lapse in regulation this ordinance shall be in full force and effect immediately.

Section Five. Effective Date. This City Council having found that an emergency exists, this ordinance shall be in full force and effect immediately.

PASSED by the City Council this_____, 2011.

APPROVED by its Mayor this _____ day of _____, 2011.

THE CITY OF OAK HARBOR

_____
Mayor

Attest:

_____
City Clerk

Approved as to Form:

_____
City Attorney

Published: _____

ATTACHMENT A

CITY OF Oak Harbor
WHIDBEY ISLAND, WASHINGTON

Adult Entertainment Facilities Overlay Zone
I and PIP Zoning
Outside of 750 Foot Buffers and 750 Foot Residential Buffer

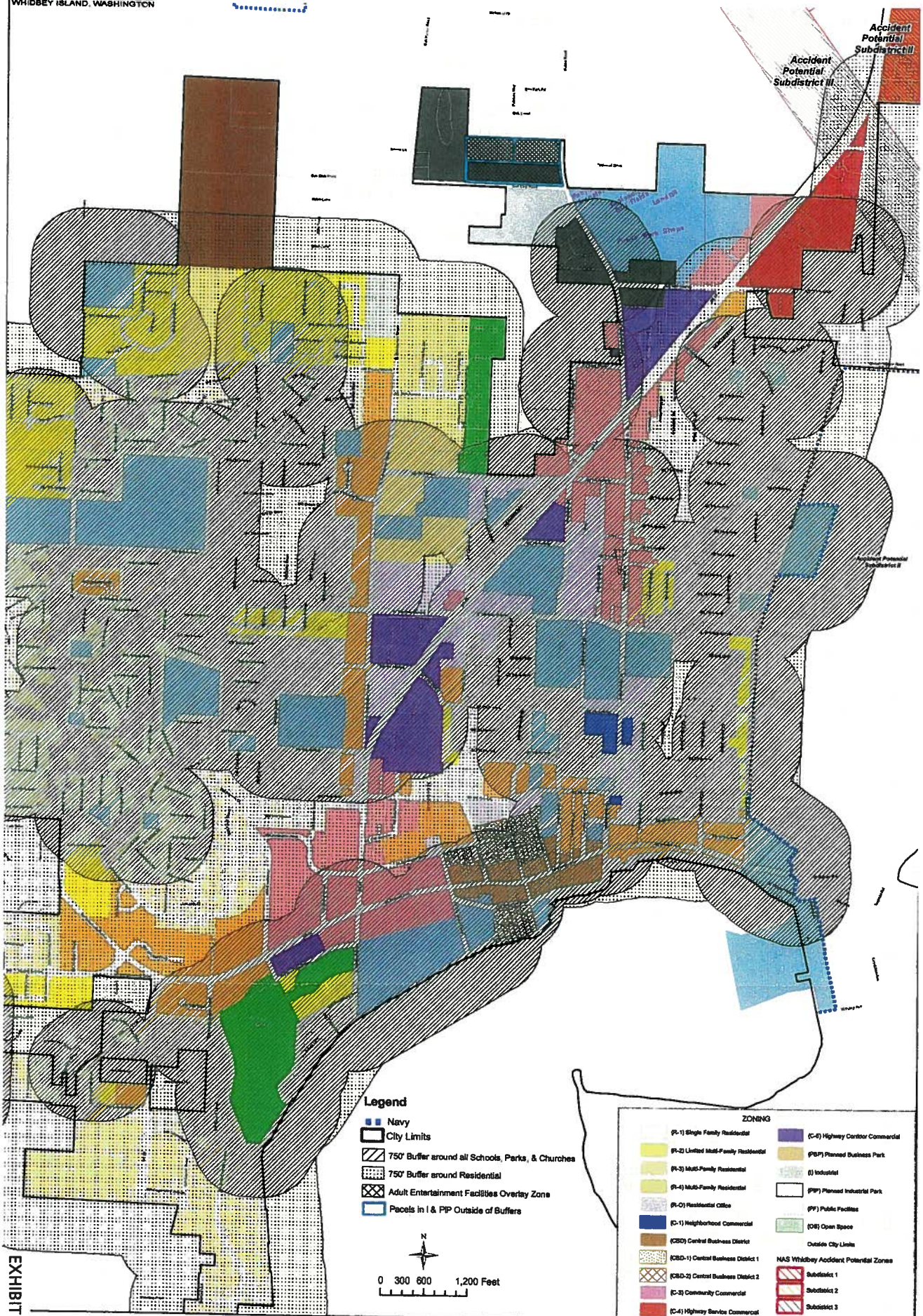


EXHIBIT A

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PLANNING COMMISSION

TO: CITY OF OAK HARBOR PLANNING COMMISSIONERS

FROM: CAC KAMAK, AICP, SENIOR PLANNER

SUBJECT: 2010 COMPREHENSIVE PLAN AMENDMENTS – REQUESTED LAND USE CHANGES

DATE: 10/22/2010

CC: STEVE POWERS, AICP, DEVELOPMENT SERVICES DIRECTOR

Purpose: The purpose of this report is to provide the Planning Commission with information regarding the legal framework regulating Adult Oriented Businesses, accepted zoning methodology for locating such uses in a community, the locations suitable for such uses in Oak Harbor, land use distribution that impacts the location of such uses and determine whether the properties identified in the Interim Adult Entertainment Facilities Overlay District is sufficient to meets the needs of the community and the adult industry. The information provided is for review and feedback. The Planning Commission is not expected to make a recommendation at this time.

Regulating Adult Entertainment Facilities: The regulation of Adult Entertainment Facilities also known as Adult-Oriented Businesses (AOB) or Sex-Oriented Businesses (SOB) have been debated in the US Supreme and State Courts which have noted that such activity constitutes "expressive conduct" entitled to some protection under the state and federal constitution[1]. However, the Supreme Court has also issued a number of decisions upholding adult business regulations aimed at reducing "secondary effects" such as increased criminal activity, sexual related crime, increased blight, increased vacancy rates etc.

In Young v. American Mini Theaters, Inc., (1976) and City of Renton v. Playtime Theaters, Inc., (1986) the Supreme Court concluded that adult oriented business regulations which are designed to reduce the secondary effects that such businesses have on their surrounding neighborhood are "content neutral" because they are enacted to reduce the secondary effects rather than suppress whatever message is being conveyed by the performer/entertainer. The harmful secondary effects the Court identified are:

1. Increased Crime – rape, sexual assault, prostitution and illegal drug sales
2. Decreased Property Values – both residential and commercial
3. Urban Blight – people and businesses fleeing the community

In adopting an ordinance regulating adult entertainment facilities, the courts do require that there must be a reasonable nexus between a municipality's adult

[1] U.S. Const. amend.1. The state constitution contains a similar provision. Wash. Const. art. 1, § 5.

entertainment ordinance and the secondary effects evidence upon which it's based. Although the passage of restrictive zoning ordinances must be supported by sufficient factual findings, the Supreme Court has held that this evidence may be borrowed from other cities where the secondary effects exist. Since Oak Harbor does not currently have any adult entertainment facilities to determine the secondary impacts, it will have to rely on studies performed elsewhere as long as whatever evidence the City relies upon is reasonably believed to be relevant to the problem it addresses.

Based on the above, Staff has provided a collection of summaries of studies (Attachment 1) related to the secondary effects of adult entertainment facilities. Some of these studies can be reviewed in more detail as the City progresses through the review and hearing process.

Regulating Adult Entertainment Facilities through Zoning: Zoning that has distinguished Adult Entertainment Facilities from other commercial uses has been upheld by the courts provided it is done within certain constitutional constraints. There are two primary methods of zoning Adult Entertainment Facilities. One is the "dispersion zoning" that regulates the uses by distance separations such as "within 1000 feet of any other such establishment or within 500 feet of a residential area". The second is the "concentration zoning" where a particular use, in this case the Adult Entertainment Facility, is prohibited from locating anywhere except in a specific portion of the municipality. Both methods have been held to be constitutionally permissible as legitimate "time, place, and manner" restrictions of protected speech[2]. Both methods of regulation are subject to the three-prong constitutional test listed below:

1. It should be unrelated to suppressing speech
2. It must be narrowly tailored to serve a substantial governmental interest
3. The regulations must permit reasonable alternative channels of communication

The above tests and other checks and balances are discussed in more detail in the article "Regulating Adult Entertainment" by Daniel Olsen (Attachment 2). The nuances of each prong of this test are complex but it also points to what zoning cannot do:

- Zoning cannot completely eliminate Adult Entertainment Facilities from the municipality
- Zoning cannot exclusively permit Adult Entertainment Facilities in an area that is "commercially unavailable"
- Zoning cannot force preexisting Adult Entertainment Facilities to cease operation and relocate.

[2] City of Renton v. Playtime Theatres, 475 U.S. at 52. Also, 427 U.S. at 63, n.18 ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment" citing Kovacs v. Cooper U.S. 77(1949) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstration in or near courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to school, of any noise which disturbs the good order of the school session)

Dispersed versus Concentrated Approach: The interim ordinance adopted by the City Council on May 4, 2010 established an overlay zone over three properties on Goldie Road that are zoned I, Industrial and PIP, Planned Industrial Park. If this were to be adopted as the final overlay zone it would be "concentrated zoning" similar to the approached in Times Square in New York City and the Combat Zone in Boston. However, it should be noted that Oak Harbor's interim overlay zone properties were identified using a separation distance from sensitive areas such as schools, parks and religious institutions. The advantages of the concentrated approach are:

1. Like uses are treated alike – the same uniform district standards apply to all uses equally. Any changes to other districts will not have an effect upon the adult entertainment facilities within the special overlay district.

2. Lower administrative costs – once the district is established and development standards set, there is not need for costly case-by-case review of adult business requests other than the regular site development or building permit review.

3. Regulation over the total growth of these uses and the development of specific new uses – the limits of the area for these uses are defined. The dispersal method may have no upper limit of these uses provided that all separation requirements are met.

4. Easier evaluation of total public services impact – heavier traffic, limited parking space, higher police costs and other effects of the adult entertainment facilities can be easier to identify if they are concentrated into one area.

The drawbacks of this approach are documented in the land use case study summaries provided in Attachment 1. Studies, such as the ones done in Austin, TX indicate that the crime rate can be 66% higher in areas where there is a concentration of such uses.

The dispersion approach (also referred to as the Detroit Model) regulates adult entertainment facilities by separating them from each other and other sensitive uses. Cities typically will require that adult entertainment facilities be separated from each other by a distance that can vary from 300 feet to 2000 feet. The regulation will also call out separations from sensitive areas such as schools, churches and parks. Some cities have also required separations from other establishments that serve alcohol. This is a more popular model since studies show that the secondary effects of these uses such as crime rates etc. are less when they are dispersed.

Location suitability for Oak Harbor: Although most studies (Attachment 1) of the impacts of AOBs done across the country indicate that the dispersion approach is the preferred approach, it is important to note that it may not be applicable to Oak Harbor due to its layout and distribution of land uses. SR 20 cuts across the City and serves as a major arterial. This has led to a concentration of commercial uses along this major corridor. Residential uses immediately flank these commercial uses. If the dispersion

approach is used for locating AOBs in Oak Harbor, even a modest and reasonable buffer/separation distance of 500 feet (used by most cities in Attachment 1) from residential uses would eliminate almost all commercial spaces for AOBs and thus render the regulations unconstitutional. The only areas that are not impacted by the buffer/separation distance are along Goldie Road (see Attachment 3). The uses in this area are primarily industrial along with a mix of commercial uses. Restriction of sensitive uses in this area is due to its proximity to NAS Whidbey Ault Field. Since AOB need to be separated from sensitive areas, as proven by the studies in Attachment 1, the Goldie Road corridor may be the only suitable location for Adult Entertainment Businesses. Therefore a concentrated approach may be suitable for Oak Harbor.

The land identified in the interim ordinance for the overlay zone was a result of a buffer/separation criteria that the community identified through a public hearing process. The separation distance was increased from 100 feet to 750 feet for residential after a public input process. The impacts of AOBs did not vary between residential uses and impacts on schools, parks and religious institutions. Therefore the buffer/separation criterion[3] was established at 750 feet for all sensitive uses (residential, schools, parks and religious institution).

The 750 feet separation is not an unreasonable distance when compared to other communities. The distances range between 500 feet and 1000 feet. Communities such as Garden Grove, CA and Whittier, CA have adopted 1000 feet separation while communities such as Adams County, CO and Manatee County, Florida have adopted 500 feet separations. St. Paul, MN has a 800 feet separation and Beaumont, TX and Houston, TX have a 750 feet separation from sensitive uses.

Land Use distribution: The information below summarizes the overall distribution of zoning classifications within the city. This information will give an idea of the total percentages that each zoning classification occupies in the City in relation to each other. This information will eventually help determine if adequate land has been zoned for Adult Entertainment Facilities in Oak Harbor.

The total area of the properties that have designated zoning classification in the city is approximately 3170 acres. This area does not include rights of way and NAS Whidbey. RI, Single Family Residential takes approximately 41% of the total area and is the largest zoning classification in the city. PF, Public Facilities, which includes parks, schools, marina and other city owned facilities, is the second largest zoning category with 11%. R2, Limited Multifamily Residential is third with 6% followed by C3, Community Commercial at approximately 5%. The industrial categories I, Industrial zoning is 1.58% and PIP, Planned Industrial Park is 1.15%. (Attachment 4)

The number of lots in each zoning category provides an indication of the average size of the lots. The R1 zoning classification has approximately 4084 parcels in 1116 acres. This constitutes smaller lots with an average of .27 acres per parcel. The Central

[3] The criterion was used to determine the properties excluded from the buffer and is not a criterion used for locating AOBs in the community.

Business District has 144 lots in 41 acres, also indicating smaller size lots at approximately .28 acres per parcel. The Community Commercial zoning has approximately 203 lots in 164 acres which equates to approximately .80 acres per parcel. The Industrial zoning classification has approximately 50 acres in 10 lots which is 5 acres per parcel and the Planned Industrial Park zoning classification has 11 lots in approximately 36.5 at 3.3 acres per parcel.

Developability of properties: The amount of land available in the relevant zoning categories is critical to determine the fairness of the regulations on Adult Entertainment Facilities. It will help determine if adequate land in this community has been zoned for the adult businesses and how it compares to other commercial uses.

In a recent study on the Urban Growth Area (UGA) capacity analysis, assessed land value data was obtained from the Island County assessor's office to determine the availability of land for development. For the purpose of this report, assume that the developability of a parcel is high if the assessed land value of the property is 90% or greater than the value of the structure. This assumes that a very small structure or improvement has an insignificant value when compared to the total value of the property and is therefore a prime candidate for development. Therefore, if the structure value is 0 in the assessor's data, then the parcel can be assumed to be vacant and the land value will constitute 100 % of the property value. Therefore the 90% threshold will identify the properties generally considered the most developable land in the City.

The recent analysis indicates that in the 90% threshold, 16.7 acres of C3, Community Commercial property is highly developable in the city. Since the city has a total of 164 acres of C3, Community Commercial zoned properties, 16.7 acres constitutes approximately 10% of all C3 zoned properties. Under the same threshold 29.1 acres out of a total of 50 acres (58%) of Industrial zoned land is highly developable and 22.5 acres out of a total of 36.5 acres (62%) of Planned Industrial Park is considered highly developable. Therefore there is more Industrial and Planned Industrial Park zoned land that is considered highly developable when compared to the Community Commercial lands.

Value of properties: The market value of properties varies with many conditions such as location, accessibility, infrastructure, utilities available etc. The values also fluctuate with time and changing market conditions. A recent interview with a local appraiser indicated that the cost of industrial land is less expensive per square feet that commercial land. Large industrial lands that are 5 acres or greater that are not improved and development-ready are approximately $1 per square feet and the industrial lands that are improved are approximately $3-$4 per square feet. Commercial properties generally range from $8 to $20 per square feet based on location. Commercial properties located along the along the highway range between $17 - $20 per square feet, while along Midway Blvd they range between $8 -$10 per square feet. In downtown the value commercial properties range from $10 to $15 per square feet.

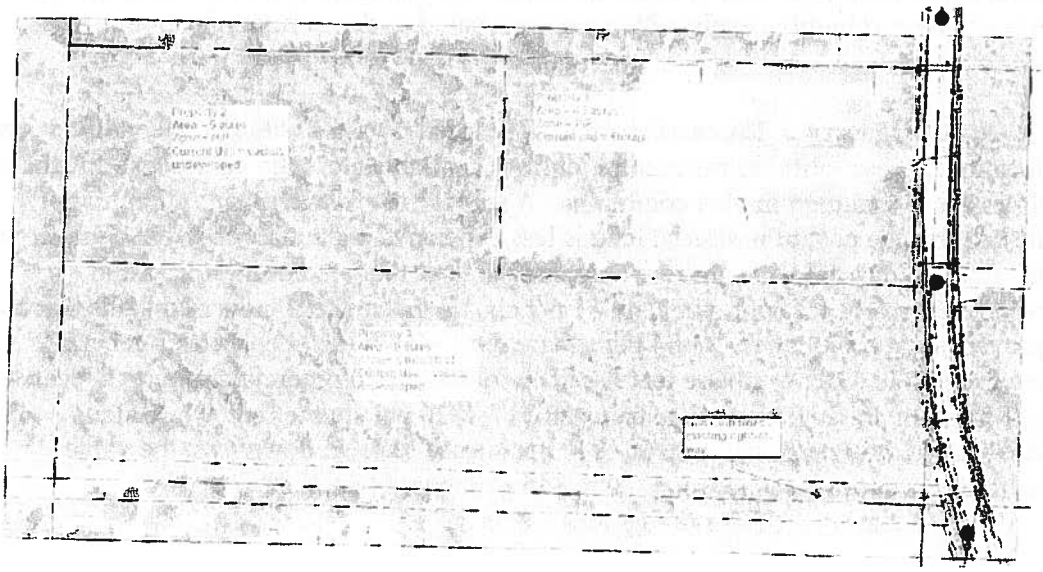
North Whidbey and the Goldie Road Corridor: The areas adjacent to Ault Field Road, Oak Harbor Road and Goldie Road contain the largest inventory of industrial lands available in Island County. A large portion of this area is in the City's Urban Growth Area. The City and the County have entered into an Interlocal Agreement regarding the development of this area. The agreement provides for consistent land use planning and street development between the properties located in the city and the county in this area. The area is also under an enterprise zone (Attachment 5) which provides development and annexation incentives.

Goldie Road is a minor arterial and is one of the major roads that serve the North Whidbey area. It provides one of the primary accesses to the NAS Whidbey Ault Field campus. Goldie Road in conjunction with Midway Blvd is a major north-south connection between residential, commercial and industrial uses for Oak Harbor.

The Goldie Road corridor has been consistently developing in the past years and is likely to continue to develop in the future. There have been recent annexations in the area along Easy Street and west of Goldie Road accompanied with land use changes to accommodate commercial development.

Utilities such as water and sewer are available along Goldie Road. One of the incentives for development of properties in the enterprise areas is the waiver of the sewer connection fee which normally recoups the cost of construction of the sewer line.

Developability of properties identified in the interim Ordinance: The three properties identified in the interim ordinance adopted on May 4, 2010 are located along the Goldie Road Corridor. They are hereafter referred to as the subject properties. As indicated in the figure below they have been labeled Property 1, 2 and 3 for convenient reference. Properties 1 and 2 are zoned PIP, Planned Industrial Park and encompass approximately 9.7 acres. Property 3 is zoned I, Industrial and is approximately 9 acres.



The zoning and land use of properties surrounding the subject area vary between the City and the County. To the north the property is adjacent to land in the county that is zoned OH-PIP and includes several lots with small industrial type uses. The property to the west is vacant/undeveloped in the City and is zoned I, Industrial. To the south, a portion of the subject property adjacent to the county that is zoned OH-Residential, with mobile homes and a portion of it is adjacent to property in the city that is zoned PIP, Planned Industrial Park.

The subject properties slope generally west from Goldie Road to a gully that drains the larger area to the 7th Avenue wetlands. The soils in this area are mostly a Everett-Alderwood complex (see Attachment 6). The soils have a high infiltration rate and will therefore be suitable for low impact development techniques to handle the storm water requirements that will be required at the time of development. Property 1 that is developed for storage uses a infiltration pond for stormwater and is likely the same methodology that will be used for the development of the other properties in the area.

All utilities are available to the subject properties. Sewer and water lines run along Goldie Road. Due to the slope of the area, development of the properties will require wastewater to be pumped up to Goldie Road. The individual connections and their design can vary and will be reviewed along with development plans for the site.

Property 1 is partially developed as a storage facility. The property takes access from Goldie Road. The recently developed storage facility occupies the northern part of the lot and therefore has room for more development on the site. The current site improvements include access, parking and storm water facilities.

Property 2 is zoned Planned Industrial Park and is currently vacant/undeveloped. This property currently does not have access to public right-of-way. Access to this property can be provided through Property 1 with an access easement. Public access could also be provided to the site with the development of Property 3. Property 2 will likely be the last property to develop in this area due to this limitation.

Property 3 is the largest parcel and is zoned I, Industrial. It is currently vacant and undeveloped. This property has access to Goldie Road but is also adjacent to the Gun Club Road right-of-way. Subdivision of this property will require the construction of Gun Club Road and possibly an extension of new street to Property 2. Since there are no minimum lot sizes in the Industrial Zoning Classification, the property can be subdivided in many lots of various sizes to suit the needs of the user/buyer. Most of the eventually subdivided lots will take access from a newly constructed Gun Club Road that will be built to a collector street standard. The design and construction of Gun Club Road will be reviewed along with development plans. A visual survey of the area indicates that there may be some wetlands at the lowest point of the property. A Critical Area Report may be necessary to determine the extent of the wetlands and identify any mitigation that may be necessary.

Supply and demand: There are currently no Adult Entertainment Facilities located in Oak Harbor. In fact there are no Adult Entertainment Facilities locates in Island County. There have been no applications filed with the City or the County for Adult Oriented Businesses ever. Therefore it is difficult to determine if there is a demand for such facilities. The lack of demand may be due to the unique location of Oak Harbor and Island County, the State's liquor laws regarding such uses or the unknown market for such uses in the area. The reasons can be numerous but it is clear that such uses have not made a legitimate attempt to locate in Oak Harbor or Island County[4].

The City's consideration of providing an overlay zone for Adult Entertainment Facilities in the Goldie Road corridor, based on the low demand, will provide a substantial supply of developable land for such uses. The total area being considered for the overlay zone is approximately 18.7 acres which constitutes approximately .66 percent of all land uses zoned in the city. It is approximately 22% of the properties zoned I, Industrial and PIP, Planned Industrial combined. The available land that is being considered for the overlay zone is more than the total area of commercial properties currently available in the city based on the 90% developability threshold discussed earlier.

The County is also considering similar development codes for AOBs. The area of focus is in the Goldie Road, Ault Field Road and Oak Harbor Road vicinity. The City's overlay zone for adult entertainment facilities combined with the eventual County adoption of code for AOB will provide an ample supply of land/properties for such uses.

Summary of Findings: Based on the above analysis it can be determined that:-

- Adult Oriented Businesses are entitled to some protection under the State and Federal constitution
- The courts have upheld regulations that are tailored to regulate the secondary effects (crime, property values, blight) of such businesses
- Regulations cannot completely eliminate these uses from a municipality
- The dispersed approach and concentrated approach have both been held to be constitutionally permissible as legitimate "time, place, and manner" of protected speech
- The dispersed approach is not suitable for Oak Harbor since it eliminates almost all properties
- Concentrated approach may be the best method for Oak Harbor to regulate adult entertainment facilities
- There is more industrial land available for development than commercial lands.
- Properties identified in the interim overlay district, referred to as subject properties, fall outside the buffers of sensitive areas

[4] Filing an application for business license, building permit, site plan etc. is considered a legitimate attempt. However, there has been interest indicated at various times to open adult entertainment facilities but none have come to fruition.

- Subject properties are located in a developing area and can be served by all utilities.
- Area of subject properties is more than all available community commercial lands
- Since there have been no applications for the development of adult entertainment facilities in Oak Harbor and Island County the land identified in the interim ordinance will provide and ample supply of properties and will be augmented by properties identified by the county in and around the same area.

Conclusion: Based on the analysis in this report, staff believes that the Interim Adult Entertainment Facilities Overlay District can be adopted as the Final Adult Entertainment Facilities Overlay District. Since studies indicate that the concentrated approach can have increased crime rates over the dispersed approach, specific site development conditions can be considered for inclusion in the development codes.

Recommendation: Staff recommends that the Planning Commission take public comment on this item and continue the public hearing to its November 23, 2010 meeting.

Attachments:

1. Summary of Studies done in other jurisdictions around the country
2. "Regulating Adult Entertainment: by Daniel Olsen
3. Map of Buffers from sensitive uses
4. Table of Zoning Areas
5. Enterprise Area Maps
6. Soils map and information

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NLC SUMMARIES OF "SOB LAND USE" STUDIES

CRIME IMPACT STUDIES BY MUNICIPAL AND STATE GOVERNMENTS ON HARMFUL SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES

1. *American Center for Law and Justice*
2. *Phoenix, Arizona*
3. *Tucson, Arizona*
4. *Garden Grove, California*
5. *Los Angeles, California*
6. *Whittier, California*
7. *Adams Co., Colorado*
8. *Manatee Co., Florida*
9. *Indianapolis, Indiana*
10. *Minneapolis, Minnesota*
11. *Saint Paul, Minnesota*
12. *Las Vegas, Nevada*
13. *Ellicottville, New York*
14. *Islip, New York*
15. *New York, New York*
16. *Times Square, New York*
17. *New Hanover Co., North Carolina*
18. *Cleveland, Ohio*
19. *Oklahoma City, Oklahoma*
20. *Oklahoma City, Oklahoma II*
21. *Hamilton County, Tennessee*
22. *Amarillo, Texas*
23. *Austin, Texas*
24. *Beaumont, Texas*
25. *Cleburne, Texas*
26. *Dallas, Texas*
27. *El Paso, Texas*
28. *Houston, Texas 1983*
29. *...Houston, Texas 1986*
30. *...Houston, Texas 1991*
31. *...Houston, Texas 1997*
32. *Newport News, Virginia*
33. *Bellevue, Washington*
34. *Des Moines, Washington*
35. *Seattle, Washington*
36. *St. Croix Co., Wisconsin*
37. *Rome, Georgia*
38. *Saint Marys, Georgia*
39. *Adams County, Colorado*
40. *...Saint Paul, Minnesota*
41. *The State of Minnesota, Attorney General's working group*
42. *Kennedale, Texas*
43. *Effingham County, Effingham, Illinois*

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National Law Center Summary of the
AMERICAN CENTER FOR LAW AND JUSTICE
LAND USE STUDY
DATED MARCH 31, 1996

OVERVIEW: This report, compiled by the Environmental Research Group for the American Center for Law and Justice in 1996, reviews the current state of knowledge about the impact of sexually-oriented businesses (SOBs) upon nearby residential and commercial areas. The study particularly notes the effect of SOBs on smaller municipalities. The study finds that SOBs support detrimental activities (i.e. personal and property crimes, prostitution, drugs, etc.) within the vicinity that are incompatible with activities occurring within residential areas. SOBs also have a negative impact on local businesses. Evidence indicates that when SOBs are located near each other or near businesses that serve alcohol, the harmful impact increases. Noting that this is not a recent problem, the study points to many municipalities that have examined the impact of SOBs on surrounding communities, thereby building an ample record of evidence in support of regulation and restriction of location and concentration of SOBs.

FINDINGS: The study gives a "Historic Overview" of the issues of SOBs and their effects, dating back to the late eighteenth century. The "tableau vivant" and "concert saloon," were the forerunners of today's "topless bar," seemingly in response to the economic pressures of the young working male of that day. The clientele of today's SOBs has not changed very much over time, being mostly young, single, transient males. In the past, when these businesses operated in a legal, far less regulated climate, it was much easier to see the link between SOBs and crime. Today, the impact of SOBs on its surroundings is less clear, but broader in scope.

The report examines the Garden Grove, CA study by McCleary and Meeker (1991) in depth, which studies 10 years worth of crime statistics in the area, pointing out the significant increase in property (burglary, theft, auto theft) and personal (assault and robbery) crimes that occur within 1,000 feet of an SOB when it is located near an establishment that sells alcohol. They also cite the City of Indianapolis study, which found a 77% higher incidence of serious crime in the area with multiple SOBs compared to the control area (matched by demographic characteristics, building types, etc.). The study indicated that SOBs help create conditions that draw outsiders to the area and provide venues for opportunistic crimes. Sex-related crimes were 4 times higher in *residential* areas near an SOB than in *commercial* areas near an SOB. Similar findings regarding significant increases in crime and arrests in areas near SOBs are referenced from studies out of Minnesota, the City of Austin, Los Angeles, and Hollywood.

Public and semi-private spaces (such as parking lots, spaces between buildings, and parks) have questionable ownership, thereby furthering the opportunity for crime. When an SOB exists, these areas become used for illicit purposes. As a result, legitimate users and residents are driven away by the illicit activity. A public area devoid of women and elderly is an indication of the relative safety in a public space. As potential patrons avoid an area, other commercial businesses suffer. The study notes that women who do walk in areas near an SOB can be subject to harassment and propositioning from assumptions that the woman is associated with the SOB. This all contributes to a "climate of fear" that intimidates people and causes them to avoid the area altogether. This may also contribute to declining property values.

Planning Commission
ATTACHMENT 1

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ATTACHMENT B

National Law Center Summary of the
AMERICAN CENTER FOR LAW AND JUSTICE
LAND USE STUDY
(CONTINUED)

The study points to evidence that the presence of SOBs effects perceived reductions in the value of residential and commercial property. The City of Indianapolis conducted the most detailed survey, doing a 20% sample national survey of real estate appraisers and a 100% survey of appraisers in similarly-sized cities with a response rate of 33%. Seventy-five percent of those responding indicated that there was a significant negative impact on residential and commercial property values when SOBs are located nearby. In fact, no other type of facility (including drug rehab centers), have such a significant negative impact on property values. A City of Austin study stated that the presence of SOBs in a neighborhood leads mortgage lenders to the conclusion that it is in decline. Similar results have been found in other studies.

The study references trade area studies that indicate SOBs are regional facilities that primarily attract people from outside the neighborhood. A license plate study in Bothell, Washington showed that out of 321 cars in the parking lot of an SOB, only 8 (2.5%) were registered in Bothell. A regional customer base, as opposed to a neighborhood customer base makes SOB owners less responsive to neighborhood problems, decreases the informal social control of behavior, and increases the potential for opportunistic crime.

Finally, the study indicates that the negative effects of an SOB in a small town will likely be more magnified than in a bigger city. First, the compact nature of surrounding residential areas to the downtown area increases the reach that harmful, negative effects would have in the town. Also, smaller populations and shorter commercial business hours result in much lighter use of public, semi-private, uncontrolled spaces (i.e. parks, parking lots and recessed storefronts), thereby providing much greater potential for illicit activity in areas surrounding SOBs. Small towns typically experience more economic stress than larger cities. This is aggravated when SOBs locate in the downtown business district of a small town.

National Law Center Summary of the
PHOENIX, ARIZONA
LAND USE STUDY
DATED MAY 25, 1979

The study examines crime statistics for 1978 comparing areas which have sexually-oriented businesses with those that do not. The results showed a marked increase in sex offenses in neighborhoods with sexually-oriented businesses, and also proved increases in property and violent crimes as well. This study is not unique but is unusually significant, in covering the issue of property crimes more extensively.

Three study areas (near locations of sexually-oriented businesses) and three control areas (with no sexually-oriented businesses) were selected. The study and control areas were paired according to the number of residents, median family income, percentage of non-white population, median age of population, percentage of dwelling units built since 1950, and percentage of acreage used for residential and non-residential purposes.

Three categories of criminal activity were included in the study: property crimes (burglary, larceny, auto theft), violent crimes (rape, murder, robbery, assault), and sex crimes (rape, indecent exposure, lewd and lascivious behavior, child molestation).

On average, the number of sex offenses was 506% greater in neighborhoods where sexually-oriented businesses were located. In one of the neighborhoods the number was 1,000% above the corresponding control area. Of the sex offenses, indecent exposure was the most common offense and the largest contributor to the increase of crimes in areas where sexually-oriented businesses were located. Even without considering the crime of indecent exposure, the number of other sex crimes, such as rape, lewd and lascivious behavior, and child molestation, was 132% greater than in control areas without sexually-oriented businesses.

On average the number of property crimes was 43% greater in neighborhoods where sexually-oriented businesses were located, and the number of violent crimes was 4% higher in those areas.

The Phoenix ordinance requires sexually-oriented businesses to locate at least 1,000 feet from another sexually-oriented business and 500 feet from a school or residential zone. Approval by the City Council and area residents can waive the 500 foot requirement. A petition signed by 51% of the residents in the 500 foot radius who do not object must be filed and be verified by the Planning Director.

National Law Center Summary of the
TUCSON, ARIZONA
LAND USE STUDY
DATED MAY 1, 1990

OVERVIEW: This report is a memorandum from Police Department Investigative Services to the City Prosecutor describing events and activities at "adult entertainment bookstores and establishments" that demonstrate the need for stronger ordinances. Investigations had been in progress since 1986 following numerous complaints of illegal sexual activity and unsanitary conditions.

FINDINGS: Officers found a wide variety of illegal sexual conduct at all adult businesses. At virtually every such business, employees were arrested for prostitution or obscene sex shows. Dancers were usually prostitutes where, for a price, customers could observe them performing live sex acts. At several businesses, customers were allowed inside booths with dancers and encouraged to disrobe and masturbate. Many times, dancers would require customers to expose themselves before they would perform. Underage dancers were found, the youngest being a 15 year old female.

Within peep booths, officers found puddles of semen on the floor and walls. If customers had used tissues, these were commonly on the floor or in the hallway. On two occasions, fluid samples were collected from the booths. In the first instance, 21 of 26 samples (81%) tested positive for semen. In the second sampling, 26 of 27 fluid samples (96%) tested positive for semen. "Glory holes" in the walls between adjoining booths facilitated anonymous sex acts between men.

RECOMMENDATIONS: (1) The bottom of the door in peep booths must be at least 30 inches from the floor so that an occupant can be seen from the waist down when seated. (2) The booth cannot be modified nor can a chair be used to circumvent the visibility of the client. (3) Employee licensing procedures that include a police department background check should be put in effect. (4) In the event of a denied or revoked license, the requirement of a hearing before any action is taken.

National Law Center Summary of the
GARDEN GROVE, CALIFORNIA
LAND USE STUDY
DATED SEPTEMBER 12, 1991

OVERVIEW: This report by independent consultants summarizes statistics to determine whether adult businesses should be regulated because of their impact on the community in terms of crime, decreased property values and diminished quality of life. Statistics were measured from 1981 to 1990, and included crime data and surveys with real estate professionals and city residents. Garden Grove Boulevard, which has seven adult businesses, was selected as the study area. The study incorporated many control factors to insure accurate results. The report includes a brief legal history of adult business regulation and an extensive appendix with sample materials and a proposed statute.

CRIME: Crime increased significantly with the opening of an adult business, or with the expansion of an existing business or the addition of a bar nearby. The rise was greatest in "serious" offenses (termed "Part I" crimes: homicide, rape, robbery, assault, burglary, theft and auto theft). On Garden Grove Boulevard, the adult businesses accounted for 36% of all crime in the area. In one case, a bar opened less than 500 feet from an adult business, and serious crime within 1,000 feet of that business rose more than 300% the next year.

REAL ESTATE: Overwhelmingly, respondents said that an adult business within 200-500 feet of residential and commercial property depreciates that property value. The greatest impact was on single family homes. The chief factor cited for the depreciation was the increased crime associated with adult businesses.

HOUSEHOLD SURVEYS: 118 calls were completed in a random sample of households in the Garden Grove Boulevard vicinity. The public consensus was that adult businesses in that area were a serious problem. Nearly 25% of the surveyed individuals lived within 1,000 feet of an adult business. More than 21% cited specific personal experiences of problems relating to these businesses, including crime, noise, litter, and general quality of life. 80% said they would want to move if an adult business opened in their neighborhood, with 60% saying they "would move" or "probably would move." 85% supported city regulation of the locations of adult businesses, with 78% strongly advocating the prohibition of adult businesses within 500 feet of a residential area, school or church. Women commonly expressed fear for themselves and their children because of adult businesses.

RECOMMENDATIONS: The report concludes that adult businesses have a "real impact" on everyday life through harmful secondary effects and makes four recommendations: (1) Keep current requirement of 1,000 feet separation between adult businesses; (2) Prohibit adult establishments within 1,000 feet of residential areas; (3) Enact a system of conditional use permits for adult businesses with police department involvement in every aspect of the process; and (4) Prohibit bars or taverns within 1,000 feet of an adult business.

National Law Center Summary of the
LOS ANGELES, CALIFORNIA
LAND USE STUDY
DATED JUNE, 1977

OVERVIEW: The Department of City Planning studied the effects of the concentration of sexually-oriented businesses on surrounding properties for the years 1969-75 (a time of proliferation for such businesses). The report focuses on five areas with the greatest concentration of these businesses (compared to five "control" areas free of them), and cites data from property assessments/sales, public meeting testimony, and responses from two questionnaires (one to business/residential owners within a 500 foot radius of the five study areas and a second to realtors/real estate appraisers and lenders). Crime statistics in the study areas were compared to the city as a whole. Also included: a chart of sexually-oriented business regulations in eleven major cities, details of current regulations available under state/municipal law, and appendices with samples of questionnaires, letters, and other study materials.

PROPERTY: While empirical data for 1969-75 did not conclusively show the relation of property valuations to the concentration of sexually-oriented businesses, more than 90% of realtors, real estate appraisers and lenders responding to city questionnaires said that a grouping of such businesses within 500-1,000 feet of residential property decreases the market value of the homes. Also, testimony from residents and business people at two public meetings spoke overwhelmingly against the presence of sexually-oriented businesses citing fear, concern for children, loss of customers and difficulty in hiring employees at non-adult businesses, and the necessity for churches to provide guards for their parking lots.

CRIME: More crime occurred in areas of sexually-oriented business concentration. Compared to city-wide statistics for 1969-75, areas with several such businesses experienced greater increases in pandering (340%), murder (42.3%), aggravated assault (45.2%), robbery (52.6%), and purse snatching (17%). Street robberies, where the criminal has face to face contact with his victim, increased almost 70% more in the study areas. A second category of crime, including other assaults, forgery, fraud, counterfeiting, embezzlement, stolen property, prostitution, narcotics, liquor laws, and gambling increased 42% more in the study areas over the city as a whole.

RECOMMENDATIONS: The study recommended distances of more than a 1,000 feet separating sexually-oriented businesses from each other, and a minimum of 500 feet separation of such businesses from schools, parks churches and residential areas.

National Law Center Summary of the
WHITTIER, CALIFORNIA
LAND USE STUDY
DATED JANUARY 9, 1978

OVERVIEW: After experiencing a rapid growth of sexually-oriented businesses since 1969, the Whittier City Council commissioned a study of the effects of the businesses on the adjacent residential and commercial areas. At the time of the study, Whittier had 13 "adult" businesses: 6 model studios, 4 massage parlors, 2 bookstores, and 1 theater. Utilizing statistics, testimonies, and agency reports, the study compared two residential areas and four business areas over a span of 10 years (1968-1977). One residential area was near the largest concentration of adult businesses, the other had no commercial frontage but was chosen because of similar street patterns, lot sizes and number of homes. For businesses, Area 1 had six adult businesses, Area 2 had one, Area 3 had three, and Area 4 had none. 1973 was selected as the year to compare before and after effects of the adult businesses. Two chief concerns cited in the report are residential and business occupancy turnovers and increased crime.

OCCUPANCY TURNOVER: After 1973, 57% of the homes in the adult business area had changes of occupancy, compared to only 19% for the non-adult business area. Residents complained of "excessive noise, pornographic material left laying about, and sexual offenders (such as exhibitionist) venting their frustrations in the adjoining neighborhood." Citizens also expressed concern about drunk drivers coming into the area. Business Area 1, with the most concentration of adult businesses (6), experienced a 134% increase in annual turnover rate. Area 3, with three adult businesses at one location, showed a 107% turnover rate. Area 2 (with 1 adult business) had no measurable change and Area 4 (with no commercial or adult businesses) experienced a 45% decrease in turnover from similar periods.

CRIME: The City Council looked at the two residential areas for the time periods of 1970-73 (before adult businesses) and 1974-77 (after adult businesses). In the adult business area, criminal activity increased 102% (the entire city had only an 8.3% increase). Certain crimes skyrocketed (malicious mischief up 700%; all assaults up 387%; prostitution up 300%). All types of theft (petty, grand, and auto) increased more than 120% each. Ten types of crime were reported for the first time ever in the 1974-77 period.

RECOMMENDATIONS: The Council's report recommended a dispersal type ordinance that prohibits adult businesses closer than 500 feet to residential areas, churches and schools. Distances between adult businesses was recommended at 1,000 feet. In addition, the study proposed a 1,000 foot separation from parks because of their use by citizens after normal working hours. Adult businesses would be given an 18-36 month amortization period (if the change involved only stock in trade, a 90 day period was recommended).

National Law Center Summary of the
ADAMS CO., COLORADO
LAND USE STUDY
DATED APRIL, 1988

OVERVIEW: This report, authored by Sgt. J.J. Long of the Adams County Sheriffs Department, was designed to accompany a new Nude Entertainment Ordinance. The report covers two parts: first, an April 1988 study of six representative locations in Adams County was undertaken to determine the transiency of adult business customers. Second, crime statistics in two Adams County areas featuring adult businesses were gathered for the years of 1986 and 1987. The study concluded that there was a clearly demonstrated rise in crime and violence, and an increase in the attraction to transients to the area as a result of nude entertainment establishments. This caused a danger to residents and an undesirable model for youth and the community at large.

FINDINGS: Adams County features 6 adult bookstores (all but one featuring nude entertainment), 1 all nude "pop shoppe," 7 massage parlors, 8 topless nightclubs (with liquor licenses), and 6 nude "rap," lingerie, and modeling-type studios (28 locations in all). An April 1988 study of six adult business locations in Adams County, revealed that 76% of patrons were transient. During the time when no adult ordinance was in effect in Adams County (1986 and 1987), 24 crimes were reported in one area featuring two adult businesses. Eighty-three percent of these crimes were linked to the adult businesses. Forty-two percent of these crimes occurred at the location of an all-nude establishment, and sixty-four percent occurred outside the hours of 4:00 p.m. to midnight. During 1987, 28 crimes were reported, 93% of which were linked to the adult businesses, 50% were alcohol-related offenses, and 77% occurred at a single establishment. Finally, 61% of those crimes occurred during hours other than those between 4:00 p.m. and midnight. Crime rates between 1986 and 1987 for another Adams County area featuring three adult bookstores, two topless nightclubs, a bar, a liquor store, and a beer outlet revealed a 15% increase in crime, (i.e., 55 crimes in 1986 as opposed to 63 in 1987). In 1986, 29 of those crimes involved alcohol, while in 1987, 41 were linked to alcohol (a 41% increase). A rural area of Adams County with a single topless nightclub experienced a 39% increase in crime between 1986 and 1987. There was a marked increase in the number of adult entertainment locations opening for business during 1986 and 1987. Further, a check of criminal histories of some of the offenders showed arrests for morals crimes, sexual assaults, alcohol-related offenses, and crimes of violence. A study of armed robbery in one area during the same time period revealed that 66% of all reported armed robberies occurred at the adult bookstores. Finally, seven homicides from 1977 to 1987 were directly linked to adult bookstores and nude entertainment businesses.

The 1988 enactment of the Nude Entertainment Ordinance, which was upheld by the Colorado Supreme Court, reduced the number of adult businesses in Adams County to only 14. The Adams County ordinance included the following provisions: 1) restricting hours of operation from 4:00 p.m. to midnight, Monday to Saturday; 2) restricting location of SOBs to 500 feet from sensitive uses; 3) an amortization clause requiring compliance within a six month period; and 4) a public nuisance provision for repeated or continuing violation of the ordinance.

National Law Center Summary of the
MANATEE CO., FLORIDA
LAND USE STUDY
DATED JUNE, 1987

OVERVIEW: This report, conducted by the Manatee County Planning and Development Department, examines the ramifications of a proposed adult entertainment ordinance. It depends upon the findings of other jurisdictions to forecast the effects of adult businesses in Manatee County. It also examines other land use studies in order to determine appropriate land use controls for Manatee County.

FINDINGS: The **Boston Model** of concentrating adult businesses into on "combat zone" has the following advantages: 1) like uses are treated alike; 2) lower administrative costs; 3) control over growth of pornographic uses and the development of specific new uses; 4) no definitional vagueness; 5) apparent constitutionality; and 6) easier evaluation of total public services impact of pornographic uses (traffic, limited parking, higher police costs and other effects). Disadvantages of this model center on the blighting effect when a central zone is created. It may also attract "undesirables" to one area. The **Detroit Model** has these advantages: 1) apparent constitutionality (withstood challenge in *Young v. American Mini Theatres*); and 2) creates a separation zone between other adult businesses and residential areas. However, it suffers from definitional weaknesses. Most jurisdictions have adopted some form of the Detroit model. Other cities have added additional buffer requirements.

Studies of secondary effects in other cities (Austin, TX, Indianapolis, IN, Los Angeles, CA, and St. Paul, MN) have examined the impact of adult businesses on property value, crime rates, and incidences of blighting. Based upon the negative findings in these areas, cities have recommended zoning and other land use regulations.

There are five adult businesses currently in the County. All five are separated from one another by more than 1,000 feet. None meet the minimum residential buffer distance of 500 feet.

RECOMMENDATIONS: The dispersal model ordinance should be considered. The present zoning ordinance should be amended to add buffer requirements to provide distance from 1) residential districts, 2) churches, schools, child care facilities, and public recreation areas, and 3) other established adult businesses. There should be at least 500 feet of separation between an adult business and the nearest residential zone. A 2000 foot buffer should be established for churches, schools, child care facilities, and recreation areas. Adult businesses should be separated from one another by at least 1000'. A one year amortization period for compliance should be considered (as provided in the draft ordinance). "Sign controls should be considered which still protect a business's freedom to advertise, but also minimize public's exposure to such uses."

INDIANAPOLIS, INDIANA

National Law Center Summary of the
LAND USE STUDY
DATED FEBRUARY, 1984

OVERVIEW: After a 10 year growth in the number of sexually-oriented businesses (to a total of 68 on 43 sites) and numerous citizen complaints of decreasing property values and rising crime, the city compared 6 sexually-oriented business "study" areas and 6 "control" locations with each other and with the city as a whole. The study and control areas had high population, low income and older residences. In order to develop a "best professional opinion," the city collaborated with Indiana University on a national survey of real estate appraisers to determine valuation effects of sexually-oriented businesses on adjacent properties.

CRIME: From 1978-82, crime increases in the study areas were 23% higher than the control areas (46% higher than the city as a whole). Sex related crimes in the study areas increased more than 20% over the control areas. Residential locations in the study areas had a 56% greater crime increase than commercial study areas. Sex related crimes were 4 times more common in residential study areas than commercial study areas with sexually-oriented businesses.

REAL ESTATE: Homes in the study areas appreciated at only 1/2 the rate of homes in the control areas, and 1/3 the rate of the city. "Pressures within the study areas" caused a slight increase in real estate listings, while the city as a whole had a 50% decrease, denoting high occupancy turnover. Appraisers responding to the survey said one sexually-oriented business within 1 block of residences and businesses decreased their value and half of the respondents said the immediate depreciation exceeded 10%. Appraisers also noted that value depreciation on residential areas near sexually-oriented businesses is greater than on commercial locations. The report concludes: "The best professional judgment available indicates overwhelmingly that adult entertainment businesses -- even a relatively passive use such as an adult bookstore -- have a serious negative effect on their immediate environs."

RECOMMENDATIONS: Sexually-oriented businesses locate at least 500 feet from residential areas, schools, churches or established historic areas.

National Law Center Summary of the
MINNEAPOLIS, MINNESOTA
LAND USE STUDY
DATED OCTOBER, 1980

OVERVIEW: This report is divided into two sections: the relationship of bars and crime and the impact of "adult businesses" on neighborhood deterioration. In the study, an "adult business" is one where alcohol is served (including restaurants) or a sexually-oriented business (i.e., saunas, adult theaters and bookstores, rap parlors, arcades, and bars with sexually-oriented entertainment). Census tracts were used as study areas and evaluated for housing values and crime rates. Housing values were determined by the 1970 census compared to 1979 assessments. Crime rates were compared for 1974-75 and 1979-80. The study is strictly empirical and reported in a formal statistical manner; therefore it is difficult for layman interpretation of the data.

FINDINGS: The report concludes that concentrations of sexually-oriented businesses have significant relationship to higher crime and lower property values. Other than statistical charts, no statements of actual crime reports or housing values are included in the report. thus, the lay reader has only the most generalized statements of how the committee interpreted the empirical data.

RECOMMENDATIONS: First, that adult businesses be at least 1/10 mile (about 500 feet) from residential areas. Second, that adult businesses should not be adjacent to each other or even a different type of late night business (i.e., 24-hour laundromat, movie theaters). third, that adult businesses should be in large commercial zones in various parts of the city (to aid police patrol and help separate adult businesses from residential neighborhood). The report said "policies which foster or supplement attitudes and activities that strengthen the qualities of the neighborhoods are more likely to have desired impacts on crime and housing values than simple removal or restriction of adult businesses."

National Law Center Summary of the
ST. PAUL, MINNESOTA
LAND USE STUDY
DATED ARIL, 1988 (SUPPLEMENTAL TO 1987 STUDY)

OVERVIEW: As a "result of a growing concern among St. Paul citizens that the City's existing adult entertainment zoning provisions, adopted in 1983," did not "adequately address the land use problems associated with adult entertainment", the City Council directed the Planning Commission to study possible amendments to the Zoning Code. The Commission's proposed amendment was based on findings made during public hearings. The "substitute" "Amendment", adopted by the City Council, is a result of those findings and the findings made by the Council during its public hearings. The 1988 Study includes the findings, addresses the nine key features of the "substitute" "Amendment", and gives the rationale for each.

FINDINGS, "AMENDMENT", AND RATIONALE:

1) "[A]dult uses are harmful to surrounding commercial establishments but that significant spacing requirements between adult uses can minimize the harm in zones reserved for the most intensive commercial activity."

2) The "Amendment" treats all nine defined adult uses the same. Included are: "adult bookstores", "cabarets", "conversation/rap parlors", "health/sport clubs", "massage parlors", "mini-motion picture theaters", "motion picture theatres", "steamroom/bathhouse facilities", and "other adult uses." Each is defined as providing "matter", "entertainment", or "services" which is "distinguished or characterized by an emphasis on the "depiction", "description", "display" or "presentation" of "specified sexual activities" or "specified anatomical areas." "Most, if not all, existing statistical studies of the impact of adult uses do not differentiate between different types of adult uses and do not recognize that the land use impact of various types of adult uses is significantly different." "[E]qual treatment is consistent with the emphasis on deconcentration".

3) The "Amendment" set spacing between adult uses at 2,640 feet outside of the downtown area and 1,320 feet downtown. A six-block goal could not be met because of the necessity to provide a "sufficient land mass". The Phoenix and Indianapolis land use studies indicate that "the negative land use impact of a single adult use extends for up to three blocks".

4) Distances between adult uses and residential zones were increased from 200 feet to 800 feet "outside of downtown" and from 100 to 400 feet downtown in the substitute "Amendment". The goal of 1,980 feet outside of "downtown" and 990 feet downtown could not be met because of the necessity to provide "enough land and sites for potential future adult uses."

5) Distances from "protected uses" outside of downtown were increased from zero to 400 feet and from 100 to 200 feet downtown. Protection for zones "other than residential or small neighborhood business zones" was "justified" because their populations are "particularly vulnerable to the negative impacts of adult uses." "Protected uses" are: day care centers; houses of worship; public libraries; schools; public parks/parkways/public recreation centers and facilities;
fire stations (because of use for bicycle registration and school field trips); community residential facilities; missions; hotels/motels (which often have permanent residents).

National Law Center Summary of the
ST. PAUL, MINNESOTA
LAND USE STUDY
(CONTINUED)

6) Limiting one type of adult use per building was justified by experience with two pre-existing "multi-functional" adult businesses, numerous studies by other cities, and St. Paul's own study in 1978, which documented significantly higher crime rates associated with two adult businesses in an area, and significantly lower property values associated with three adult uses in an area. The 1987 study included statistics showing that most "prostitution arrests in the city occur within four blocks on either side of the concentration of four adult businesses." Other problems included "the propositioning" and "sexual harassment of neighborhood women mistaken for prostitutes", "discarding of hard-core pornographic literature" ("which is "most strongly associated with adult bookstores") "on residential property where it becomes available to minors", a "generally high crime rate," and "a general perception" that such an area "is an unsafe place due to the concentration of adult entertainment that exists there". Redevelopment experience in St. Paul showed that adult use areas caused a "blighting influence inhibiting development". Multi-functional adult uses will attract more customers which "increases the likelihood that such problems will occur." A "Sex for Sale Image" attracts more street prostitutes and their customers, and demoralizes other businesses and neighborhood residents".

7) Amount of land available for 24 existing adult uses (which includes split-off of two multi-functional businesses with three-four types per business) was 6.5% of the City's total land mass, for a maximum of 44 sites based on "absolute site capacity", calculated without regard for existing infrastructure, or 28 sites based on "relative site capacity" on existing street frontage calculated without regard for existing development or suitability of land for development.

8) Annual review of the "Special Condition Use Permit" was included in the "Amendment" "to ensure that no additional uses are added to the type of adult use that is permitted."

9) Prohibition of obscene works and illegal activities was included in the "Amendment" to "guard against the conclusion that the Zoning Code permits activities which the City can and should prohibit as illegal."

National Law Center Summary of the
LAS VEGAS, NEVADA
LAND USE STUDY
DATED MARCH 15, 1978

OVERVIEW: Prior to adopting a zoning ordinance for adult businesses, the City of Las Vegas conducted a survey of businesses, residences, and real estate brokers and agents. The results of the survey are included in this report. Also included in the report: minutes of the March 15, 1978, City Commission meeting on the matter of adding an adult business zoning chapter to the City code; an affidavit from Donald Saylor, Director of the Department of Community Planning and Development for Las Vegas, on the blighting effect of adult businesses; an affidavit from William Powell, Vice and Narcotics detective with the Las Vegas Metropolitan Police Department, on the link between a high concentration of adult businesses and an increase in criminal activity; and an affidavit from Donald Carns, professor of Sociology at the University of Nevada, Las Vegas, on the problems adult businesses pose for the economic well-being and vitality of a city.

FINDINGS: Among brokers and realtors, overwhelming majorities said that adult entertainment establishments had negative effects on the market value (82%), saleability/rentability (78%), and rental value (76%) of properties located near these establishments. According to 81%, there is a decrease in the annual income of businesses in the vicinity of adult establishments. Strong majorities reported that a concentration of adult businesses near other businesses (from under 500 feet to more than 1000 feet) has negative effects on market values, rental values, and rentability/saleability of residential property. Among surveyed homeowners and residents living near adult businesses, the consensus was similar: adult establishments have a negative effect on the 1) neighborhood; 2) business conditions (sales and profits) in the area (2-square block radius); and 3) value and appearance of homes in the vicinity (within 500 feet). Reportedly, 85% said that their normal living habits had been limited or hindered in some way due to the presence of adult businesses in the area. Among surveyed business owners and proprietors, the results were mixed. The majority of respondents did report that adult businesses had a negative effect on homes immediately adjacent to and in the area (500 feet or more) of adult businesses. A majority believed adult businesses had the following secondary effects: complaints from customers (66%), additional crime (58%), and deteriorated neighborhood appearance (58%). Finally, among residents living in areas not located near adult businesses, the consensus was clear: adult establishments have negative effects on neighborhoods, business conditions in the City, the value and appearance of homes, property values, the amount of crime, and resident transiency. These residents were nearly unanimous (96%) in the belief that their living habits had been limited or hindered by the operation of adult businesses.

RECOMMENDATIONS: Adult businesses should be prohibited from locating in residential areas. They should also be restricted to designated areas and dispersed throughout those designated areas. Adult businesses should be located at least 1000 feet from playgrounds, churches, schools, and parks.

National Law Center Summary of the
ELLICOTTVILLE, NEW YORK
LAND USE STUDY
DATED JANUARY, 1998

OVERVIEW: On April 28, 1997, the Ellicottville Village Board of Trustees and Town Board placed a moratorium on approvals of new sexually-oriented establishments. There were four purposes for the move: 1) to allow the community time to study the effects of adult entertainment businesses; 2) "to determine if a regulatory response was necessary;" and 3) "if stronger land use controls were warranted to draft the regulatory changes for the legislative board's consideration." As there were no adult businesses in Ellicottville at the time of the study, the report cites secondary effects studies in other jurisdictions as a means of forecasting the effects of an Ellicottville adult business. The negative secondary effects examined included: economic impacts, property values, fear of crime, and negative impact on community character.

FINDINGS: Ellicottville is a community that relies upon attracting tourists. As such, "the atmosphere and aesthetic features of the community take on an economic value." Though active land use controls have been practiced to maintain the look and vitality of the community, currently there are no differentiations made between the regulation of an adult business and, say, a juice bar.
To assess potential secondary effects, studies administered in other New York jurisdictions will be helpful. The 1994 NYC Adult Entertainment study found the following: adult businesses tend to cluster in certain areas, a rise in crime is linked to clusters of adult businesses, negative reactions toward adult businesses were common among adjacent business and home owners, isolation of adult businesses limited secondary effects, real estate brokers believe property values are negatively impacted by nearby adult establishments, and adult business signs are often larger and more graphic.

Allowing adult businesses to locate within the historic business district would negatively impact Ellicottville's efforts to provide a family-friendly community. Similarly, permitting adult businesses to locate near residences would have an eroding effect on "aesthetic qualities" and property values. The type of signage typically used by adult businesses would run counter to the business district. The following uses seemed most prone to negative secondary effects: the Ellicottville historic district, places of worship (6 churches in Ellicottville), the school, the child care facility, recreation parks/areas/playgrounds and public/civic facilities, and residential neighborhoods.

RECOMMENDATIONS: The Town and Village should adopt zoning regulations that create a land use category, and regulate adult establishment uses, allowing them to locate in industrial zones and the industrial-service commercial district. The establishment of adult businesses should be considered Conditional Uses (requiring approval of a special use permit). Exterior advertising, signs, and loudspeakers and sound equipment should be regulated. The following distance buffers should be set for: 500 feet (town) or 300 feet (Village) from residential areas; 1000 feet (town) or 500 feet (Village) from other adult businesses; and 500 feet (town and Village) from a church, school, day care center, park, playground, civic facility or historic resource. Definitions for adult uses should be added to existing zoning regulations.

National Law Center Summary of the
ISLIP, NEW YORK
LAND USE STUDY
DATED SEPTEMBER 23, 1980

OVERVIEW: This report, compiled by Daniel Dollmann of the Islip Department of Planning, features an analysis of studies and ordinances from other jurisdictions, a case study of an adult business in Islip, research of public outcry against the establishment of adult businesses in Islip, and a survey by hamlet of adult entertainment businesses in Islip. The study includes a lengthy appendix with news articles detailing the history of the Islip zoning ordinance, letters of complaint from local residents, a historical perspective about the Detroit ordinance, copies of ordinances from other jurisdictions, and a copy of the proposed Islip zoning ordinance, reflecting the findings in this report.

FINDINGS: The study looks at the Detroit ordinance, upheld by the U.S. Supreme Court in 1976, which restricted sexually-oriented businesses (SOBs) from locating within 1,000 feet of other SOBs, and within 500 feet of residential areas. The Islip ordinance is modeled after the Detroit ordinance's approach to disperse SOBs ("anti-skid row") as opposed to creating a "combat zone," which was unsuccessfully attempted by the Town of Islip in 1975. The study notes that the ordinance incorporates "adults-only" definitions in an attempt to avoid First Amendment issues. In determining its distance requirement between adult businesses and sensitive uses, the Town of Islip took into consideration: distance requirements used in Detroit, MI, Norwalk, CA, Dallas, TX, Prince George's Co., MD, and New Orleans, LA zoning ordinances; it's own measurements on an Islip zoning map of several distance proposals; information from the local case study; and resident feedback. The study analyzes the problems unique to an area called Sunrise Highway (23% of businesses are adult) and compares the differences between Islip and Detroit, including population size and number of SOBs, to justify needs for greater distance limitations between SOBs.

One of the goals of the Town is to protect its historic downtown district and keep it from further deterioration (which occurred in the past due to an increase in multi-family dwellings, transients and bars). The Study noted that limiting SOBs to the Town's light industrial zone would be in keeping with this goal. Currently, there is a "dead zone" in one of the healthier parts of the downtown area due to two adult businesses located there.

The Study includes a case study of the Bohemia Book Store which was located extremely close to a residential area. In 1980 the store was temporarily closed down by court order, as a result of citizen picketing and subsequent violence against the picketers. The operators of this particular SOB were reported to have associations with organized crime (i.e., mob-operated national porno ring, multiple obscenity charges and convictions).

RECOMMENDATIONS: the proposed zoning ordinance requires 500 feet between an adult business and residential areas or other sensitive uses, like churches and schools, and a ½ mile distance between SOBs. The ordinance includes a waiver clause for certain conditions, and an amortization clause.

National Law Center Summary of the
NEW YORK CITY, NEW YORK
LAND USE STUDY
DATED NOVEMBER, 1994

OVERVIEW: This study of the secondary impacts of adult entertainment uses on communities in New York City (NYC), prepared by the Department of City Planning (DCP), includes: a survey of studies in other jurisdictions, a description of the adult entertainment business in NYC, a review of studies previously done in NYC, a DCP survey of the impacts on NYC communities, and maps showing SOB locations.

FINDINGS: Recent trends in sexually-oriented businesses (SOBs) in NYC show a 35% increase over the last decade (75% of which were located in zoning districts that permit residences). However, since the survey for this information focused only on XXX video and bookstores, adult live or movie theaters, and topless or nude bars, this may be an underestimate of total SOB uses. Also in the past decade the availability of pornographic material has increased, the price has decreased greatly, and the image of nude bars has become more sophisticated or "upscale", contributing to the wide-spread availability of SOBs in NYC. SOBs have continued to concentrate in specific areas, specifically in three communities within Manhattan. Between 1984 and 1993: the concentrated areas of SOBs have nearly tripled; the number of SOBs has increased from 29 to 86 (74% of which were adult video stores – not included in the 1984 survey); adult theaters declined from 48 to 23, and topless/nude bars increased from 54 to 68 (54%).

After examining studies from other jurisdictions, this study concludes that the negative secondary impacts are similar in every jurisdiction, despite size of city, variations in land use patterns, and other local conditions. The study specifically examines the negative secondary impacts documented in Islip, NY, Indianapolis, IN, Whittier, CA, Austin, TX, Phoenix, AZ, Los Angeles, CA, New Hanover Co., NC, Manatee Co., FL, and MN,
which evidenced problems with "dead zones", declining property values, high turnover rates in adjacent businesses, and higher sex crime rates. Various studies done on the City of New York (including Times Square) showed that concentration of SOBs had resulted in significant negative impacts, including economic decline, decreased property values, and deterrence of customers, and significantly increased crime incidence. Business owners strongly believed their businesses were adversely affected by SOBs. The DCP did its study in NYC boroughs where there was less concentration of SOBs. The negative impacts in these areas were harder to measure, but there was a definite negative perception among residents about the presence of SOBs. It has been shown that negative perceptions related to SOBs can lead to disinvestment and tendency to avoid shopping in adjacent areas – leading to economic decline. Residents reared potential proliferation of SOBs and the resultant negative impact on traditional neighborhood-oriented shopping areas. Eighty percent of real estate brokers surveyed responded that an SOB would have a negative impact on property values (consistent with a national survey). Residents were also concerned about exposure to minors of sexual images.

The DCP concluded that it would be appropriate to regulate SOBs differently from other commercial businesses, based on the significant negative impact caused by SOBs.

National Law Center Summary of the
TIMES SQUARE, NEW YORK
LAND USE STUDY
DATED APRIL, 1994

OVERVIEW: The Times Square Business Improvement District (BID) conducted a study of the secondary effects of adult businesses on the Times Square area. Due to an increase in the number of adult use establishments from 36 in 1993[1] to 43 in 1994 the BID conducted this study to obtain evidence and documentation on the secondary effects of adult use businesses in the Times Square BID, and of their dense concentrations along 42nd Street and Eighth Avenue. The study was performed by combining available data on property values and incidence of crime, plus in-person and telephone interviews with a broad range of diverse business and real estate enterprises, including major corporations, smaller retail stores, restaurants, theatres and hotels, as well as with Community Boards, block associations, activists and advocates, churches, schools, and social service agencies.

FINDINGS: The study made the following four findings:

1) Surveys - All survey respondents voiced optimism about the future of Times Square, even as they bemoaned the increase of adult use establishments. Many respondents felt that some adult establishments could exist in the area, but their growing number and their concentration on Eighth Avenue constitute a threat to the commercial property and residential stability achieved in the past few years.

2) Crime - Although the study was unable to obtain data from before the recent increase in adult establishments and, thus, unable to show if there's been an increase in actual complaints, there were 118 complaints made to the police on Eighth Avenue between 45th and 48th compared to 50 on the control blocks on Ninth Avenue between 45th and 48th Streets. In addition, the study reveals a reduction in criminal complaints the further one goes north on Eighth Avenue away from the major concentration of these establishments.

3) Property Values - The rate of increase of total assessed values of the Eighth Avenue study blocks increased by 65% between 1985 and 1993 compared to 91% for the control blocks during the same period. Furthermore, acknowledging the many factors that lead to a property's increased value, including greater rents paid by some adult establishments, an assessment of the study blocks reveal that the rates of increases in assessed value for properties with adult establishments is greater than the increase for properties on the same blockfront without adult establishments.

4) Anecdotal evidence - Many property owners, businesses, experts, and officials provided anecdotal evidence that proximity to adult establishments hurts businesses and property values.

CONCLUSION: BID's findings support the results from other national studies and surveys. Adult use businesses in Times Square have a negative effect on property values, cause a greater number of criminal complaints, and have an overall negative impact on the quality of life for the residents and small businesses of Times Square.

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[1] This number is a great deal lower than the all time high of 140 in the late 1970s. During that time the Times Square area was referred to as a "sinkhole" by the (The Daily News, August 1`4, 1975).

National Law Center Summary of the
NEW HANOVER CO., NORTH CAROLINA
LAND USE STUDY
DATED JULY, 1989

OVERVIEW: This Planning Department report cites several studies and reports outlining adverse economic, physical, and social effects of adult businesses generally and specifically in jurisdictions across the country. While noting that New Hanover County does not currently have a noticeable problem with adult establishments, the report emphasizes the need to institute "preventative" zoning measures to protect and preserve the quality of life. It also offers an overview of common zoning approaches and the attendant constitutional issues.

FINDINGS:

1) Municipalities across the country have documented, both empirically and anecdotally, the adverse effects of adult businesses on property values, rental values, neighborhood conditions, and other commercial businesses in the immediate area.
2) Cities have documented a link between adult businesses and urban blight, increased traffic, and light and noise pollution.
3) Studies have linked concentrations of adult businesses to an increase in crime, specifically prostitution, drugs, assault, and other sex crimes.
4) Community reputations and general quality of life are also negatively impacted by the presence of adult businesses.
5) An adult bookstore has been closed and re-opened several times after raids by law enforcement authorities. It is also reported that a topless dancing establishment may be opened in the County.
6) New zoning regulations would control the establishment of adult businesses near churches, schools, and residential areas.

RECOMMENDATIONS: 1) New Hanover should adopt the dispersal (Detroit) zoning approach. 2) Adult businesses should not be permitted to locate within 1,000 feet of each other. 3) Adult businesses should not be permitted within 500 feet of any school, church, park, or residential zone. 4) Adult businesses should only be allowed to locate in designated business and industrial districts, and only by a special use permit. 5) Signs and displays used by adult businesses should be regulated to protect the public, especially teenagers and children, from exposure to obscene material ("any display, device or sign that depicts or describes sexual activities or specified anatomical areas should be out of view of the public way and surrounding property"). 6) The County Attorney's Office and Sheriff's Department should explore the viability of requiring licensing for adult businesses. 7) Definitions for "adult business establishments," "specified sexual activities," and "specified anatomical areas" should be added to the zoning ordinance.

National Law Center Summary of the
CLEVELAND, OHIO
LAND USE STUDY
DATED AUGUST 24, 1977

OVERVIEW: This is a Cleveland Police Department report from Captain Carl Delau, commander of the City's vice and obscenity enforcement units and reported by him while he participated in a panel discussion at the National Conference on the Blight of Obscenity held in Cleveland July 28-29, 1977. The topic was "The Impact of Obscenity on the Total Community." Crime statistics are included for 1976 robberies and rapes. Areas evaluated were census tracts (204 in the whole city, 15 study tracts with sexually-oriented businesses). At the time of the study, Cleveland had 26 pornography outlets (8 movie houses and 18 bookstores with peep shows). their location was not regulated by city zoning laws.

FINDINGS: For 1976, study tracts had nearly double the number of robberies as the city as a whole (40.5 per study tract compared to 20.5 for other city tracts). In one study tract with five sexually-oriented businesses and 730 people, there were 136 robberies. In the city's largest tract (13,587 people, zero pornography outlets) there were only 14 robberies. Of the three tracts with the highest incidence of rape, two had sexually-oriented businesses and the third bordered a tract with two such businesses. In these three, there were 41 rapes in 1976 (14 per tract), nearly seven times the city average of 2.4 rapes per census tract.

CONCLUSION: "Close scrutiny of the figures from the Data Processing Unit on any and every phase of the degree of crime as recorded by census tracts indicates a much higher crime rate where the pornography outlets are located."

National Law Center Summary of the
OKLAHOMA CITY, OKLAHOMA
LAND USE STUDY
DATED MARCH 3, 1986

OVERVIEW: This study contains the results of a survey of 100 Oklahoma City Real Estate Appraisers. Appraisers were given a hypothetical situation and a section to comment on the effects of sexually-oriented businesses in Oklahoma City. The hypothetical situation presented a residential neighborhood bordering an arterial street with various commercial properties which served the area. A building vacated by a hardware store was soon to be occupied by an "adult" bookstore. No other sexually-oriented businesses were in the area and no other vacant commercial space existed. With less than a one month response time, 34 completed surveys were received by the city.

FINDINGS: 32% of the respondents said that such a bookstore within one block of the residential area would decrease home values by at least 20%. Overwhelmingly, respondents said an "adult" bookstore would negatively effect other businesses within one block (76%). The level of depreciation is greater for residents than businesses. The negative effects on property values drop sharply when the sexually-oriented business is at least three blocks away. In the subjective portion, 86% of the respondents noted a negative impact of sexually-oriented businesses on Oklahoma City. Frequent problems cited by the appraisers included the attraction of undesirable clients and businesses, safety threats to residents and other shoppers (especially children), deterrence of home sales and rentals, and immediate area deterioration (trash, debris, vandalism).

CONCLUSIONS: Oklahoma City's findings supported results from other national studies and surveys. Sexually-oriented businesses have a negative effect on property values, particularly residential properties. The concentration of sexually-oriented businesses may mean large losses in property values.

National Law Center Summary of the
OKLAHOMA CITY, OKLAHOMA II
LAND USE STUDY
DATED JUNE 1992

This study, written by Jon Stephen Gustin, a retired sergeant for the Oklahoma City Police Department, examines a history of the successful abatement of sexually-oriented businesses (SOBs) in Oklahoma City between 1984 - 1989, which ultimately reduced an alarmingly high crime rate in the city, which is one of many harmful secondary effects related to the operation of SOBs in the community.

This study indicates that in the early 1980's there was a large growth of SOBs in Oklahoma City in conjunction with a boom in the oil industry resulting in a large influx of oil field workers in the area. Houses of prostitution, nude bars and adult theaters spread throughout the city. SOB promoters and entrepreneurs from around the country came to the area to compete for their share in the market. By 1984, over 150 SOBs and an estimated 200 prostitutes operated in the city. SOB owners competed by using more and more blatant signs and advertising. As a result, the city experienced epidemic proportions of crime problems associated with the SOBs. Citizens began to voice concerns over the decay of community moral standards, the increased crime rate, and decreased property values.

Although Oklahoma City had a history of unsuccessful prosecution of cases related to pornography, prostitution, and related SOBs, public pressure from citizens and elected officials ultimately resulted in support by the Chief of Police, the City Council and the city's District Attorney to prosecute SOBs that were in violation of the law. Abating prostitution and related businesses was the first priority. The media aided this effort by publishing names of arrested customers and prostitutes, and airing live coverage of arrests and raids. This bolstered citizen support of police and prosecutors.

At adult bookstores and peep booths arrests were made for customers propositioning undercover officers to engage in sex acts, for the sale and possession of pornography, the display of pornography and for health department violations (including seminal fluids on the walls and floors of peep show booths). [Note that the author uses the term "pornography" referring to illegal pornography, also known as "obscenity."]

The city next focused on prosecution for violations at nude and semi-nude dance bars, where customers engaged in sexual favors with nude employees in exchange for the purchase of expensive cocktails. Repeated arrests in these bars forced them into compliance, causing a lack of customer support. Simple arrests at escort services, which were organized fronts for prostitution, did little to abate the illegal activity. Therefore, police worked undercover , arresting solicitors of the service. Also an attempt was made to prohibit businesses that had been convicted on prostitution charges from having access to phone service.

As a result of the aggressive arrest and prosecution efforts, only a handful of the original 150 SOBs remained by early 1990. All remaining SOBs operated within statutory guidelines. It has been documented that incidents of reported rape in Oklahoma City decreased 27% during that period, while it increased 16% in the rest of the state. In 1983 nearly one-half of the rapes in Oklahoma occurred in Oklahoma City, decreasing to one-third by 1989. This is an example of the benefits of stringent enforcement and prosecution of the so called "victimless crimes" associated with SOBs.

National Law Center Summary of the
HAMILTON COUNTY AND
CITY OF CHATTANOOGA, TENNESSEE
LAND USE STUDY
DATED MAY 1997

OVERVIEW: The Community Protection Committee, established by County Resolution 794-18, undertook a 2 ½ year study of vice-related laws and law enforcement activities in Hamilton County, Tennessee. The mission of the Committee was the renewal of efforts to protect children and families, relating to public health and safety. Members of the Committee represented the Hamilton County Executive, the Board of Commissioners, the Mayor of Chattanooga, and the Chattanooga City Council. The resolution requested that all federal, state and local law enforcement agencies and legislature renew their commitments to enforcing existing vice-related laws, and enacting necessary legislation. In 1996, the Committee met bi-monthly to hear national and local experts and law enforcement officials. They finished preparing recommendations in December 1996 and presented the full report in May 1997.

SUMMARY OF THE REPORT: In preparing and researching for this report the Committee operated from the following questions: is the presence of vice related activity harmful to the community? If so, how does it harm the community? The Committee first focused on "prostitution" and "pornography" along with the corresponding "harmful effects on the community, finding that prostitution posed a danger to Chattanooga and Hamilton County.

The report found that prostitution is extremely dangerous to public health, primarily due to the spread of STDs, which currently infect one in five Americans. In Chattanooga, four people control all the escort services, which serve as a front for prostitution. The report cited statistics for Shelby County, TN, including 33% of all prostitutes jailed in 1990 tested positive for VD, and 13% of all prostitutes jailed tested positive for HIV, (all dying within 3-5 years at an estimated cost of $500,000 per person, at tax payer expense). In one topless club 8 out of 9 female employees tested positive for VD.

Other issues researched in the report include:

- addiction to obscenity and the danger it poses to Hamilton County (i.e. promoting violence and perpetuating the "rape myth");
- victims of the sex business (Performers - often runaway, drug-using girls from abusive backgrounds that are lured into stripping by promise of more money, then abused further by patrons; and Customers – addiction to pornography can produce aggression, depression, debt, and eventually, loss of family);
- the harm of pornography on children (the 12-17 yr. old male is the largest group of consumers of pornography; early exposure to porn related to greater involvement in deviant sexual practices; pedophiles use porn to molest children; in Hamilton County there were 585 cases of child molestation reported in 1994; the cost to Hamilton County to counsel sexually abused children in 1994 was over $1.5 Million; child molesters report from 30-60 victims each before arrested the first time);

National Law Center Summary of the
HAMILTON COUNTY AND
CITY OF CHATTANOOGA, TENNESSEE
LAND USE STUDY
(CONTINUED)

- the relationship of pornography and organized crime (organized crime has historically been involved in 95% of the adult business establishments);
- the harmful secondary effects of sex businesses on the community (including increased crime, good businesses abandoning area, reduced property values, eroded tax base, and lost revenue for law enforcement);
- a look at the what the law allows regarding the regulation of pornography and the establishing of a "Community Standard";
- an examination of the positive results from enforcement of zoning and obscenity laws (specifically looking at Oklahoma City, OK which strictly enforced obscenity during the late 1980s and experienced a 27% drop in the rape rate over 6 years);
- an assessment of law enforcement manpower and training necessary to be effective;
- analysis by Bruce Taylor (NLC) of related TN statutes that need to be amended or enacted by the State legislature to protect children and families from pornography-related vice crimes (i.e. making wholesaling a felony).

RECOMMENDATIONS: The Committee's recommendations included:

(1) Hamilton County - adopting a zoning ordinance to regulate SOBs; imposing reasonable gross receipt taxes on SOBs to fund additional enforcement; appropriating funds for a Special D.A. expert in prosecuting obscenity; developing a computer network in the Sheriff's department to track child sex abuse and obscenity cases; enforcing TN State law requiring persons arrested for prostitution to be tested for STDs; and establishing a committee to assist in the implementation of these recommendations.

(2) Hamilton County Sheriff's Department and Chattanooga Police Department - establishing a child sex abuse task force; educating the public about the relationship between child sex abuse and pornography.

(3) City of Chattanooga - strengthening zoning laws; continuing dispersement policy, which prohibits SOBs from clustering; revoking certain grandfather clause protections; hiring additional vice officers (currently only one officer); and regulating SOBs from locating within 500 feet of a business selling alcohol.

(4) Small Communities within Hamilton County – enacting SOB zoning laws to limit location of SOBs in the smaller communities; closely tracking child sex abuse and obscenity cases with Hamilton County Sheriff's Department.

(5) State of Tennessee – strengthening the State's Public Indecency and Obscenity laws; encouraging an officer exchange program to assist with local enforcement; encouraging Tennessee Bureau of Investigation to review organized crime activities and connections to the sex industry across the State; enacting legislation making it a felony for an adult to solicit sex from a minor, or to use pornography to solicit sex from a minor; enacting legislation giving local governments authority to restrict SOB operating hours; and revoking applicable licenses if an SOB sells pornography to a minor.

National Law Center Summary of the
AMARILLO, TEXAS
LAND USE STUDY
DATED SEPTEMBER 12, 1977

OVERVIEW: This Planning Department report cites several sources including national news magazines, "adult business" ordinances from other cities, an American Society of Planning Officials report and pertinent Supreme Court decisions. Lengthy explanation of the *Miller* test (with legal definitions), discussion of *Young v. American Mini Theatres*, and a comparison of the Boston and Detroit zoning models are included. The city defined "adult businesses" as taverns, lounges, lounges with semi-nude entertainment, and bookstores or theaters with publications featuring nudity and explicit sexual activities. (At the time, Amarillo had 3 such theaters and 4 bookstores with space for such publications).

FINDINGS: The police department provided an analysis showing that areas of concentrated "adult only" businesses had 2 1/2 times the street crime as the city average. The Planning Department concluded that concentrations of these businesses have detrimental effects on residential and commercial activities caused by 1) noise, lighting and traffic during late night hours 2) increased opportunity for street crimes and 3) the tendency of citizens to avoid such business areas. The study noted that lack of zoning regulations would lead to concentrations of sexually-oriented businesses (causing increased crime) or more such establishments locating near residential areas or family and juvenile oriented activity sites (churches, parks, etc.)

RECOMMENDATIONS: 1) Adult businesses locate 1,000 feet from each other. No recommended distance was specified from residential zones or family/juvenile activities. 2) City development of an amortization schedule and permit/licensing mechanism. 3) City regulation of signs and similar forms of advertising. 4) Vigorous enforcement of State Penal Code, especially relating to "Harmful to Minors." 5) City amendments prohibiting minors from viewing or purchasing sexually-oriented materials (enforced physical barriers).

National Law Center Summary of the
AUSTIN, TEXAS
LAND USE STUDY
DATED MAY 19, 1986

OVERVIEW: The report was the basis for developing an amendment to existing sexually-oriented business ordinances. At the time, 49 such businesses operated in Austin, mostly bookstores, theaters, massage parlors and topless bars. The study examined crime rates, property values, and trade area characteristics.

The report focused on sexually related crimes in four study areas (with sexually-oriented businesses) and four control areas (close to study areas and similar). Two study areas had one sexually-oriented business and the others had two such businesses. To determine the effects of these businesses on property values, the city sent surveys to 120 real estate appraising or landing firms (nearly half responded). For trade area characteristics, three businesses (a bookstore, theater and topless bar) were observed on a weekend night to determine customer addresses.

CRIME: Sexually related crime ranged from 177-482% higher in the four study areas than the city average. In the two study areas containing two sexually-oriented businesses, the rate was 66% higher than in the study areas with one such business. All control areas had crime rates near the city average.

REAL ESTATE: 88% said that a sexually-oriented business within one block of a residential area decreases the value of the homes (33% said depreciation would be at least 20%). Respondents also said such a business is a sign of neighborhood decline, making underwriters hesitant to approve the 90-95% financing most home buyers require. They said commercial property is also negatively effected by such businesses.

TRADE AREA CHARACTERISTICS: Of 81 license plates traced for owner address, only 3 lived within one mile of the sexually-oriented business. 44% were from outside Austin.

RECOMMENDATIONS: 1) Sexually-oriented businesses should be limited to highway or regionally-oriented zone districts. 2) Businesses should be dispersed to avoid concentration. 3) Conditional use permits should be required for these businesses.

National Law Center Summary of the
BEAUMONT, TEXAS
LAND USE STUDY
DATED SEPTEMBER 14, 1982

OVERVIEW: This report by the city Planning Department encourages amendments to existing "adult business" ordinances to include eating or drinking places featuring sexually-oriented entertainment (strippers, etc.). Zoning laws required "adult uses" to locate 500 ft. from residential areas; 300 ft. from any other adult bookstore, adult theater, bar, pool hall or liquor store; and 1,000 feet from a church, school, park, or recreational facility where minors congregate.

CRIME: Police verified that bars, taverns, and lounges (especially those with sexually-oriented entertainment) are frequent scenes of prostitution and the sale/use of narcotics. On the whole, all criminal activity was higher at sexually-oriented businesses.

RECOMMENDATIONS: 1) Add eating/drinking places that exclude minors (under Texas law), unless accompanied by a consenting parent, guardian or spouse. 2) Require specific permits for areas zoned as General Commercial-Multiple Family Dwelling Districts. 3) Reduce the required distance of sexually-oriented businesses from residential areas, schools, parks, and recreational facilities from 1,000 to 750 ft.

National Law Center Summary of the
CLEBURNE, TEXAS
LAND USE STUDY
DATED October 27, 1997

OVERVIEW: This is a report by Regina Atwell, City Attorney for the City of Cleburne, Texas, on how and why the city organized a joint, county-wide sexually-oriented business (SOB) task force. The purpose of this report is to educate and provide assistance to other jurisdictions on what the author considers important aspects of organizing, drafting and adopting an SOB ordinance or amendment to an SOB ordinance. In the introduction, Ms. Atwell cautions that although SOBs now appear more sophisticated and have begun to integrate into the mainstream, the secondary effects of these businesses are still harmful to the community. She offers a set of questions to help assess a local government's needs to enact or update its SOB ordinance. Also, she gives a brief legal history of zoning regulations for SOBs.

ORDINANCE ENACTMENT: The City of Cleburne decided to update its existing SOB ordinance in response to plans by Houston and Dallas to revise their SOB ordinances, as well as related concerns that Dallas-Ft. Worth SOBs might subsequently infiltrate the Cleburne area. After learning that the County did not have an SOB ordinance, county officials and officials from all cities in the county were invited to appoint task force members to join the Cleburne's SOB Task Force. Due to an excellent response from the county and many cities within the county, a Joint County-Wide SOB Task Force was formed, realizing that a united stand on this issue was imperative.

After researching the law, consulting experts, examining sample ordinances from other jurisdictions, thoroughly investigating SOBs and their negative secondary effects on the community, and deciding which time/place/manner regulations were most appropriate to protect the governmental interests of their area, the Joint Task Force presented a draft of an SOB Ordinance to their city and county officials. For all its functions, the Task Force relied on the following guidelines: (1) Drafting an ordinance is done by the city planning office, the city attorney and the ordinance review committee, in reliance on case studies discussing secondary effects of SOBs. It is important that the actual studies be presented to legislators; (2) Public hearings should be held to discuss the ordinance and a legislative record created to preserve testimony, studies, maps, and other evidence; (3) Draft a good "Preamble" indicating the council's concern with secondary effects of SOBs; (4) Keep legislative record clean from any suggestions that impermissible motives have influenced the legislative process; (5) Be sure the ordinance allows reasonable "alternative avenues of communication" for SOBs to locate, and include zoning maps with measurements and available sites for the record; and (6) If interested in enacting a licensing ordinance, be sure that it is narrowly drawn to serve legitimate state interests without restricting 1A speech of SOBs. The report also gives extensive tips for how to hold public hearings.

CONCLUSIONS: Regulation of SOBs, including licensing, was necessary to combat the detrimental effects of SOBs, including high crime rate, depreciated property values, and spread of communicable diseases. In addition, the Task Force recommended enforcement of public nuisance laws, diligent prosecution of obscenity and sexual offense cases, and specialized training for local police and sheriffs.

National Law Center Summary of the

DALLAS, TEXAS
LAND USE STUDY
DATED APRIL 29, 1997

This study, which is an update of a December 14, 1994 report prepared by The Malin Group, analyzes the effects of sexually-oriented businesses (SOBs), specifically those that offer or advertise live entertainment and operate as an adult cabaret, on the property values in the surrounding neighborhoods. The study concludes that there is a much greater impact on the surrounding neighborhoods when there is a high concentration of these businesses in one locale.

The study found that the presence of an SOB in an area can create a "dead zone" which is avoided by shoppers and families with children that do not want to be in areas that also have adult uses. Also, the late hours of operation combined with loitering by unsavory people in the area where SOBs are located, appear to lead to higher crime in the area. In fact, a look at police calls for service over a four year period (1993-1996) shows that SOBs were a major source of the calls. One area averaged more than one call to police per day, where there was a concentration of seven SOBs. In that same area there was a much higher incidence of sex crime arrests than in similar areas with none or fewer SOBs.

This study applied the conclusions of several other studies completed by New York, Phoenix, Indianapolis, Austin, and Los Angeles, finding that the methodology used was appropriate and the conclusions were sound. This study concludes that the finding in these other studies would not be any different in Dallas. The studies found that SOBs have negative secondary impacts such as increased crime rates, depreciation of property values, deterioration of community character and the quality of life. In addition, real estate brokers interviewed in the Dallas area reported that SOBs are "perceived to negatively affect nearby property values and decrease market values." There were similar results from surveys taken in New York City and a national survey completed in Indianapolis and Los Angeles. The study also showed that community residents were concerned that the business signs used by SOBs were out of keeping with neighborhood character and could expose minors to sexual images. In areas where SOBs were concentrated, the signs were larger more visible and more graphic, to compete for business.

The study shows that a concentration of SOBs has a higher negative impact on the surrounding communities than an area with one isolated SOB. When concentrated, SOBs tend to be a magnet for certain businesses such a pawn shops, gun stores, liquor stores, etc., while driving away more family-oriented businesses. It can be harder to rent or sell vacant land in areas where SOBs are located. In fact, the negative perceptions associated with these areas have a significant impact on declining property values, even where other negative effects of SOBs are difficult to measure. Interviews with owners of commercial property near SOBs confirmed that the loss of property value manifested in a variety of ways, including: increased operating costs, like additional security patrols, burglar alarms, and trash cleanup; properties selling at much lower sales prices; and extreme difficulty in leasing properties. Owners thought that if the SOBs were gone, their property values would increase.

National Law Center Summary of the

EL PASO, TEXAS
LAND USE STUDY
DATED SEPTEMBER 26, 1986

OVERVIEW: This study done by the Department of Planning, Research and Development, the City Attorney's Office, the Police Department Data Processing Division, and New Mexico State University involved one year of studying the impacts of SOBs on the El Paso area. A separate report by the New Mexico State University on perceived neighborhood problems is also included. The study is in response to resident concern about the negative impacts resulting from the significant growth in SOBs over the past ten years. The study results show that SOBs are an important variable in the deviation from normal rates for real estate market performance or crime. Also included in the study are detailed maps showing the locations of SOBs in El Paso and within the selected study areas.

FINDINGS: In studying the impacts caused by SOBs, three study areas (with SOBs located in the area) and three control areas (similar areas in size and population, but without SOBs) within El Paso were identified and studied. Using the results of the study areas and the attitudes of the residents living near SOBs, the study concluded that the following conditions existed within the study areas: (1) the housing base within the study area decreases substantially with the concentration of SOBs; (2) property values decrease for properties located within a 1-block radius of SOBs; (3) there is an increase in listings on the real estate market for properties located near SOBs; (4) the presence of SOBs results in a relative deterioration of the residential area of a neighborhood; (5) there is a significant increase in crime near SOBs; (6) the average crime rate in the study areas was 72% higher than the rate in the control areas; (7) sex-related crimes occurred more frequently in neighborhoods with even one SOB; (8) residents in the study areas perceived far greater neighborhood problems than residents in control areas; (9) residents in study areas had great fear of deterioration and crime than residents in control areas.

The study of perceived neighborhood problems done by the New Mexico State University revealed strong concern by residents of the impact of SOBs on children in the neighborhood. In addition, some respondents told survey interviewers they feared retaliation from SOBs if they gave information about problems related to SOBs. Overall, this survey showed a strong, consistent pattern of higher neighborhood crime, resident fear and resident dissatisfaction in the neighborhoods containing SOBs.

RECOMMENDATIONS: The main recommendations included that a zoning ordinance be adopted with distance requirements between SOBs and sensitive uses, that a licensing system be established, that annual inspections be required, that signage regulations be established, and that a penalty/fine section be included for violations.

National Law Center Summary of the
HOUSTON, TEXAS
LAND USE STUDY
DATED NOVEMBER 3, 1983

OVERVIEW: Report by the Committee on the Proposed Regulation of Sexually-Oriented Businesses determining the need and appropriate means of regulating such businesses. Four public hearings provided testimony from residents, business owners, realtors, appraisers, police, and psychologists. The committee and legal department then reviewed the transcripts and drafted a proposed ordinance. More hearings obtained public opinion on the proposal and the ordinance was refined for vote by the City Council.

TESTIMONY: The testimony was summarized into six broad premises: (1) The rights of individuals were affirmed. (2) Sexually-oriented businesses can exist with regulations that minimize their adverse effects. (3) The most important negative effects were on neighborhood protection, community enhancement, and property values. (4) Problems increased when these businesses were concentrated. (5) Such businesses contribute to criminal activities. (6) Enforcement of existing statutes was difficult.

ORDINANCE: (1) Required permits for sexually-oriented businesses (non-refundable $350 application fee). (2) Distance requirements: 750 ft. from a church or school; 1,000 ft. from other such businesses; 1,000 ft. radius from an area of 75% residential concentration. (3) Amortization period of 6 months that could be extended by the city indefinitely on the basis of evidence. (4) Revocation of permit for employing minors (under 17), blighting exterior appearance or signage, chronic criminal activity (3 convictions), and false permit information. (5) Age restrictions for entry.

National Law Center Summary of the
HOUSTON, TEXAS II
LAND USE STUDY
DATED JANUARY 7, 1986

OVERVIEW: This is a Legislative Report prepared by the Committee on the Regulation of Sexually-Oriented Businesses for the Houston City Council. This report was prepared to explain to the members of City Council, and to the public, why the Committee has recommended certain amendments to the "original ordinance." History behind the ordinance includes the formation by the Mayor of a committee of Council Members to determine the need for regulation of sexually-oriented businesses in Houston. This was in response to growing community concern over the proliferation of SOBs. After public hearings, the Legal Department reviewed testimony and research on the subject. A final version of the "original ordinance" was adopted in December 1983.

The Committee reconvened in 1985 to revisit several possible changes in the SOB ordinance, including whether *SOBs licensed to sell alcohol* should be subject to the distance provisions of the ordinance. Originally it appeared that State law preempted municipalities from regulating SOBs that sold alcoholic beverages. But in 1985 the Texas Legislature enabled municipalities to regulate businesses selling alcohol. The Committee also wanted to consider amendments regarding consolidating administrative responsibility for enforcement of the ordinance, and review possible procedural changes that would expedite and strengthen enforcement.

FINDINGS & CONCLUSIONS: The Committee found that the feedback from the hearing was similar to that received when passing the "original ordinance." Therefore the Committee reaffirmed those findings, including: (a) that SOBs have a substantial negative impact on their surrounding neighborhoods by adversely affecting area security, property values, potential for economic development, general quality of life, suitability for family activities, and stability of the neighborhood environment; (b) that problems created by SOBs increase in intensity if clustered together; and that it is reasonable to restrict exterior signage and features to protect properties in the vicinity; and finally, (c) that SOBs are likely contributory factors to criminal activities in and around the premises.

Additional findings and conclusions for the current amendments included: (a) that the proliferation of SOBs selling alcohol contributed to the City's difficulties in economic development (expert testimony explained that Houston had a "bad reputation," making it difficult to persuade employees to move and live there); (b) that all SOBs have adverse impacts on stability and attractiveness for investment in neighborhoods, whether residential or mixed use; (c) that the "original ordinance" had a substantially positive impact on encouraging neighborhood stability and economic development, as well as lowering the incidents of crime (prostitution, drug sales) and substantial traffic jams related to clustering of SOBs; (Example: A 10-block span on Westheimer Road had a cluster of 14 SOBs and suffered from tremendous amounts of criminal activity associated with them. The passing of the "original ordinance" served as an impetus for the area turning around. Today only there are only 4 SOBs and new economic development is occurring.); (d) that applying the existing distance requirements to SOBs that serve alcohol would not unduly, unfairly or improperly limit the ability of SOBs to locate within Houston, according to a study and testimony by a member of the Planning and Development Department; (e) that continuing an amortization provision instead of grandfathering in the existing SOBs selling alcohol

would be more effective, since there was recourse for those businesses showing they could not reasonably recoup their investment within the allotted 6-month amortization period; and (f) that testimonies of committee members and the Police Department Vice Squad revealed inadequacies and inconsistencies within the permitting and enforcement process that needed to be addressed.

RECOMMENDATIONS: The Committee recommended that (1) SOBs selling alcohol be included under the same distance limitations of the "original ordinance"; (2) that the principal responsibility for overseeing the permitting process be transferred from the Department of Finance and Administration to the Police Department; (3) that the processes for enforcement of the amended ordinance be streamlined; and (4) that licensed day care centers be added to churches and schools as a protected category.

National Law Center Summary of the
HOUSTON, TEXAS III
LAND USE STUDY
DATED JANUARY 7, 1991

OVERVIEW: This is a Legislative Report prepared by the Committee on the Regulation of Sexually-Oriented Businesses for the Houston City Council. This report was prepared and adopted by the City Council as part of the legislative record regarding proposed legislation to include adult bookstores and movie theaters within the ambit of the Houston City SOB Ordinance and to amend certain permit procedures. This report is intended to supplement the 1986 report issued when the City adopted an amendment to regulate premises serving alcoholic beverages (i.e. topless bars). All of the above amendments were based on changes in the Texas state enabling statute. This report relies in part on evidence gathered in 1983 and 1986 relating to adult bookstores and movie theaters.

FINDINGS: The Committee held several hearings regarding the secondary effects of adult bookstores and movie theaters on surrounding communities. The committee heard from expert witnesses, including representatives from the police department, real estate appraisal experts, local political scientists, and dozens of citizens. The overwhelming consensus of the evidence received indicated that adult bookstores and movie theaters exert the same sorts of impacts upon surrounding communities as other forms of adult uses currently regulated. The impacts included: reduction in property values, dehumanizing impact upon nearby social institutions (i.e. churches, schools, etc.) de-stabilization of community character, and psychological concerns regarding exposure to children. These findings were the basis for the Committee to begin formal consideration of regulating adult bookstores and movie theaters.

CONCERNS & RECOMMENDATIONS: The Committee had concerns about whether the change to the ordinance would require a revision in existing distance limitations (750 feet from sensitive uses and 1000 feet from other SOBs). It concluded that leaving the distance requirements the same would still allow more than an adequate number of sites for SOBs to locate. A one-time grandfathering provision would be available to those existing SOBs that could not quite comply with the 1000-ft requirement from other SOBs, but complied with all other locational requirements.

The Committee considered various revisions of the permit provisions to fix minor administrative problems raised by the Police Department, including sites applied for but not used, time extensions for signage issues, appeals, relocation, subdivision of property, compliance and "use of pasties", and miscellaneous areas of conformity with court decisions and city code.

The Committee considered addressing perceived loopholes in the ordinance that seemed to allow SOBs to achieve conspicuous exterior signage and premises, negatively affecting the surrounding community. However, conflicting public response to proposed amendments resulted in the Committee delaying any amendments on this issue till a future date.

HOUSTON, TEXAS III
(CONTINUED)

The Committee considered whether to add exposure of "male breasts" to the definition of "Specified Anatomical Areas", because of a Texas Supreme Court case examining this issue in light of Equal Rights. However, the Committee decided not to amend the ordinance based on expert testimony and lack of probative evidence based on actual experience in local SOBs that exposure to male breasts was considered sexually arousing.

At the second public hearing, which was poorly attended except for a few SOB business representatives, the Committee addressed various issues raised, including questions about amortization that the ordinance was being used to put SOBs out of business. The Committee maintained that the 6-month amortization was reasonable, given that extensions could be granted in certain circumstances. Also, the Committee affirmed that the ordinance does not regulate the substance of the speech, but only serves to minimize the secondary effects of adult uses on the community by addressing location, appearance, signage and related matters regarding SOBs.

CONCLUSIONS: The Committee recommended the ordinance as a logical step to complete the scope of the City's land use controls for adult uses.

National Law Center Summary of the

OVERVIEW: This is a summary of a legislative report prepared by the Sexually-Oriented Business Revision Committee for the Houston City Council, analyzing the strengths and weaknesses of the City's current SOB ordinance, and making recommendations for amendments and additions principally pertaining to employee licensing, lighting configurations, location requirements, prohibition of "glory holes," elimination of closed-off areas, public notification of SOB applications, clear lines of vision inside SOBs, and dancer "no-touch" policies. This report summary includes discussion of prior regulation efforts, testimony by HPD Vice Department, citizen correspondence, industry memos, legal research, and summaries of public testimony.

SUMMARY: This study was a result of increasing community concern over increasing proliferation of SOBs under the existing SOB ordinance and the HPD's need for better control over increasingly repetitive serious violations at numerous SOBs. The Committee made the following findings: (1) Due to criminal activity associated with SOBs, licenses should be required for all SOB employees (requiring criminal background investigations); (2) There are obstacles to successful enforcement of public lewdness, prostitution, indecent exposure, and other criminal activities (i.e. entertainers can detect when a patron is an undercover cop); (3) "Glory holes" between enclosed booths promote anonymous sex and facilitate the spread of disease, so prohibition of these openings was recommended; (4) The lack of a clear line of vision between manager's stations and booths or secluded areas (V IP rooms) encourages lewd behavior and sexual contact (also difficult to observe during inspections); (5) Multi-family tracts were being counted as one tract, so new formula devised based on homeowners' property size; (6) Inadequate lighting in SOBs makes it difficult for SOB managers and police to monitor illegal activities, so minimum requirements for "exit" signs in Uniform Building Code was suggested; (7) Locked rooms within SOBs are usually fronts for prostitution, so prohibition of enclosed rooms recommended; (8) Public and expert testimony requested the inclusion of "public parks" as a sensitive use in the zoning location ordinance; (9) Repeated testimony requested notification to public regarding pending SOB permits, so posting of a sign notifying of pending permit was required; and (10) Continuing amortization provisions was preferable to grandfathering in those SOBs not in compliance with the amended ordinance (i.e. 6 months plus extensions for recouping investment).

CONCLUSIONS: The Committee concluded that strengthening the ordinance would achieve expedited revocation process, accountability to SOB employees through licensing, aid to police investigations by improved lighting and configurations, protections to the community by increasing distance requirements, and reduction of disease from anonymous spread by eliminating "glory holes."

National Law Center Summary of the
NEWPORT NEWS, VIRGINIA
LAND USE STUDY
DATED MARCH, 1996

OVERVIEW: As of November, 1995, there were 31 "adult use" establishments: 14 "adult entertainment" establishments ("exotic dancing girls", "go-go" bars, "gentlemen's clubs", etc.); 8 "adult book/video stores" (outlets selling and renting pornographic magazines, videos, and sex devices); and 9 night clubs (music, dancing, or other live entertainment). Of the 31 uses, 17 are in the General Commercial zone, 5 in the Regional Business District zone, 7 in the Retail Commercial zone, and 2 are in the Light Industrial zone. They are dispersed along two streets with a few clusters. A proposed ordinance would require "adult uses" to be 500 feet from other "adult" uses and to locate at least 500 feet away from sensitive uses (churches, schools, homes, etc.), with no distance limits in the downtown zone.

CRIME: The Police Department researched calls for police responses to the 31 businesses, by address, for the period of January 1, 1994, to October 31, 1995, with a cross-check to assure accuracy of the calls to the correct address. The effects of concentrations of "adult uses" were also checked by comparing study areas with control areas. Study area 1, with 4 "adult" uses, had 81% more police calls than nearby control area 1. When adjusted for population differences, the study area had 57% higher police calls and 40% higher crimes than the control area. For the 31 sexually-oriented businesses, there were 425 calls of those: 65% were to strip clubs and go-go bars, averaging 23 calls per "adult entertainment" business; night clubs had 30% of the calls, averaging 14 calls per business; and "adult" bookstores and video stores had 4%, averaging 2 calls per business; . The reasons for the calls included: 25 assaults; 18 malicious destructions of property; 39 intoxications; 60 fights; and 151 disorderly conduct incidents. A selected list of restaurants with ABC licenses averaged 11 calls for service during the same period. One particular downtown "adult entertainment" establishment had 116.7 "police calls per 100 occupancy" compared to a regular restaurant, non-adult use, located across the street, with 50 calls per 100 occupancy.

MERCHANTS/REAL ESTATE: A very high percentage of realtors indicated that having "adult uses" nearby can reduce the number of people interested in occupying a property by 20 to 30%; would hurt property values and resale of adjacent residential property. Realtors expressed concern for personal safety, increased crime, noise, strangers in the neighborhood, and parking problems. Merchants associations surveyed supported strengthening the city's regulations of "adult uses" and expressed a common concern that additional "adult uses" would contribute to deterioration of their areas.

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National Law Center Summary of the
BELLEVUE, WASHINGTON
LAND USE STUDY
DATED FEBRUARY, 1988

OVERVIEW: This is a compilation of materials prepared for the City Council Members of Bellevue, Washington for use in enacting an SOB zoning ordinance. The study includes general information about regulation of SOBs, secondary impacts from SOBs, experiences from nearby communities, description of Bellevue's current situation, and recommendations for appropriate forms of regulation of SOBs within Bellevue. Also included is a bibliography of land use studies, articles, correspondence and reference materials from adjacent municipalities made available for council members' use. Minutes from two public hearings about regulation of SOBs, maps showing the location of current SOBS, and memos from the planning department are also included.

FINDINGS: The study begins by explaining the legal basis history behind regulating SOBs. Existing provisions in the State and local codes relating to obscenity or licensing are mentioned. The study notes that the goal of regulating SOBs is to mitigate the secondary impacts of these uses in the communities. It concludes that the implications of the data and experience studied in other jurisdictions are significant to Bellevue. It discusses the link between crime rates and areas with concentrations of SOBs, as revealed by police research, noting the "skid row" effect that occurred in Detroit, and the higher percentages of crime documented in Cleveland (in the 1970's), and other cities. The study noted that while police crime statistics showed a strong connection between criminal activity and some adult uses, there is no clear consensus (in psychological studies) that exposure to pornography causes criminal behavior. The study also discusses the impact to property values. It notes a Kent survey of real estate appraisers that revealed an overall consensus that the impact on residential property values is probably negative. In Bellevue, the three existing SOBs are widely dispersed and centrally located in commercial areas, which have thus far not experienced deterioration in surrounding structures and areas. Based on a Puget Sound study, it was noted that SOBs are incompatible with residential, educational and religious uses. *The Northend Cinema v. Seattle* case agreed that the goal of preserving the quality of residential neighborhoods by prohibiting disruptive adult uses was a valid, substantial interest. This case also points out that residents' perceptions may be a major factor in siting SOBs. Overall the study concludes that research has shown SOBS may lead to the secondary effects mentioned above, but it is not possible to say definitely in each case. The study goes on to review regulations adopted by different jurisdictions, analyzing approaches of dispersal and concentration of SOBs. The study enumerates several sections of code showing public policy concerns to be considered when deciding Bellevue's approach to regulating SOBs. Currently, the three existing SOBs in Bellevue show no particular negative impacts on the surrounding community, and are widely dispersed from each other and other sensitive uses (residences, etc). However, there is not guarantee that future concentrations of SOBs will not occur.

RECOMMENDATIONS: The study recommended the adoption of a modified dispersal/concentration approach (i.e. dispersal within CB, OLB and CBD zones), with a 600-foot distance limitation between SOBs and other sensitive uses.

National Law Center Summary of the
DES MOINES, WASHINGTON
LAND USE STUDY
DATED AUGUST, 1984

OVERVIEW: This land use study includes an independent report prepared by R. W. Thorpe & Associates, Inc for the Des Moines City Council, and a report from the City Administration on the impacts of Sexually-Oriented Businesses (SOBs) on the area. Appendices include: a theater admission report, a 1978 Des Moines Community opinion survey, a copy of a Des Moines ordinance requiring an impact study of SOBs on the city, a list of criminal incidents related to the adult theater, a business activity chart of businesses adjacent to the adult theater, a copy *of Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (1978), and transcripts of the hearing and testimonies.

FINDINGS: When the study was made, Des Moines had an adult theater operating in the Revitalization area/central business district of the city. It had been operating as such since the 1970's. The Administration report noted a 1978 Community Opinion Survey reporting that the majority of residents in the area were opposed to the theater. The Administration's report also lists several negative impacts caused by the presence of the adult theater in the community, including: decreased property values, refusal to shop in stores adjacent to the adult theatre, noticeable deterioration of the district, deferred maintenance, parking and traffic problems, attraction of transients, increased crime, and interference with parental responsibilities for children. As a result, the study noted that there had been numerous business failures and high business turnover in the commercial areas near the adult theater. Public testimony, staff studies and the independent study all concluded that the continued presence of the adult theater would nullify any investment in the revitalization efforts of downtown Des Moines. The study examined efforts to regulate SOBs in North Carolina, Detroit, Maryland, and Seattle. The Administration's study took particular note of Seattle's zoning ordinance, which restricted location of SOBs to a certain part of the city. It was upheld by that state's highest court, which said the city's important interest in regulating the use of its property for commercial purposes was sufficient justification.

The independent study submitted by R. W. Thorpe & Associates, Inc for the Des Moines City Council mostly focused on and made comparisons to studies done in cities in the western part of Washington State. However, the study also looked at other jurisdictions like Boston, and New Orleans. It looks at various negative impacts on the community including crime, decline in adjacent land uses, economic impact (decreased property values), and community impact (incompatibility with sensitive uses and areas where minors may meet collectively). It discussed differing approaches to regulating SOBs, including clustering and dispersal.

RECOMMENDATIONS: The Administration's report, based partly on the independent study, concluded that a zoning ordinance should be enacted, locating adult businesses in the CG zone along Highway 99. This would keep SOBs away from the central business district that the city was trying to revitalize and maintain a family friendly atmosphere there. Dispersal of SOBs was also recommended to minimize impact of crime potential volatile situations associated with close proximity of SOBs.

National Law Center Summary of the
SEATTLE, WASHINGTON
LAND USE STUDY
DATED MARCH 24, 1989

OVERVIEW: The report concerns a proposed amendment to add topless dance halls to existing land use regulations for "adult entertainment establishments." Seattle had eight such dance halls (termed "adult cabarets"), six established since 1987. The study relies on reports from a number of cities, including Indianapolis, Los Angeles, Phoenix, Austin and Cleveland.

FINDINGS: The increased number of cabarets resulted in citizen complaints, including phone calls, letters (from individuals and merchants associations), and several petitions with hundreds of signatures. Protests cited decreased property values; increased insurance rates; fears of burglary, vandalism, rape, assaults, drugs, and prostitution; and overall neighborhood deterioration. The report notes that patrons of these cabarets most often are not residents of nearby neighborhoods. Without community identity, behavior is less inhibited. Increased police calls to a business, sirens, and traffic hazards from police and emergency vehicles are not conducive to healthy business and residential environments.

RECOMMENDATIONS: Since city zoning policy is based on the compatibility of businesses, the report recommends that the cabarets locate in the same zones as "adult motion picture theaters." This plan allows about 130 acres for such businesses to locate throughout the city.

National Law Center Summary of the
ST. CROIX CO., WISCONSIN
LAND USE STUDY
DATED SEPTEMBER, 1993

OVERVIEW: At the time the St. Croix County Planning Department did this study, the County had two adult cabarets, but did not have a problem with concentration of sexually-oriented businesses (SOBs). The study acknowledges that SOB zoning ordinances have generally been upheld by the courts as constitutional and suggests the County consider following the lead of other communities who have enacted similar ordinances. The main concern surrounded possible growth of SOBs resulting from future plans for an interstate highway system linking St. Croix County and the great Twin Cities metro area. To preserve the County's "quality of life" the study indicates the need to take preventative vs. after-the-fact action.

SUMMARY: The study notes the continued growth of the SOB industry and analyzes the economic, physical, and social impact it has on the community. It examines documented economic impact of SOBs in Los Angeles, CA, Detroit, MI, Beaumont, TX, and Indianapolis, IN, noting that concentrations of SOBs results in decreased property values, rental values, and rentability/salability. General economic decline is also associated with concentration of SOBs. Residents surveyed in other studies perceived a less negative impact on property values of residential and commercial areas the further away SOBs were located. The study also noted that economic decline caused physical deterioration and blight. During night time operation hours, traffic congestion and noise glare could also be problems. Social impacts studied included negative effects on morality, crime, community reputation and quality of life. It noted the 1970 Commission on Obscenity and Pornography saying porn has a deleterious effect upon the individual morality of American citizens. It sites the Phoenix, AZ study reporting a tremendous increase in crime in three study areas containing SOBs (43% more property crimes, 4% more violent crimes, and over 500% more sex crimes). The study mentions Justice Powell's quote *in Young v. American Mini-Theatres* regarding using zoning to protect "quality of life."

The study analyzes different zoning techniques, including dispersal and concentration of SOBs, and their constitutionality. It also discusses the use of "special use" and "special exception" permits. Other regulatory techniques discussed include licensing ordinances, active law enforcement, sign regulations, and nuisance provisions. The study includes detailed examples of SOB definitions, a proposed zoning ordinance, and a bibliography of the sources used for this study.

RECOMMENDATIONS: The study recommended that the county adopt a zoning ordinance using the dispersal technique. It also suggested the county explore the possibility of licensing SOBs.

National Law Center Summary of the
ROME, GEORGIA CITY COMMISSION
LAND USE STUDY
DATED MARCH 6, 1995

OVERVIEW: Captain Marshall Smith, the Commander of the Detective Division of Rome (GA) City Police Department presented a report to the City Commission in respect the effects of crime rates surrounding adult entertainment and the impacts on other Georgia communities.

SUMMARY OF THE REPORT: The Captain reported several Georgia communities had sufficient increases of reported crimes in several Georgia communities. Specifically, Captain Smith reported the following:

- An investigator in La Grange, Georgia stated that after an adult entertainment business opened in this community, there was an increase in the number of calls. Specifically, the La Grange Police Department responded to 106 calls relating to one adult club in the year 1994.

- The Augusta Police Department reported that for a two-year period between January of 1993 and December 1994, the Police Department responded to 971 calls from three different adult entertainment businesses. The calls for service ranged from thefts and fights to aggravated assaults with weapons involved.

- The Whitfield County Sheriff's Office stated they have had instances involving prostitution, drugs, thefts, and aggravated assaults involving discharging of firearms.

National Law Center Summary of the
THE CITY OF SAINT MARYS, GEORGIA
DIGEST OF RESEARCH ON THE EVIDENCES OF RELATIONSHIPS BETWEEN ADULT ORIENTATED BUSINESSES AND COMMUNITY CRIME AND DISORDER

The Police Department of Saint Marys, Georgia, was requested to gather evidence relating to the evidence of the relationship between crime and adult businesses, if any.

THE REPORT: The report summarizes studies from across the United States and specifically in the State of Georgia with respect to the adverse secondary effects of all adult oriented businesses in those communities. The report took those various studies together and other sources of evidence and found that the amount of crime and the type of crime, especially sexual related crimes, would increase at statistically significant levels with the introduction of adult oriented businesses in their community.

National Law Center Summary of the
THE ADAMS COUNTY SHERIFF'S DEPARTMENT
ADAMS COUNTY NUDE ENTERTAINMENT STUDY
DATED JUNE 20, 1991

OVERVIEW: The Adams County Sheriff's Department performed research related to a proposed nude entertainment ordinance for Adams County, Colorado. In this study six representative locations were selected at random representing six different areas in the unincorporated portions of Adams County.

SUMMARY OF THE REPORT:

- The study in April of 1988 determined that 76 percent of the patronage of adult businesses in their community were transient, coming from counties other than Adams County, Colorado.

- A one-block area of the community was selected because it contained two nude entertainment establishments, a Seven Eleven, a convenience store, a neighborhood tavern, three fast food businesses, and a gas station. In this block in 1986, 24 crimes were reported from the area of which 83 percent were attributed to the two nude entertainment establishments.

- In 1987 the same area was surveyed and 28 crimes were reported, 93 percent of which were attributed to the two adult businesses. It was also noted in this block that 61 percent of the crimes occurred between 4:00 p.m. and 12:00 p.m.

- A study of another block, which included three adult book stores, two topless night clubs, one neighborhood bar, one liquor store, and one beer outlet found that during 1986, 55 crimes were reported compared to 63 crimes in 1987, a 15 percent increase.

- In a more rural and isolated section of the county where a topless night club was located, 13 crimes were reported in 1986, compared to 18 crimes in 1987, a 39 percent increase.

- This study was updated looking at 1990 statistics and reported no significant changes in these areas with a few exceptions. One such exception was that one block in question in the original study reported crimes increased by 900 percent of which a 290 percent increase was attributed to adult businesses which offered nude entertainment and/or alcohol.

National Law Center Summary of the
MINNESOTA ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATIONS OF SEXUALLY-ORIENTED BUSINESSES

DATED JUNE 6, 1989

OVERVIEW: The Attorney General of the State of Minnesota created a working group with respect to the regulation of adult businesses. The working group for a testimony conducted briefings on the impact of adult businesses on crime and communities with methods available to reduce the secondary effects of adult businesses. Additional research was done to evaluate strategy use in other states and cities and the ramifications of those strategies.

FINDINGS RECOMMENDATIONS:

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

2. The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecutor offices by making such cooperation a condition for receiving any such grant funds.

3. The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.

4. Obscenity prosecutions should begin with cases involving those materials which most flagrantly offend community standards.

5. The Legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion, or receiving profit from prostitution and operation of a "disorderly house."

6. The Legislature should consider the potential for a RICO-like statute with an obscenity predicate.

7. Prosecutors should use the public nuisance statute to enjoin operations of sexually-oriented businesses which repeatedly violate laws pertaining to prostitution, gambling, or operating a disorderly house.

8. Communities should document findings of adverse secondary effects of sexually-oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

National Law Center Summary of the MINNESOTA ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATIONS OF SEXUALLY-ORIENTED BUSINESSES

(CONTINUED)

9. To reduce the adverse effects of sexually-oriented businesses, communities should adopt zoning regulations which set distance requirements between sexually-oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

10. To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually-oriented businesses and between sexually-oriented businesses and liquor establishments, and should consider restricting sexually-oriented businesses to one use per building.

11. Communities should require existing businesses to comply with new zoning or other regulation of sexually-oriented businesses within a reasonable time so that prior uses will conform to new laws.

12. Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually-oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

13. Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually-oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

14. Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually-oriented businesses, including but not limited to regulations of signage and exterior design of such businesses, and should enforce state law requiring sealed wrappers and opaque covers on sexually-oriented material.

National Law Center Summary of the REPORT TO THE CITY OF ATTORNEY OF KENNEDALE, TEXAS, ON CRIME-RELATED SECONDARY EFFECTS OF ADULT BUSINESSES

The City Attorney for Kennedale, Texas retained Professor Richard McCleary to express an opinion as to four questions relating to litigation in which the city was involved regarding sexually-oriented businesses (SOBs). Specifically, Professor McCleary reported on the crime-related secondary effects of SOBs.

The following are the questions asked and opinions rendered by Dr. McCleary:

Question 1: Do SOBs pose significant ambient public safety hazards?

Opinion 1: As a class, SOBs pose a significant ambient public safety hazards. These hazards involve not only "victimless" crimes (prostitution, e.g.) plus, also, "serious" crimes, (robbery, e.g.) and "opportunistic" crimes, (vandalism, e.g.) that are associated with vice.

Question 2: How valid is the empirical evidence that SOBs pose significant public safety hazards?

Opinion 2: The criminogenic nature of SOBs is a scientific fact. This opinion is based on two considerations. First, strong, empirically-validated criminological theory predicts that crime victimization risks will be higher around SOB sites as a consequence of the normal commercial activities at the sight. Second, this theoretically expected secondary effect has been observed in a diverse range of locations, circumstances, and times. Although the magnitude and nature of the observed crime-related secondary effect varies from case to case, every adequately designed study has observed and reported a large, significant effect.

Question 3: Do SOBs that provide material for off-premise-only use pose smaller ambient public safety hazards than other SOBs?

Opinion 3: To the extent that the on premise and off premise only SOB's draw similar patrons from similarly wide catchment areas, criminological theory predicts similar ambient crime risks. This theoretical expectation is supported by the data.

Question 4: Can the ambient public safety hazard associated with SOBs be mitigated by "hours-of-operation" regulations?

Opinion 4: The ambient public safety hazard (or crime victimization risk) can be mitigated by regulation, including hours-of-operation regulations.

National Law Center Summary of the
REPORT OF DR. RICHARD MCCLEARY TO EFFINGHAM COUNTY, EFFINGHAM, ILLINOIS

OVERVIEW: Dr. McCleary was asked to review materials sent to him by the Effingham County State's Attorney's office and the empirical studies of crime-related secondary effects. Dr. McCleary provided his opinions with respect crime-related secondary effects.

FINDINGS AND OPINIONS: Dr. McCleary offered the following opinions to the stated questions and those opinions are stated herein:

Question 1: Do sexually-oriented businesses, as a general class, pose significant ambient public safety hazards?

Opinion 1: As a class, SOBs pose a significant ambient public safety hazards. These hazards involve not only "victimless" crimes (prostitution, e.g.) plus, also, "serious" crimes," (robbery, e.g.) and "opportunistic" crimes, (vandalism, e.g.) that are associated with vice. The ambient public safety hazard (for crime victimization risks) can be ameliorated by regulation.

Question 2: Given an affirmative answer to the first question, how valid is the evidence upon which this opinion is based?

Opinion 2: The criminogenic nature of SOBs is a scientific fact. This opinion is based on two considerations. First, strong, empirically-validated criminological theory predicts that crime victimization risks will be higher around sexually-oriented business sites, and as a consequence of the normal commercial activities at the site. Second, this theoretically expected secondary effect has been observed in a diverse range of locations, circumstances, and times. Although the magnitude and nature of the observed crime-related secondary effect varies from case to case, every adequately designed study has observed and reported a large, significant effect.

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REGULATING ADULT ENTERTAINMENT:

Daniel Olson, Assistant Legal Counsel

The phrase "adult entertainment" might be used to describe a women's slow-pitch softball tournament or a men's horseshoe competition but these are not the circumstances to which local officials usually apply it. Rather, "adult entertainment" is commonly used to broadly describe a range of communicative conduct (dancing) or material (books, magazines, videos) with a substantial erotic or sexual character. Thus, a city council or village board member who learns that "adult entertainment" will soon be part of their community does not immediately think about preparing a letter thanking the provider.

Sometimes, the news of commercial adult entertainment activity precedes the adoption of any local sexually-oriented business (SOB) or adult-oriented business (AOB) regulation. This prompts contact with the municipal attorney who is asked what regulations can be implemented after-the-fact. The response leaves the local official unsatisfied because she is advised that the books, magazines, movies, dances and other communicative materials or conduct sold or offered by the SOB or AOB are constitutionally protected speech, provided they are not obscene communications under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973) an codified in Wis. Stat. sec. 944.21, which severely diminishes the prospect of meaningful after-the-fact regulation.

The constitutionally protected status of non-obscene adult entertainment speech creates some tension for local officials. Despite a substantial societal presence, it is disfavored speech and the personal or political tendency of a local official is to try and keep adult entertainment speech businesses out of their community. However, she must act contrary to that tendency because there is no legally permissible method to exclude all adult entertainment speech businesses from a city or village. Total bans on adult entertainment speech businesses are unconstitutional. And, implementing policies and regulations that seek such a goal will expose the municipality and the official to significant financial liability. Therefore, this comment seeks to advance effective and legally permissible alternatives by identifying constitutional adult entertainment regulation systems, key constitutional principles and important unresolved issues.

REGULATION SYSTEMS

Zoning is probably the most common form of adult entertainment business regulation. There are two types of zoning utilized. The first is "dispersion zoning" which requires specified separation distances between adult entertainment businesses as well as other types of uses such as residences, schools, etc. The second is "concentration zoning" also known as "red light district" zoning which seeks to concentrate adult entertainment businesses to particular areas of a community by prohibiting their location anywhere but selected areas. Both methods are constitutionally permissible "time, place, and manner" restrictions of protected speech, provided the implementing regulations satisfy applicable constitutional principles and rules.

The second common regulation system is licensing. In general, such systems establish requirements for owners and employees of adult establishments. These requirements focus on how the adult entertainment business is operated rather than where it is located. Thus, they differ from zoning requirements, which apply to the physical property involved irrespective of the owners or operators, in that they establish management requirements on owners/operators. However,

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Whereas, the hospitality and friendliness of Appleton officials and citizens have contributed immeasurably to the success of this conference; and

Whereas, it is proper and fitting that the assembled delegates of the League of Wisconsin Municipalities should duly recognize the hospitality which has been so graciously afforded.

Now, Therefore Be It Resolved that the League of Wisconsin Municipalities in conference assembled on October 15, do hereby express their sincere appreciation for the contributions of the mayor, common council and other officials of the City of Appleton and its residents to the success of this 2009 Annual League Conference.

Resolution No. 2009-4

Supporting Legislation Creating Renewable Resource Credits for Electric Providers that Use Renewable Energy Applications like Solar Light Pipe Technology

Whereas, Wisconsin's Renewable Portfolio Standard (RPS) does not allow Wisconsin utilities to take full advantage of Wisconsin's renewable energy potential; and

Whereas, companion bills Senate Bill 273 and Assembly Bill 401 – relating to creation of renewable resource credits by electric providers and granting rule-making authority – fixes this problem by allowing Wisconsin utilities to employ direct use renewable energy to meet their RPS obligations; and

Whereas, direct use renewable energy is the purest form of renewable energy available; and,

Whereas, direct use renewable energy applications, such as solar water heating and solar light pipe technology, use renewable energy resources to displace electricity that is generated from fossil fuels thereby reducing harmful greenhouse gas emissions that harm our environment and allowing Wisconsin businesses and ratepayers to save significant amounts of money; and,

Whereas, direct use renewable energy will help create "green" manufacturing jobs in our state and put hundreds of Wisconsin construction workers, roofers, and electricians to work installing direct use renewable energy systems across the state.

Now, Therefore, Be It Resolved, that the League of Wisconsin Municipalities in conference assembled on October 15, 2009, urges the Legislature and Governor to enact SB 273/AB 401, reducing the need for generating energy from fossil fuels by replacing those fossil fuels with clean, renewable energy sources; and creating hundreds of good paying jobs in the process.

Resolutions Committee

Delegate	District
Charles Kuen, President, Kimberly	1
Michael Walsh, Mayor, De Pere	2
Terry Witkowski, Alderman, Milwaukee	3
Ashanti Hamilton, Alderman, Milwaukee	4
Neil Palmer, President, Elm Grove	5
Joe Davis, Alderman, Milwaukee	6
Al Richards Mayor, St. Francis	7
Michael West, President, Fox Point	8
Dianne Reese, Mayor, New Holstein	9
Mark Dahlberg, Trustee, Grantsburg	10
Larry Nelson, Mayor, Waukesha	11
Doug Williams, Mayor, Merrill	12
Fred Smith, Alderman, Watertown	13
Brian Smith, Mayor, Waupaca	14
Larry N. Arft, Manager, Beloit	15
Robb Kuhl, Mayor, Monona	16
Jerry Wehrle, Mayor, Lancaster	17
Tom Herre, Manager, Fond du Lac	18
Tim Hanna, Mayor, Appleton	19
Scott Mittelsteadt, President, Jackson	20
Steven Jansen, President, Sturtevant	21
Michael Pollocoff, Administrator, Pleasant Prairie	22
David Jankoski, Mayor, Stanley	23
Andrew Halverson, Mayor, Stevens Point	24
Larry MacDonald, Mayor, Bayfield	25
Michael Schumacher, Council Member, Madison	26
Thomas Cothard, Alderman, Evansville	27
John Hermes, President, Greendale	28
Neal Torney, President, Rothschild	29
Keith Chambers, President, Pulaski	30
Delton Thorson, President, Augusta	31
Mark Seitz, Trustee, Holmen	32
Jeff Speaker, Mayor, Brookfield	33

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Legal Principles and Issues

as with zoning requirements, there are important constitutional principles restricting adult entertainment business licensing systems that must be followed.

Constitutional Principles

It is well established law that constitutional protection extends to books, magazines, photographs, sculptures, paintings, movies, speeches, plays, dances and other forms of communication that primarily convey an erotic or sexual message and are not deemed obscene under the law. Thus, effective adult entertainment speech regulation hinges on compliance with the principles or rules that define its constitutionally protected status.

The Content Neutrality Principle. When analyzing speech regulations, courts distinguish between content-neutral and content-based regulations. Content-neutral regulations of speech are not concerned with the nature of the speech affected by the regulation. For example, a regulation that requires all signs in residential neighborhoods to be located at least three feet from a lot line is content-neutral. The regulation applies irrespective of whether the sign message is about a garage sale or a political candidate. In contrast, content-based regulations distinguish favored speech from disfavored speech on the basis of the ideas expressed. An ordinance that places time limits on political signs is one example because the ordinance is concerned with the sign's message.

Content-based regulations are subject to strict judicial scrutiny and are presumed invalid.[1] This presumption may be overcome only by a showing that the regulation is "necessary to serve a compelling state interest and employs the least restrictive means to accomplish it."[2]

There are few judicially recognized "compelling" governmental interests and prohibiting the expression of an idea simply because society finds the idea itself offensive or disagreeable is not one of them. Thus, it is very rare for a court to find a content-based speech regulation valid and adult entertainment speech regulation cannot be based on the fact that a local official or her community is offended by such communication.

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> "It is well established that content-based regulations are subject to strict judicial scrutiny and are presumed invalid."

1. *City of Renton v. Playtime Theaters, Inc.* 475 U.S. 41, 47 (1986).
2. *See, e.g., Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

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> "There is an important exception to the general rule that strict scrutiny applies to content-based regulations. Some time, place or manner regulations are treated as content-neutral, even though they are content-based."

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Upon examination, it is apparent that adult entertainment speech regulations are content-based. They universally specify coverage of only particular types of speech such as live performances characterized by the exposure of specified anatomical areas or by specified sexual activities; or films, motion pictures, video cassettes, slides, photographic reproductions, or other image producing devices that are characterized by the depiction or description of specified anatomical areas or specified sexual activities; or exotic or erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customers. These adult entertainment speech regulations target certain communicative activities because of their erotic or sexual content. Thus, they could be subjected to the tough strict scrutiny standard by our courts but they are not.

There is an important exception to the general rule that strict scrutiny applies to content-based regulations. Some time, place or manner regulations are treated as content-neutral, even though they are content-based.[3]

Time, place, or manner restrictions are those government uses to direct speech through certain avenues rather than others. These include restrictions on operating hours, the locations within the community it might occur and specifying open video booths, separation distances between patrons and dancers and other limitations on the way erotic or sexual messages can be conveyed. Significantly, such restrictions are only subject to content-neutral intermediate scrutiny if they "are **justified** without reference to the content of the regulated speech."[4] "Such justification is present if the regulation's predominant concern is with the 'secondary effects' of the regulated speech, rather than with the content of that speech."[5]

Accordingly, content-based time, place or manner restrictions imposed on adult entertainment speech by municipalities are not required to satisfy the more demanding **compelling** governmental interest test associated with content-based speech regulations, so long as the predominant concern of the regulation is controlling adverse secondary effects. However, such regulations cannot go too far and must also be narrowly tailored to serve the government's significant interest in curbing adverse secondary effects.[6] And, finally, they must leave open "reasonable alternative avenues" for "adult entertainment" speech communication.[7]

It is important to note that there are two lines of cases in the adult entertainment speech context with slightly different tests. The *Renton* line deals with zoning regulations aimed at dispersing adult entertainment establishments. The other line, represented by *United States v. O'Brien*, 391 U.S. 367

3. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).
4. *City of Renton*, 475 U.S. at 48.
5. *Id.* at 47.
6. *Id.*
7. *Id.*

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(1968), deals with regulations directed at expressive conduct such as dancing. However, lower courts recognize that the analytical differences between the tests in each line are not significant.[8] Given that zoning is arguably the more prevalent means for controlling adult entertainment speech business and the similarity between the tests, this comment will focus on the three *Renton* test elements.

Secondary Effects.
Recognized adverse secondary effects connected with adult entertainment include increased crime, decreased property values, prostitution, illicit sex, sexually transmitted disease and urban blight.[9] It is not constitutionally necessary for any local regulation to be based on all or more than one adverse secondary effect associated with adult entertainment speech. Instead, the secondary effects justification for a content-based time, place and manner regulation of "adult entertainment" speech is present when the "municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance."[10]

When evaluating the sufficiency of an asserted connection between speech and secondary effects, the courts must "examine evidence concerning regulated speech and secondary effects."[11] Thus, local officials must be able to identify for the courts the secondary effects evidence they relied upon for their regulation decision.

Municipalities are not, however, required to produce their own independent evidence of secondary effects. Rather, a municipality may rely on studies performed elsewhere "so long as whatever evidence the [municipality] relies upon is reasonably believed to be relevant to the problem that [it] addresses."[12] However, the Supreme Court cautioned that even though municipalities are not required to independently produce secondary effects evidence, "[t]his is not to say that a municipality can get away with shoddy data or reasoning."[13] For the regulation to be upheld, "[t]he municipality's evidence must fairly support the municipality's rationale for its ordinance."[14] Thus, there must be a reasonable nexus between a municipality's adult entertainment regulation and the secondary effects evidence upon which it is based.

Narrowly Tailored.
The adverse secondary effects associated with adult entertainment speech provides the constitutionally permissible grounds for content-based time, place and manner regulations. The permissible scope of such regulations is provided by the "narrowly tailored" limitation.

At one level, the "narrowly tailored" requirement is intertwined with the secondary effects justification. An adult entertainment speech ordinance is not narrowly tailored if it captures speech that does not generate the adverse secondary effects linked to erotic speech.[15] Thus, local officials must draft regulations that are not overinclusive to avoid violating the "narrowly tailored" requirement.[16]

On another level, the "narrowly tailored" analysis is not strictly connected to the secondary effects rationale. Here the concern is simply imprecise regulatory language. If regulation terms are too ambiguous or vague, the regulation is arguably not narrowly tailored. However, mathematical precision is not the standard courts use to determine whether a particular term or phrase is constitutionally adequate and avoiding successful claims that regulations are not narrowly tailored because they contain impermissible vague terms or phrases has been relatively easy for municipalities. But, local officials must understand that

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8. *See Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (explaining that the *O'Brien* expressive conduct analysis and the time, place and manner analysis are really just "variations on the same principle."); *see also Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003).
9. *City of Renton*, 475 U.S. at 48.
10. *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004).
11. *Id.*
12. *City of Renton* at 51-52.
13. *City of Los Angeles v. Alameda Books*, 535 U.S. 435, 438 (2002).
14. *Id.*
15. *See Schad v. Mount Ephraim*, 452 U.S. 61 (1981).
16. *See e.g., MDK, Inc. v. Village of Grafton*, 345 F.Supp.2d 952 (E.D. Wis. 2004).

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inadequately drafted ordinances are still inadequate and can lead to adverse court decisions.[17]

Reasonable Alternative Avenues of Communication.
A content-based time, place or manner regulation of adult entertainment speech is constitutional only if it preserves "reasonable opportunity" to disseminate the speech at issue.[18] Thus, "only the provisions of [ordinances] that regulate the time, place or manner of adult entertainment without removing alternative channels of communication are reasonable under the First Amendment."[19]

In general, the reasonable opportunity for alternative channels or avenues of adult entertainment speech communication duty of municipalities relates to the availability of places in it where adult entertainment speech might be conducted under the regulation. If a regulation effectively eliminates all opportunity, a total ban, than the regulation is unquestionably unconstitutional. But, where is the other end of the "opportunity" spectrum? In other words, how much "opportunity" is constitutionally required?

There is no definitive answer to this question because the courts advise that the analysis is case-by-case.[20] To some extent, this makes sense given the variability of circumstances between municipalities. On the other hand, the analytical flexibility this approach attaches to a constitutional right, makes the underlying free speech right appear variable. Nonetheless, in general, "reasonable opportunity" compliance hinges on whether application of the regulation leaves some locations within the municipality's commercial real estate market that could reasonably be used for adult entertainment speech.

An adult entertainment business ordinance that satisfies the foregoing elements of the intermediate scrutiny *Renton* test or even the *O'Brien* test, is not automatically valid. It is a restriction on protected speech and, accordingly, subject to several other important general principles controlling all speech regulations, which include overbreadth, vagueness and prior restraint.

Overbreadth Doctrine.
The overbreadth principle in the speech regulation context is used by the courts in at least two ways. Both applications focus on the constitutional precision of the regulation's language.

In one form, overbreadth refers to a circumstance where a party in a case is allowed to challenge speech restrictions of a regulation that do not directly apply to the party but allegedly chill the speech rights of others who are not a party in the case but "who may be unwilling or unlikely to raise a challenge in their own stead." However, in these "facial challenge" cases, the challenging party must show that the overbreadth of the ordinance "must not only be real but substantial as well, judged in relation to the [ordinance's] plainly legitimate sweep."[21] In other words, substantial overbreadth is not demonstrated by a few hypothetical examples of overreach.

Nonetheless, some overbreadth claims have been successful. In *Erznoznik v Jacksonville*, 422 U.S. 205 (1975), the Supreme Court struck down as substantially overbroad a city ordinance that made it illegal for drive-in theater operators to show movies including any form of nudity if the film could be seen from any public road or place. Explaining the ordinance could prohibit clearly constitutional speech with nudity such as newsreel footage of an art exhibit with nude paintings, an image of a baby's buttocks, or film of bare-breasted African dancers, the Court concluded the ordinance reached too much protected speech outside of the city's legitimate concern for protecting minors from sexual images.

Application of the facial "substantial overbreadth" test in "adult entertainment" speech cases is sometimes muddled with the "narrowly tailored" prong of the content-based time, place and manner exception test. Judicial analysis can be found where the court finds that an "adult entertainment" speech regulation is not narrowly tailored because it prohibits speech not

17. *See e.g., Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (Ordinance that applied to "adult theaters" without defining the term held to be impermissibly vague).
18. *City of Renton*, 475 U.S. at 52.
19. *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir. 2000).
20. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 78-79 (1981) (Blackmun, J., concurring).
21. *Broadrick v Oklahoma*, 413 U.S 601, 615 (1973).

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associated with negative secondary effects of such speech and concludes the regulation is unconstitutionally overbroad. However, such overlapping analysis is flawed. While a substantially overbroad regulation is certainly not narrowly tailored, an ordinance that is not narrowly tailored is not always **substantially** overbroad. In such cases, a more sound overbreadth inquiry focuses directly on whether the regulation reaches too much speech unrelated to the secondary effects justification, ignoring the "narrowly tailored" analysis altogether.[22]

In its second form, overbreadth refers to a circumstance where a litigant claims the regulation impermissibly denies the litigant, not a third party, too much protected speech. In these "as applied" cases, the litigant does not have to show **substantial** overbreadth. Rather, this type of overbreadth claim succeeds where the litigant demonstrates that the regulatory language prohibits a constitutionally protected form of speech.[23] This means ordinances must be carefully reviewed to determine whether they impermissibly prohibit protected speech.

Vagueness Doctrine.
Related to the overbreadth doctrine is the vagueness doctrine. Like overbreadth, vagueness is concerned with the level of precision provided by the regulation's language.

The vagueness doctrine, an aspect of the due process requirement of notice, provides that a law is facially invalid if persons of common intelligence must necessarily guess at its meaning and differ as to its application. Consequently, a law is void for vagueness if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior.[24]

In general, greater clarity is required under the vagueness doctrine when the subject regulation affects fundamental rights such as free speech. Nonetheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[25] Thus, "[t]o say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand — a proposition the Supreme Court has rejected over and over again."[26]

Noted earlier in regard to the "narrowly tailored" requirement, constitution-

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IN GENERAL, GREATER CLARITY IS REQUIRED UNDER THE VAGUENESS DOCTRINE WHEN THE SUBJECT REGULATION AFFECTS FUNDAMENTAL RIGHTS SUCH AS FREE SPEECH.

22. *See e.g., Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W.2d 156 (1998).
23. *See Schultz v. City of Cumberland*, 228 F.3d 831, 848 (7th Cir. 2000) (Ordinance definition of "specified sexual activities" deprived "the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance" and substantially interfered "with the dancer's ability to communicate her erotic message.").
24. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
25. *Ward v. Rock Against Racism*, 491 U.S. 781, 194 (1989).
26. *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006).

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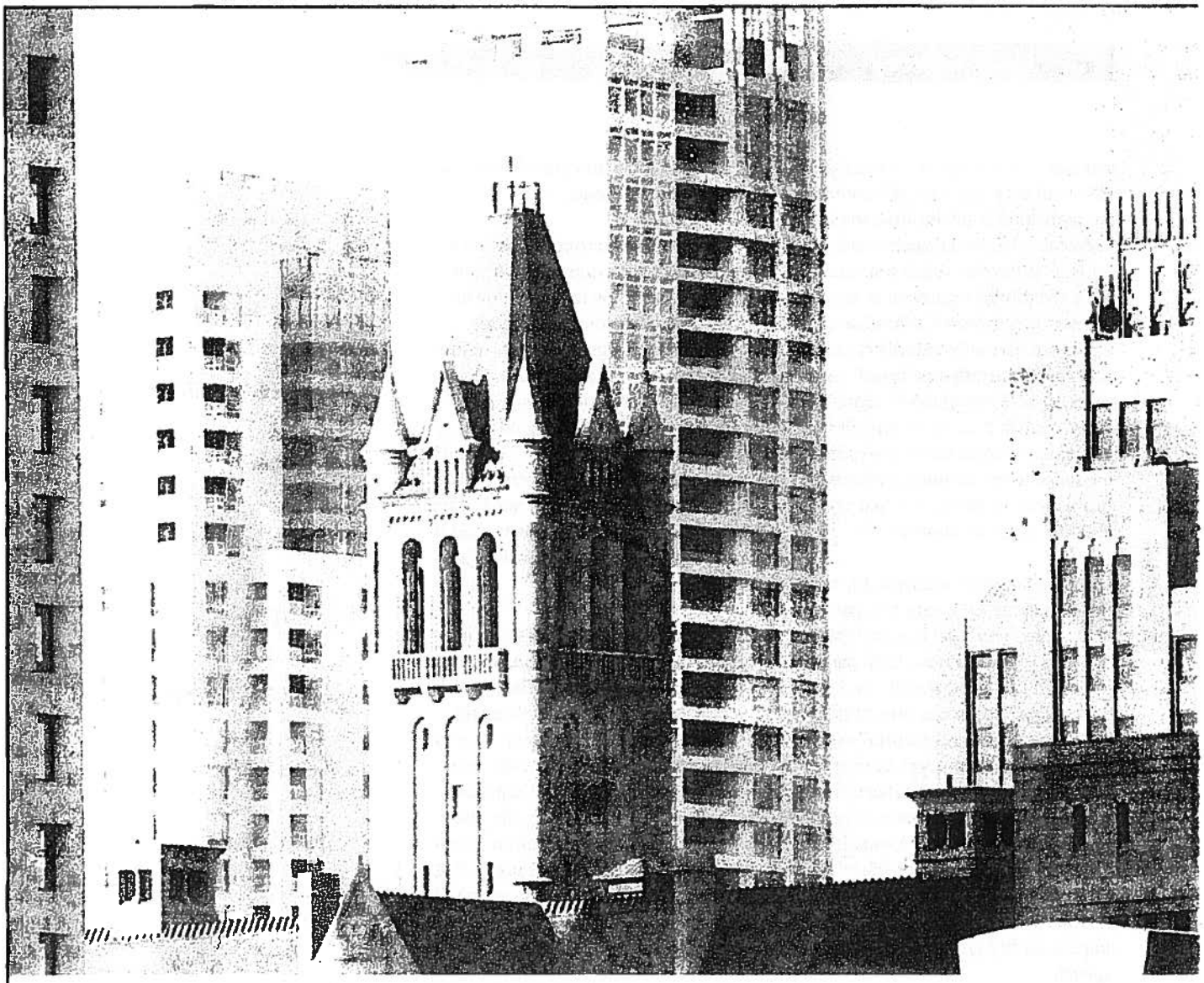

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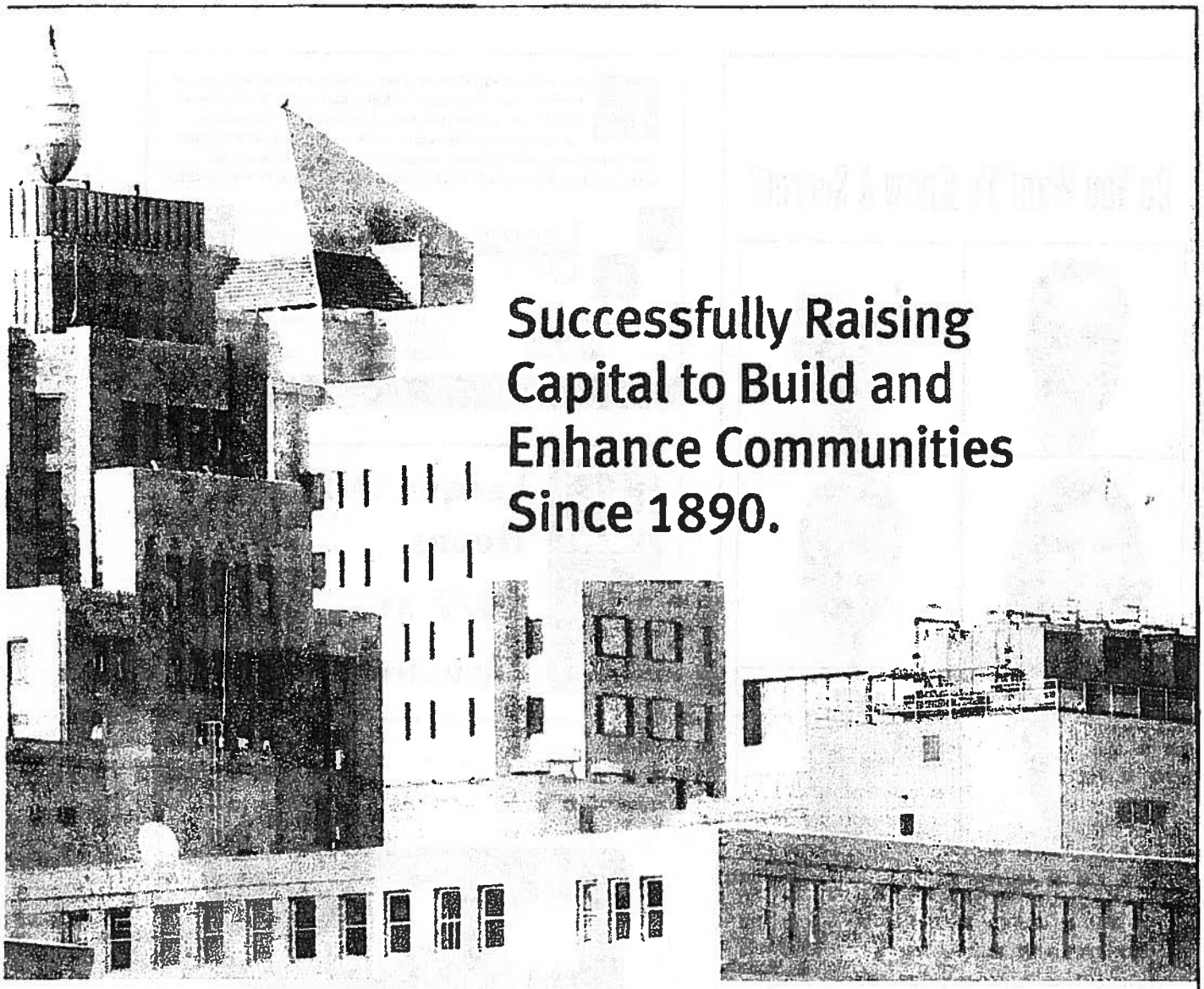

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ally permissible imprecision in adult entertainment regulation is an effective shield in most cases to claims that terms or phrases are unconstitutionally vague. However, constitutionally acceptable imprecision is not a shelter for poor drafting. Thus, local officials must faithfully seek to produce an ordinance that is readily understood, given that the alternative will virtually assure litigation.

Prior Restraint Doctrine

Permit and licensing systems for adult entertainment speech enterprises such as conditional use permits and business licenses are prior restraints on speech since they require government permission to speak. Accordingly, these regulatory practices are subject to the doctrine of prior restraint which seeks to prevent the government from quelling expression in advance of its communication.[27]

While not *per se* unconstitutional, a prior restraint bears a heavy presumption against constitutionality.[28] However, prior restraints are upheld where procedural safeguards are in place to "reduce the danger of suppressing constitutionally protected speech."[29]

The Supreme Court addressed licensing schemes for adult entertainment speech as prior restraints in *FW/PBS*, where the local ordinance required all "sexually oriented businesses" to be licensed in order to operate. A majority of the Court could not agree on whether all of the standards set forth in its leading prior restraint decision, *Freedman v. Maryland*, 380 U.S. 51 (1965), should apply. However, a plurality did agree that an adult entertainment licensing scheme must provide clear standards to guide the decisionmaker and there must be prompt judicial review, prior to which the status quo must be maintained.

The clear standards requirement is designed to eliminate the risk of government censorship. Accordingly, adult entertainment permit or license regulations must not vest a decisionmaker with unbridled discretion that permits either undue delay or subjective decisions. Rather, under *FW/PBS*, such systems must contain narrow, objective and definite standards, including explicit and reasonable time limits for a decision.

For a while, the *FW/PBS* prompt judicial review requirement generated considerable court activity. The issue was whether local regulations must create access to prompt judicial review (difficult since municipalities generally have no power to dictate judicial action) or whether they must guarantee a judicial decision within a specified time. The Supreme Court resolved this issue in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), wherein the Court held that ordinary judicial review is sufficient. Thus, municipalities are not required to create judicial review access through their local regulation.

ONGOING ISSUES

So, are the legal principles guiding adult entertainment speech regulation settled? The answer is no. In part, evidence for this answer is found in the significant number of adult entertainment decisions of the Supreme Court decided by slim majorities or only pluralities. Additional evidence is provided by recent cases which highlight continuing issues tied to one or more of the legal principles already discussed.

Secondary Effects Evidence.

The "reasonably believed to be relevant" standard for secondary effects evidence set forth *Renton* is fairly lenient. Courts regularly defer to the legislative judgment of local officials about what studies are relevant. However, an ongoing issue is the degree of consistency between the secondary effects evidence relied on and the type of adult entertainment speech business regulated.[30]

Until recently, this issue did not generate a reported judicial decision by a court with Wisconsin jurisdiction. This changed with the *New Albany DVD, L.L.C v. City of New Albany*, 581 F.3d

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27. *See Alexander v. United States*, 509 U.S. 544, 550 (1993).
28. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990).
29. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).
30. *See Wolff v. City of Monticello*, 803 F. Supp. 1568, 1572-73 (D. Minn. 1992) (holding an ordinance based on studies of adult uses as principal use is not narrowly drawn if applied to uses where adult aspects were an accessory use); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992) (city can not rely on studies of impact of peep show businesses to justify regulation location of adult video store with "take out" only fare).

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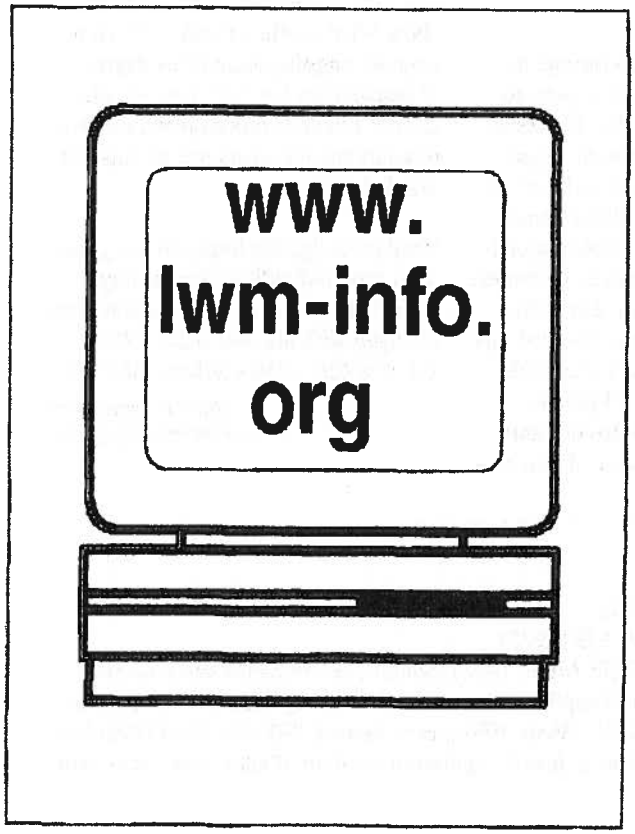
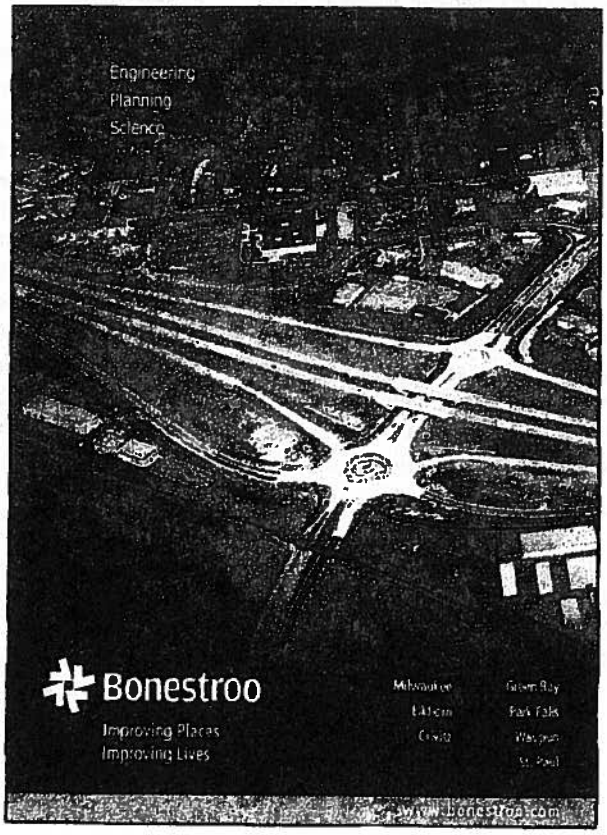
556 (7th Cir. 2009), decision of a three-judge Seventh Circuit panel.

The case involved an adult store that sold books, magazines and videos for off-premises reading or viewing. The store did not provide any "live or recorded entertainment on site," which undermined the local regulation. The court explained that the local regulation rested on studies that "principally reflect the effects of adult businesses that offer live entertainment or peep shows." Apparently considering this "evidence implying that take-home adult stores do not have adverse secondary effects," the court remanded the case to the trial court for an evidentiary hearing. Thus, *New Albany* appears to add Wisconsin, Illinois and Indiana to the places where a specific connection between the secondary effects study evidence supporting the regulation and the type of business regulated is constitutionally required.

Narrowly Tailored.
In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court intimated that the internet is the principal medium for sexually explicit communication in America. The Court identified the widespread availability of sexually explicit material online, including hard core pornography.[31] However, the internet represents an entirely different means of communicating such speech that presents some new challenges for local regulation of adult entertainment businesses.

30. *Id.* at 2336.





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One issue is drafting language to bring such operations within the scope of the adult entertainment regulation. The *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232 (11th Cir. 2001), decision is an interesting example.

Voyeur Dorm, L.C. operated a website that allowed paid subscribers to observe, through the use of webcams and the internet, women living in a dorm residence in Tampa, Florida. This included seeing the women disrobed and potentially involved in intimate acts. City of Tampa officials concluded that the activities at the Voyeur Dorm residence constituted an adult business use and sought to enforce applicable regulations. On appeal, the Eleventh Circuit rejected the City's arguments. It noted that the entertainment occurred in the "virtual space" of the internet and, as such, there was no offering of adult entertainment at the dorm residence as required by the court's interpretation of the City ordinance language.

However, even assuming an ordinance is written or rewritten with sufficient precision to bring internet adult entertainment speech delivery within its regulatory framework, this leaves a potentially more difficult issue for regulation that *Voyeur Dorm* did not answer. The issue is whether such operations generate any recognized secondary effects that would justify a content-based regulation given that such operations do not involve on-site patrons — customers are at home or otherwise off-site. If a sufficient secondary effects nexus cannot be established, like other regulations with this problem in cases noted above, the regulation would presumably be invalidated as not narrowly tailored since it would not further the government's interest in curbing secondary effects.

Reasonable Alternative Avenues. The widespread availability of internet sources may someday yield a judicial decision accepting the argument that such availability should be considered when evaluating whether a local regulation unduly denies reasonable alternative avenues of communication for adult entertainment speech. The argument however must confront the general "alternative avenues" concept that the alternatives be located within the jurisdictional boundary of the regulating municipality. However, this aspect of "alternative avenues" analysis is being questioned, particularly in cases involving small communities.

For example, in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, n. 2 (11th Cir. 1999), the court determined that the relevant real estate market contained available sites for adult entertainment, including those as far as one and a quarter miles outside city limits. More recently, Judge Easterbrook, writing for a three-judge panel of the Seventh Circuit, commented on this issue in *Illinois One News, Inc. v. City of Marshall*, 477 F.3d 461 (2007).

The case involved a claim that the adult entertainment business regulation of the City of Marshall, Illinois, a small community of 3.2 square miles located in Clark County, which left only four percent of its area for adult business operations failed the "alternative avenues" requirement. The court disagreed and found that four percent was adequate.

The more interesting aspect of the case is Judge Easterbrook's commentary on the relationship between the constitutionally mandated "alternative avenues" duty and the arbitrariness of municipal boundaries. In it, he asked, "But, if land to the north of the City's border would supply a constitutionally adequate venue for the speech if the City extended its border by a half mile or so, why is the same parcel a constitutionally inadequate venue when it is outside the City's border?" He answered this rhetorical question by stating that the "Constitutional rule is that a person have adequate opportunity to speak, not that the land be in one polity (the City of Marshall) rather than another (Clark County)." Thus, there is some support in the Seventh Circuit for the proposition that arbitrary municipal boundaries should not be the touchstone for "alternative avenues" analysis. A future case will show whether that support is converted to legal authority or remains mere dicta.

CONCLUSION

Municipalities that fail to adopt proactive adult entertainment business regulations may find themselves in an unsatisfactory and unnecessary situation. Many municipalities have successfully adopted zoning and licensing systems which seek to address the negative secondary effects of such businesses. That success follows from a faithful adherence to relevant constitutional principles, careful drafting and attention to ongoing issues.

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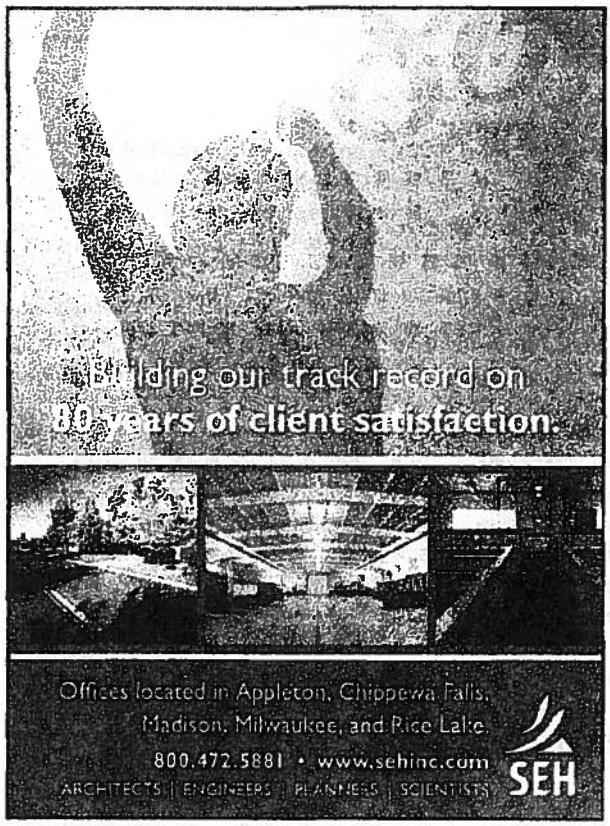

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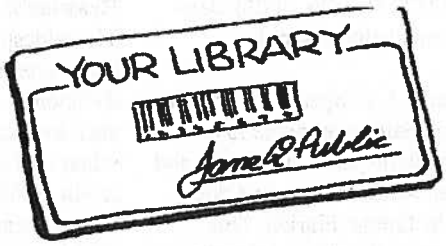

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Adult Entertainment Facilities (Schools 750, Parks 750, Churches 750, and Residential 500 Foot Buffers)

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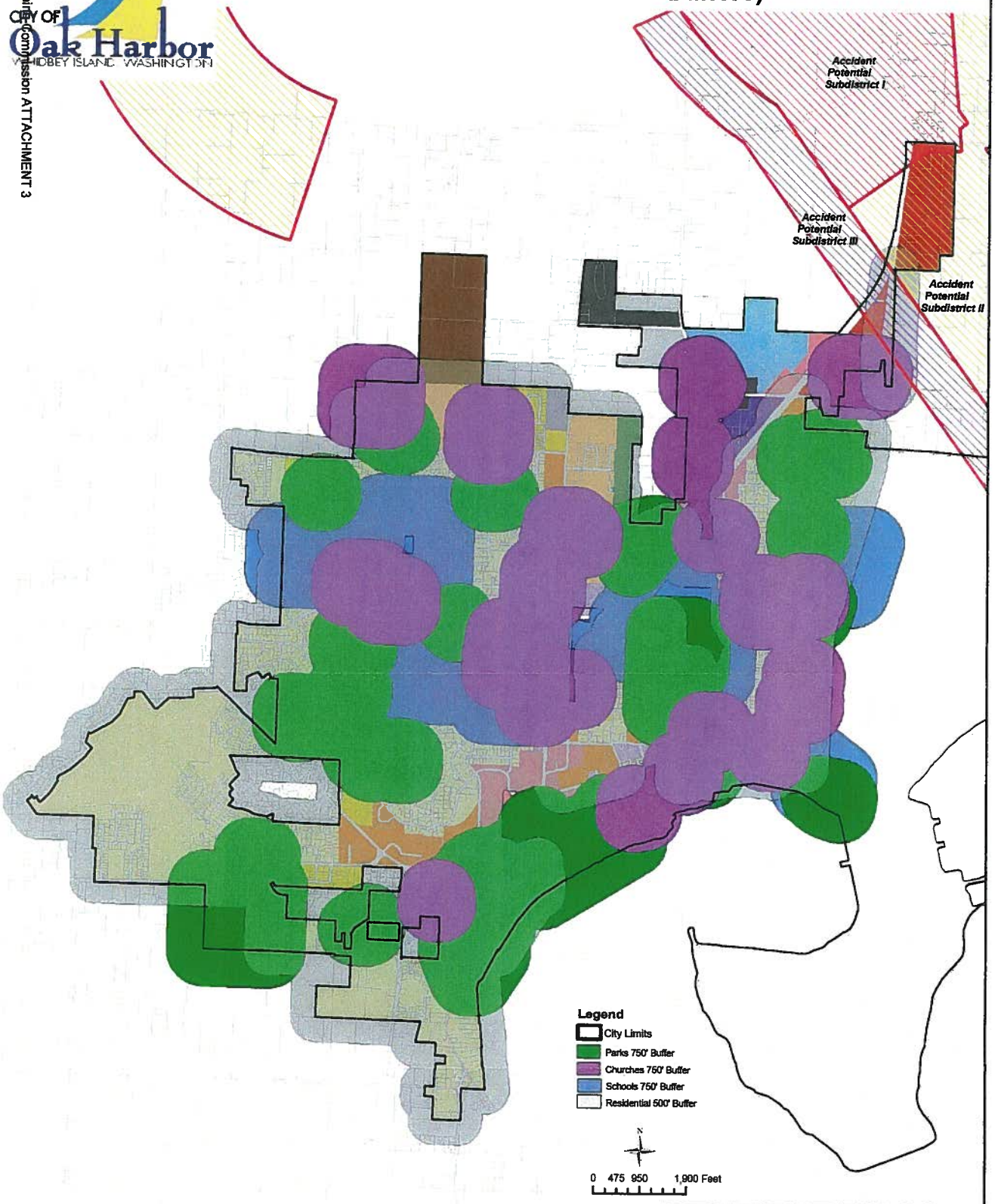

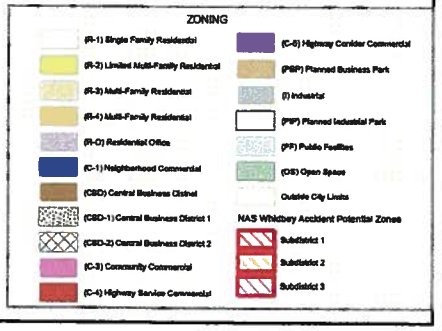

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Zoning Category	City Limits			
	# of Parcels	Acreage	% of Total Parcels	% of Total Acreage
R1, Single Family Residential	4084	1292	70	41
R2, Limited Multifamily Residential	752	192	13	6
R3, Multifamily Residential	89	101	2	3
R4, Multifamily Residential	180	181	3	6
RO, Residential Office	187	77	3	2
C1, Neighborhood Commercial	12	6	0	0
CBD, Central Business District	144	41	2	1
C3, Community Commercial	203	164	3	5
C4, Highway Service Commercial	25	98	0	3
C5, Highway Corridor Commercial	45	69	1	2
PIP, Planned Industrial Park	11	37	0	1
PBP, Planned Business Park	3	80	0	3
I, Industrial	10	50	0	2
PF, Public Facilities	61	360	1	11
OS, Open Space	12	94	0	3
TOTALS	**5818**	**2841**	**100**	**90**

Total Land Area	3170.4	
ROW	329.5	10%

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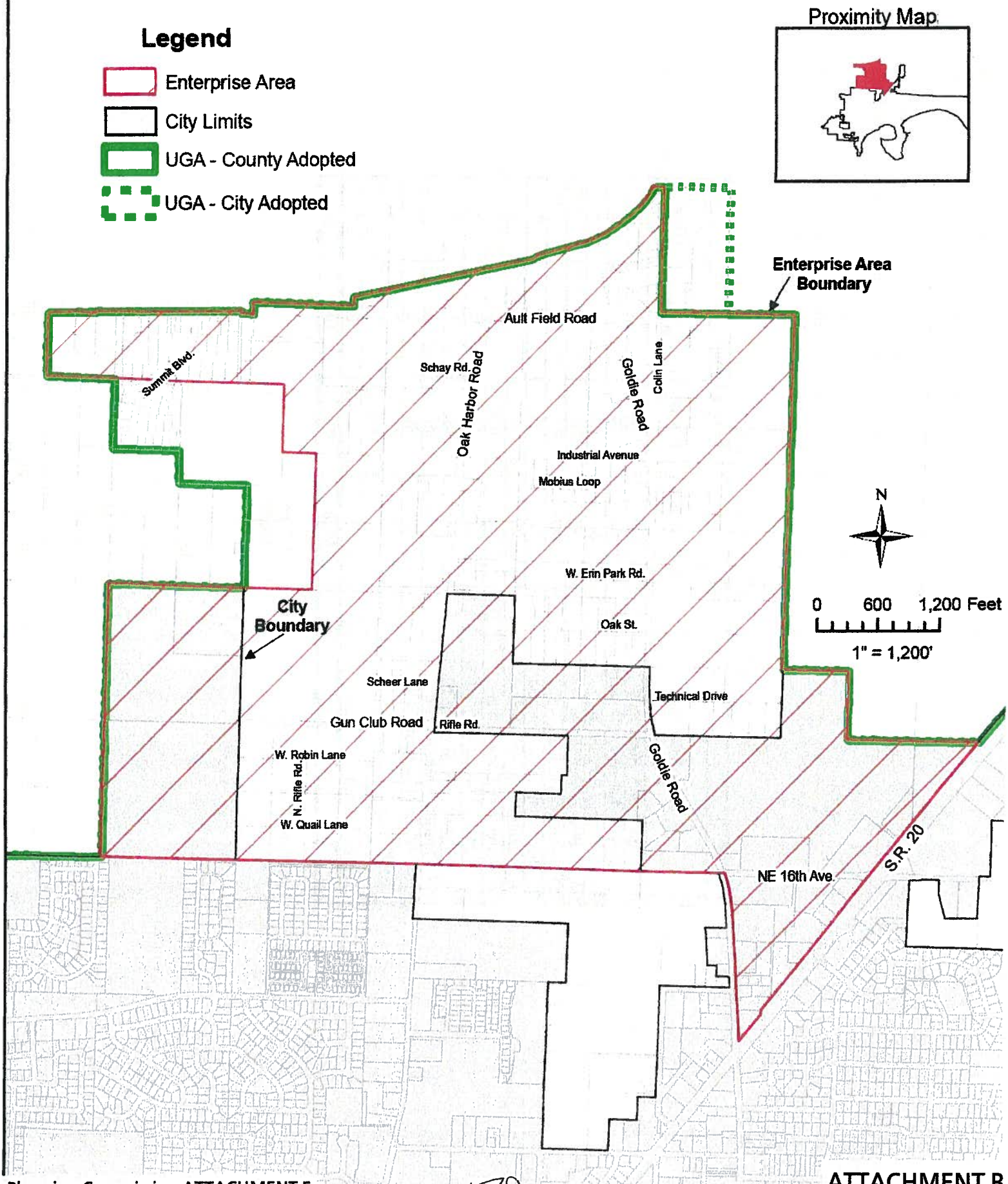
EXHIBIT A
NORTH WHIDBEY ENTERPRISE AREA



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Tables -- Hydrologic Soil Group -- Summary By Map Unit

Summary by Map Unit -- Island County, Washington

Map unit symbol	Map unit name	Rating	Acres in AOI	Percent of AOI
1019	Morancreek, cool-Limepoint complex, 0 to 5 percent slopes	C	22.6	15.1%
3011	Everett-Alderwood complex, 0 to 5 percent slopes	A	47.2	31.5%
3017	Everett-Alderwood complex, 3 to 15 percent slopes	A	65.1	43.5%
3019	Everett-Alderwood complex, 15 to 40 percent slopes	A	14.9	9.9%
Totals for Area of Interest			**149.8**	**100.0%**

Description — Hydrologic Soil Group

Hydrologic soil groups are based on estimates of runoff potential. Soils are assigned to one of four groups according to the rate of water infiltration when the soils are not protected by vegetation, are thoroughly wet, and receive precipitation from long-duration storms.

The soils in the United States are assigned to four groups (A, B, C, and D) and three dual classes (A/D, B/D, and C/D). The groups are defined as follows:

Group A. Soils having a high infiltration rate (low runoff potential) when thoroughly wet. These consist mainly of deep, well drained to excessively drained sands or gravelly sands. These soils have a high rate of water transmission.

Group B. Soils having a moderate infiltration rate when thoroughly wet. These consist chiefly of moderately deep or deep, moderately well drained or well drained soils that have moderately fine texture to moderately coarse texture. These soils have a moderate rate of water transmission.

Group C. Soils having a slow infiltration rate when thoroughly wet. These consist chiefly of soils having a layer that impedes the downward movement of water or soils of moderately fine texture or fine texture. These soils have a slow rate of water transmission.

Group D. Soils having a very slow infiltration rate (high runoff potential) when thoroughly wet. These consist chiefly of clays that have a high shrink-swell potential, soils that have a high water table, soils that have a claypan or clay layer at or near the surface, and soils that are shallow over nearly impervious material. These soils have a very slow rate of water transmission.

If a soil is assigned to a dual hydrologic group (A/D, B/D, or C/D), the first letter is for drained areas and the second is for undrained areas. Only the soils that in their natural condition are in group D are assigned to dual classes.

Tables — Depth to Water Table — Summary By Map Unit

Summary by Map Unit — Island County, Washington

Map unit symbol	Map unit name	Rating (centimeters)	Acres in AOI	Percent of AOI
1019	Morancreek, cool-Limepoint complex, 0 to 5 percent slopes	51	22.6	15.1%
3011	Everett-Alderwood complex, 0 to 5 percent slopes	>200	47.2	31.5%
3017	Everett-Alderwood complex, 3 to 15 percent slopes	>200	65.1	43.5%
3019	Everett-Alderwood complex, 15 to 40 percent slopes	41	14.9	9.9%
Totals for Area of Interest			**149.8**	**100.0%**

Description — Depth to Water Table

"Water table" refers to a saturated zone in the soil. It occurs during specified months. Estimates of the upper limit are based mainly on observations of the water table at selected sites and on evidence of a saturated zone, namely grayish colors (redoximorphic features) in the soil. A saturated zone that lasts for less than a month is not considered a water table.

This attribute is actually recorded as three separate values in the database. A low value and a high value indicate the range of this attribute for the soil component. A "representative" value indicates the expected value of this attribute for the component. For this soil property, only the representative value is used.

PLANNING COMMISSION
JULY 27, 2010

ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Hearing
Mr. Kamak reported that this public hearing is part of the process to finalize the interim ordinance adopted by the City Council on March 23rd. Mr. Kamak summarized the actions taken to date by the City Council as follows:

The City adopted ordinances that address public nudity and licensing of adult entertainment based on a recently expressed interest to open an adult entertainment establishment in the area. As part of adopting these regulations, the City also adopted an interim zoning control to restrict such uses to an overlay district. The ordinances are summarized as follows:

- Ordinance Banning Public Nudity: The City Council adopted an ordinance creating a new chapter 6.70 entitled "Nudity in Public Places" to Title 6 Public Peace, Safety and Morals of the Oak Harbor Municipal Code. The purpose of this ordinance is to ban public nudity with appropriate exceptions. Since this is not a land use related ordinance it will not be necessary for Planning Commission to review this language.

- Ordinance adopting Adult Entertainment Licensing and Regulations: The Ordinance created a new chapter 5.20 entitled ""Adult Entertainment" in Title 5 Business Licenses and Regulations of the Oak Harbor Municipal Code. The regulations adopted with this ordinance address how the business should operate and deals directly with the details of the how the business is run to mitigate the secondary impacts that are caused by such uses. Since this deals with the business licensing and related requirements and is not a land use related ordinance it will not be necessary for Planning Commission to review this language.

- Interim Ordinance adopting an Adult Entertainment Overlay Zone: This Ordinance created an interim zoning control by adopting an overlay zone that determines where such uses may locate. The interim ordinance created a new chapter 19.52 entitled "Adult Entertainment Facilities Overlay Zone". The interim ordinance entered findings of fact concerning the negative secondary impacts of adult entertainment facilities and created and overlay districts that includes I-Industrial and PIP, Planned Industrial Park zoned property along Goldie Road.

The interim Adult Entertainment Overlay Zone requires further discussion and hearing by the Planning Commission since it is a land use related ordinance.

Mr. Kamak provided information on legal cases that support the regulation of adult entertainment land uses and also provided some options to consider when locating these facilities in Oak Harbor.

Mr. Kamak noted that the Supreme Court has issued a number of decisions upholding adult business regulations aimed at reducing "secondary effects" such as increased criminal activity, sexual related crime, increased blight, increased vacancy rates etc. Mr. Kamak also commented that the courts require that there must be a nexus between a municipality's adult entertainment ordinance and the secondary effects evidence upon which it's based. The Supreme Court has also held that this evidence may be borrowed from other cities where the secondary effects exist. Since Oak Harbor does not currently have any adult entertainment facilities to determine the secondary impacts, it will have to rely on studies performed elsewhere as long as whatever evidence the City relies upon is reasonably believed to be relevant to the

ATTACHMENT C

problem it addresses. Summaries of such studies were included in the Planning Commission's agenda packet.

Mr. Kamak explained that zoning that has distinguished Adult Entertainment Facilities from other commercial uses has been upheld by the courts provided it is done within certain constitutional constraints. There are two primary methods of zoning Adult Entertainment Facilities. One is the "dispersion zoning" that regulates the uses by distance separations such as "within 1000 feet of any other such establishment or within 500 feet of a residential area". The second is the "concentration zoning" where a particular use, in this case the Adult Entertainment Facility, is prohibited from locating anywhere except in a specific portion of the municipality. Both methods have been held to be constitutionally permissible as legitimate. Both methods of regulation cannot do the following:

- Zoning cannot completely eliminate Adult Entertainment Facilities from the municipality
- Zoning cannot exclusively permit Adult Entertainment Facilities in an area that is "commercially unavailable"
- Zoning cannot force preexisting Adult Entertainment Facilities to cease operation and relocate.

Mr. Kamak noted that the interim ordinance adopted by the City Council on May 4, 2010 established an overlay zone over three properties on Goldie Road that are zoned I, Industrial and PIP, Planned Industrial Park. If this were to be adopted as the final overlay zone it would be "concentrated zoning". However, it should be noted that Oak Harbor's interim overly zone properties were identified using a separation distance from sensitive areas such as schools, parks and religious institutions.

Mr. Kamak summarized the concentrated approach and the dispersion as follows:

Concentrated Approach

1. Like uses are treated alike – the same uniform district standards apply to all uses equally. Any changes to other districts will not have an effect upon the adult entertainment facilities within the special overlay district.

2. Lower administrative costs – once the district is established and development standards set; there is not need for costly case-by-case review of adult business requests other than the regular site development or building permit review.

3. Control over the total growth of these uses and the development of specific new uses – the limits of the area for these uses are defined. The dispersal method may have no upper limit of these uses provided that all separation requirements are met.

4. Easier evaluation of total public services impact – heavier traffic, limited parking space, higher police costs and other effects of the adult entertainment facilities can be easier to identify if they are concentrated into one area.

The drawbacks of this approach are documented in the land use case study summaries provided in the Planning Commission agenda packet. Studies, such as the ones done in Austin, TX indicate that the crime rate is 66% higher in areas where there is a concentration of such uses.

Dispersion Approach

The dispersion approach (also referred to as the Detroit Model) regulates adult entertainment facilities by separating them from each other and other sensitive uses. Cities typically will require that adult entertainment facilities be separated from each other by a distance that can vary from 300 feet to 2000 feet. The regulation will also call out separations from sensitive areas such as schools, churches and parks. Some cities have also required separations from other establishments that serve alcohol. This is a more popular model since studies show that the secondary effects of these uses such as crime rates etc. are less when they are dispersed.

Mr. Kamak explained the various options available to Oak Harbor as follows:

1. Maintain the current properties in the interim ordinance: This would retain the properties identified in the interim ordinance in the overlay zone and will not add additional properties. This will be similar to the concentrated approach discussed earlier. If the City chooses this option, the properties must be studied to assure reasonable developability of the property for infrastructure and site development.

2. Dispersion method: This option will consider dispersing the Adult Entertainment Facilities in various locations within the city. The dispersion method is traditionally done by regulating the uses with separation distances from sensitive areas and similar uses. Due to the layout of Oak Harbor, this option will be challenging in identifying locations without reducing the separation distances significantly from some sensitive areas such as residential areas. Maps were attached to the Planning Commission's agenda packet showing some queries on different separation distances for the various uses. Different buffers can be used for the various sensitive areas. A few examples of the combination of different distances have been provided for study.

3. Establish a corridor: This option will consider adding property to the ones that are currently in the interim ordinance. An example would be the Goldie Road corridor. This will provide more options for the Adult Entertainment Facilities and may lessen the burden for the City to prove the availability of land for such uses. This option is also a concentrated approach.

Commission Discussion

Mr. Wiggins commented that he believed there were no redeeming factors in allowing adult entertainment facilities into the community. Property values go down, crime goes up and the administrative costs will go up dramatically.

Mr. Powers the stated that the Council had the same concerns during the public process in March and in May. The short answers from the City Attorney and the Prosecuting Attorney was that the decisions as to whether or not to allow these businesses into our community have been made for us at the State Supreme Court level and at the Unites States Supreme Court level. What still remains within the local choice is the opportunity to decide were those businesses can locate. Prior to Council action in March and May there were no regulations on the books therefore we did not have the level of protection from at least having the ordinances.

Mr. Fakkema asked what would happen if the City didn't allow the business to locate in Oak Harbor. Mr. Power indicated that a business owner's recourse would be through legal action.

Mr. Powers indicated that it is planning staff's responsibility to present the interim ordinance and ask for Planning Commission review, input and recommendation to the City Council. The

ATTACHMENT C

Council will then have the responsibility of considering the recommendation as they decide what the final form or our adult entertainment facilities ordinances should look like.

Mr. Kamak added that we currently have the interim ordinance and before we had no ordinance. This is a proactive approach and doesn't mean that these businesses will flock to these areas. It is better to have well thought out regulations in place before hand.

Mr. Powers asked Planning Commission to provide input as to which of the options they would like staff to look at and provide more information on and to open the public hearing and then continue the public hearing until the August meeting.

Ms. Fey also agreed with Mr. Wiggin's sentiment but understood that the City has to face this issue and must go forward to find a place where adult entertainment facilities can locate, otherwise the City is hanging out there and will have a very hard time if and when someone does come to town specifically to establish this type of facility.

Mr. Wiggins noted that the Laser Tag business is in the vicinity of the properties where adult entertainment facilities can locate according to the interim ordinance and children use the Laser Tag Facility. Mr. Wiggins asked if other uses could be identified as sensitive and require a separation distance. Mr. Powers cautioned against having such a large number of sensitive areas requiring separation that there are no properties left for adult entertainment facilities inside the city limits.

Mr. Fakkema stated that he was leaning toward the Concentrated Approach. He asked if the city required to have a certain percentage set aside for these uses? Mr. Powers state that there are no rules of thumb such as a certain percentage of land use.

Mr. Fakkema asked if a plumbing contractor were to build a plumbing shop on that site zoned for adult uses, would that be allowed and could we possible fill up the designated area with other uses? Mr. Powers indicated that the City's obligation is to provide regulations as to where adult entertainment facilities can locate but we don't have the obligation to preserve those locations. The market forces are still at work.

The public hearing was opened.

Mel Vance PO Box 2882. Mr. Vance commented that there were no serious applications pending and no hints of applications for adult entertainment facilities in the future so the Planning Commission should take time and to be very careful when considering the regulations. Mr. Vance cautioned against going to the most extreme prohibitive regulations, many of which have not withstood serious Constitutional challenge in the Supreme Court. Oak Harbor cannot afford a court challenge and it could potentially bankrupt the City. Mr. Vance agreed that buffers between sensitive areas was a good idea and should be preserved in what ever final ordinance is brought forth. Mr. Vance also noted that there is more to the adult entertainment industry than strip clubs and peep shows and the ordinance adopting Adult Entertainment Licensing and Regulations only applies to strip clubs and peep shows.

The public hearing was continued to the August 24, 2010 Planning Commission meeting.

ATTACHMENT C

PLANNING COMMISSION
AUGUST 24, 2010

ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Hearing
Mr. Kamak reported that City Council adopted three ordinances regarding adult entertainment facilities in March. One of the ordinances was an interim overlay zone for where adult entertainment uses can be located.

Mr. Kamak stated that the law only allows for interim ordinances to be effective for six months. If the work that is necessary cannot be completed within that six months a work plan is required to outline the steps that are necessary to complete the work. Staff has prepared a work plan which was attached to the Planning Commission agenda. The work plan will be presented for City Council's consideration at their September 7, 2010 meeting. If the wok plan is adopted the effective period of the interim zoning ordinance can be extended for an additional six months.

Commission Discussion
Ms. Jensen pointed out an error in the tentative schedule paragraph on page 11. The sentence that says that the six month extension that will keep the interim overlay zone effective until March 2010 should be corrected to say March 2011.

Public Comment
Mel Vance (PO Box 2882) urged the City to work closely with the County since the County is also considering adult entertainment regulations. He encouraged working together on the zoning regulations in the areas that seem most appropriate for adult entertainment facilities which are either adjacent to or in the Urban Growth Areas on the north side of the City.

ACTION: MS. DALE MOVED, MS. JENSEN SECONDED, MOTION CARRIED TO CONTINUE THE PUBLIC HEARING TO SEPTEMBER 28, 2010.

PLANNING COMMISSION
SEPTEMBER 28, 2010

ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Hearing
Mr. Powers requested the Planning Commission continue this agenda item to the Planning Commission's October 26, 2010 meeting so that staff has additional time to gather the research. Since the public hearing has been opened on this item it is necessary for a motion to continue the public hearing.

ACTION: MS. JENSEN MOVED, MR. OLIVER SECONDED, MOTION CARRIED TO CONTINUE THE ADULT ENTERTAINMENT INTERIM ORDINCE PUBLIC HEARING TO THE PLANNING COMMISSION'S OCTOBER 26, 2010 MEETING.

ATTACHMENT C

PLANNING COMMISSION
OCTOBER 26, 2010

ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Hearing

Mr. Kamak reviewed previous actions by the City Council to adopted ordinances that address public nudity and licensing of adult entertainment and as part of adopting these regulations, the City also adopted an interim zoning control to restrict such uses to an overlay district. Mr. Kamak noted that the interim ordinance expired in September and staff submitted a work plan which extended the interim ordinance for six months so that staff could continue research as to whether the properties covered by the interim overlay zone was sufficient to legally cover the needs of locating such facilities in Oak Harbor.

Mr. Kamak provided a Power Point presentation (Attachment 1) to the Planning Commission detailing information regarding the legal framework regulating Adult Oriented Businesses, accepted zoning methodology for locating such uses in a community, the locations suitable for such uses in Oak Harbor, land use distribution that impacts the location of such uses and determining whether the properties identified in the Interim Adult Entertainment Facilities Overlay District are sufficient to meets the needs of the community and the adult industry.

Mr. Kamak concluded the presentation by summarizing staff's findings as follows:

- Adult Oriented Businesses are entitled to some protection under the State and Federal constitution.
- The courts have upheld regulations that are tailored to regulate the secondary effects (crime, property values, blight) of such businesses.
- Regulations cannot completely eliminate these uses from a municipality.
- The dispersed approach and concentrated approach have both been held to be constitutionally permissible as legitimate "time, place, and manner" of protected speech.
- The dispersed approach is not suitable for Oak Harbor since it eliminates almost all properties.
- Concentrated approach may be the best method for Oak Harbor to regulate adult entertainment facilities.
- There is more industrial land available for development than commercial lands.
- Properties identified in the interim overlay district, referred to as subject properties, fall outside the buffers of sensitive areas.
- Subject properties are located in a developing area and can be served by all utilities.
- Area of subject properties is more than all available community commercial lands.
- Since there have been no applications for the development of adult entertainment facilities in Oak Harbor and Island County the land identified in the interim ordinance will provide and ample supply of properties and will be augmented by properties identified by the county in and around the same area.

Mr. Kamak reasoned that based on the analysis, staff believes that the Interim Adult Entertainment Facilities Overlay District can be adopted as the Final Adult Entertainment Facilities Overlay District. Since studies indicate that the concentrated approach can have increased crime rates over the dispersed approach, specific site development conditions can be considered for inclusion in the development codes.

Mr. Kamak recommended that the Planning Commission take public comment and continue the public hearing to its November 23, 2010 meeting.

ATTACHMENT C

Commission Discussion
Commissioners asked the following questions:

Are there any other areas available? Mr. Kamak stated that the area selected was the only area located outside of sensitive buffer areas.

What if additional UGA land is absorbed by the City and it is zoned Industrial or PIP would adult entertainment uses be allow there as well? Mr. Kamak said no, and explained that an overlay zone is a line that is drawn on certain properties that stays there.

What if at a later date there is more Industrial of PIP property available shouldn't we be expanding the overlay zone? Mr. Kamak explained that the overlay zone should only be expanded if our supply becomes less than our demand.

How would this affect a company's decision to expand in this area? Mr. Kamak explained that adult entertainment uses are located throughout the country in many areas so we are trying to find the best location in Oak Harbor and we hope that by identifying this location, a developer will know ahead of time that this is where adult uses can locate and the developer can plan for it.

Is the City allowed to add other types of restrictions on how the business is run? Mr. Kamak stated that the two ordinances that address public nudity and licensing of adult entertainment have regulations and restrictions concerning how the business is run. Mr. Powers added that the business regulations address some of the internal design characteristics and the personnel side of things in an effort to lessen the opportunity for those crimes that have been identified in the nationwide studies.

Chairman Neil opened the public hearing at 8:24 p.m.

Mel Vance (PO Box 2882) stated that he was not necessarily in favor of strip clubs in Oak Harbor and he was not in favor of the overlay method but was in favor of allowing adult uses through zoning by allowing adult uses in Industrial and Business Park zoning districts. Mr. Vance said the City should consider that once an adult entertainment facility is established in a particular location that a protected use should not be allowed to locate any closer than the established buffer area for that use. Mr. Vance also stated that the existing ordinances have existing grounds for a legal challenge. Mr. Vance encouraged being as flexible as possible to avoid any legal issues.

ACTION: MR. OLIVER MOVED, MR. WALLIN SECONDED, MOTION CARRIED TO CONTINUE THE ADULT ENTERTAINMENT INTERIM ORDINCE PUBLIC HEARING TO THE PLANNING COMMISSION'S NOVEMBER 23, 2010 MEETING.

Mr. Kamak asked the Planning Commission to hold on to the materials that were provided in their agenda packet because they would need them at the November 23rd meeting.

PLANNING COMMISSION
NOVEMBER 23, 2010
MEETING CANCELLED DUE TO WEATHER

ATTACHMENT C

PLANNING COMMISSION
REGULAR MEETING
CITY HALL – COUNCIL CHAMBERS
December 28, 2010

ROLL CALL: **Present:** Bruce Neil, Kristi Jensen, Keith Fakkema, Greg Wasinger, Gerry Oliver and Jeff Wallin.

Staff Present: Development Services Director, Steve Powers; Senior Planners, Cac Kamak and Ethan Spoo; and Associate Planner; Melissa Sartorius

Chairman Neil called the meeting to order at 7:30 p.m.

MINUTES: **MR. FAKKEMA MOVED, MR. OLIVER SECONDED, MOTION CARRIED TO APPROVE THE OCTOBER 26, 2010 MINUTES AS PRESENTED.**

PUBLIC COMMENT
No comments.

ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Hearing
The Planning Commission conducted a public hearing to consider finalizing the Interim Adult Entertainment Ordinance. Mr. Neil noted that the Public Hearing was opened on July 27th.

Mr. Powers reminded the Commission that in previous briefings staff provided information on the legal framework that regulates adult used, several studies on the effects of adult uses in communities and analysis regarding the location of such uses in Oak Harbor. Mr. Powers noted that this material was not recreated in the Planning Commission's December agenda packet but that he had three copies available if needed. Mr. Powers stated that staff is recommending that the Planning Commission make a recommendation to the Council to adopt the interim ordinance as the final ordinance based on the following:

- Adult Oriented Businesses are entitled to some protection under the State and Federal constitution.
- The courts have upheld regulations that are tailored to regulate the secondary effects (crime, property values, blight) of such businesses.
- Regulations cannot completely eliminate these uses from a municipality.
- The dispersed approach and concentrated approach have both been held to be constitutionally permissible as legitimate "time, place, and manner" of protected speech.
- The dispersed approach is not suitable for Oak Harbor since it eliminates almost all properties.
- Concentrated approach may be the best method for Oak Harbor to regulate adult entertainment facilities.
- There is more industrial land available for development than commercial lands.
- Properties identified in the interim overlay district, referred to as subject properties, fall outside the buffers of sensitive areas.
- Subject properties are located in a developing area and can be served by all utilities.
- Area of subject properties is more than all available community commercial lands.
- Since there have been no applications for the development of adult entertainment facilities in Oak Harbor and Island County the land identified in the interim ordinance will provide and ample supply of properties and will be augmented by properties identified by the county in and around the same area.

Mr. Powers recommended that Planning Commission open the public hearing again, take any additional public testimony, then close the public hearing and have Commission deliberation and make a recommendation to the Council.

Commission Discussion
Ms. Jensen asked about the sentence on page 21 of the packet titled 19.52.060 Non-conforming uses. She asked what is meant by, "an adult entertainment facility which receives non-conforming status by virtue of an order from a court of competent jurisdiction..." Mr. Powers explained that it meant that if someone claimed that they had a non-conforming status and the City said that they did not and the issue was taken to court that has jurisdiction to make that decision and the court decided that they in fact were non-conforming, that then would suffice for the meeting of the standards being a non-conforming use. Ms. Jensen also asked about 19.52.060 (2). Mr. Powers explained that there is an amortization period for a non-conforming use and that it will not continue forever.

Chairman Neil opened the public hearing. No comments were forthcoming and the public hearing was closed.

Mr. Oliver asked if there was anyone that had come forward stating that they would like move forward in opening an adult entertainment facility. Mr. Powers stated that there were none and that since the time that the City Council adopted the interim ordinance there have been one or two additional inquiries but there have been no applications filed yet.

ACTION: **MR. FAKKEM MOVED, MR. WALLIN SECONDED, MOTION CARRIED TO RECOMMEND THAT THE CITY COUNCIL APPROVE ADOPTING THE INTERIM ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE ORDINANCE AS THE FINAL ORDINACE.**

PROPOSED CHANGES TO CHAPTER 21.80 OHMC PERTAINING TO BINDING SITE PLANS – Public Hearing
Chairman Neil opened the public hearing.

Mr. Spoo presented the binding site plan code amendments. Mr. Spoo indicated that the amendments would establish a process for altering binding site plans and specify who can submit an alteration for a binding site plan.

Mr. Spoo explained that a binding site plan is a type of land division. There are three types of land divisions that the State allows City's to regulate. Those are subdivisions, short subdivisions and binding site plans. Binding site plans are primarily for commercial and industrial properties but can be used for residential condominiums.

Mr. Spoo stated that State law RCW 58.17.035 requires a binding site plan alteration and vacation process. If a City chooses to adopt binding site plans as an alternative land division process then we are required to have an alteration and vacation process. The City's existing code is incomplete in that aspect, as it does not have an alteration process.

Mr. Spoo explained that the central issue in the draft Binding site plan code presented is who may submit an alteration application to a binding site plan. Page 35 of the agenda packet shows a new section of the Binding site plan code called "Alteration of an approved binding site plan." The proposed new section states that it is the majority of owners whose lots are proposed to be altered. After further consideration, staff believes that it is better if all owners whose lots are proposed to be altered within a binding site plan should sign the alteration

John W. Martin
Spc. 86
225 NE Ernst St.
Oak Harbor, WA 98277

Aug. 15, 2010

Cac Kamas:

I lived in Alaska in many places from 1947 to 1978. I did and observed every thing I could & that was a lot. I lived in several places that had either a legal, regulated "line" or in small towns that had one or two legalized houses. They worked great; no problems, no disease, no complaints.

I also saw first hand what the B joints (Booze & Broads) did in Anchorage in the 50's. Run & owned by toughs, ex cons, ex police & collectors; not places to get out of line in. These are facts. I had a friend? that was in it. (most)

Sex women & lonely or & drunk men leads only to trouble. the article in the Record in one statement seemed to indicate Sex clubs, call them what you will; can be operated w/o booze. Bull shit, it can't & won't happen. Put broads & booze together & you've got the needs of enforcers, you've got fights & with today's prevalence of packing a gun; shootings.

I will say one way out of this problem is to forbid liquor licences & drinking of alcohol for Sex clubs. Don't issue a liquor license within a mile or more of the "club."

Ask the experienced lawmen's ideas & opinions. I was amazed that the Supreme Court grants any rights to Sex Clubs! How in the name of our Founding Fathers did they find that ruling supported in the Constitution!?

The article indicates you are in favor of granting licenses. How can you!? How!?

Sincerely Yours,

John W. Martin

RECEIVED
AUG 23 2010
CITY OF OAK HARBOR
Development Services Department

144

ATTACHMENT D

February 28, 2011

RECEIVED
3/1/11 CTW

Dear Connie T. Wheeler,

City Clerk

RE: Legal No. 464543

We oppose any ordinance or law permitting the zoning and building of adult entertainment facilities!

It is proven knowledge that any community that allows for the constructing of or zoning of adult pornographic facilities opens itself up to all sorts of crime! Do you want more crime in our community!! This has been a clean, safe and family oriented city and island for decades! We have children and grand children in this community who will be negatively affected by unattractive landscape, attitudes and influences of such businesses. It is bad business and too costly to our family oriented communities! There are plenty of other places that offer this; but hopefully not Oak Harbor!!!!

Sincerely,

Thomas and Cindy Hellinger

5036 Chipshot Way

Freeland, WA 98249

ATTACHMENT D

City of Oak Harbor
Development Services Dept.

Memo

To: Mayor and City Council

From: Steve Powers, Director

CC: Paul Schmidt, City Administrator

Date: March 10, 2011

Re: Adult Entertainment Facilities Zoning: Supplemental Memo

Purpose

This report concludes that designation of an overlay zone for adult entertainment facilities comprised of Industrial and Planned Industrial Park lands is the most appropriate manner to meet the practical, structural and locational needs of such establishments in Oak Harbor. The report falls into five parts: first, an extrapolation of the likely square footage requirements for an adult entertainment establishment in light of the City's licensing regulations; second, a review of commercial zones in terms of parcel sizes in those zones; third a review of the uses and availability of commercial parcels; fourth, an inventory of available commercial lands; and fifth, an assessment of the character of proposed industrial and planned industrial park parcels for commercial use.

The report finds that adult entertainment facilities will likely require an estimated 10,850 square feet of interior space to meet the City's business license requirements. It is estimated an additional 30,000 square feet is required for parking to serve this size facility. With additional site area required for building setback and landscaping, a total gross site area of at least 44,000 to 48,000 square feet (1.01 to 1.1 acres) is required. It further finds that due to limitations in the commercial property market, industrial and planned industrial park zoned property provide the best opportunities for buildings and sites of this size.

1. Adult Entertainment Facility Size Estimate

Because Oak Harbor has no experience with adult entertainment establishments, it is necessary to make some assumptions in setting estimates for building and property needs. This analysis both analyzes space needs of nightclubs that have operated successfully in Oak Harbor and also extrapolates likely space needs of adult entertainment facilities based on the licensing requirements for such establishments.

The approximate area required for an Adult Entertainment Facility can be extrapolated by a review of the Oak Harbor Municipal Code, especially those provisions related to adult entertainment facilities (licensing and zoning) and fire suppression. The code requires that performance stages be 18 inches above the floor level and removed at least 10 feet from the nearest patron.[1] It requires that restrooms for patrons be separate from performers and

[1] OHMC 5.20.200

employees.[2] The code also requires all the public/patron areas to be completely separated from those serving the establishment's employees to reduce the mingling and interaction that can lead to unlawful activities.[3] These considerations must to be taken into account when designing a space/structure for such uses. Additional requirements include that all areas providing adult entertainment be visible form the common areas and that visibility shall not be blocked or obstructed by doors, curtains etc.[4]

Another requirement that will need to be considered for such facilities is a sprinkler system. Entertainment facilities that have a stage and viewing area greater than 350 square feet require a sprinkler system.[5] As this threshold is relatively low, it is assumed that adult entertainment facilities will need to install a fire sprinkler system. It is further assumed that due to the additional cost to install such a system, the owner of an adult entertainment facility would likely maximize the space inside of such establishment to accommodate a fairly large number of patrons in order to realize a return on their overall investment. This could mean both a fairly large stage and a large viewing area for patrons.

The space needs estimate starts with the assumption that the stage will be a minimum of 350 square feet.[6] To separate the stage from the closest patrons by 10 feet will require approximately 750 square feet of space surrounding the stage. The employee and performers' area must be separated from the patron/public area and therefore require separate restrooms and dressing rooms, with storage, and office areas to support the use. Assuming that approximately 10-15 employees are working at any given time, the space required for employees would be 1,000 – 1,500 square feet. If the business provides drink service, it would require a service area and associated storage. These can be accommodated in 500 square feet. The size of the patron/common area will depend on the number of people the business is intending to serve. This capacity could depend on a variety of factors, including the population of the community (or service area), facility size to revenue generation relationship, etc. For Oak Harbor, an assumed occupancy of 300 was utilized. This occupancy is similar to other existing nightclub businesses such as Elements or the former Lava Lounge. Approximately 7500 square feet (including restrooms) is needed to accommodate 300 people.

Taking all of the above into account it is estimated that an adult entertainment facility would likely establish a structure that is approximately 10,850 square feet or more. See Table 1 below.

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[2] OHMC 5.20.220
[3] OHMC 5.20.220
[4] OHMC 5.20.200
[5] OHMC 8.05.060
[6] This is a small to medium sized stage or a small sized dance floor in Oak Harbor. Even if this size is reduced by 50% it would not significantly alter the estimated size of the adult entertainment facility.

Table 1: Estimated Size of Adult Entertainment Facility

Building Space Requirements	Size
Stage	350 square feet
Patron separation area	750 square feet
Employee areas (separate restrooms, dressing rooms, storage and office)	1,500 square feet
Drink service area (plus storage)	500 square feet
Patron area (for 300 people) plus restrooms	7,500 square feet
Total Space Requirements	**10,850 square feet**

Adult entertainment facilities require one (1) parking space for every three (3) seats and one (1) parking space for every two (2) employees.[7] From the above assumptions approximately 108 parking spaces will be required. Assuming approximately 270 square feet for each space and associated drive aisles, approximately 30,000 square feet or more will be required to accommodate the parking needs.

In addition to the structure and parking, the facility must meet the landscape requirements and setback requirements. These vary depending on the zoning district, location of property, etc. The configuration of the property will also affect the efficiency of the site layout (i.e. what is the smallest amount of site area that can accommodate all of the required site elements).

Factoring in all of the above site components, it is conservatively estimated that approximately 44,000 to 48,000 square feet (or 1.01 to 1.1 acres) is needed to accommodate an adult entertainment facility in Oak Harbor.

2. Commercial Spaces in Oak Harbor – Size and Style

Commercial properties in Oak Harbor are categorized into five zoning categories. C1, Neighborhood Commercial zoning is the least intense commercial district with approximately 12 parcels and 6 acres. The CBD, Central Business District has the highest density with approximately 144 parcels in 41 acres. The C3, Community Commercial district is the workhorse of the commercial districts with approximately 203 parcels in 164 acres. The C4, Highway Service Commercial district, has a limited use list (in recognition of the zoned properties proximity to NASWI) and has approximately 45 parcels in 69 acres. The C5, Highway Corridor Commercial district (characterized by larger retail centers or stores) has approximately 25 parcels in 98 acres.

Though site layout and design for individual properties vary there are some identifiable, general patterns among similarly zoned commercial properties. For instance, the C-1 properties have smaller lots with smaller structures surrounded by parking. The average lot size is approximately one-half acre in size with structures ranging between 4,000 – 5,000 square feet. The most notable exception to this is the bowling alley which is approximately 12,000 square feet. On average the Central Business District has small lots, with maximum lot coverage by their structures and little on-site parking. Lot sizes vary as do the size of the structures; they range from 7,000 square feet to 20,000 square feet. The smaller structures normally accommodate one business whereas the larger structures tend to accommodate several businesses.

[7] OHMC 19.55.50

Commercial development in Oak Harbor generally falls under one of three distinctive styles. These styles of development are the large stand-alone retail establishments, (e.g. Home Depot and Walmart), the out-lots (e.g. Applebee's and Kentucky Fried Chicken) and the strip centers. The large stand-alone structures are greater than 100,000 square feet on various size lots with shared parking or exclusive parking. The structures on the out-lots average between 5,000-6,000 square feet. The strip centers vary widely in size but usually have at least one major anchor per complex. The large anchors such as the Safeway grocery store occupy approximately 40,000 square feet while smaller anchors such as Ace Hardware and the Dollar Store are approximately 23,000 square feet. Most of the other businesses in the strip centers range between 2,000 – 6,000 square feet. Very few structures exist in the 8,000 to 10,000 square foot range. One notable exception is the Big 5 store which is 10,000 square feet in size.

3. Commercial Space – Availability

The general commercial market in Oak Harbor has remained consistent in the past decade or more. This may largely be due to the consistent customer base, minimum competition and amount of available land. The large anchors (100,000 sq ft) in Oak Harbor have established themselves over the years and with limited large developable tracts of land remaining, it is likely that these anchors will remain in place (sans major changes at NAS Whidbey). Currently there are no large anchor commercial spaces available in Oak Harbor.

The commercial structures on out-lots (Applebee's, Zorbas etc) in Oak Harbor range between 3,000 – 8,000 square feet. These out-lots have also shown consistent success with very little turnover. However, a few buildings such as Blockbuster (south end) and the former Hot Shots are vacant due to changing times and the economy.

The majority of Oak Harbor's commercial enterprises are accommodated in strip centers. Most of these businesses are in spaces that average approximately 2,000 square feet. In some respects these strip center spaces are the most flexible of all the commercial spaces for most retail businesses since they can be modified at minimal costs. However, conversion to a use with drink service is more costly due to the need to retrofit the space to accommodate certain plumbing facilities. A windshield survey indicates that currently there are approximately 7-10 of these spaces available for commercial uses. Some of them are more apt for office (based on adjacent uses and parking) use rather than commercial/retail use. Table 2 below presents a sampling of the typical types of commercial spaces in Oak Harbor.

Table 2: A Sample of Representative Commercial Buildings in Oak Harbor

Type of Commercial / Business Name	Size of Structure (s.f.)[8]	Number of Businesses
Large Commercial		
Walmart	105,000	1
Home Depot	112,000	1
Out lots/stand alone structures		
Applebee's	6,050	1
Island Café	2,700	1

[8] Source: Building Department permit files, windshield surveys and Google maps

Type of Commercial / Business Name	Size of Structure (s.f.)[8]	Number of Businesses
Jack in the Box	3,900	1
San Remo	6,000	1
Flyers	5,700	1
Blockbuster (vacant)	6,500	1
Hot Shots (closed)	2,600	1
Strip shopping centers		
Safeway Center	74,000	12
Safeway store	40,000	
Rite Aid	20,000	
Other businesses	<2,000 each	
Whidbey Furniture Center	30,000	10
Whidbey Furniture	12,000	
Other businesses	<2,000 each	
Businesses with entertainment		
Elements	10,900	
Lava Lounge (closed)	14,000	

There are recent examples of commercial businesses (both existing and new) needing to construct a building to serve their needs. The Palm Funeral Home (a new business) built an 11,024 square foot facility on 1.6 acres of commercially zoned land. The existing North End Fitness and Excalibur Gym are combining operations in a new 16,000 square foot building. This building was built on Planned Industrial Park zoned property within the Goldie Road corridor (north of the overlay zone area). Both of these projects were constructed in 2010.

4. Commercial Property Inventory

If suitable commercial buildings are not available for use as an adult entertainment facility, it is reasonable to assume that a business owner may wish to construct their own building. To do so would require available commercial property. In 2006, the City studied their commercial lands inventory. The following is a summary of that effort:

- Staff prepared an inventory of commercially-zoned land within the Oak Harbor Urban Growth Area based on a parcel by parcel analysis. A total of 329 acres of land is zoned for commercial use. Of this total, approximately 8% is undeveloped or 27.4 acres.

- Based on a methodology of commercial square footage per capita, reinforced through an employment based needs projection, the projected need for new commercial zoning to serve our 2025 population is 52.8 acres (with only 27.4 acres available). This projected need takes into account a 10% increase in the intensity (infill and/or redevelopment) of already developed commercial sites.

- Factoring in a reasonable market supply factor of 25% of the projected need, a total of about 40 acres of additional undeveloped land with commercial zoning will be needed to provide sufficient capacity to serve the City's 2025 population projection. This additional acreage should be combined with the infill and/or redevelopment of existing commercial lands.

Since 2006, less than 20 acres of new commercial property has been created. This means that the community still has a deficit of approximately 20 acres of commercial lands to meet the full range of commercial activities. By extension, it is reasonable to assume that there would also be a shortage of commercially zoned property to meet the needs of adult entertainment establishments.

5. Assessment of Industrial and PIP Sites; Equivalency to Commercial
It is necessary to determine whether or not the identified industrial and planned industrial park zoned properties provide a development and/or business opportunity that is equivalent to that found on commercially zoned properties or within commercial districts.

To begin this assessment it is helpful to understand where the city's industrial properties are situated and their relationship to the rest of the community. The industrial and light industrial districts (I, PIP and PBP) are located in the northern portion of the city limits and urban growth area. To the north of this is the area's major employer, Naval Air Station Whidbey Island (NASWI). Connecting the industrial and light industrial area to the residential/commercial areas to the south and NASWI to the north are two major streets: Oak Harbor and Goldie Streets. Of these streets, it is Goldie Street which is characterized by the largest amount of commercial and industrial development. This area is generally perceived as the industrial core of Oak Harbor and Whidbey Island. The proposed overlay zone identifies properties within this corridor as appropriate for adult entertainment facilities.

The following factors can be considered when determining if the industrial and PIP sites are equivalent in nature to commercial properties within the community:

- The adult entertainment facilities overlay zone is located in the North Whidbey Enterprise Area. The Enterprise Area has been identified as an area appropriate for the creation of employment opportunities. It is intended to be an area which the community wishes to attract new development and job creation. This designation demonstrates that the community does not view its industrial area as a 'forgotten area' or a 'waste land.'
- The Enterprise Area contains properties with commercial, industrial and planned industrial park zoning. Uses within this area include a mix of retail, service and light industrial businesses. Churches and certain types of schools are also found there. Service businesses (such as restaurants and a sports bar) have been in existence in this area for some time. All of these uses coexist in close proximity to one another.
- Approximately $1.2 million of public funds were expended to install a major sewer facility within the Goldie Road corridor. This significant expenditure demonstrates the public's commitment to encouraging business growth within the Enterprise Area. Public sewer is generally identified as a utility that is essential to have when undertaking urban development. The sewer facility will serve both commercial and industrial properties within the Enterprise Area, including those properties within the overlay adult entertainment overlay zone.
- In most communities, commercial properties are typically served by a full range of urban improvements (urban streets with curb, gutter and sidewalks). Depending on its location, this is not always true for commercial properties in Oak Harbor. Established commercial properties may not have a separate sidewalk; they may in fact depend on the street to serve as both pedestrian and vehicular circulation routes. They may also lack formal stormwater facilities.
- Unique street standards have been adopted for the whole of the Enterprise Area. These standards do not require sidewalks or enclosed drainage systems. These typical public improvements are normally required elsewhere in the community. Not

installing these typical public improvements provides some level of financial incentive for developing within the Enterprise Area.

Conclusion

Through a review of the City's business licensing regulations, an estimate of 10,850 square feet was arrived at for a "typical" adult entertainment facility in Oak Harbor.[9] The total site requirements (including elements such as parking, building setbacks and landscaping) are likely to be at least 1.01 to 1.1 acres in size. In terms of occupancy, commercial spaces in Oak Harbor appear to be reasonably stable. A previous study concluded that there is a shortage of commercially zoned property in Oak Harbor and that 40 additional acres of commercial lands needed to be created in order to meet the overall commercial needs of the community. This amount of commercially-zoned property has not been created. Therefore, the existing building and property stock is not likely to support either the location or the construction of an adult entertainment facility on commercially zoned land. A review of a variety of factors finds that in terms of commercial development opportunities, the overlay zone properties within the North Whidbey Enterprise Area are equivalent to or better than commercial properties located elsewhere in Oak Harbor. This report has demonstrated that designation of an overlay zone for adult entertainment facilities comprise of Industrial and Planned Industrial Park lands is the most appropriate manner to meet the practical, structural and locational needs of such establishments in Oak Harbor.

[9] This estimate is based on a series of assumptions. Changes in these assumptions will change the resulting estimate.

City of Oak Harbor
City Council Agenda Bill

AGENDA BILL NO. 4
Date: March 22, 2011
Subject: 2011 Comprehensive Plan Amendments – Preliminary Docket

FROM: Steve Powers SP
Development Services Director

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Margery Hite, City Attorney, as to form

PURPOSE
This agenda bill presents the preliminary docket for the 2011 Comprehensive Plan amendments. The 2011 preliminary docket proposes to continue work on the UGA capacity analysis.

AUTHORITY
The City is required by the Growth Management Act (GMA) to adopt a comprehensive plan and to review and revise it pursuant to RCW 36.70A.130. Oak Harbor Municipal Code Chapter 18.15 prescribes the process for considering Comprehensive Plan amendments. The code requires the Planning Commission to hold a public hearing, review the preliminary docket and make a recommendation to the City Council. The City Council must establish an annual docket before March 31st each year.

DISCUSSION
The code provides for three types of Comprehensive Plan amendments: sponsored amendments, initiated by members of the public; mandatory amendments to meet state and local deadlines; and discretionary amendments to proactively address goals and policies of the Comprehensive Plan. This year no sponsored amendments and no discretionary amendments are proposed.

Sponsored Amendments
Land Use Changes
The process to amend the Comprehensive Plan in 2011 was initiated in October of 2010. A notice in the Whidbey New Times was published informing the public of the amendment process and calling for applications. The notice was published on October 30, 2010 and included the application deadline of December 1, 2010 in accordance with OHMC 18.15.040(2). Land owners interested in changing the land use designation of their property normally submit applications during that time. The Development Services Department received a few phone calls with questions and interest but no applications were received. Therefore no land use change requests are included in the 2011 Comprehensive Plan Docket.

Mandatory Amendments

UGA Capacity Analysis

The City will continue to work on the UGA capacity analysis. In 2010, the work on the UGA capacity analysis was primarily related to data collection and methodology. In 2011, city staff will work with the County on furthering the analysis. The actual outcomes of this year's works on the UGA capacity analysis is unclear at this time, however, it is the City's intent to continue discussions with the County to determine how Oak Harbor's projected growth and the County's projected growth can be accommodated under the currently adopted goals and polices. Discussions with the County may or may not lead to changes in the capacity analysis.

Capital Improvements Plan (CIP)

The Capital Improvements Plan is updated annually in the Comprehensive Plan amendment cycle. The updates to the Plan incorporate the most recent and accurate information available. This normally includes updates to reflect consistency with adopted plans, updates to revenues and expenditures provided by the Finance Department, and any changes to the projects, schedules or project costs. The changes this year to the CIP are expected to fall in to one of the above types. The most significant change in projects will be the removal of the Pioneer Way Improvements project from the CIP as it will be completed in 2011. Other major changes to projects are not anticipated as there have been no new directions (new plans) adopted that would require additions or re-evaluation of the current project lists. Therefore the updates will primarily be related to updating revenues and expenditure for the various funds (sewer, water, stormwater, streets etc.). Since the updates would be primarily financial, there maybe some benefits to considering adopting this years CIP update along with the city's budget as permitted by RCW 36.70A.130(2)(a)(iii).

The benefits of adopting this year's CIP update with the city's budget are provided below:

- Review of the capital projects expenditures along with the city's budget
- Cost saving in printing new CIP documents when there are only minor changes
- The focus is on the numbers and not on goals and policies

Preliminary Docket Review Criteria

OHMC 18.15.070 establishes the criteria to review the Comprehensive Plan Amendment Docket. The table below provides the applicability of the criteria to the proposed preliminary docket.

Criteria provided in OHMC 18.15.070 (2)	UGA Capacity Analysis (continued)	Capital Improvements Plan	Land Use Changes (no applications received in 2011)
(a) The proposed amendments are consistent with Growth Management Act and the Countywide Planning Policies.	✓Yes Mandated (RCW 36.70A.130)	✓Yes Mandated (RCW 36.70A.130)	

Criteria provided in OHMC 18.15.070 (2)	UGA Capacity Analysis (continued)	Capital Improvements Plan	Land Use Changes (no applications received in 2011)
		but can also be adopted with the budget	
(b) The proposal does not appear to contradict other elements, goals and policies within the Comprehensive Plan.	No contradictions	No contradictions	
(c) The proposal will implement or further existing goals and policies in the Comprehensive Plan.	✓Yes Updates will keep the Comprehensive Plan in compliance with GMA	✓Yes Updates will keep the Comprehensive Plan in compliance with GMA	
(d) The proposal would correct an inconsistency within or make a clarification to a provision of the Comprehensive Plan.	NA	NA	
(e) The proposed amendments have been clearly defined to determine a fairly accurate scope of work.	✓Yes	✓Yes	
(f) The proposed amendments respond to an expressed desire by the community.	NA	NA	
(g) The public interest would be best served by considering the proposal in the current year.	✓Yes	✓Yes	

The preliminary docket does not include any proposals that are inconsistent with the criteria established in OHMC 18.15.070 (2).

PLANNING COMMISSION:

The amendments were compiled as a preliminary docket for review and recommendation by the Planning Commission. The Planning Commission conducted a public hearing on January 25, 2011 and recommended approval of the docket as presented.

STANDING COMMITTEE REPORT:

The Governmental Services Standing Committee reviewed the docket for the 2011 Comprehensive Plan Amendments on February 8, 2011.

RECOMMENDED ACTION:

1. Conduct the public hearing.
2. Approve the proposed the 2011 Comprehensive Plan Amendment docket.

ATTACHMENTS:

•Resolution adopting the annual docket for the 2011 Comprehensive Plan Amendments
•Planning Commission minutes from January 25, 2011 meeting

RESOLUTION NO. 11-08

A RESOLUTION ADOPTING THE DOCKET FOR THE 2011 COMPREHENSIVE PLAN AMENDMENTS

WHEREAS, the City of Oak Harbor first adopted a Comprehensive Plan consistent with the requirements of the Washington State Growth Management Act (Chapter 36.70A RCW) in 1995 by Ordinance 1027, and adopted amendments to the plan in 1997 by Ordinance 1100, in 1998 by Ordinance 1161, in 2000 by Ordinance 1215, in 2001 by Ordinance 1287, in 2003 by Ordinance 1340, in 2004 by Ordinance 1396, in 2005 by Ordinance 1439, in 2007 by Ordinance 1488, in 2008 by Ordinance 1542, in 2009 by Ordinance 1564 and in 2010 by Ordinance 1594; and

WHEREAS, THE CITY OF OAK HARBOR, in the public interest, may adopt amendments or revisions to the Comprehensive Plan no more frequently than once per year in accordance with the State of Washington Growth Management Act RCW 36.70A.130(2); and

WHEREAS, the City of Oak Harbor in accordance with RCW 36.70A.130 has adopted Ordinance 1565 that established a schedule and process to review and amend the Comprehensive Plan; and

WHEREAS, the proposals in the preliminary docket, as presented below, were reviewed against the criteria established in OHMC 18.15.070(2) and determined to be consistent; and

WHEREAS, the Planning Commission conducted a public hearing on the preliminary docket on January 25, 2011 and recommended approval of a preliminary docket by the City Council; and

WHEREAS, the City Council conducted a public hearing on the docket on March 22, 2011;

NOW, THEREFORE BE IT RESOLVED by the City Council of the City of Oak Harbor that the following shall be established as the 2011 Comprehensive Plan Docket:

2011 Comprehensive Plan Amendment Docket

Proposed Amendment	Type of Amendment	Priority as per OHMC 18.15.050
Capital Improvements Plan update (proposed to be adopted with the city budget)	Mandated 36.70A.070(3) and RCW 36.70A.130	Priority A
UGA Capacity Analysis (continued) Work with the county to further the analysis.	Mandated RCW 36.70A.130	Priority A
Land Use Changes - NONE	-	-

PASSED and approved by the City Council this _____, 2011.

THE CITY OF OAK HARBOR

_____
Jim Slowik
Mayor

Attest:

_____
City Clerk

Approved as to form:

_____
Margery Hite
City Attorney

PRELIMINARY DOCKET FOR THE 2011 COMPREHENSIVE PLAN AMENDMENTS – Public Hearing

Mr. Powers reported the City followed advertising procedures to inform the informing the public of the amendment cycle and called for applications. The City received no request for privately sponsored land use map amendments. Therefore, the docket has two items; the annual Capital Improvements Plan update and staff will continue to work on the UGA capacity analysis. In 2011, City staff will work with the County on furthering the analysis. It is not anticipated that there will be any actual Comprehensive Plan amendments coming out of the continuation of the UGA capacity analysis. Mr. Powers summarized the staff report which details the criteria for considering items for the docket and a draft City Council resolution for the proposed docket. Mr. Powers concluded by recommending that the Planning Commission conduct the public hearing and recommend that the City Council approve the proposed docket for the 2011 Comprehensive Plan amendments.

The public hearing was opened. No comments came forth and the public hearing was closed.

ACTION: MR. OLIVER MOVED, MS. JENSEN SECONDED, MOTION CARRIED TO FORWARD A RECOMMENDATION THAT THE CITY COUNCIL APPROVE THE PROPOSED DOCKET FOR THE 2011 COMPREHENSIVE PLAN AMENDMENTS.

LOW IMPACT DEVELOPMENT (LID) CODE UPDATE PROJECT – No Action Required

Mr. Spoo reviewed the concept of Low Impact Development and the project background. Mr. Spoo explained that LID is stormwater practices which mimic natural hydrologic cycle through the use of rain gardens, pervious pavement, native vegetation (Infiltration). Traditional stormwater management uses ponds and pipes (conveyance).

Mr. Spoo said that the reason for LID is the Puget Sound cleanup efforts by the State. There are also advantages to property owners and the community. By moving away from traditional stormwater practices to LID it reduces the amount of public stormwater infrastructure that the community has to maintain and in certain cases, the use of LID instead of a stormwater pond could open up more of the site to development.

Mr. Spoo summarized the project background as follows:

- Project start – late 2007 with grant award
- 2008 – Consultant drafted code
- 2009 – Staff reviewed code
- Early 2010 – Work with Planning Commission
- Late 2010 – Staff drafts code

Mr. Spoo summarized the proposed code changes as follows:

Title 11 "Streets"

- Changes to match subdivision code
- Provisions for LID in streets, sidewalks, driveways. Two new LID street sections

Title 19 "Zoning"

- Chapter 19.44 "Parking"
  - ✓ Maximum parking standard – 150% minimum
  - ✓ Variance required for more than 150% of minimum
  - ✓ Pervious surface for 125% or more
- Chapter 19.46 "Landscaping and Screening"
  - ✓ Tree retention is rolled into native vegetation areas

City of Oak Harbor
City Council Agenda Bill

Bill No. 5
Date: March 22, 2011
Subject: SE Pioneer Way Reconstruction
On Call Design and Engineering
Support Agreement

FROM: Cathy Rosen, Public Works Director
Eric Johnston, City Engineer

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Margery Hite, City Attorney, approved as to form

PURPOSE:
This agenda bill requests approval of an agreement with Perteet, Inc., for on call design and engineering support services during construction of the SE Pioneer Way Reconstruction project in the not to exceed amount of $50,000.

AUTHORITY
The authority to enter into agreements for improvements or use of real property is granted to the City of Oak Harbor under RCW 35A.11.020.

SUMMARY STATEMENT
Reconstruction of SE Pioneer Way will result in the replacement of 2,400 linear feet of roadway from SE Pioneer Way between City Beach Street and Midway Boulevard. The reconstruction will replace pavement, sidewalks and appurtenances from building face to building face. The work includes the underground conversion of overhead power and telecommunications facilities, the installation of approximately 500 linear feet of 12-inch sanitary sewer and pipe bursting of approximately 1,200 feet of 12-inch sanitary sewer.

As part of the project management and oversight plan of the City there are three key groups consisting of the City staff, the construction management professional and the design engineer of record.

During construction the design engineer of record may be needed from time to time to clarify or adjust the design. The efforts of the engineer are not intended to correct mistakes rather it is intended to manage unforeseen issues requiring the attention of the responsible design

professional. As the design engineer of record it is appropriate to retain Perteet for this type of on call work.

The scope of work is intended to be in essence an on call arrangement. When needed city staff would ask for assistance but it is not anticipated that design engineer would have a significant role during construction. The construction management team will have primarily responsibility for the day to day work of the contractor during construction.

Amount of contract: The hourly rate contract has a maximum not to exceed limit of $50,000. As on call contract, charges for services will only occur as requested by the City.

Funding: The funding for the project was established by Resolution 10-16, passed and approved by the City Council at their June 15, 2010 meeting. The following tables detail the funding sources for this project and the comparison of the actual versus estimated project costs.

Source	**Amount**
Wastewater	$ 1,000,000.00
Stormwater	$ 650,000.00
REET 1	$ 2,500,000.00
REET 2	$ 3,000,000.00
Island County Economic Development Grant	$ 1,000,000.00
Water	$ 200,000.00
Total	***$ 8,350,000.00***

	90% Opinion of Cost	Final Engineer's Estimate	Contract Prices	
Right of Way (approximate)	$150,000		$150,000	
Community Outreach Preconstruction (enviroissues)	$94,000		$94,000	
Design Fee (Perteet)	$760,592		$760,592	
subtotal	*$1,004,592*		*$1,004,592*	
Roadway and City Utilities Reconstruction	$4,143,900	$4,009,146	$2,980,899	
Parking Alternate	$135,622	$138,772	$117,357	
Overhead Utility Undergrounding	$1,063,298	$1,443,408	$670,000	1
Inspection/Testing	$75,000		$23,012	
Surveyor	$128,000		$117,385	2
Construction Management (KBA)	$511,000		$398,975	3
Other	$185,000		$185,000	4
Public Art (1% of project)	$80,000		$80,000	
Contingency @ 9%	$575,000		$400,000	5
subtotal	*$6,896,820*		*$4,972,628*	
Extended Outreach				
Enviroissues	$150,000		$0	6
Construction Mitigation Outreach	$170,000		$167,500	7
direct costs (approximate)	$74,500		$0	8
subtotal	*$394,500*		*$167,500*	
total project cost	***$8,295,912***		***$6,144,720***	

NOTES:
1) includes conduit trenching performed by contractor PLUS costs paid to PSE under separate SCH 74 agreement
2) includes both contracts for pre-construction and construction survey work
3) includes revised NTE limit on KBA Contract
4) includes city costs for the project, ie office space, equipment, permit fees, city direct cost
5) includes 10% of construction cost as contingency and approximately $50k for engineering design services during construction
6) public outreach by Enviroissues as subcontractor in KBA contract has been eliminated
7) amount approved by City Council on March 1, 2011
8) eliminated to reflect reduction in outreach effort

Selection process: Perteet Inc was selected at the most qualified firm, in accordance with OHMC for design services during the original project selection process

Justification: Retention of the design engineer of record for assistance in changes and design clarifications is appropriate and consistent with practices of both the City and industry. While the bulk of the construction related issues and questions will be addressed by the City staff and the Construction management team, the design engineer may be needed from time to time. This contract and the maximum amount are sufficient to meet the anticipated need.

STANDING COMMITTEE REPORT

This item was discussed with the Public Works Standing Committee at the January 6, 2011, February 3, 2011 and March 3, 2011 meetings. This item was also discussed with General Government Standing Committee at the January 11, 2011, February 8, 2011 and March 8, 2011 meetings.

RECOMMENDED ACTION:

Authorize the Mayor to sign the Contract with Perteet Inc for services with a not to exceed limit of $50,000.

ATTACHMENTS:

Contract

MAYOR'S COMMENTS:

CITY OF
Oak Harbor
WHIDBEY ISLAND, WASHINGTON

CITY OF OAK HARBOR
CONSULTANT AGREEMENT
WITH Perteet Inc

PROJECT TITLE: SE Pioneer Way Reconstruction

PROJECT COMPLETION DATE: December 31, 2011

MAXIMUM AMOUNT PAYABLE: $ 50,000

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1646

CONSULTANT CONTRACT
HEADING

I. INSTRUCTIONS

This contract must be completed in full, including all applicable exhibits. If an exhibit is not applicable, it should be marked "VOID".

Any changes or additions to this contract must be made in writing and set forth below. (The parties may attach appendices and exhibits to this contract but they must be listed in Section IV below.) Any exceptions or changes to the General Requirements must be listed in Section XI of the contract.

II. CONSULTANT INFORMATION

Name: Perteet Inc

Address: 2707 Colby Avenue Suite 900 Everett WA 98201

Telephone/Fax No.: _____

Federal ID No.: _____

Do you require a 1099 for the IRS? No

III. PROJECT INFORMATION

Protect Title: SE Pioneer Way Reconstruction

Project Description: Provide on call engineering + Design support services to the City of Oak Harbor during construction of the

Project Completion Date: 12/31/2011
Maximum Amount Payable: $50,000
Progress Payments: Monthly

IV. ADDITIONAL DOCUMENTS ADDED TO THIS CONTRACT

None

AGREEMENT

V. INTRODUCTION

THIS AGREEMENT, made and entered into this _____ day of _____, _____, between the City of Oak Harbor, Washington, hereinafter called the "CITY", and the below identified organization hereinafter called the "CONSULTANT" consists of this agreement, the exhibits and the General Requirements attached hereto.

WITNESSETH THAT:

WHEREAS, the CITY desires to accomplish the above-referenced project, and

WHEREAS, the CITY does not have sufficient staff to meet the required commitment and, therefore, deems it advisable and desirable to engage the assistance of a CONSULTANT to provide the necessary services for the PROJECT; and

WHEREAS, the CONSULTANT represents that he/she is in compliance with the Washington State statutes relating to professional registration, if applicable, and has signified a willingness to furnish consulting services to the CITY;

NOW, THEREFORE, in consideration of the terms, conditions, covenants and performance contained herein, or attached and incorporated and made a part hereof, the parties hereto agree as follows:

VI. GENERAL DESCRIPTION OF WORK

The work under this AGREEMENT shall consist of the work and services described in Section III of this AGREEMENT and as herein defined and necessary to accomplish the completed work for this PROJECT. The CONSULTANT shall furnish all services, labor and related equipment necessary to conduct and complete the work as designated elsewhere in this AGREEMENT.

VII. SCOPE OF WORK

The Scope of Work and project level of effort for this project is detailed in Exhibit "B" attached hereto, and by this reference made a part of this AGREEMENT.

VIII. PAYMENT

The CONSULTANT shall be paid by the CITY for completed work and services rendered under this AGREEMENT on the basis of a negotiated hourly rate plus costs as provided in Exhibit "C" attached hereto, and by this reference made part of this AGREEMENT. Such payment shall be full compensation for work performed or services rendered and for all labor, materials, supplies, equipment, and incidentals necessary to complete the work specified in Exhibit "B" attached hereto and by this reference made part of this AGREEMENT; except for out of pocket costs as identified in Exhibit "C".

IX. CERTIFICATION OF THE CONSULTANT AND THE CITY

Attached hereto as Exhibit "A-1" is the Certification of the Consultant and Certification of City Official. Exhibit "A-2" is the Certification Regarding Debarment, Suspension, and Other Responsibility Matters - Primary Covered Transactions.

X. COMPLETE AGREEMENT

This document and referenced attachments contain all covenants, stipulations and provisions agreed upon by the parties. No agent or representative of either party has authority to make, and the parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments, or modifications of the terms hereof shall be valid unless reduced to writing and signed by the parties as an amendment to this AGREEMENT.

XI. GENERAL REQUIREMENTS

The General Requirements for Consulting Contract, on file in the City Clerk's Office at Oak Harbor City Hall, a copy of which is attached hereto, shall apply to this AGREEMENT except as modified in this Section XI (General Requirements). The CONSULTANT has assured that the attached copy of the General Requirements conforms to the set filed in the City Clerk's Office.

_____

_____

_____

_____

General provisions are modified to provide that "CONSULTANT shall provide period reports as required and not necessarily on a monthly basis."

XII. EXECUTION AND ACCEPTANCE

This AGREEMENT may be simultaneously executed in several counterparts, each of which shall be deemed to be an original having identical legal effect. The CONSULTANT does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the proposal, and the supporting materials submitted by the CONSULTANT, and does hereby accept the AGREEMENT and agrees to all of the terms and conditions thereof.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year first above written.

By_____ By_____

Consultant:_____ Agency:_____

Principal

I, _____, Consultant, certify under penalty of perjury under the laws of the State of Washington that this copy of the General Requirements for Consultant Contract conform to the set filed in the Clerk's Office.

Dated:_____

_____

By_____

GENERAL REQUIREMENTS

1. MISCELLANEOUS PROVISIONS

All aspects of coordination of the work of this AGREEMENT, with outside agencies, groups or individuals shall receive advance approval by the CITY. Necessary contacts and meetings with agencies, groups or individuals shall be coordinated through the CITY.

The CONSULTANT shall attend coordination, progress and presentation meetings with the CITY or such officials, groups or individuals as may be requested by the CITY. The CITY will provide the CONSULTANT sufficient notice prior to meetings requiring CONSULTANT's participation. The minimum number of hours or days notice required shall be agreed to between the CITY and the CONSULTANT and shown in Exhibit "B" attached hereto and made part of this AGREEMENT. The CONSULTANT shall prepare a monthly progress report as needed by the CITY (but in no case shall it be more than once a month), in a form approved by the CITY, that will outline in written and graphical form the various phases and the order of performance of the work in sufficient detail so that the progress of the work can easily be evaluated.

All reports and other data, furnished to the CONSULTANT by the CITY shall be returned. All designs, drawings, specifications, documents, and other work products prepared by the CONSULTANT prior to completion or termination of this AGREEMENT are instruments of service for this PROJECT and are property of the CITY. Reuse by the CITY or by others acting through or on behalf of the CITY of any such instruments of service, not occurring as part of this PROJECT, shall be without liability or legal exposure to the CONSULTANT.

2. TIME FOR BEGINNING AND COMPLETION

The CONSULTANT shall not begin any work under the terms of this AGREEMENT until authorized in writing by the CITY. All work under this AGREEMENT shall be completed by the date shown in Section III of this AGREEMENT under "Project Completion Date".

The established completion time shall not be extended because of any delays attributable to the CONSULTANT, but may be extended by the CITY, in the event of a delay attributable to the CITY, or because of unavoidable delays caused by an act of God, governmental actions or other conditions beyond the control of the CONSULTANT. A prior supplemental agreement issued by the CITY is required to extend the established completion date.

3. SUBCONTRACTING

The CITY permits subcontracts for only those items of work designated for subcontracts in Exhibit "G-1" or "G-2" to this AGREEMENT.

The work of the subconsultant shall not exceed its maximum amount payable unless prior written approval has been issued by the CITY.

All reimbursable direct labor, overhead, direct non-salary costs and fixed fee costs for the subconsultant shall be substantiated in the same manner as outlined in Section VIII. All subcontracts exceeding Ten Thousand Dollars ($10,000.00) in cost shall contain all applicable provisions of this AGREEMENT.

The CONSULTANT shall not subcontract for the performance of any work under this AGREEMENT without prior written permission of the CITY. No permission for subcontracting shall create, between the CITY and subcontractor, any contract or any other relationship.

4. EMPLOYMENT

The CONSULTANT warrants that he/she has not employed or retained any company or person, other than a bona fide employee working solely for the CONSULTANT, to solicit or secure this contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the CONSULTANT, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this contract. For breach or violation of this warrant, the CITY shall have the right to annul this AGREEMENT without liability, or in its discretion, to deduct from the AGREEMENT price or consideration or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

Any and all employees of the CONSULTANT or other persons while engaged in the performance of any work or services required of the CONSULTANT under this AGREEMENT, shall be considered employees of the CONSULTANT only and not of the CITY, and any and all claims that may or might arise under any Workers' Compensation Act on behalf of said employees or other persons while so engaged, and any and all claims made by a third party as a consequence of any act or omission on the part of the CONSULTANT's employees or other persons while so engaged on any of the work or services provided to be rendered herein, shall be the sole obligation and responsibility of the CONSULTANT.

The CONSULTANT shall not engage, on a full or part time basis, or other basis, during the period of the contract, any professional or technical personnel who are, or have been, at any time during the period of the contract, in the employ of the CITY, except regularly retired employees, without written consent of the public employer of such person.

5. NONDISCRIMINATION

The CONSULTANT agrees not to discriminate against any client, employee or applicant for employment or for services because of race, creed, color, national origin, marital status, sexual orientation, sex, age, honorably discharged veteran or military status, or the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a person with a disability; unless based upon a bona fide occupational qualification; with regard to, but not limited to, the following: employment upgrading, demotion or transfer, recruitment or any recruitment advertising, a layoff or termination, rate of pay or other forms of compensation, selection for training, or rendition of services. The CONSULTANT understands and agrees that if it violates this provision, this AGREEMENT may be terminated by the CITY and further that

the CONSULTANT shall be barred from performing any services for the CITY now or in the future unless a showing is made satisfactory to the CITY that discriminatory practices have terminated and that recurrence of such action is unlikely.

During the performance of this AGREEMENT, CONSULTANT, for itself, its assignees and successors in interest agrees as follows:

A. **COMPLIANCE WITH REGULATIONS**: The CONSULTANT shall comply with the applicable federal law relative to nondiscrimination, Title 49, Code of Federal Regulations, which are herein incorporated by reference and made a part of this AGREEMENT. The CONSULTANT shall comply with the Americans with Disabilities Act of 1992, as amended and the Americans with Disabilities Amendments Act of 2008.

B. **INFORMATION AND REPORTS**: The CONSULTANT shall provide all information and reports required by the CITY and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the CITY to be pertinent to ascertain compliance with such state or federal law. Where any information required of the CONSULTANT is in the exclusive possession of another who fails or refuses to furnish this information, the CONSULTANT shall so certify to the CITY, and shall set forth what efforts it has made to obtain the information.

C. **SANCTIONS FOR NONCOMPLIANCE**: In the event of the CONSULTANT's noncompliance with the nondiscrimination provisions of this AGREEMENT, the CITY shall impose such sanctions as it may determine to be appropriate, including, but not limited to:

(1) Withholding of payments to the CONSULTANT under the AGREEMENT until the CONSULTANT complies, and/or

(2) Cancellation, termination or suspension of the AGREEMENT, in whole or in part.

D. **INCORPORATION OF PROVISIONS**: The CONSULTANT shall include the provisions of paragraphs (A) through (E) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The CONSULTANT shall take such action with respect to any subconsultant or procurement as the CITY may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that, in the event a CONSULTANT becomes involved in, or is threatened with, litigation with a subconsultant or supplier as a result of such direction, the CONSULTANT may request the CITY to enter into such litigation to protect the interests of the CITY.

E. **UNFAIR EMPLOYMENT PRACTICES**: The CONSULTANT shall comply with RCW 49.60.180 and Executive Order number E.O. 77-13 of the Governor of the State of Washington which prohibits unfair employment practices.

6. TERMINATION OF AGREEMENT

The right is reserved by the CITY to terminate this AGREEMENT at any time upon ten (10) days' written notice to the CONSULTANT.

In the event this AGREEMENT is terminated by the CITY other than for default on the part of the CONSULTANT, a final payment shall be made to the CONSULTANT as shown in Exhibit "F".

No payment shall be made for any work completed after ten (10) days following receipt by the CONSULTANT of the Notice to Terminate. If the accumulated payment made to the CONSULTANT prior to Notice to Terminate exceeds the total amount that would be due, computed as set forth herein above, then no final payment shall be due and the CONSULTANT shall immediately reimburse the CITY for any excess paid.

If the services of the CONSULTANT are terminated by the CITY for default on the part of the CONSULTANT, the above formula for payment shall not apply. In such an event, the amount to be paid shall be determined by the CITY with consideration given to the actual costs incurred by the CONSULTANT in performing the work to the date of termination, the amount of work originally required which was satisfactorily completed to date of termination, whether that work is in a form or a type which is usable to the CITY at the time of termination; the cost to the CITY of employing another firm to complete the work required and the time which may be required to do so, and other factors which affect the value to the CITY of the work performed at the time of termination. Under no circumstances shall payment made under this subsection exceed the amount which would have been made using the formula set forth in the previous paragraph.

If it is determined for any reasons that the CONSULTANT was not in default or that the CONSULTANT's failure to perform is without it or its employee's fault or negligence, the termination shall be deemed to be a termination for the convenience of the CITY in accordance with the provision of this AGREEMENT.

In the event of death of any member, partner or officer of the CONSULTANT or any of its supervisory personnel assigned to the project, or, dissolution of the partnership, termination of the corporation, or disaffiliation of the principally involved employee, the surviving members of the CONSULTANT hereby agree to complete the work under the terms of this AGREEMENT, if requested to do so by the CITY. This subsection shall not be a bar to renegotiation of the AGREEMENT between the surviving members of the CONSULTANT and the CITY, if the CITY so chooses.

In the event of the death of any of the parties listed in the previous paragraph, should the surviving members of the CONSULTANT, with the CITY's concurrence, desire to terminate this AGREEMENT, payment shall be made as set forth in the second paragraph of this section.

Payment for any part of the work by the CITY shall not constitute a waiver by the CITY of any remedies of any type it may have against the CONSULTANT, or for failure of the

CONSULTANT to perform work required of it by the CITY. Forbearance of any rights under the AGREEMENT will not constitute waiver of entitlement to exercise those rights with respect to any future act or omission by the CONSULTANT.

7. CHANGES OF WORK

The CONSULTANT shall make changes and revisions in the complete work of this AGREEMENT as necessary to correct errors appearing therein, when required to do so by the CITY, without additional compensation thereof. Should the CITY find it desirable for its own purposes to have previously satisfactorily completed work or parts thereof changed or revised, the CONSULTANT shall make such revisions as directed by the CITY. This work shall be considered as Extra Work and will be paid for as herein provided under General Requirements, Section 13.

8. DISPUTES

Any dispute concerning questions of fact in connection with the work not disposed of by AGREEMENT between the CONSULTANT and the CITY shall be referred for determination to the City Administrator or his/her designee, whose decision in the matter shall be final and binding on the parties of this AGREEMENT, provided, however, that if an action is brought challenging the Public Works Superintendent or City Engineer's decision, that decision shall be subject to de novo judicial review.

9. VENUE, APPLICABLE LAW AND PERSONAL JURISDICTION

In the event that either party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that any such action shall be initiated in the Superior Court of the State of Washington, situated in Island County. The parties hereto agree that all questions shall be resolved by application of Washington law and that the parties to such action shall have the right of appeal from such decisions of the Superior Court in accordance with the laws of the State of Washington. The CONSULTANT hereby consents to the personal jurisdiction of the Superior Court of the State of Washington, situated in Island County.

10. LEGAL RELATIONS AND INSURANCE

A. The CONSULTANT shall comply with all Federal, State, and local laws and ordinances applicable to the work to be done under this AGREEMENT. This AGREEMENT shall be interpreted and construed in accordance with the laws of Washington.

B. The CONSULTANT's relation to the CITY shall be at all times as an independent contractor and not as an employee.

C. Unless otherwise specified in the AGREEMENT, the CITY shall be responsible for administration of construction contracts, if any, on the project. Subject to the processing of an acceptable, supplemental agreement, the CONSULTANT shall provide on-call

assistance to the CITY during contract administration. By providing such assistance, the CONSULTANT shall assume no responsibility for: proper construction techniques, job site safety, or any construction contractor's failure to perform its work in accordance with the contract documents.

D. The CITY will pay no payments under Section VIII "Payments" until the CONSULTANT has fully complied with this section. This remedy is not exclusive; and the CITY may take such other action as is available to them under other provisions of this AGREEMENT, or otherwise in law.

11. INDEMNIFICATION REQUIREMENTS

Indemnification/Hold Harmless. CONSULTANT shall defend, indemnify and hold the CITY, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or resulting from the acts, errors or omissions of the CONSULTANT in performance of this AGREEMENT, except for injuries and damages caused by the sole negligence of the CITY.

Notwithstanding the provisions of the preceding paragraph, it is understood and mutually agreed by the CONSULTANT and the CITY that neither party will attempt to enforce strict liability for any act, error or omission against either party and that the work covered under this AGREEMENT will be completed by the CONSULTANT with the standard of care of the Civil Engineering profession in the State of Washington.

Should a court of competent jurisdiction determine that this AGREEMENT is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the CONSULTANT and the CITY, its officers, officials, employees, and volunteers, the CONSULTANT's liability hereunder shall be only to the extent of the CONSULTANT's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the CONSULTANT's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this AGREEMENT.

12. INSURANCE.

The CONSULTANT shall procure and maintain for the duration of this AGREEMENT, insurance claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the CONSULTANT, its agents, representatives or employees.

A. **No Limitation**. CONSULTANT's maintenance of insurance as required by the AGREEMENT shall not be construed to limit the liability of the CONSULTANT to the coverage provided by such insurance, or otherwise limit the CITY's recourse to any remedy available at law or in equity.

B. **Minimum Scope of Insurance**. CONSULTANT shall obtain insurance of the types described below:

1. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.

2. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors and personal injury and advertising injury. The CITY shall be named as an insured under the CONSULTANT's Commercial General Liability insurance policy with respect to the work performed for the CITY.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

4. Professional Liability insurance appropriate to the CONSULTANT's profession.

C. **Minimum Amounts of Insurance**. CONSULTANT shall maintain the following insurance limits:

1. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of One Million Dollars ($1,000,000.00) per accident.

2. Commercial General Liability insurance shall be written with limits no less than One Million Dollars ($1,000,000.00) each occurrence, Two Million Dollars ($2,000,000.00) general aggregate.

3. Professional Liability insurance shall be written with limits not less than One Million Dollars ($1,000,000.00) per claim and One Million Dollars ($1,000,000.00) policy aggregate limit.

D. **Other Insurance Provisions**. The insurance policies are to contain, or be endorsed to contain, the following provisions for Automobile Liability, Professional Liability and Commercial General Liability insurance:

1. The CONSULTANT's insurance coverage shall be primary insurance with respect to the CITY. Any insurance, self-insurance, or insurance pool coverage maintained by the CITY shall be in excess of the CONSULTANT's insurance and shall not contribute with it.

2. The CONSULTANT's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the CITY.

E. **Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

F. **Verification of Coverage.** CONSULTANT shall furnish the CITY with original certificates and a copy of the amendatory endorsements including, but not necessarily limited to, the additional insured endorsement evidencing the insurance requirements of the CONSULTANT before commencement of the work.

13. EXTRA WORK

A. The CITY may at any time, by written order, make changes within the general scope of the AGREEMENT in the services to be performed.

B. If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this AGREEMENT, whether or not changed by the order, or otherwise affects any other terms and conditions of the AGREEMENT, the CITY shall make an equitable adjustment in the (1) maximum amount payable; (2) delivery or completion schedule, or both; and (3) other affected terms and shall modify the AGREEMENT accordingly. If the change causes an increase in the maximum amount payable, it shall not become a part of this AGREEMENT unless and until a written amendment to the AGREEMENT is executed by both the CITY and the CONSULTANT.

C. The CONSULTANT must submit its "request for equitable adjustment" (hereafter referred to as "claim") under this clause within thirty (30) days from the date of receipt of the written order. However, if the CITY decides that the facts justify it, the CITY may receive and act upon a claim submitted before final payment of the AGREEMENT.

D. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the CONSULTANT from proceeding with the AGREEMENT as changed.

E. Notwithstanding the terms and conditions of paragraphs (A) and (B) above, the maximum amount payable for this AGREEMENT shall not be increased or considered to be increased except by specific written supplement to this AGREEMENT.

14. ENDORSEMENT OF PLANS

The CONSULTANT shall place his endorsement on all plans, estimates or any other engineering data furnished by him.

15. EQUAL OPPORTUNITY

A. Compliance with 41 CFR 60-1.4 -- Equal Opportunity Clause. The CITY incorporates 41 CFR 60-1.4 -- Equal Opportunity Clause by reference.

B. Compliance with 41 CFR 60-250.5 -- Equal Opportunity Clause (Special Disabled Veterans).

1. The CONSULTANT will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or other protected veteran in regard to any position for which the employee or applicant for employment is qualified. The CONSULTANT agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or other protected veteran in all employment practices, including the following:

   i. Recruitment, advertising, and job application procedures;

   ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

   iii. Rates of pay or any other form of compensation and changes in compensation;

   iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

   v. Leaves of absence, sick leave, or any other leave;

   vi. Fringe benefits available by virtue of employment, whether or not administered by the CONSULTANT;

   vii. Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

   viii. Activities sponsored by the CONSULTANT including social or recreational programs; and

   ix. Any other term, condition, or privilege of employment.

2. The CONSULTANT agrees to immediately list all employment openings which exist at the time of the execution of this AGREEMENT and those which occur during the performance of this AGREEMENT, including those not generated by this AGREEMENT and including those occurring at an establishment of the CONSULTANT other than the one wherein the AGREEMENT is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local employment service office of the state employment security agency wherein the opening occurs. Listing employment openings with the U.S. Department of Labor's America's Job Bank shall satisfy the requirement to list jobs with the local employment service office.

3. Listing of employment openings with the local employment service office pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a bona fide job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the CONSULTANT from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

4. Whenever the CONSULTANT becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the state employment security agency in each state where it has establishments of the name and location of each hiring location in the state: Provided, That this requirement shall not apply to state and local governmental CONSULTANTS. As long as the CONSULTANT is contractually bound to these provisions and has so advised the state agency, there is no need to advise the state agency of subsequent AGREEMENTS. The CONSULTANT may advise the state agency when it is no longer bound by this AGREEMENT clause.

5. The provisions of paragraphs 2 and 3 of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

6. As used in this clause:

   i. All employment openings include all positions except executive and top management, those positions that will be filled from within the CONSULTANT's organization, and positions lasting three (3) days or less. This term includes full-time employment, temporary employment of more than (3) three days' duration, and part-time employment.

ii. Executive and top management means any employee:

(a) whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and

(b) who customarily and regularly directs the work of two (2) or more other employees therein; and

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) who customarily and regularly exercises discretionary powers; and

(e) who does not devote more than twenty percent (20%), or, in the case of an employee of a retail or service establishment who does not devote as much as forty percent (40%), of his or her hours of work in the work week to activities which are not directly and closely related to the performance of the work described in (a) through (d) of this paragraph 6.ii.; Provided, that (e) of this paragraph 6.ii. shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a twenty percent (20%) interest in the enterprise in which he or she is employed.

iii. Positions that will be filled from within the CONSULTANT's organization means employment openings for which no consideration will be given to persons outside the CONSULTANT's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of his or her own organization.

7. The CONSULTANT agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

8. In the event of the CONSULTANT's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

9. The CONSULTANT agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Deputy Assistant Secretary for Federal Contract Compliance, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the CONSULTANT's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are special disabled veterans, veterans of the Vietnam era, recently separated veterans, or other protected veterans. The CONSULTANT must ensure that applicants or employees who are special disabled veterans are informed of the contents of the notice (e.g., the CONSULTANT may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

10. The CONSULTANT will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the CONSULTANT is bound by the terms of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and is committed to take affirmative action to employ and advance in employment qualified special disabled veterans, veterans of the Vietnam era, recently separated veterans, and other protected veterans.

11. The CONSULTANT will include the provisions of this clause in every subcontract or purchase order of Twenty-five Thousand Dollars ($25,000.00) or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, so that such provisions will be binding upon each subcontractor or vendor. The CONSULTANT will take such action with respect to any subcontract or purchase order as the Deputy Assistant Secretary for Federal Contract Compliance may direct to enforce such provisions, including action for noncompliance.

C. Compliance with 41 CFR 60-741.5 -- Equal Opportunity Clause (Workers with Disabilities).

1. The CONSULTANT will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The CONSULTANT agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability in all employment practices, including the following:

   i. Recruitment, advertising, and job application procedures;

ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

iii. Rates of pay or any other form of compensation and changes in compensation;

iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

v. Leaves of absence, sick leave, or any other leave;

vi. Fringe benefits available by virtue of employment, whether or not administered by the CONSULTANT;

vii. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

viii. Activities sponsored by the CONSULTANT including social or recreational programs; and

ix. Any other term, condition, or privilege of employment.

2. The CONSULTANT agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

3. In the event of the CONSULTANT's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

4. The CONSULTANT agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Deputy Assistant Secretary for Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the CONSULTANT's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The CONSULTANT must ensure that applicants and employees with disabilities are informed of the contents of the notice (e.g., the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

5. The CONSULTNAT will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative

action to employ and advance in employment individuals with physical or mental disabilities.

6. The CONSULTANT will include the provisions of this clause in every subcontract or purchase order in excess of Ten Thousand Dollars ($10,000.00), unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each subcontractor or vendor. The CONSULTANT will take such action with respect to any subcontract or purchase order as the Deputy Assistant Secretary for Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

EXHIBIT A-1
CERTIFICATION OF CONSULTANT

Project No. Eng 08-07

I hereby certify that I am _____ a duly authorized representative of the firm of PerTeet Inc whose address is 2707 Colby Avenue, Ste 900 Everett, WA 98201 and that neither I nor the above firm I here represent has:

(a) employed or retained for a commission, percentage, brokerage, contingent fee or other consideration, any firm or person (other than a bona fide employee working solely for me or the above CONSULTANT) to solicit or secure this contract.

(b) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract.

(c) paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the above CONSULTANT) any fee, contribution, donation or consideration of any kind for, or in connection with procuring or carrying out the contract; except as here expressly stated (if any).

I further certify that the firm I here represent is authorized to do business in the State of Washington and that the firm is in full compliance with the requirements of the Board of Professional Registration.

I acknowledge that this certificate is subject to applicable State and Federal laws, both criminal and civil.

_____ _____
Date Signature

CERTIFICATION OF CITY OFFICIAL

I hereby certify that I am the responsible City official for the City of Oak Harbor, Washington, for this AGREEMENT and that the above consulting firm or its representative has not been required directly or indirectly as an express or implied condition in connection with obtaining or carrying out this contract to:

(a) employ or retain, or agree to employ or retain, any firm or person; or

(b) pay or agree to pay to any firm, person or organization, any fee, contribution, donation or consideration of any kind, except as here expressly stated (if any).

I acknowledge that this certificate is subject to applicable State and Federal laws, both criminal and civil.

Date _____ Signature _____

EXHIBIT A-2
CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS- PRIMARY COVERED TRANSACTIONS

1. The CONSULTANT, through the prospective primary participant, certifies to the best of its knowledge and belief, that it and its principals:

   a. are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any State or Federal department or city;

   b. have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission or fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

   c. are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state or local) with commission of any of the offenses enumerated in paragraph 1.b. of this certification; and

   d. have not within a three-year period preceding this application/proposal had one or more public transactions (federal, state or local) terminated for cause or default.

2. Where the CONSULTANT, through the prospective primary participant, is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Consultant (Firm): Penteet, Inc

Date

President or Authorized Official or Consultant Signature

EXHIBIT B
SCOPE OF WORK (ADD ON)

Project No. Eng 08-07

See attached documents furnished by the Consultant

Exhibit "B"
Scope of Services

City of Oak Harbor
S.E. Pioneer Reconstruction
Construction Support Services

PROJECT DESCRIPTION

Reconstruction of SE Pioneer Way will result in the replacement of 2,400 linear feet of roadway from SE Pioneer Way between City Beach Street and Midway Boulevard. The reconstruction will replace pavement, sidewalks and appurtenances from building face to building face. The work includes the underground conversion of overhead power and telecommunications facilities, the installation of approximately 500 linear feet of 12-inch sanitary sewer and pipe bursting of approximately 1,200 feet of 12-inch sanitary sewer.

Perteet Inc., ("Consultant") is the design engineer of record and was responsible (together with its authorized sub-consultants) for the contract documents, project plans and project specifications together all of the engineering design, surveying and reporting necessary to produce said documents. As such, Consultant is in possession of the final approved plans and specifications.

As part of the project management and oversight plan of the City of Oak Harbor (the "City") there are three key groups consisting of the City staff, the construction management professional and the design engineer of record.

During construction the design engineer of record may be needed from time to time to clarify or adjust the design. The efforts of the engineer are not intended to correct mistakes rather it is intended to manage unforeseen issues requiring the attention of the responsible design professional. As the design engineer of record it is appropriate to retain Perteet, Inc for this type of on call work. It is expected that the Consultant will act in good faith and use their best efforts to respond to City requests for work under this contract.

It is assumed for purposes of this agreement that the City and its construction management staff will have responsibility for:

1. Construction management
2. Construction quality control
3. Meeting minutes and agenda preparation
4. Public and franchise utility coordination
5. Public communication
6. Post project reporting (including GREENROADS certification documentation)
7. Processing and documentation of change orders
8. Construction observation
9. Records management and administration
10. Preparation of contractor pay estimates for City approval

11. Survey services
12. Coordination with property owners during construction
13. Geotechnical services or testing.

ON CALL SERVICES

The purpose of this Agreement is to provide on call design and engineering support professional services for the Pioneer Way Reconstruction Project in Oak Harbor, WA. This scope of services provides for services from date of execution of this contract through December, 2011.

When requesting services from the Consultant, the City will provide a written request via hardcopy letter, facsimile transmission or electronic mail. The written request will include a description of the work requested and a date and time the work shall be delivered to the City of Oak Harbor. Upon receipt of the request the Consultant will provide the design and engineering support services requested. If services requested are anticipated, by the Consultant, to take longer than 24 clock hours or the fee for the service is anticipated, by the Consultant, to exceed $1,000, then the Consultant shall provide to the City, within 24 hours of the receipt of the written request, an estimate of both the time and fee to provide the requested design and engineering support services. Upon receipt of the estimated time and fee, the City shall provide a written authorization to proceed, revise the request for services or cancel the request. Consultant shall receive written authorization from the City prior to any site visit that may be necessary to respond to a request from the City.

The City will not be responsible for any charges by the Consultant for services not requested or authorized by the City. Work covered by this Agreement is for design items not foreseen in the original design or otherwise found in the construction documents (plans and specifications). Errors and/or omissions from the construction drawings or project manual are not included in this proposal.

This is an on-call Agreement. Services will be provided as requested in writing by the City and the level of effort for each work element is limited to the amount of labor and expenses indicated in each on-call fee determination as previously outlined. Fees for services requested and completed will be based on the fee schedules included with this agreement. Perteet's rates are attached hereto as Exhibit "D". Rates for subconsultant work are attached hereto as Exhibit "G".

SUBCONSULTANTS

Qualified Sub-Consultants approved for use as part of this contract include:

Hough Beck & Baird, Inc. ("HBB") – Landscaping, Irrigation & Urban Amenities

No other subcontractors are approved for use as part of this contract without written prior approval from the City of Oak Harbor.

DESIGN AND ENGINEERING SUPPORT

The following are general descriptions of design and engineering support services anticipated during the duration of this agreement:

1. **Project Management and Coordination** – For work requested by the City, the Consultant will manage and coordinate internal work with the subcontractor and provide invoices on a monthly basis for work completed. Detailed invoices shall include a summary statement of the work completed, charges for work and a balance of the amount remaining in the contract fee limit. Markup on subcontractor fees shall not be allowed.

2. **Field Changes and Design Revisions** – Assist the City with any requests where field construction modifications or additions or clarifications are requested .

3. **Weekly Construction Meetings**: The Consultant will attend construction progress meetings as requested by the Project Engineer.

4. **Review of Shop Drawings and Materials Submittals**: Review and recommend action on Contractor submittals for City approval, as may be requested by the City These submittals may include: Shop drawings and other technical submittals, certifications, working drawings and request for material sources. The Consultant may be asked to consider and evaluate minor alternatives or substitutions proposed by the Contractor. Consultant may provide reviews for the following elements:
    a. Perteet – Roadway and related items, storm water conveyance and treatment, illumination, signals and raised planters. Sanitary sewer, water and overhead utility conversion;
    b. HBB – Irrigation, public art and landscaping.

5. **Requests for Information (RFI)/Clarifications**: Provide clarification of the contract documents as requested by the City. Prepare and submit written responses and drawings or sketches to the City to clarify the contract documents. The Consultant will endeavor to provide an initial response to RFIs within four hours or will work with the City to determine an acceptable time table for more complicated requests.

6. **Landscaping, Irrigation and Urban Amenities**: The Consultant or its subcrontractor, HBB, will review construction progress, plant materials, public art and irrigation installation as requested by the City's Project Engineer. HBB will attend a preliminary punch-list review in the field of completed planting and irrigation work. HBB will assist the City in preparing a written punch-list of planting and irrigation corrections or completion items. HBB will attend a final field review of completed planting and irrigation work to verify final completion. As part of the project plans, several types of urban amenities are to be provided by the contractor as a location to be determined by the City. HBB will be on site when requested by the City to assist in identifying placement locations for benches, planters, trash receptacles and other urban amenities as outlined in the project plans and specifications. Public art is currently being selected by the City. Final selection of the art pieces has not been made. Once a selection of art is made, additional design and engineering may be necessary to place the art within the project limits. The City may request assistance from the Consultant and it subcontractors in evaluating public

art proposals, design of infrastructure necessary to support placement of public art or otherwise assist the City in incorporating public art into the project.

Deliverables:

- Deliverables will be defined in written requests for assistance issued to the Consultant

Schedule:

- Defined deliverables will be provided within 24 hours or as otherwise approved in writing by the City

EXHIBIT C
PAYMENT (NEGOTIATED HOURLY RATE PLUS COSTS)

The CONSULTANT shall be paid by the CITY for completed work and services rendered under this AGREEMENT as provided hereinafter. Such payment shall be full compensation for work performed or services rendered and for all labor, materials, supplies, equipment, and incidentals necessary to complete the work. If a federal highway project, the CONSULTANT shall conform with all applicable portions of 48 CFR 31.

1. **Hourly Rates**

The CONSULTANT shall be paid by the CITY for work done, based upon the negotiated hourly rates shown in Exhibits "D-1" and "D-2" attached hereto and by this reference made part of this AGREEMENT. The rates listed shall be applicable for the first twelve (12) month period and shall be subject to negotiation for the following twelve (12) month period upon request of the CONSULTANT or the CITY. If negotiations are not conducted for the second or subsequent twelve (12) month periods within ninety (90) days after completion of the previous period, the rates listed in this AGREEMENT or subsequent written authorization(s) from the CITY shall be utilized for the life of the AGREEMENT. The rates are inclusive of direct salaries, payroll additives, overhead and fees.

In the event renegotiation of the hourly rates is conducted, the CITY reserves the right to audit for any change in the overhead rate currently in use by the CONSULTANT and modify the hourly rates to be paid to the CONSULTANT subsequent to the renegotiation accordingly. Any changes in CONSULTANT's fixed hourly rates may include salary or overhead adjustments.

2. **Direct Non-salary Costs**

Direct non-salary costs will be reimbursed at the actual cost to the CONSULTANT. These charges may include, but are not limited to, the following items: travel, printing, long distance telephone, supplies, computer charges, and fees of subconsultants. Air or train travel will only be reimbursed to economy class levels unless otherwise approved by the CITY. Automobile mileage for travel will be reimbursed as the current rate approved for CITY employees and shall be supported by the date and time of each trip with origin and designation of such trips. Subsistence and lodging expenses will be reimbursed at the same rate as for CITY employees. The billing for non-salary cost, directly identifiable with the PROJECT, shall be an itemized listing of the charges supported by the original bills, invoices, expense accounts, and miscellaneous supporting data retained by the CONSULTANT. Copies of the original supporting documents shall be supplied to the CITY upon request. All above charges must be necessary for the services provided under this AGREEMENT.

~~3. Management Reserve Fund~~

No Reserve

~~The CITY may desire to establish a Management Reserve Fund to provide the Agreement Administrator the flexibility of authorizing additional funds to the AGREEMENT for allowable unforeseen costs, or reimbursing the CONSULTANT for additional work beyond that already defined in this AGREEMENT. Such authorization(s) shall be in writing and shall not exceed the lesser of Fifty Thousand Dollars ($50,000.00) or ten percent (10%) of the Total Amount Authorized as shown in the heading of this AGREEMENT. The amount included for the Management Reserve Fund is shown in the heading of this AGREEMENT. This fund may be replenished in a subsequent supplement agreement. Any changes requiring additional costs in excess of the "Management Reserve Fund" shall be made in accordance with Section 11, "Extra Work".~~

4. **Maximum Amount Payable**

The maximum amount payable for completion of work under this AGREEMENT shall not exceed the amount shown in the heading of this AGREEMENT. The maximum amount payable includes the Management Reserve Fund, but does not include payment for extra work as stipulated in Section 11, "Extra Work" of the General Requirements. No minimum amount payable is guaranteed under this AGREEMENT.

5. **Monthly Progress Payments**

Progress payments may be claimed on a monthly basis for all costs authorized in (1) and (2) above. The monthly invoices shall be supported by detailed statements for hours expended at the rates established in Exhibits "D-1" and "D-2", including names and classifications of all employees, and invoices for all direct non-salary expenses. To provide a means of verifying the invoiced salary costs for the CONSULTANT's employees, the CITY may conduct employee interviews. These interviews may consist of recording the names, titles, salary rates, and present duties of those employees performing work on the project at the time of the interview.

6. **Inspection of Cost Records**

The CONSULTANT and his/her subconsultants shall keep available for inspection by representatives of the CITY, State, and the United States, for a period of three (3) years after final payment, the cost records and accounts pertaining to this AGREEMENT and all items related to or bearing upon these records with the following exception: if any litigation, claim, or audit is started before the three (3) year period, the records shall be retained until all litigation, claims, or audit filings involving the records have been resolved. The three (3) year retention period begins when the CONSULTANT receives final payment.

7. **Final Payment**

Final payment of any balance due the CONSULTANT of the gross amount earned will be made promptly upon its verification by the CITY after the completion of the work under this AGREEMENT, contingent upon receipt of all PS&E, plans, maps, notes, reports, and other related documents which are required to be furnished under this AGREEMENT. Acceptance of such final payment by the CONSULTANT shall constitute a release of all claims for payment which the CONSULTANT may have against the CITY unless such claims are specifically reserved in writing and transmitted to the CITY by the CONSULTANT prior to its acceptance. Said final payment shall not, however, be a bar to any claims that the CITY may have against the CONSULTANT or to any remedies the CITY may pursue with respect to such claims.

The payment of any billing will not constitute agreement as to the appropriateness of any item and at the time of final audit, all required adjustments will be made and reflected in a final payment. In the event that such final audit reveals an overpayment to the CONSULTANT, the CONSULTANT will refund such overpayment to the CITY within ninety (90) days of notice of the overpayment. Such refund shall not constitute a waiver by the CONSULTANT of any claims relating to the validity of a finding by the CITY of overpayment.

Exhibit "D-1

PERTEET, INC. 2707 Colby Avenue, Suite 900 Everett, WA 98201 City of Oak Harbor - S.E. Pioneer Reconstruction Support Services				
		162.58%	30.00%	
JOB CLASSIFICATION				INCLUSIVE HOURLY RATE
	Direct Salary	OH	Fee	
Associate	$53.74	$87.37	$16.12	$157.23
Lead Engineer/Manager	$45.00	$73.16	$13.50	$131.66
Engineer III/Project Engineer	$38.46	$62.53	$11.54	$112.53
Engineer II	$28.00	$45.52	$8.40	$81.92
Engineer I	$25.00	$40.65	$7.50	$73.15
Lead Technician/Designer	$34.00	$55.28	$10.20	$99.48
Technician III	$24.00	$39.02	$7.20	$70.22
Accountant	$30.45	$49.51	$9.14	$89.10
Clerical	$26.00	$42.27	$7.80	$76.07

Direct (Non-Salary) Reimbursable Expenses

Expense Type	**Rate Per Item**
Mileage	@ current federal rate
Color Copies	$.80 each
CADD Workstation	$10/hr.
GIS / Traffic Modeling	$15/hr.

Exhibit D-2

Perteet
Overhead Schedule
For the Year Ended December 31, 2009

Description	Trial Balance	Adj. Amount	WSDOT Adj.	Ref.	Accepted Amount	%
Direct Labor Base	4,399,770				4,399,770	
Design Build 20% Bid & Proposal		(39,869)		P	(39,869)	
Uncompensated Overtime		61,391		Q	61,391	
Overtime Premium		(63,237)		N	(63,237)	
Total Direct Labor Base	4,399,770	(41,715)	0		4,358,055	100.00%
Fringe Benefits						
Payroll Taxes	$660,504				$660,504	15.16%
Insurance - Medical/Dental	$617,505				$617,505	14.17%
Vacation/Holiday/Sick Leave	$802,953				$802,953	18.42%
401k Employer Contribution	$218,097				$218,097	5.00%
ESOP Contribution	$215,000				$215,000	4.93%
Bonuses	$88,850		($88,850)	S	$0	0.00%
Total Fringe Benefits	$2,602,909	$0	($88,850)		$2,514,059	57.69%
General Overhead:						
G&A Wages	$2,383,477	($2,049)	($28,243)	N,U	$2,353,185	54.00%
Variance - Uncompensated Overtime		($61,391)		Q	($61,391)	-1.41%
Design Build 20% Bid & Proposal		$39,869		P	$39,869	0.91%
Auto Expense	$106,811	($10,813)	($36,232)	K,R,T	$59,766	1.37%
Bank & Service Fees	$20,850				$20,850	0.48%
Communications	$167,719				$167,719	3.85%
Computer Expenses	$178,028				$178,028	4.09%
Conferences & Meetings	$28,807				$28,807	0.66%
Copier Expense	$81,629				$81,629	1.87%
Depreciation - Book Basis	$357,587		($50,000)	V	$307,587	7.06%
Dues & Memberships	$33,257	($5,001)		A	$28,256	0.65%
Entertainment	$9,817	($9,817)		D	$0	0.00%
Golf tournament	$1,322	($1,322)		D	$0	0.00%
Insurance	$118,466				$118,466	2.72%
Life Insurance	($5,986)	$5,986		C	$0	0.00%
Licenses & Fees	$2,890				$2,890	0.07%
Meals	$26,234	($22,140)		E	$4,094	0.09%
Miscellaneous	$109				$109	0.00%
Outside Services	$34,134				$34,134	0.78%
Postage & Delivery Services	$9,652				$9,652	0.22%
Professional Services	$99,774	($6,836)		B,O	$92,938	2.13%
Recruiting	$1,270				$1,270	0.03%
Rent	$742,974				$742,974	17.05%
Repairs & Maintenance	$604				$604	0.01%
Reproduction	$11,201	($619)		L	$10,582	0.24%
Seminars & Training	$74,475				$74,475	1.71%
Staff Functions	$3,804	($1,000)	($2,804)	D,W,X,Y	$0	0.00%
Subscriptions & Publications	$6,337				$6,337	0.15%
Supplies	$67,777		($1,825)	W,X,Y	$65,952	1.51%
Travel & Lodging	$46,686				$46,686	1.07%
Advertising	$8,142	($8,142)		F	$0	0.00%
Bad Debt Expense	$64,143	($64,143)		G	$0	0.00%
Claims	$39,786	($39,786)		M	$0	0.00%
Contributions	$10,425	($10,425)		H	$0	0.00%
Gifts	$320	($320)		J	$0	0.00%
Interest	$33,535	($33,535)		I	$0	0.00%
Sponsorships	$9,485	($9,485)		F	$0	0.00%
Taxes - Business & Property	$307,854				$307,854	7.06%

Exhibit D-2
(cont)

Perteet
Overhead Schedule
For the Year Ended December 31, 2009

Description	Trial Balance	Adj. Amount	WSDOT Adj.	Ref.	Accepted Amount	%
Book basis of assets deleted from depr sch	$11,371				$11,371	0.26%
Less: Offsets for Direct Costs	($201,801)				($201,801)	-4.63%
Total General Overhead	$4,892,964	($240,968)	($119,104)		$4,532,892	104.00%
Total Overhead Costs	$7,495,873	($240,968)	($207,954)		$7,046,951	161.70%
Overhead Rate (Less FCC)	170.37%	166.47%			161.70%	
Facilities Cost of Capital		$38,393			$38,393	0.88%
					$7,085,344	
Overhead Rate (Less FCC)					162.58%	

Perteet - Reviewed and Accepted on 11/30/2010 MYS
"Overhead Rate still subject to WSDOT Audit"

References
Perteet Adjustments:

- A Lobbying costs unallowable per 48 CFR 31.205-22.
- B Federal income tax preparation fees in excess ($500) of $250 unallowable per 31.205-41(b)(2), 48 CFR 31.201-6(d), and WSDOT Overhead Policy.
- C Key Person Life Insurance unallowable per 48 CFR 31.205-19(e)(2)(vi).
- D Entertainment costs unallowable per 48 CFR 31.205-14. Picnic costs over $10 per employee unallowable per WSDOT Overhead Policy and 48 CFR 31.201-3.
- E Local meals unallowable per 48 CFR 31.205-46(a)(2)(i) and WSDOT Accounting Manual M13-82, Chapter 10 Travel
- F Advertising & Promotional costs unallowable per 48 CFR 31.205-1(f).
- G Bad Debt unallowable per 48 CFR 31.205-3.
- H Contributions unallowable per 48 CFR 31.205-8.
- I Interest unallowable per 48 CFR 31.205-20.
- J Gifts unallowable per 48 CFR 31.205-13(b).
- K Personal commute unallowable per 48 CFR 31.205-6(m)(2).
- L Printing and mailing costs related to Valentines unallowable per 48 CFR 31.205-14.
- M Direct project costs unallowable per 48 CFR 31.202(a).
- N Overtime Premium unallowable per 48 CFR 22.103-1, 22.103-4(g) and WSDOT OH Policy.
- O Attorney costs unallowable per 48 CFR 31.205-47, 31.201-6
- P 20% Bid & Proposal for design build efforts - In 2009, Perteet participated in design build efforts for which the firm was not selected. The projects required that 20% of labor be part of bid and proposal, or direct selling, effort to win the projects. No adjustment has been made in the GL so an adjustment has been made to the overhead schedule as Perteet has not been reimbursed for this amount.
- Q Uncompensated Overtime

WSDOT Adjustments:

- R Auto allowances in the amount of $285 unallowable per 48 CFR 31.201-4 - a total of $16,700 was paid for auto allowances during the year. $10,813 was previously removed by Perteet for the personal commute portion. The remaining $5,602 was for business usage.
- S Bonus unallowable per 48 CFR 31.205-6(f) - Annual bonuses in the amount of $88,850 unallowable because they are based upon company profits. Per firm policy, the firm distributes 10% of the profits each year and payout amounts to employees are based upon salary, not performance.
- T Parking in the amount of $35,947 unallowable per 48 CFR 31.201-4 and 48 CFR 31.205-6(m) - parking is removed because it is only paid for top exectives and clients
- U Severance pay in the amount of $28,243 unallowable per 48 CFR - per Perteet, the firm does not have a written severance policy. Severance payments are made based on the circumstances at the time of termination.

Exhibit D-2
(cont)

Perteet
Overhead Schedule
For the Year Ended December 31, 2009

	Description	Trial Balance	Adj. Amount	WSDOT Adj.	Ref.	Accepted Amount	%
V	Depreciation removed in the amount of $50,000 per 48 CFR 31.205-11 - During 2008, Perteet recorded depreciation on the tax basis of accounting, and took an additional $250,000 in S179 depreciation. During 2009, the firm switched to book basis of accounting with a majority of the assets depreciated on the straight line method over a period of 5 years. In order to avoid the firm receiving depreciation on the items that were accelerated during 2008, we will remove the $250,000 over 5 years on the straight line method.						
W	Gifts unallowable per 48 CFR 31.205-13(b) - $152 removed from 'Staff Functions' for awards and prizes to employees; $705 removed from 'Supplies' for gifts and awards;						
X	Entertainment costs unallowable per 48 CFR 31.205-14. - $458 removed from 'Staff Functions' for excess holiday party and company picnic costs; $878 removed from 'Staff Functions' for a company ski day; $188 removed from 'Supplies' for excess company picnic costs; $500 removed from 'Supplies' for a retirement celebration.						
Y	Treats and cake celebrations unallowable per 48 CFR 31.201-3 - Perteet has a cake celebration each month and payday treats listed several times each month. Total amount removed from 'Staff Functions was $1,316; Removed $432 from 'Supplies'.						

EXHIBIT F
PAYMENT UPON TERMINATION OF AGREEMENT BY CITY
OTHER THAN FOR FAULT OF THE CONSULTANT
(Refer to General Requirements, Section 3)

Specific Rates of Pay Contracts Work completed
A final payment shall be made to the CONSULTANT for ~~actual hours charged~~ at the time of termination of this AGREEMENT plus any direct non-salary costs incurred at the time of termination of this AGREEMENT.

Exhibit "G-1"

Hough Beck & Baird Inc.
215 Westlake Avenue North
Seattle, WA 98109

Salary and Billing Rates Table
January 2011 - December 2011

CLASSIFICATION	DIRECT SALARY COST 100% x DSC	OVERHEAD RATE 174.44% x DSC	FIXED FEE 30% x DSC	BILLING RATE 304.44% x DSC
Colie Hough Beck (Principal)	$ 62.00	$ 108.15	$ 18.60	$ 188.75
Jim Howard (LA / Project Manager)	$ 39.00	$ 68.03	$ 11.70	$ 118.73
Cara Vibert (Computer Tech.)	$ 21.60	$ 37.68	$ 6.48	$ 65.76
Jeff Chase (Admin/Clerical)	$ 18.50	$ 32.27	$ 5.55	$ 56.32

Billing Rate = DSC + Overhead Rate (174.44%) x DSC + Fixed Fee (30.00%) x DSC = 304.44% x DSC

Exhibit G-2

Hough Beck & Baird Inc.
Overhead Schedule
Fiscal Year December 31, 2008

Description	Financial Statement Amount	HBB Adj.	WSDOT Adj.	Ref.	Accepted Amount	%
Total Direct Labor	$404,268		$13,441	U	$417,709	100.00%
Fringe Benefits						
Bonuses	$112,614		($70,600)	Q	$42,014	10.06%
Holiday Pay	17,727				17,727	4.24%
Vacation	57,838				57,838	13.85%
Sick Leave	12,257				12,257	2.93%
Payroll Taxes	74,465				74,465	17.83%
Corporate Taxes (1120)	23,380	(23,380)		A	0	0.00%
Pension Contributions	37,402				37,402	8.95%
Health Care Insurance	22,880				22,880	5.48%
Key Man Life Insurance	533	(533)		B	0	0.00%
Total Fringe Benefits	$359,096	($23,913)	($70,600)		$264,583	63.34%
General Overhead						
Indirect Salaries - Principals	$99,894		($56,875)	T,V	$43,019	10.30%
Variance Account			(13,441)	U	(13,441)	-3.22%
Indirect Salaries - (Emp)	148,445				148,445	35.54%
Indirect Sal-prop (Emp)	31,800				31,800	7.61%
Indirect Sal-Prop (Prn)	53,785				53,785	12.88%
Consultants-Reimbursable	448,066	(448,066)		J	0	0.00%
Travel & Lodging - Reimbursable	10,758	(10,758)		J	0	0.00%
Reproductions-Reimbursable	1,329	(1,329)		J	0	0.00%
Models/Render./Photo/Mockups -Reimbursable	1,400	(1,400)		J	0	0.00%
Misc. Reimbursable Expenses -Reimbursable	13,779	(13,779)		J	0	0.00%
Postage/Shipping/Delivery - Reimbursable	1,639	(1,639)		J	0	0.00%
Meals - WSDOT Not Allowed	63	(63)		L	0	0.00%
Transportation (Project) Not Billable	173	(173)		J	0	0.00%
Professional Development	299				299	0.07%
Professional Registration & Dues	1,200	(55)		E	1,145	0.27%
Rent	87,467				87,467	20.94%
Office Supplies/Periodicals	20,053	(1,644)		I	18,409	4.41%
Telephone/Communications	10,198				10,198	2.44%
Postage & Shipping	1,941				1,941	0.46%
Repairs & Maintenance	7,888				7,888	1.89%
Other Office Expense	4,230	(1,896)		C,O	2,334	0.56%
Legal	952	(702)		M,P	250	0.06%
Interest Expense	4,520	(4,520)		C	0	0.00%
Accounting/Audit/Tax Prep.	1,500	(1,250)		D	250	0.06%
Professional Liability Insurance	8,522				8,522	2.04%
Computer Consultants	20,025	(18,451)		F	1,574	0.38%
Other Ins. Premiums	3,089				3,089	0.74%
Misc. Taxes & Licenses	28,561	(625)		N	27,936	6.69%
Automobile Expense	-1,193				-1,193	-0.29%
Travel & Lodging	293	(293)		J	0	0.00%
Meals: Staff Meeting	6,825	(5,876)	(358)	L,S	592	0.14%
Meals: Staff Review Lunches/Business Meetings	3,999	(3,999)		J,L	0	0.00%
Mileage/Parking/Bus	10,327	(739)	(5,220)	J,R	4,368	1.05%
General Office Brochure	5,963	(5,963)		I	0	0.00%
Reprints/Photos/Publications	953	(953)		I	0	0.00%
Public Relations/Contributions	1,642	(1,642)		G	0	0.00%
Office Functions/Events	2,499	(2,149)		H	350	0.08%
Lobbying Activities	62	(62)		E	0	0.00%
Advertising	9,979	(9,979)		K	0	0.00%

Exhibit G-2
(cont)

Hough Beck & Baird Inc.
Overhead Schedule
Fiscal Year December 31, 2008

Description	Financial Statement Amount	HBB Adj.	WSDOT Adj.	Ref.	Accepted Amount	%
Depreciation	25,023				25,023	5.99%
Total General Overhead	$1,077,947	($538,003)	($75,893)		$464,050	111.09%
						0.00%
Total Overhead Expenses	$1,437,043	($561,917)	($146,493)		$728,633	174.44%
Overhead Rate	355.47%	216.47%			174.44%	

Hough Beck & Baird, Inc. - Reviewed and Accepted TR 7/14/10
Overhead Rate still subject to WSDOT Audit

References
Hough Beck & Baird Adjustments:

A Federal Income Tax unallowable per 48 CFR 31.205-41(b)(1)

B Key Man Life Insurance unallowable per 48 CFR 31.205-19(a)(2)(vi)

C Interest Expense unallowable per 48 CFR 31.250-20

D Federal tax return preparation fees over $250 unallowable per 48 CFR 31.205-41(b)(1), 48 CFR 31.201-6(d)

E Lobbying unallowable per 48 CFR 31.205-22 Lobbying

F Computer Consultant's Direct costs billed to clients per 48 CFR 31.202(a)

G Contributions or Donations unallowable per 48 CFR 31.205-8

H Christmas party expenses in excess of $25 per employee not allowed per 48 CFR 31.205-14

I Brochures per 48 CFR 31.205-1(f)(5)

J Direct costs billed to clients per 48 CFR 31.202(a)

K Advertising 48 CFR 31.205-1(d)

L Local meals per 48 CFR 31.205-14 and WSDOT Travel Directive D 13-50, except when the meal is a bona fide business meeting. To support costs, there must be an agenda, a listing of people who attended showing how much was spent for each person.

M Agent fee for Alaska is not allocable per 48 CFR 31.201-4

N Montana, Idaho, Alaska fees not allocable per 48 CFR 31.201-4

O Costs of memberships in civic and community organizations and not a membership in trade, business, technical and professional organizations per 48 CFR 31.205-1(f)(7&8) and 48 CFR 31.205-43

P Organization and Reorganization (FAR 31.205-27)

WSDOT Adjustements:

Q Distribution of Profit unallowable per 48 CFR 31.205-6 (a) (6) (ii) and AASHTO Audit Guide Chapter 7.12
The bonus was purely based on number of shares held by each owner.

R Parking for owners only, unallocable per 48 CFR 31.201-4 and unreasonable per 48 CFR 31.201-3

S Entertainment unallowable per 48 CFR 31.205-14.

T Reduced indirect labor by $51,500, to arrive at a reasonable amount of direct labor, 65%, per 48 CFR 31.201-3.

U Uncompensated overtime adjustment $13,440.55 per 48 CFR 37.115 & DCAA 5-910, 5-910.2 and 6-410.

V Adjustment to tie to Payroll ($5,374.66)

T and V = ($51,500) + ($5,374.66) = ($56,875)

City of Oak Harbor
City Council Agenda Bill

Bill No. 6
Date: March 22, 2011
Subject: SE Pioneer Way Project Construction Agreement with PSE

FROM: Cathy Rosen, Public Works Director
Eric Johnston, City Engineer

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

Jim Slowik, Mayor
Paul Schmidt, City Administrator
Doug Merriman, Finance Director
Margery Hite, City Attorney, as to form

PURPOSE

This agenda bill requests approval of the Project Construction Agreement and Project Plan with Puget Sound Energy (PSE) for construction work associated with the relocation of overhead power lines and conversion to an underground system.

AUTHORITY

The authority to enter into agreements for improvements or use of real property is granted to the City of Oak Harbor under RCW 35A.11.020.

SUMMARY STATEMENT

Following the established procedure outlined in the attached Schedule 74, Conversion to Underground Service for Government Entities, the process for the underground conversion occurs in two basic steps. The first step is design. On July 6, 2010, the City Council approved Agenda Bill 9, Schedule 74, Attachment A "Design Agreement." The design work was coordinated between PSE and the City's design team. The design necessary to underground electric and communications utilities has been completed.

The second step is construction as outlined in Schedule 74, Attachment B. Approval of the Project Construction Agreement and Project Plan is necessary to proceed with undergrounding utilities. The attached Schedule 74, Attachment B, Construction Agreement outlines both party's responsibilities, the limits of the work and an estimated cost sharing. If the City chooses to not proceed with the underground conversion, then the City is responsible for 100% of the cost of the Design Agreement (Schedule 74, Attachment A, $32,777). If the City chooses to proceed with the underground conversion, the design costs are rolled into the Construction Cost Sharing Agreement and are proportioned appropriately.

PSE's Schedule 74 establishes a 40/60 (City/PSE) cost share for the least cost installation. In our particular case, we have chosen to have a few improvements made to the installation above what is considered the least cost alternative to meet the goals of the project. For instance, transformers are planned to be installed below grade or in traffic areas to minimize hazards to pedestrians and to improve the aesthetic appearance of the street. The increased cost over the least cost alternative is not included in the 40/60 cost share and is charged 100% to the City.

The total estimated cost to the City to underground PSE facilities is $312,816. This is approximately 44% of the total $712,036 cost to underground PSE's facilities. PSE is contributing $399,220 toward the total estimated cost. This cost share and the dollar amounts shown above are only in relation to the agreement with PSE. The cost includes design, materials, conduit installation, vaults, transformers and wire. In addition to costs to PSE, there are other costs for relocation of facilities owned by Frontier, Comcast, Blackrock, and the Oak Harbor School District. The estimated cost for all franchise utility relocation is shown in Table 1. Upon completion of the conversion, actual costs will be determined based on construction costs per Schedule 74, Attachment "B," Section 7 – "Compensation and Payment."

City staff and the engineering design team have met with PSE on several occasions and are satisfied that the agreement, proposed costs, and schedule are consistent with the project schedule and are within the project funding levels previously approved by the Council.

Note that individual property owners will have responsibility for costs associated with converting their service connection to the new underground system.

Justification: The City Council has determined the conversion to underground power is desired as part of the Pioneer Way Street Improvements Project. The tariff and Schedule 74 approved by the Washington Utilities Commission mandates the process and requirements for proceeding with the underground power conversion. As the tariff and associated schedule are issued under the authority of the Washington State Utilities Commission, there is little to no negotiation available in the terms of the agreement.

Amount of contract: The total estimated cost to the City to underground PSE facilities is $312,816. Please note on page 6 of the Exhibit A Project Plan that this estimate is based on the applicable tariff as of December 31, 2010. The City has been informed that the tariff is currently being revised which could result in a 3-5% increase in the City's share of the project cost, or about $9,000 to $15,000. This increase can be accommodated within the monies allocated for the utility conversion portion of the project.

Funding: Resolution 10-16 and Resolution 9-26 outline the funding plan for the Pioneer Way Street Improvements Project and Table 2. In summary, the project is funded through a combination of REET Funds totaling $5,500,000; Island County Economic Development Grants totaling $1,000,000; Sewer Funds totaling $1,000,000; Storm Drain Funds totaling $650,000;

and, Water Funds totaling $200,000. Funding for the utility relocation comes from these designated funds.

Table 1

	90% Opinion of Cost	Final Engineer's Estimate	Contract Prices	
Right of Way (approximate)	$150,000		$150,000	
Community Outreach Preconstruction (Enviroissues)	$94,000		$94,000	
Design Fee (Perteet)	$760,592		$760,592	
subtotal	*$1,004,592*		*$1,004,592*	
Roadway and City Utilities Reconstruction	$4,143,900	$4,009,146	$2,980,899	
Parking Alternate	$135,622	$138,772	$117,357	
Overhead Utility Undergrounding	$1,063,298	$1,443,408	$670,000	1
Inspection/Testing	$75,000		$23,012	
Surveyor	$128,000		$117,385	2
Construction Management (KBA)	$511,000		$398,975	3
Other	$185,000		$185,000	4
Public Art (1% of project)	$80,000		$80,000	
Contingency @ 9%	$575,000		$400,000	5
subtotal	*$6,896,820*		*$4,972,628*	
Extended Outreach				
Enviroissues	$150,000		$0	6
Construction Mitigation Outreach	$170,000		$167,500	7
direct costs (approximate)	$74,500		$0	8
subtotal	*$394,500*		*$167,500*	
total project cost	***$8,295,912***		***$6,144,720***	

NOTES:
1) estimated amount includes conduit trenching performed by contractor PLUS costs paid to PSE under separate SCH 74 agreement and allowances for other franchise utilities
2) includes both contracts for pre-construction and construction survey work
3) NTE limit on KBA Contract
4) includes city costs for the project, ie office space, equipment, permit fees, city direct cost
5) includes 10% of construction cost as contingency and approximately $50k for engineering design services during construction
6) public outreach by Enviroissues as subcontractor in KBA contract has been eliminated
7) amount approved by City Council on March 1, 2011
8) eliminated to reflect reduction in outreach effort

Table 2

Source	Amount
Wastewater	$ 1,000,000.00
Stormwater	$ 650,000.00
REET 1	$ 2,500,000.00
REET 2	$ 3,000,000.00
Island County Economic Development Grant	$ 1,000,000.00
Water	$ 200,000.00
Total	***$ 8,350,000.00***

STANDING COMMITTEE REPORT

This item was presented to the Public Works Standing Committee on February 3, 2011 and March 3, 2011 and the General Government Standing Committee on February 8, 2011 and March 8, 2011.

RECOMMENDED ACTION

A motion authorizing the Mayor to execute the Project Construction Agreement and Project Plan with Puget Sound Energy (PSE) for construction work associated with the relocation of overhead power lines and conversion to an underground system.

ATTACHMENTS

Schedule 74
Schedule 74 Attachment A – Design Agreement
Schedule 74 Attachment B – Construction Agreement

MAYOR'S COMMENTS:

SCHEDULE 74 UNDERGROUND CONVERSION

Project Design Agreement

Project Name: City of Oak Harbor – Pioneer Way

Project Number: Notification 10877896

THIS Agreement, dated as of this 10th day of June, 2010, is made by and between the City of Oak Harbor, a municipal corporation (the "Government Entity"), and PUGET SOUND ENERGY, Inc., a Washington Corporation (the "Company").

RECITALS

A. The Company is a public service company engaged in the sale and distribution of electric energy and, pursuant to its franchise or other rights from the Government Entity, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity.

B. The Government Entity is considering conversion of the Company's existing overhead electric distribution system to a comparable underground electric distribution, as more specifically described in the Scope of Work (as defined in paragraph 2, below) furnished to the Company by the Government Entity (the "Conversion Project").

C. The Government Entity has requested that the Company perform certain engineering design services and otherwise work cooperatively with the Government Entity to develop a mutually acceptable Project Plan (as defined in paragraph 6, below) for the Conversion Project, in accordance with and subject to the terms and conditions of this Agreement (the "Design Work").

D. The Government Entity and the Company wish to execute this written contract in accordance with Schedule 74 of the Company's Electric Tariff G ("Schedule 74") to govern the Design Work for the Conversion Project.

AGREEMENT

The Government Entity and the Company therefore agree as follows:

1. Unless specifically defined otherwise herein, all terms defined in Schedule 74 shall have the same meanings when used in this Agreement.

2. The Government Entity shall, within ten (10) business days after the date of this Agreement, provide the Company with a written scope of work for the Conversion Project which includes, among other things, (a) a reasonably detailed description of the scope of the work required for the Conversion Project, (b) a list of the key milestone dates for the Conversion Project, (c) reasonably detailed drawings showing any associated planned improvements to the Public Thoroughfare, and (d) a statement as to whether the Government Entity desires to install the ducts and vaults for the Conversion Project (the "Scope of Work"). The Government Entity shall provide the Company two (2) hard copies of the Scope of Work and a copy of the relevant electronic file(s) in a mutually agreed electronic format.

3. Within ten (10) business days of its receipt of the Scope of Work, the Company shall prepare and submit to the Government Entity (a) a reasonably detailed, good faith estimate of the cost to perform the Design Work (the "Design Cost Estimate"), and (b) a proposed schedule for completion of the

Design Work which, to the extent reasonably practicable, reflects the applicable key milestone dates specified in the Scope of Work and provides for completion of the Design Work within ninety (90) business days from the date the Company receives the Government Entity's notice to proceed under paragraph 5, below (the "Design Schedule"). The proposed Design Cost Estimate and the proposed Design Schedule shall be based upon the then-current Scope of Work. Unless otherwise specified in the Scope of Work, the Design Work shall not include negotiation or acquisition of third party property rights but shall include preliminary planning between the Company and the Government Entity regarding their respective obligations for negotiating and acquiring third party property rights.

4. Within ten (10) business days after the Government Entity's receipt of the proposed Design Cost Estimate and the proposed Design Schedule from the Company, the Government Entity and the Company shall meet in order to (a) review the proposed Design Cost Estimate, (b) review the proposed Design Schedule; (c) review the Scope of Work, and (d) make any changes necessary to create a final Scope of Work, final Design Cost Estimate, and final Design Schedule that are reasonably acceptable to both parties. If the parties are unable to agree upon a final version of the Scope of Work, Design Cost Estimate, and/or Design Schedule, then either party may, by written notice to the other party, submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. The final Scope of Work, Design Cost Estimate and Design Schedule, once determined in accordance with this paragraph 4, may thereafter be changed or amended only in accordance with the change procedures set forth in paragraph 13, below.

5. The Government Entity shall, within ten (10) business days after determination of the final of the Scope of Work, Design Cost Estimate, and Design Schedule, issue (a) a written notice to proceed which shall delineate the final Scope of Work, Design Cost Estimate, and Design Schedule, or (b) a written notice to terminate this Agreement without cost to the Government Entity. If the Government Entity terminates this Agreement, the costs incurred by the Company in preparing and submitting the Design Cost Estimate and the Design Schedule shall not be reimbursable to the Company, and the rights and obligations of the parties under this Agreement shall be terminated in their entirety and without liability to either party.

6. Following the Company's receipt of the notice to proceed, and within the applicable time period specified in the Design Schedule, the Company shall, with the cooperation and assistance of the Government Entity as outlined in this Agreement, prepare a project plan for the Conversion Project (the "Project Plan") which shall include, among other things, the following: (a) a detailed description of the work that is required to be performed by each party and any third party in connection with the Conversion Project (the "Construction Work"), (b) the applicable requirements, drawings, and specifications for the Construction Work, (c) a description of any operating and other property rights that are required to be obtained by each party for the Conversion Project (and the requirements and specifications with respect thereto), (d) a detailed estimate of the costs to be incurred by each party in its performance of the Construction Work, and (e) a detailed schedule for completing the Construction Work (including, without limitation, the dates for delivery of the ducts and vaults and other materials for use at the site of the Construction Work).

7. The Government Entity shall be responsible for coordinating the Design Work with all other design work to be performed in connection with the Conversion Project and any associated planned improvements to the Public Thoroughfare. The parties shall work together in an effort to mitigate the costs of the Conversion Project to each party, including, without limitation, identifying ways to accommodate the facilities of the Company to be installed as part of the Conversion Project within the Public Thoroughfare.

8. Within the applicable time period specified in the Design Schedule, the Company shall prepare and submit to the Government Entity a proposed initial draft of the Project Plan. The parties understand and acknowledge that the proposed Project Plan submitted by the Company shall be preliminary in nature and shall not include, without limitation, information required to be supplied by the Government

Entity (e.g., scope and estimate of the cost of the Construction Work to be performed by the Government Entity).

9. Within the applicable time period specified in the Design Schedule, the Government Entity shall (a) review the proposed Project Plan submitted by the Company, (b) complete any information required to be supplied by the Government Entity, (c) make any changes required to conform the proposed Project Plan to the Scope of Work and this Agreement, and (d) return the amended Project Plan to the Company.

10. Within the applicable time period specified in the Design Schedule, the Company shall review the amended Project Plan submitted by the Government Entity and notify the Government Entity in writing of either the Company's acceptance of, or the Company's specific objections to, the amended Project Plan. If the Company makes any objection to the amended Project Plan, and the parties are unable to resolve the objections and mutually agree upon the Project Plan prior to the final design date specified in the Design Schedule, then either party may, by written notice to the other party, submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. The Project Plan, as mutually agreed upon by the parties or established through the dispute resolution process, shall be attached to and incorporated in a Project Construction Agreement substantially in the form attached hereto as Exhibit A (the "Construction Agreement") which is to be signed by the parties prior to commencement of the Construction Work.

11. The parties intend and agree that the Design Work and the Project Plan in its final form shall conform to the following requirements:

    (a) The Project Plan shall, if requested by the Government Entity in its initial Scope of Work, specify that the Government Entity shall install the ducts and vaults for the Conversion Project; provided that (i) the parties mutually agree upon and set forth in the Project Plan (A) the costs of such installation work to be included in the Cost of Conversion, and (B) the specifications and standards applicable to such installation work, and (ii) such installation work is accomplished by the Government Entity in accordance with the applicable design and construction specifications provided by the Company and set forth in the Project Plan.

    (b) Each estimate of the costs to be incurred by a party shall, at a minimum, be broken down by (i) the design and engineering costs, (ii) property and related costs, including any costs of obtaining operating rights, and (iii) construction costs, including and listing separately inspection, labor, materials, and equipment.

    (c) All facilities of the Company installed as part of the Conversion Project shall be located, and all related property and operating rights shall be obtained, in the manner set forth in the applicable provisions of Schedule 74. The Project Plan shall describe in detail the location of such facilities, any related property and operating rights required to be obtained, and the relative responsibilities of the parties with respect thereto.

    (d) The schedule set forth in the Project Plan for completing the Construction Work shall include, at a minimum, milestone time periods for completion of the Trenching, installation of ducts and vaults, the construction and removal of any Temporary Service, and the removal of overhead facilities.

    (e) The Project Plan may include the specification of work and requirements for Government-Requested Upgrades and Company-Initiated Upgrades; provided, however, that the costs incurred by the Company with respect to the design and engineering of Company-Initiated Upgrades shall not be included in the costs reimbursable to the Company under this Agreement or the Construction Agreement. For purposes of the foregoing, (i) the term "Government-Requested Upgrade" shall mean any feature of the Underground Distribution System which is requested by the Government Entity and is not reasonably required to make the Underground

Distribution System comparable to the overhead distribution system being replaced, and (ii) the term "Company-Initiated Upgrade" shall mean any feature of the Underground Distribution System which is required by the Company and is not reasonably required to make the Underground Distribution System comparable to the overhead distribution system being replaced. For purposes of subparagraph (ii), above, a "comparable" system shall include, unless the parties otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less) of such diameter and number as may be specified and agreed upon in the final Scope of Work necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced. For purposes of subparagraph (i), above, any empty ducts installed at the request of the Government Entity shall be a Government-Requested Upgrade.

(f) The Project Plan shall set forth all specifications, design standards and other requirements for the Construction Work and the Conversion Project, including, but not limited to, the following: (i) applicable federal and state safety and electric codes and standards, (ii) applicable construction and other standards of the Company, and (iii) applicable street design and other standards of the Government Entity which are in effect as of the commencement of the Conversion Project.

12. Upon request of the Government Entity, and in any event at the times specified in the Design Schedule, the Company shall provide periodic reports which compare the actual costs of the Design Work incurred to that point in time to the Design Cost Estimate, as changed or amended in accordance with paragraph 13, below. Further, if at any time the Company reasonably expects that the actual cost of the Design Work will exceed the Design Cost Estimate, as changed or amended in accordance with paragraph 13, below, the Company shall notify the Government Entity immediately. Upon receipt of the Company's notice, the Government Entity may, at its option,

(a) notify the Company in writing that this Agreement is terminated; or

(b) request a reasonably detailed explanation supported by documentation (reasonably satisfactory to the Government Entity) to establish that the actual costs in excess of the Design Cost Estimate are:
   (i) reasonable,
   (ii) consistent with the Scope of Work, and
   (iii) consistent with sound engineering practices.

If the Government Entity requests an explanation, the Government Entity shall, within ten (10) business days after receipt of the explanation,

(a) change the Scope of Work in accordance with paragraph 13, below, or

(b) direct the Company to continue with the Design Work without a change in the Scope of Work, but reserving to the Government Entity the right to dispute the reasonableness of the costs to be paid the Company under paragraph 14, below, in accordance with the dispute resolution procedures in paragraph 16, below, or

(c) direct the Company to discontinue performing the Design Work pending resolution, pursuant to paragraph 16, below, of any dispute regarding the reasonableness of the costs, in which event the Design Schedule will be adjusted to reflect the delay, or

(d) notify the Company in writing that this Agreement is terminated.

In the event the Government Entity terminates this Agreement or discontinues the performance of the Design Work under subparagraph (c), above, for more than ninety (90) days, the Government Entity shall pay the Company for all costs incurred by the Company in its performance of the Design Work

prior to the date the Company receives the Government Entity's notice of termination, plus any costs incurred by the Company for materials and other items ordered or procured by the Company with the prior authorization of the Government Entity in order to meet the schedule for the Conversion Project. The foregoing payment obligation shall survive any termination of this Agreement.

13. (a) Either party may, at any time, by written notice thereof to the other party, request changes to the Scope of Work (a "Request for Change"). No Request for Change shall be effective and binding upon the parties unless signed by an authorized representative of each party. If any approved Request for Change would cause an increase in the cost of, or the time required for, the performance of any part of the Design Work, an equitable adjustment in the Design Cost Estimate and the Design Schedule shall be made to reflect such increase. The parties shall negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If the parties are unable to agree upon the terms of the equitable adjustment, either party may submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. Notwithstanding any dispute or delay in reaching agreement or arriving at a mutually acceptable equitable adjustment, each party shall, if requested by the other party, proceed with the Design Work in accordance with the Request for Change. Any such request to proceed must be accompanied by a written statement setting forth the requesting party's reasons for rejecting the proposed equitable adjustment of the other party.

    (b) The Design Cost Estimate and/or the Design Schedule shall be equitably adjusted from time to time to reflect any change in the costs or time required to perform the Design Work to the extent such change is caused by: (i) any Force Majeure Event under paragraph 17, below, (ii) the discovery of any condition within the Conversion Area which affects the scope, cost, schedule or other aspect of the Design Work and was not known by or disclosed to the affected party prior to the date of this Agreement, or (iii) any change or inaccuracy in any assumptions regarding the scope, cost, schedule or other aspect of the Design Work which are expressly identified by the parties in the final Scope of Work. Upon the request of either party, the parties will negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If, at any time thereafter, the parties are unable to agree upon the terms of the equitable adjustment, either party may submit the matter for resolution pursuant to the dispute resolution provisions in paragraph 16, below.

14. Upon completion of the Design Work (i.e., the date on which the Project Plan is final under paragraph 10, above, either by mutual agreement of the parties or as established through the dispute resolution procedures), the Government Entity shall pay the Company all actual, reasonable costs to the Company for the Design Work (which, if disputed in good faith by the Government Entity, may be submitted by either party for resolution pursuant to the dispute resolution provisions in paragraph 16, below), plus any costs incurred by the Company for materials and other items ordered by the Company with the prior authorization of the Government Entity in order to meet the schedule for the Conversion Project. If, thereafter, the Construction Agreement is executed by the parties and the Conversion Project is completed within five (5) years from the date of this Agreement, the full amount of the costs incurred by the Company in its performance of the Design Work shall be included in the "Shared Company Costs" under the Construction Agreement and any payment of such amounts under this Agreement shall be credited to the Government Entity in calculating the "Net Amount" payable under the Construction Agreement.

15. Within sixty (60) business days after completion of the Design Work, the Company shall issue to the Government Entity an itemized invoice for the amounts payable under this Agreement. Such invoice shall be in a form mutually agreed upon by the Company and the Government Entity and shall, at a minimum, itemize the design and engineering costs, including and listing separately inspection, labor, materials and equipment. In the event the Government Entity does not verify such invoice within ten (10) business days of receipt, the Government Entity shall provide a written request to the Company specifying the additional information needed to verify the invoice. The Company will provide, within a

reasonable period after receipt of any request, such documentation and information as the Government Entity may reasonably request to verify such invoice. The Government Entity shall pay the Company all amounts payable under this Agreement within thirty (30) days after receipt of the Company's invoice. Payment as provided in this Agreement shall be full compensation for the Company's performance of the Design Work, including without limitation all services rendered and all materials, supplies, equipment, and incidentals necessary to complete the Design Work.

16. Dispute Resolution Procedures:

(a) Any dispute, disagreement or claim arising out of or concerning this Agreement must first be presented to and considered by the parties. A party who wishes dispute resolution shall notify the other party in writing as to the nature of the dispute. Each party shall appoint a representative who shall be responsible for representing the party's interests. The representatives shall exercise good faith efforts to resolve the dispute. Any dispute that is not resolved within ten (10) business days of the date the disagreement was first raised by written notice shall be referred by the parties' representatives in writing to the senior management of the parties for resolution. In the event the senior management are unable to resolve the dispute within twenty (20) business days (or such other period as the parties may agree upon), each party may pursue resolution of the dispute through other legal means consistent with the terms of this Agreement. All negotiations pursuant to these procedures for the resolution of disputes shall be confidential and shall be treated as compromise and settlement negotiations for purposes of the state and federal rules of evidence.

(b) Any claim or dispute arising hereunder which relates to the Scope of Work, Design Cost Estimate, and Design Schedule under paragraph 4, above; the Project Plan under paragraph 10, above; or any Request for Change (including, without limitation, any associated equitable adjustment) under paragraph 13, above; and is not resolved by senior management within the time permitted under paragraph 16(a), above, shall be resolved by arbitration in Seattle, Washington, under the Construction Industry Arbitration Rules of the American Arbitration Association then in effect. The decision(s) of the arbitrator(s) shall be final, conclusive and binding upon the Parties. All other disputes shall be resolved by litigation in any court or governmental agency, as applicable, having jurisdiction over the Parties and the dispute.

(c) In connection with any arbitration under this paragraph 16, costs of the arbitrator(s), hearing rooms and other common costs shall be divided equally among the parties. Each party shall bear the cost and expense of preparing and presenting its own case (including, but not limited to, its own attorneys' fees); provided, that, in any arbitration, the arbitrator(s) may require, as part of his or her decision, reimbursement of all or a portion of the prevailing party's costs and expenses by the other party.

(d) Unless otherwise agreed by the parties in writing, the parties shall continue to perform their respective obligations under this Agreement during the pendency of any dispute.

17. In the event that either party is prevented or delayed in the performance of any of its obligations under this Agreement by reason beyond its reasonable control (a "Force Majeure Event"), then that party's performance shall be excused during the Force Majeure Event. Force Majeure Events shall include, without limitation, war; civil disturbance; flood, earthquake or other Act of God; storm, earthquake or other condition which necessitates the mobilization of the personnel of a party or its contractors to restore utility service to customers; laws, regulations, rules or orders of any governmental agency; sabotage; strikes or similar labor disputes involving personnel of a party, its contractors or a third party; or any failure or delay in the performance by the other party, or a third party who is not an employee, agent or contractor of the party claiming a Force Majeure Event, in connection with the Work or this Agreement. Upon removal or termination of the Force Majeure Event, the party claiming a Force Majeure Event shall promptly perform the affected obligations in an orderly and expedited manner under this Agreement or procure a substitute for such obligation. The parties shall use all commercially reasonable efforts to eliminate or minimize any delay caused by a Force Majeure Event.

18. This Agreement is subject to the General Rules and Provisions set forth in Tariff Schedule 80 of the Company's electric Tariff G and to Schedule 74 of such Tariff as approved by the Washington Utilities and Transportation Commission and in effect as of the date of this Agreement.

19. Any notice under this Agreement shall be in writing and shall be faxed (with a copy followed by mail or hand delivery), delivered in person, or mailed, properly addressed and stamped with the required postage, to the intended recipient as follows:

If to the Government Entity:	City of Oak Harbor 865 S.E. Barrington Drive Oak Harbor, WA 98277 Attn: Russ Pabarcus Fax: 360-279-4519
If to the Company:	Puget Sound Energy, Inc. PO Box 97034 BOT-01G Bellevue, WA 98009-9734 Attn: David Matulich Fax: 425-424-6675

Either party may change its address specified in this paragraph by giving the other party notice of such change in accordance with this paragraph.

20. This Agreement shall in all respects be interpreted, construed and enforced in accordance with the laws of the State of Washington (without reference to rules governing conflict of laws), except to the extent such laws may be preempted by the laws of the United States of America.

21. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and all other agreements and understandings of the Parties, whether written or oral, with respect to the subject matter of this Agreement are hereby superseded in their entireties.

22. This Agreement shall be binding upon and inure to the benefit of the respective successors, assigns, purchasers, and transferees of the parties, including but not limited to, any entity to which the rights or obligations of a party are assigned, delegated, or transferred in any corporate reorganization, change of organization, or purchase or transfer of assets by or to another corporation, partnership, association, or other business organization or division thereof.

Government Entity:

City of Oak Harbor

BY _____

ITS Mayor

Date Signed 6-11-10

Company:

PUGET SOUND ENERGY, INC.

BY _____

ITS MUNICIPAL LIAISON MANAGER

Date Signed 6-23-10

Approved as to form:

_____

Original Sheet No. 74
Canceling First Revised Sheet Nos. 71 and 71-b,
WN U-60 and Second Revised Sheet No. 71-a

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE FOR GOVERNMENT ENTITIES

(N)

1. AVAILABILITY

The Company shall install an Underground Distribution System and shall remove the existing overhead electric distribution system of 15,000 volts or less together with Company-owned poles following removal of all utility wires therefrom under this Schedule when all of the following conditions are met:

a. The Government Entity has determined that installation of an Underground Distribution System is or will be required and has notified the Company in writing of such determination, and the Company and such Government Entity have agreed upon the provisions of the Design Agreement and the Construction Agreement pursuant to which the Company shall design and install an Underground Distribution System and provide service under this Schedule.

b. The Company has the right to install, construct, operate, repair and maintain an electrical distribution system (including an Underground Distribution System) within the Public Thoroughfare in the Conversion Area pursuant to a franchise previously granted by the Government Entity requesting such installation and executed by the Company, or, if there is no such franchise, or if such franchise does not provide such right, pursuant to some other grant of rights mutually agreed upon by the Company and the Government Entity.

c. All customers served by the Company within the Conversion Area will receive electric service through Underground Service Lines from the Underground Distribution System, unless the Company explicitly agrees to other electric service arrangements.

Government Entities that are eligible to receive service under this Schedule are not eligible for service under Schedule 73 of the Company's Electric Tariff G.

2. AGREEMENT PROVISIONS

The Company shall provide and install an Underground Distribution System within the Conversion Area subject to the terms and conditions of a Schedule 74 Design Agreement (the "Design Agreement") and a Schedule 74 Construction Agreement (the "Construction Agreement"), and the following shall apply:

(N)

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Advice No.: 2002-12
By Authority of the Washington Utilities and Transportation Commission in Docket Nos. UE-011570 & UG-011571
Issued By Puget Sound Energy

By: George Pohndorf George Pohndorf **Title**: Director, Rates & Regulation

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74 (N)
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

a. The Design Agreement and the Construction Agreement shall (i) be consistent with this Schedule, and (ii) be substantially in the forms of Attachment A and Attachment B hereto, which attachments are by this reference incorporated in this Schedule as if fully set forth herein. Without limiting the possibility that the Company and the Government Entity may (consistent with this Schedule) mutually agree upon terms that are in addition to those contained in the forms set forth in Attachments A and B hereto, neither the Government Entity nor the Company shall be required to agree to additional terms as a condition of service under this Schedule.

b. The Design Agreement and the Construction Agreement shall:
   (1) except as otherwise provided in Section 2.b(2), obligate the Government Entity to pay the Company 40% of the total Cost of Conversion and the Company to pay 60% of the total Cost of Conversion;
   (2) obligate the Government Entity to pay (i) 100% of the total Cost of Conversion for conversion of that portion, if any, of the existing overhead distribution system located, as of the date on which the Government Entity provides the notice referred to in Section 4.a or the date on which the Government Entity commences acquisition or condemnation of real property to facilitate construction of any public improvements related to the conversion project, whichever occurs first, (A) outside of the Public Thoroughfare or (B) pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by the Government Entity, less (ii) the distribution pole replacement costs (if any) that would be avoided by the Company on account of such conversion, as determined consistent with the applicable Company distribution facilities replacement program, plus (iii) just compensation as provided by law for the Company's interests in real property on which such existing overhead distribution system was located prior to conversion;
   (3) obligate the Government Entity to pay the Company 100% of the costs of (i) cancellation as provided herein; (ii) any facilities installed at the time of the conversion to provide Temporary Service, as provided for herein; and (iii) removal of any facilities installed to provide Temporary Service (less salvage value of removed equipment);
   (4) obligate the Company to pay 100% of the cost of obtaining the rights referred to in Section 3.b; and
   (5) obligate the Government Entity to (i) perform or to cause to be performed (A) all Trenching and Restoration and job coordination required for the installation of the Underground Distribution System and (B) all surveying for alignment and grades of vaults and ducts and (ii) to pay 100% of the cost of performance under clause (i) of this Section 2.b(5). (N)

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PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

(N)

c. The Government Entity may, at its option, install ducts and vaults, provided that (i) pursuant to the Design Agreement and the Construction Agreement the Government Entity and the Company have mutually agreed upon (A) the cost of such installation to be included in the Cost of Conversion and (B) the specifications and standards applicable to such installation, and (ii) such installation is accomplished by the Government Entity in accordance with the applicable design and construction specifications provided by the Company for such installation pursuant to the Design Agreement. To the extent the Government Entity installs any of the Facilities pursuant to the Construction Agreement, the Company shall not be required to do so under this Schedule.

d. A Government Entity that is a municipality shall notify all persons and entities within the Conversion Area that electric service to such persons and entities must be converted from overhead to underground (as provided for in the Company's Electric Tariff G) within the applicable statutory period following written notice from the Government Entity that service from underground facilities is available in accordance with RCW 35.96.050. The Government Entity shall exercise its authority to order disconnection and removal of overhead facilities with respect to persons and entities failing to convert service lines from overhead to underground within the timelines provided in RCW 35.96.050.

3. INSTALLATION AND OPERATING RIGHTS:

a. The Company may install all of the Facilities within a Public Thoroughfare in the locations provided for in a franchise previously granted by the Government Entity or otherwise provided for in the grant of rights referred to in Section 1.b. The Government Entity shall act in good faith and shall use its best efforts to provide space sufficient for the safe and efficient installation, operation, repair and maintenance of all of the Facilities ("Sufficient Space") within the Public Thoroughfare in the Conversion Area, and the Company shall act in good faith and shall use its best efforts to install Facilities in such space within the Public Thoroughfare. If the Company and the Government Entity agree that there is not or will not be Sufficient Space within the Public Thoroughfare in the Conversion Area, then the Government Entity shall provide Sufficient Space by obtaining additional Public Thoroughfare or other equivalent rights mutually agreeable to the Government Entity and the Company, title to which shall be in the Government Entity's name.

(N)

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PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74 (N)
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

b. If, notwithstanding the use of best efforts by each of the Government Entity and the Company as provided in Section 3.a, the Government Entity and the Company do not agree whether there is or will be Sufficient Space within the Public Thoroughfare in the Conversion Area, the Company shall install those Facilities, for which there is not Sufficient Space within the Public Thoroughfare, on property outside the Public Thoroughfare, the rights for which shall be obtained by the Company at its sole expense. Subject to the other provisions of this Schedule, nothing in this section shall excuse the Company from complying with any work schedule agreed to by the Government Entity and the Company pursuant to the Design Agreement and the Construction Agreement.

c. If the Government Entity requires the relocation of any Facilities installed pursuant to this Schedule in a Public Thoroughfare within five (5) years from the date of the energization for service of such Facilities, the Government Entity shall reimburse the Company for all costs incurred by the Company in connection with the relocation and reinstallation of facilities substantially equivalent to the relocated Facilities.

d. If the Government Entity requires (or takes any action that has the effect of requiring) a third party not acting as an agent or a contractor of Government Entity to relocate any Facilities installed pursuant to this Schedule in a Public Thoroughfare within five (5) years from the date of the energization for service of such Facilities, the Government Entity shall require the third party, as a condition to the Company's performance of any relocation, to pay the Company for all costs incurred by the Company in connection with the relocation and reinstallation of facilities substantially equivalent to the relocated Facilities.

4. GENERAL

a. Timing: The Company shall commence performance (as contemplated in the forms of Design Agreement and Construction Agreement attached hereto as Attachments A and B) within ten (10) business days of written notice from a Government Entity of its determination that it requires installation of an Underground Distribution System under this Schedule.

b. Ownership of Facilities: Except as otherwise provided in the Company's Electric Tariff G, the Company shall own, operate, and maintain the Underground Distribution System installed or provided pursuant to this Schedule.

c. Prior Contracts: Nothing herein contained shall affect the rights or obligations of the Company under any previous agreements pertaining to existing or future facilities of greater than 15,000 Volts within any Conversion Area. (N)

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PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74 (N)
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

d. Temporary Service: Temporary Service shall not exceed a term of 18 months from the date on which service from the Underground Distribution System is available, unless the Company acting reasonably agrees to extend such term. Should a Temporary Service not be removed within such 18-month period or such other period of time that has been approved by the Company acting reasonably, a Government Entity that is a municipality shall exercise its authority under RCW 35.96.050 to order such Temporary Service disconnected and removed within the applicable statutory period following the date of mailing of the Government Entity's notice under RCW 35.96.050. Otherwise, if a Temporary Service is not disconnected or removed within such time approved by the Company acting reasonably, the Government Entity shall pay either (i) 100% of the Cost of Conversion for the entire Underground Distribution System or (ii) 100% of the costs of converting only the Temporary Service to underground, whichever the Government Entity may elect.

5. USE BY OTHER UTILITIES OF TRENCHES PROVIDED BY GOVERNMENT ENTITY

Other utilities may be permitted by the Government Entity to use trenches provided by the Government Entity pursuant to this Schedule for the installation of such other utilities' facilities, so long as such facilities, or the installation thereof, do not interfere (as determined pursuant to the Company's electrical standards) with the installation, operation or maintenance of the Company's Facilities located within such trenches.

6. CANCELLATION

If by written notice or other official action a Government Entity cancels or suspends indefinitely or takes similar official action regarding a conversion project undertaken under this Schedule prior to completion of the conversion to an Underground Distribution System, the Government Entity shall pay the Company all of the costs incurred by the Company to the date of such cancellation consistent with the termination provisions of the Design Agreement and Construction Agreement.

7. STREET LIGHTING

Removal and replacement of existing street lighting or installation of new street lighting within the Conversion Area suitable for service from the Underground Distribution System installed pursuant to this Schedule shall be arranged separately as provided in the Company's Electric Tariff G. (N)

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PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74 (N)
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

8. UNDERGROUND SERVICE LINES

Underground Service Lines shall be installed, owned, and maintained as provided in the Company's Electric Tariff G.

9. GENERAL RULES AND PROVISIONS

Service under this Schedule is subject to the General Rules and Provisions contained in Schedule 80 of the Company's Electric Tariff G.

10. DEFINITIONS

The following terms when used in this Schedule, the Design Agreement or the Construction Agreement shall, solely for purposes of this Schedule and such agreements, have the meanings given below:

a. Conversion Area: The geographical area in which the Company replaces its overhead electric distribution system with an Underground Distribution System.
b. Cost of Conversion: The cost of converting an existing overhead distribution system to an Underground Distribution System shall be the sum of:
   (i) the actual, reasonable costs to the Company for labor, materials and overheads and all other reasonable costs, not including mark-up or profit of the Company, for design of the Underground Distribution System, such costs to be determined in accordance with the Design Agreement; plus
   (ii) the actual costs to the Company for labor, materials and overheads and all other costs, not including mark-up or profit of the Company, to construct and install the Underground Distribution System, up to a maximum amount determined in accordance with the Construction Agreement; plus
   (iii) the actual reasonable design costs to the Company (including costs for labor, materials and overheads and all other reasonable costs), and the actual construction and installation costs to the Company (including costs for labor, materials and overheads and all other costs), less the salvage value to the Company of the facilities removed, up to a maximum amount determined in accordance with the Construction Agreement, in each case not including mark-up or profit of the Company, for removal of the existing electrical facilities; plus (N)

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SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

(N)

(iv) the actual costs to the Government Entity (if any) of installation of ducts and vaults or other Facilities that the Government Entity has agreed to install for the Underground Distribution System pursuant to the Construction Agreement, up to a maximum amount determined in accordance with the Construction Agreement; plus

(v) the actual, reasonable costs to the Government Entity (if any) of obtaining Public Thoroughfare or other equivalent rights for the Facilities pursuant to Section 3.a.

The Cost of Conversion shall not include any costs of Trenching and Restoration, or of the Company's obtaining rights pursuant to Section 3.b of this Schedule. Company upgrades and expansions, Government Entity requested changes and requested upgrades, the cost of delays and overtime labor costs shall be as provided for in the Design Agreement and the Construction Agreement.

c. Facilities: All components of the Underground Distribution System, including but not limited to, primary voltage cables, secondary voltage cables, connections, terminations, pad-mounted transformers, pad-mounted switches, ducts, vaults and other associated components.

d. Government Entity: The municipality, county or other government entity having authority over the Public Thoroughfare in the Conversion Area.

e. Public Thoroughfare: Any municipal, county, state, federal or other public road, highway or throughway, or other public right-of-way or other public real property rights allowing for electric utility use.

f. Temporary Service: Temporary Service shall have the meaning set forth in the General Rules and Provisions of the Company's Electric Tariff G and, in addition, shall mean (i) limited overhead facilities that, at the request of the Government Entity, the Company may elect in its sole discretion to leave in place within the Conversion Area after installation of the Underground Distribution System and/or (ii) limited overhead or underground facilities that, at the request of the Government Entity, the Company may elect in its sole discretion to install concurrently with the installation of the Underground Distribution System, and that, in each case, shall be used to provide overhead distribution service within the Conversion Area for such period as may be approved by the Company acting reasonably under the circumstances, (e.g., to accommodate other demolition or construction projects within the Conversion Area).

(N)

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PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 74 (N)
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

g. Trenching and Restoration: Includes, but is not limited to, any or all of the following, whether in Public Thoroughfares or on other property: breakup of sidewalks, driveways, street surfaces and pavements; disturbance or removal of landscaping; excavating for vaults; trenching for ducts or cable; shoring, flagging, barricading and backfilling; installation of select backfill or concrete around ducts (if required); compaction; and restoration of Public Thoroughfares and other property; all in accordance with the specifications applicable thereto set forth in the Design Agreement and the Construction Agreement.

h. Underground Distribution System: An underground electric distribution system, excluding "Underground Service Lines" as such term is defined herein, that is comparable to the overhead distribution system being replaced. The Underground Distribution System includes the Facilities as defined herein. For purposes of this Schedule, a "comparable" system shall include, unless the Government Entity and the Company otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less) of such diameter and number as may be specified and agreed upon in the Design Agreement and Construction Agreement necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced.

i. Underground Service Lines: The underground electric cables and associated components extending from the service connections at the outside of the customers' structures to the designated primary voltage or secondary voltage service connection points of an Underground Distribution System. (N)

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SCHEDULE 74 UNDERGROUND CONVERSION

Project Construction Agreement

Project Name: City of Oak Harbor - Pioneer Way Conversion
Project Number: 101064957

THIS Agreement, dated as of this ____ day of December, 2010, is made by and between the City of Oak Harbor, municipal corporation (the "Government Entity"), and PUGET SOUND ENERGY, Inc., a Washington Corporation (the "Company").

RECITALS

A. The Company is a public service company engaged in the sale and distribution of electric energy, and pursuant to its franchise or other rights from the Government Entity, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity.

B. The Government Entity has determined that it is necessary to replace the existing overhead electric distribution system within the area specified in the Project Plan (as defined below) (the "Conversion Area") with a comparable underground electric distribution system, all as more specifically described in the Project Plan (the "Conversion Project").

C. The Government Entity and the Company have previously entered into a Project Design Agreement dated as of June 11, 2010 (the "Design Agreement"), pursuant to which the parties completed certain engineering design, cost assessment, operating rights planning and other preliminary work relating to the Conversion Project and, in connection with that effort, developed the Project Plan.

D. The Government Entity and the Company wish to execute this written contract in accordance with Schedule 74 of the Company's Electric Tariff G ("Schedule 74") to govern the completion of the Conversion Project, which both parties intend shall qualify as an underground conversion under the terms of Schedule 74.

AGREEMENT

The Government Entity and the Company therefore agree as follows:

1. Definitions.

   (a) Unless specifically defined otherwise herein, all terms defined in Schedule 74 shall have the same meanings when used in this Agreement, including, without limitation, the following:

   i) Cost of Conversion;
   ii) Public Thoroughfare;
   iii) Temporary Service;
   iv) Trenching and Restoration;
   v) Underground Distribution System; and
   vi) Underground Service Lines.

   (b) "Company-Initiated Upgrade" shall mean any feature of the Underground Distribution System which is required by the Company and is not reasonably required to make the Underground Distribution System comparable to the overhead distribution system being replaced. For purposes of the foregoing, a "comparable" system shall include, unless the Parties otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less)

of such diameter and number as may be specified and agreed upon in the Project Plan necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced.

(c) "Estimated Reimbursable Private Conversion Costs" shall mean the Company's good faith estimate of the Reimbursable Private Conversion Costs, as specified in the Project Plan and as changed and adjusted from time to time in accordance with Section 6, below.

(d) "Estimated Reimbursable Temporary Service Costs" shall mean the Company's good faith estimate of the Reimbursable Temporary Service Costs, as specified in the Project Plan and as changed and adjusted from time to time in accordance with Section 6, below.

(e) "Estimated Reimbursable Upgrade Costs" shall mean the Company's good faith estimate of the Reimbursable Upgrade Costs, as specified in the Project Plan and as changed and adjusted from time to time in accordance with Section 6, below.

(f) "Estimated Shared Company Costs" shall mean the Company's good faith estimate of the Shared Company Costs, as specified in the Project Plan and as changed and adjusted from time to time in accordance with Section 6, below.

(g) "Estimated Shared Government Costs" shall mean the Government Entity's good faith estimate of the Shared Government Costs, as specified in the Project Plan and as changed and adjusted from time to time in accordance with Section 6, below.

(h) "Government-Requested Upgrade" shall mean any feature of the Underground Distribution System which is requested by the Government Entity and is not reasonably required to make the Underground Distribution System comparable to the overhead distribution system being replaced. For purposes of the foregoing, any empty ducts installed at the request of the Government Entity shall be a Government-Requested Upgrade.

(i) "Party" shall mean either the Company, the Government Entity, or both.

(j) "Private Property Conversion" shall mean that portion, if any, of the Conversion Project for which the existing overhead electric distribution system is located, as of the date determined in accordance with Schedule 74, (i) outside of the Public Thoroughfare, or (ii) pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by the Government Entity.

(k) "Project Plan" shall mean the project plan developed by the Parties under the Design Agreement and attached hereto as Exhibit A, as the same may be changed and amended from time to time in accordance with Section 6, below. The Project Plan includes, among other things, (i) a detailed description of the Work that is required to be performed by each Party and any third party, (ii) the applicable requirements and specifications for the Work, (iii) a description of the Operating Rights that are required to be obtained by each Party for the Conversion Project (and the requirements and specifications with respect thereto), (iv) an itemization and summary of the Estimated Shared Company Costs, Estimated Shared Government Costs, Estimated Reimbursable Private Conversion Costs (if any), Estimated Reimbursable Temporary Service Costs (if any) and Estimated Reimbursable Upgrade Costs (if any), and (v) the Work Schedule.

(l) "Operating Rights" shall mean sufficient space and legal rights for the construction, operation, repair, and maintenance of the Underground Distribution System.

(m) "Reimbursable Private Conversion Costs" shall mean (i) all Costs of Conversion, if any, incurred by the Company which are attributable to a Private Property Conversion, less (ii) the distribution pole replacement costs (if any) that would be avoided by the Company on account of such

Private Property Conversion, as determined consistent with the applicable Company distribution facilities replacement program, plus (iii) just compensation as provided by law for the Company's interests in real property on which such existing overhead distribution system was located prior to conversion; provided that the portion of the Reimbursable Private Conversion Costs attributable to the Costs of Conversion under subparagraph (i) of this paragraph shall not exceed the Estimated Reimbursable Private Conversion Costs without the prior written authorization of the Government Entity.

(n) "Reimbursable Temporary Service Costs" shall mean all costs incurred by the Company which are attributable to (i) any facilities installed as part of the Conversion Project to provide Temporary Service, as provided for in Schedule 74, and (ii) the removal of any facilities installed to provide Temporary Service (less salvage value of removed equipment); provided that the Reimbursable Temporary Service Costs shall not exceed the Estimated Reimbursable Temporary Service Costs without the prior written authorization of the Government Entity.

(o) "Reimbursable Upgrade Costs" shall mean all Costs of Conversion incurred by the Company which are attributable to any Government-Requested Upgrade; provided that the Reimbursable Upgrade Costs shall not exceed the Estimated Reimbursable Upgrade Costs without the prior written authorization of the Government Entity.

(p) "Shared Company Costs" shall mean all Costs of Conversion (other than Reimbursable Upgrade Costs, Reimbursable Private Conversion Costs and Reimbursable Temporary Service Costs) incurred by the Company in connection with the Conversion Project; provided, however, that the Shared Company Costs shall not exceed the Estimated Shared Company Costs without the prior written authorization of the Government Entity. For the avoidance of doubt, the "Shared Company Costs" shall, as and to the extent specified in the Design Agreement, include the actual, reasonable costs to the Company for the "Design Work" performed by the Company under the Design Agreement.

(q) "Shared Government Costs" shall mean all Costs of Conversion incurred by the Government Entity in connection with (i) any duct and vault installation Work which the Parties have specified in the Project Plan is to be performed by the Government Entity as part of the Government Work, and (ii) the acquisition of any Operating Rights which the Parties have, by mutual agreement, specified in the Project Plan are to be obtained by the Government Entity for the Conversion Project, but only to the extent attributable to that portion of such Operating Rights which is necessary to accommodate the facilities of the Company; provided, however, that the Shared Government Costs shall not exceed the Estimated Shared Government Costs without the prior written authorization of the Company.

(r) "Total Shared Costs" shall mean the sum of the Shared Company Costs and the Shared Government Costs. For the avoidance of doubt, the Total Shared Costs shall not include, without limitation, (i) costs to the Government Entity for Trenching and Restoration, or (ii) costs associated with any joint use of trenches by other utilities as permitted under Section 3(b).

(s) "Work" shall mean all work to be performed in connection with the Conversion Project, as more specifically described in the Project Plan, including, without limitation, the Company Work (as defined in Section 2(a), below) and the Government Work (as defined in Section 3(a), below).

(t) "Work Schedule" shall mean the schedule specified in the Project Plan which sets forth the milestones for completing the Work, as the same may be changed and amended from time to time in accordance with Section 6, below.

2. Obligations of the Company.

(a) Subject to the terms and conditions of this Agreement, the Company shall do the following as specified in, and in accordance with the design and construction specifications and other requirements set forth in, the Project Plan (the "Company Work"):

i) furnish and install an Underground Distribution System within the Conversion Area (excluding any duct and vault installation or other Work which the Parties have specified in the Project Plan is to be performed by the Government Entity);
ii) provide a Company inspector on-site at the times specified in the Work Schedule to inspect the performance of any duct and vault installation Work which the Parties have specified in the Project Plan is to be performed by the Government Entity; and
iii) upon connection of those persons or entities to be served by the Underground Distribution System and removal of facilities of any other utilities that are connected to the poles of the overhead system, remove the existing overhead system (including associated wires and Company-owned poles) of 15,000 volts or less within the Conversion Area except for Temporary Services.

(b) Upon request of the Government Entity, the Company shall provide periodic reports of the progress of the Company Work identifying (i) the Company Work completed to date, (ii) the Company Work yet to be completed, and (iii) an estimate regarding whether the Conversion Project is on target with respect to the Estimated Shared Company Costs, the Estimated Reimbursable Private Conversion Costs (if any), the Estimated Reimbursable Temporary Service Costs (if any), the Estimated Reimbursable Upgrade Costs (if any) and the Work Schedule.

(c) Except as otherwise provided in the Company's Electric Tariff G, the Company shall own, operate and maintain all electrical facilities installed pursuant to this Agreement including, but not limited to, the Underground Distribution System and Underground Service Lines.

(d) Subject to the terms and conditions of this Agreement, the Company shall perform all Company Work in accordance with the Project Plan, the Work Schedule and this Agreement.

3. Obligations of the Government Entity.

(a) Subject to the terms and conditions of this Agreement, the Government Entity shall do the following as specified in, and in accordance with the design and construction specifications and other requirements set forth in, the Project Plan (the "Government Work"):

i) provide the Trenching and Restoration;
ii) perform the surveying for alignment and grades for ducts and vaults; and
iii) perform any duct and vault installation and other Work which the Parties have specified in the Project Plan is to be performed by the Government Entity.

(b) Other utilities may be permitted by the Government Entity to use the trenches provided by the Government Entity for the installation of their facilities so long as such facilities or the installation thereof do not interfere (as determined pursuant to the Company's electrical standards) with the Underground Distribution System or the installation or maintenance thereof. Any such use of the trenches by other utilities shall be done subject to and in accordance with the joint trench design specifications and installation drawings set forth or otherwise identified in the Project Plan, and the Government Entity shall be responsible for the coordination of the design and installation of the facilities of the other utilities to ensure compliance with such specifications and drawings.

(c) Upon request of the Company, the Government Entity shall provide periodic reports of the progress of the Government Work identifying (i) the Government Work completed to date, (ii) the Government Work yet to be completed, and (iii) an estimate regarding whether the Conversion Project is on target with respect to the Estimated Shared Government Costs and the Work Schedule.

(d) The Government Entity shall be responsible for coordinating all work to be performed in connection with the street improvement program within the Conversion Area.

(e) Subject to the terms and conditions of this Agreement, the Government Entity shall perform all Government Work in accordance with the Project Plan, the Work Schedule and this Agreement.

4. Work Schedule.

(a) The Government Entity and the Company have agreed upon the Work Schedule as set forth in the Project Plan. Changes to the Work Schedule shall be made only in accordance with Section 6, below.

(b) Promptly following the execution of this Agreement, and upon completion by the Government Entity of any necessary preliminary work, the Government Entity shall hold a pre-construction meeting involving all participants in the Conversion Project to review project design, coordination requirements, work sequencing and related pre-mobilization requirements. Following the pre-construction meeting, the Government Entity shall give the Company written notice to proceed with the Work at least ten (10) business days prior to the commencement date specified in the Work Schedule.

(c) Subject to the terms and conditions of this Agreement, each Party shall perform the Work assigned to it under this Agreement in accordance with the Work Schedule. So long as the Company performs the Company Work in accordance with the Work Schedule, the Company shall not be liable to the Government Entity (or its agents, servants, employees, contractors, subcontractors, or representatives) for any claims, actions, damages, or liability asserted or arising out of delays in the Work Schedule.

5. Location of Facilities.

All facilities of the Company installed within the Conversion Area pursuant to this Agreement shall be located, and all related Operating Rights shall be obtained, in the manner set forth in the applicable provisions of Schedule 74, as specified by the Parties in the Project Plan.

6. Changes.

(a) Either Party may, at any time, by written notice thereof to the other Party, request changes in the Work within the general scope of this Agreement (a "Request for Change"), including, but not limited to: (i) changes in, substitutions for, additions to or deletions of any Work; (ii) changes in the specifications, drawings and other requirements in the Project Plan, (iii) changes in the Work Schedule, and (iv) changes in the location, alignment, dimensions or design of items included in the Work. No Request for Change shall be effective and binding upon the Parties unless signed by an authorized representative of each Party.

(b) If any change included in an approved Request for Change would cause a change in the cost of, or the time required for, the performance of any part of the Work, an equitable adjustment shall be made in the Estimated Shared Company Costs, the Estimated Shared Government Costs, the Estimated Reimbursable Private Conversion Costs (if any), the Estimated Reimbursable Temporary Service Costs (if any), the Estimated Reimbursable Upgrade Costs (if any) and/or the Work Schedule to reflect such change. The Parties shall negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If the Parties are unable to agree upon the terms of the equitable adjustment, either Party may submit the matter for resolution pursuant to the dispute resolution provisions in Section 10, below.

(c) The Work Schedule, the Estimated Shared Company Costs, the Estimated Shared Government Costs, the Estimated Reimbursable Private Conversion Costs, the Estimated Reimbursable Temporary Service Costs and/or the Estimated Reimbursable Upgrade Costs shall be further

equitably adjusted from time to time to reflect any change in the costs or time required to perform the Work to the extent such change is caused by: (i) any Force Majeure Event under Section 11, below, (ii) the discovery of any condition within the Conversion Area which affects the scope, cost, schedule or other aspect of the Work and was not known by or disclosed to the affected Party prior to the date of this Agreement, or (iii) any change or inaccuracy in any assumptions regarding the scope, cost, schedule or other aspect of the Work which are expressly identified by the Parties in the Project Plan. Upon the request of either Party, the Parties will negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If, at any time thereafter, the Parties are unable to agree upon the terms of the equitable adjustment, either Party may submit the matter for resolution pursuant to the dispute resolution provisions in Section 10, below.

(d) Notwithstanding any dispute or delay in reaching agreement or arriving at a mutually acceptable equitable adjustment, each Party shall, if requested by the other Party, proceed with the Work in accordance with any approved Request for Change. Any request to proceed hereunder must be accompanied by a written statement setting forth the requesting Party's reasons for rejecting the proposed equitable adjustment of the other Party.

7. Compensation and Payment.

(a) Subject to and in accordance with the terms and conditions of this Agreement (including, without limitation, the payment procedures set forth in this Section 7), payment in connection with the Conversion Project and this Agreement shall be as follows:

i) The Total Shared Costs shall be allocated to the Parties in the following percentages: (A) sixty percent (60%) to the Company, and (B) forty percent (40%) to the Government Entity.
ii) The Government Entity shall pay one hundred percent (100%) of all Reimbursable Private Conversion Costs, if any.
iii) The Government Entity shall pay one hundred percent (100%) of all Reimbursable Upgrade Costs, if any.
iv) The Government Entity shall pay one hundred percent (100%) of all Reimbursable Temporary Service Costs, if any.
v) The Government Entity shall pay one hundred percent (100%) of the costs it incurs to perform that portion of the Government Work specified in Section 3(a)(i) and (ii) (i.e., Trenching and Restoration and surveying).
vi) The Company shall pay one hundred percent (100%) of the costs it incurs to design, provide and construct any Company-Initiated Upgrade.
vii) The Company shall pay one hundred percent (100%) of the costs it incurs to obtain Operating Rights outside the Public Thoroughfare.

(b) Based on the allocation of responsibilities set forth in Section 7(a), above, the Parties shall determine the net amount payable by the Government Entity or the Company, as applicable, to the other Party under this Agreement (the "Net Amount"). The Net Amount shall be determined by using the amount of the Total Shared Costs allocated to the Government Entity under Section 7(a)(i), and adjusting such amount as follows:

i) Subtracting (as a credit to the Government Entity) the amount of the Shared Government Costs.
ii) Adding (as a credit to the Company) the amount of all Reimbursable Private Conversion Costs, Reimbursable Upgrade Costs and Reimbursable Temporary Service Costs.
iii) Subtracting (as a credit to the Government Entity) any payments previously made to the Company by the Government Entity under the Design Agreement which, under the terms of the Design Agreement, are to be credited to the Government Entity under this Agreement.

The Net Amount, as so calculated, (A) will be an amount payable to the Company if it is a positive number, and (B) shall be an amount payable to the Government Entity if it is a negative number.

(c) Within sixty (60) business days of completion of the Conversion Project, the Government Entity shall provide the Company with an itemization of the Shared Government Costs (the "Government Itemization"), together with such documentation and information as the Company may reasonably request to verify the Government Itemization. The Government Itemization shall, at a minimum, break down the Shared Government Costs by the following categories, as applicable: (i) property and related costs incurred and/or paid by the Government Entity, including any costs of obtaining Operating Rights, and (ii) construction costs incurred and/or paid by the Government Entity, including and listing separately inspection, labor, materials and equipment, overhead and all costs charged by any agent, contractor or subcontractor of the Government Entity.

(d) Within thirty (30) business days after the Company's receipt of the Government Itemization and requested documentation and information, the Company shall provide the Government Entity a written statement (the "Company Statement") showing (i) an itemization of the Shared Company Costs, (ii) the Parties' relative share of the Total Shared Costs based on the Company's itemization of the Shared Company Costs and the Government Entity's itemization of the Shared Government Costs set forth in the Government Itemization, (iii) any Reimbursable Private Conversion Costs, (iv) any Reimbursable Upgrade Costs, (v) any Reimbursable Temporary Service Costs, (vi) any credits to the Government Entity for payments previously made to the Company by the Government Entity under the Design Agreement which, under the terms of the Design Agreement, are to be credited to the Government Entity under this Agreement, and (vii) the Net Amount, as determined in accordance with Section 7(b), above, together with such documentation and information as the Government Entity may reasonably request to verify the Company Statement. The itemization of the Shared Company Costs included in the Company Statement shall, at a minimum, break down the Shared Company Costs by the following categories, as applicable: (i) design and engineering costs, and (ii) construction costs, including and listing separately inspection, labor, materials and equipment, overhead and all costs charged by any agent, contractor or subcontractor of the Company.

(e) Within thirty (30) business days after the Government Entity's receipt of the Company Statement and requested documentation and information, the Net Amount shall be paid by the owing Party to the other Party, as specified in the Company Statement.

8. Indemnification.

(a) The Government Entity releases and shall defend, indemnify and hold the Company harmless from all claims, losses, harm, liabilities, damages, costs and expenses (including, but not limited to, reasonable attorneys' fees) caused by or arising out of any negligent act or omission or willful misconduct of the Government Entity in its performance under this Agreement. During the performance of such activities the Government Entity's employees or contractors shall at all times remain employees or contractors, respectively, of the Government Entity.

(b) The Company releases and shall defend, indemnify and hold the Government Entity harmless from all claims, losses, harm, liabilities, damages, costs and expenses (including, but not limited to, reasonable attorneys' fees) caused by or arising out of any negligent act or omission or willful misconduct of the Company in its performance under this Agreement. During the performance of such activities the Company's employees or contractors shall at all times remain employees or contractors, respectively, of the Company.

(c) Solely for purposes of enforcing the indemnification obligations of a Party under this Section 8, each Party expressly waives its immunity under Title 51 of the Revised Code of Washington, the Industrial Insurance Act, and agrees that the obligation to indemnify, defend and hold harmless provided for in this Section 8 extends to any such claim brought against the indemnified Party by

or on behalf of any employee of the indemnifying Party. The foregoing waiver shall not in any way preclude the indemnifying Party from raising such immunity as a defense against any claim brought against the indemnifying Party by any of its employees.

9. Conversion of Service to Customers within Conversion Area.

(a) Upon commencement of the Work, the Government Entity shall notify all persons and entities within the Conversion Area that service lines to such customers must be converted from overhead to underground service within the applicable statutory period following written notice from the Government Entity that service from underground facilities are available in accordance with RCW 35.96.050. Upon the request of any customer, other than a single family residential customer, within the Conversion Area, the Company shall remove the overhead system and connect such persons' and entities' Underground Service Lines to the Underground Distribution System.

(b) The Parties acknowledge that single family residences within the Conversion Area must (i) provide a service trench and conduit, in accordance with the Company's specifications, from the underground meter base to the point of service provided during the conversion, and (ii) pay for the secondary service conductors as defined in Schedule 85 of the Company's Electric Tariff G. The Government Entity shall exercise its authority to order disconnection and removal of overhead facilities with respect to owners failing to convert service lines from overhead to underground within the timelines provided in RCW 35.96.050.

10. Dispute Resolution.

(a) Any dispute, disagreement or claim arising out of or concerning this Agreement must first be presented to and considered by the Parties. A Party who wishes dispute resolution shall notify the other Party in writing as to the nature of the dispute. Each Party shall appoint a representative who shall be responsible for representing the Party's interests. The representatives shall exercise good faith efforts to resolve the dispute. Any dispute that is not resolved within ten (10) business days of the date the disagreement was first raised by written notice shall be referred by the Parties' representatives in writing to the senior management of the Parties for resolution. In the event the senior management are unable to resolve the dispute within twenty (20) business days (or such other period as the Parties may agree upon), each Party may pursue resolution of the dispute through other legal means consistent with the terms of this Agreement. All negotiations pursuant to these procedures for the resolution of disputes shall be confidential and shall be treated as compromise and settlement negotiations for purposes of the state and federal rules of evidence.

(b) Any claim or dispute arising hereunder which relates to any Request for Change or any equitable adjustment under Section 6, above, or the compensation payable by or to either Party under Section 7, above, and which is not resolved by senior management within the time permitted under Section 10(a), above, shall be resolved by arbitration in Seattle, Washington, under the Construction Industry Arbitration Rules of the American Arbitration Association then in effect. The decision(s) of the arbitrator(s) shall be final, conclusive and binding upon the Parties. All other disputes shall be resolved by litigation in any court or governmental agency, as applicable, having jurisdiction over the Parties and the dispute.

(c) In connection with any arbitration under this Section 10, costs of the arbitrator(s), hearing rooms and other common costs shall be divided equally among the Parties. Each Party shall bear the cost and expense of preparing and presenting its own case (including, but not limited to, its own attorneys' fees); provided, that, in any arbitration, the arbitrator(s) may require, as part of his or her decision, reimbursement of all or a portion of the prevailing Party's costs and expenses (including, but not limited to, reasonable attorneys' fees) by the other Party.

(d) Unless otherwise agreed by the Parties in writing, the Parties shall continue to perform their respective obligations under this Agreement during the pendency of any dispute.

11. Uncontrollable Forces.

In the event that either Party is prevented or delayed in the performance of any of its obligations under this Agreement by reason beyond its reasonable control (a "Force Majeure Event"), then that Party's performance shall be excused during the Force Majeure Event. Force Majeure Events shall include, without limitation, war; civil disturbance; flood, earthquake or other Act of God; storm, earthquake or other condition which necessitates the mobilization of the personnel of a Party or its contractors to restore utility service to customers; laws, regulations, rules or orders of any governmental agency; sabotage; strikes or similar labor disputes involving personnel of a Party, its contractors or a third party; or any failure or delay in the performance by the other Party, or a third party who is not an employee, agent or contractor of the Party claiming a Force Majeure Event, in connection with the Work or this Agreement. Upon removal or termination of the Force Majeure Event, the Party claiming a Force Majeure Event shall promptly perform the affected obligations in an orderly and expedited manner under this Agreement or procure a substitute for such obligation. The Parties shall use all commercially reasonable efforts to eliminate or minimize any delay caused by a Force Majeure Event.

12. Insurance.

(a) PSE shall, and shall require each of its contractors to, secure and maintain in force throughout the duration of the Conversion Project (or, if sooner, until termination of this Agreement) comprehensive general liability insurances, with a minimum coverage of $1,000,000 per occurrence and $1,000,000 aggregate for personal injury; and $1,000,000 per occurrence/ aggregate for property damages, and professional liability insurance in the amount of $1,000,000.

(b) The Government Entity shall ensure that each of its contractors performing any Government Work secures and maintains in force throughout the duration of the Conversion Project (or, if sooner, until termination of this Agreement) insurance policies having the same coverage, amounts and limits as specified Section 12(a), above.

(c) In lieu of the insurance requirements set forth in Section 12(a), above, the Company may self-insure against such risks in such amounts as are consistent with good utility practice. Upon the Government Entity's request, the Company shall provide the Government Entity with reasonable written evidence that the Company is maintaining such self-insurance.

13. Other.

(a) Agreement Subject To Tariff. This Agreement is subject to the General Rules and Provisions set forth in Tariff Schedule 80 of the Company's electrical Tariff G and to Schedule 74 of such Tariff as approved by the Washington Utilities and Transportation Commission and in effect as of the date of this Agreement.

(b) Termination. The Government Entity reserves the right to terminate the Conversion Project and this Agreement upon written notice to the Company. In the event that the Government Entity terminates the Conversion Project and this Agreement, the Government Entity shall reimburse the Company for all costs reasonably incurred by the Company in connection with the Work performed prior to the effective date of termination. In such event, the costs reimbursable to the Company (i) shall not be reduced by any Shared Government Costs or other costs incurred by the Government Entity, and (ii) shall be paid within thirty (30) days after the receipt of the Company's invoice therefor. Sections 1, 5, 7, 8, 9, 10, 11 and 13 shall survive any termination of the Conversion Project and/or this Agreement.

(c) Facilities Greater Than 15,000 Volts. Nothing in this Agreement shall in any way affect the rights or obligations of the Company under any previous agreements pertaining to the existing or future facilities of greater than 15,000 Volts within the Conversion Area.

(d) Compliance With Law. The Parties shall, in performing the Work under this Agreement, comply with all applicable federal, state, and local laws, ordinances, and regulations.

(e) No Discrimination. The Company, with regard to the Work performed by the Company under this Agreement, shall comply with all applicable laws relating to discrimination on the basis race, color, national origin, religion, creed, age, sex, or the presence of any physical or sensory handicap in the selection and retention of employees or procurement of materials or supplies.

(f) Independent Contractor. The Company and the Government Entity agree that the Company is an independent contractor with respect to the Work and this Agreement. The Company is acting to preserve and protect its facilities and is not acting for the Government Entity in performing the Work. Nothing in this Agreement shall be considered to create the relationship of employer and employee between the Parties. Neither the Company nor any employee of the Company shall be entitled to any benefits accorded employees of the Government Entity by virtue of the Work or this Agreement. The Government Entity shall not be responsible for withholding or otherwise deducting federal income tax or social security or contributing to the State Industrial Insurance Program, or otherwise assuming the duties of an employer with respect to the Company, or any employee of the Company.

(g) Nonwaiver of Rights or Remedies. No failure or delay of either Party to insist upon or enforce strict performance by the other Party of any provision of this Agreement or to exercise any other right under this Agreement, and no course of dealing or performance with respect thereto, shall, except to the extent provided in this Agreement, be construed as a waiver or, or choice of, or relinquishment of any right under any provision of this Agreement or any right at law or equity not otherwise provided for herein. The express waiver by either Party of any right or remedy under this Agreement or at law or equity in a particular instance or circumstance shall not constitute a waiver thereof in any other instance or circumstance.

(h) No Third Party Beneficiaries. There are no third-party beneficiaries of this Agreement. Nothing contained in this Agreement is intended to confer any right or interest on anyone other than the Parties, their respective successors, assigns and legal representatives.

(i) Governmental Authority. This Agreement is subject to the rules, regulations, orders and other requirements, now or hereafter in effect, of all governmental regulatory authorities and courts having jurisdiction over this Agreement, the Parties or either of them. All laws, ordinances, rules, regulations, orders and other requirements, now or hereafter in effect, of governmental regulatory authorities and courts that are required to be incorporated into agreements of this character are by this reference incorporated in this Agreement.

(j) No Partnership. This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties or to impose any partnership obligations or liability upon either Party. Further, neither Party shall have any right, power or authority to enter into any agreement or undertaking for or on behalf of, to act as or be an agent or representative of, or to otherwise bind the other Party.

(k) Severability. In the event that any provision of this Agreement or the application of any such provision shall be held invalid as to either Party or any circumstance by any court having jurisdiction, such provision shall remain in force and effect to the maximum extent provided by law, and all other provisions of this Agreement and their application shall not be affected thereby but shall remain in force and effect unless a court or arbitrator holds they are not severable from the invalid provisions.

(l) Notice. Any notice under this Agreement shall be in writing and shall be faxed (with a copy followed by mail or hand delivery), delivered in person, or mailed, properly addressed and stamped with the required postage, to the intended recipient as follows:

If to the Government Entity:	City of Oak Harbor 865 S.E. Barrington Drive Oak Harbor, WA 98277 Attn: Joe Stowell Fax: 360-279-4519
If to the Company:	Puget Sound Energy, Inc. PO Box 97034 BOT-01G Bellevue, WA 98009-9734 Attn: David Matulich Fax: 425-424-6675

Any Party may change its address specified in this Section 13(l) by giving the other Party notice of such change in accordance with this Section 13(l).

(m) Applicable Law. This Agreement shall in all respects be interpreted, construed and enforced in accordance with the laws of the State of Washington (without reference to rules governing conflict of laws), except to the extent such laws may be preempted by the laws of the United States of America.

(n) Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and all other agreements and understandings of the Parties, whether written or oral, with respect to the subject matter of this Agreement are hereby superseded in their entireties; provided, however, that except as expressly set forth in this Agreement, nothing herein is intended to or shall alter, amend or supersede the Design Agreement and the same shall remain in full force and effect in accordance with its terms.

(o) Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the respective successors, assigns, purchasers, and transferees of the Parties, including but not limited to, any entity to which the rights or obligations of a Party are assigned, delegated, or transferred in any corporate reorganization, change of organization, or purchase or transfer of assets by or to another corporation, partnership, association, or other business organization or division thereof.

Government Entity:	Company:
City of Oak Harbor	PUGET SOUND ENERGY, INC.
BY_____	BY_____
ITS Mayor_____	ITS Municipal Liaison Manager
Date Signed_____	Date Signed_____

Approved as to form:

_____

PUGET SOUND ENERGY
The Energy To Do Great Things

Exhibit "A" Project Plan
Schedule 74 Underground Conversion

City of Oak Harbor – Pioneer Way
PSE Project Number: 101064957
February 1, 2011

Pursuant to Puget Sound Energy ("PSE") Rate Schedule 74 and as described in this Project Plan, PSE will convert its existing overhead electrical distribution system of 15,000 volts or less to an equivalent Underground Distribution System. This Project Plan describes work to be performed by PSE and the City of Oak Harbor (the "City") for the conversion of certain PSE electrical distribution system facilities as described herein (the "Conversion Project"). Construction of this Conversion Project is contingent upon and shall not commence prior to both written acceptance of this Project Plan and written execution of a Schedule 74 Construction Agreement by the City and PSE.

This Project Plan includes and consists of:

- Detailed description of the Construction Work to be performed
- Construction Drawings, Standards, Specifications and Requirements for the Construction Work (attached)
- Operating Rights to be obtained for the Conversion Project
- Construction Work Schedule
- Construction Costs Estimate Summary (attached)

Revisions to this Project Plan must be mutually approved by the City and PSE.

Scope of Work

This Conversion Project will replace PSE's existing overhead electrical distribution system with an Underground Distribution System within the following area (the "Conversion Area"):

On and along Pioneer Way from SE City Beach Street pole 447487-155720 to SE Midway Boulevard pole# 447541-155933, and portions of Ely Street, Dock Street, Ireland Street, Ilwaco, Jensen Street as they intersect Pioneer Way.

Ely Street - Extend the conversion north on Ely Street to pole 44717-155766.

Dock Street - North to pole 447518-155821, and southerly, tie into existing UG J-Box 447485-155832) on SE Bayshore Drive, and to a new UG system in the alley feeding the 700 block of Pioneer Highway.

Ireland Street - North to new termination pole north of existing pole 447531-155872

Ilwaco - North to pole 447542-155890.

Jensen Street - North to new termination pole off of Pioneer Way.

In total approximately 4,300 L.F. of trenching will be required for installation to underground PSE's facilities.

The Conversion Project includes modification or replacement of all existing services lines within the Conversion Area to connect to the Underground Distribution System and removal of PSE's existing overhead electric distribution facilities (including PSE distribution poles and pole mounted street lights) from the Conversion Area.

There are no Company Initiated Upgrades, or Temporary Service elements included in the Conversion Project Scope of Work.

City requested upgrades included in this project consist of: 3 total underground transformers (TUT's) with non-skid lids. There are additional costs for installations of TUT's due to increased maintenance and shorter life. These costs will be billed at 100% City cost.

Temporary Services are not included in this project.

In conjunction with this Conversion Project, PSE will remove its existing street lighting system from the Conversion Area. The City plans to install City owned and maintained streetlights, and there is no provisions for replacement street lighting system within the Conversion Area in this Project Plan. Replacement street lighting service can be provided by separate arrangement in accordance with applicable PSE Tariff Schedules.

Responsibilities of Parties

City Responsibilities

a) Provide written notice to customers within the Conversion Area in advance of Conversion Project Construction Work start. The notice will include contact information for both the City and PSE, the expected Conversion Project schedule, anticipation of service interruptions and work required to be performed by customers.

b) Coordinate other utility conversion, removal and relocation from PSE's poles.

c) Provide all surveying for equipment placement, locations, and establish all grade elevations for the Underground Distribution System within the Conversion Area.

d) Provide all necessary excavation, bedding, backfill, off-site disposal, site restoration and coordination for installation of the Underground Distribution System. This includes trenching, backfill, and restoration for cut-over and transfer of existing underground system and service lines from the existing overhead distribution system to the new Underground Distribution System.

e) Coordinate private property trenching, excavation and restoration activity with private property owners affected by this Conversion Project.

f) Provide flagging and traffic control as required for all work performed by the City.

g) Install and proof all ducts and vaults for the Underground Distribution System (excluding work in ducts or vaults containing energized cables or equipment – see PSE Responsibilities) in accordance with PSE standards and specifications using ducts and vaults provided by PSE. "Proofing" as used herein is defined as verification using a mandrel that the duct and vault system is free and clear of damage, installed to the proper grade and at the proper location and contains a pulling line.

h) Provide PSE at least ten (10) business days notice prior to the start of trenching activity to allow for delivery of PSE materials to the job site and scheduling of PSE's on-site Inspector. Provide at least two (2) business days notice for scheduled delivery of vaults from the manufacturer.

i) Provide secure staging and storage area(s) for duct and vault materials provided by PSE. The City shall be responsible for the security and condition of these materials until they are installed and accepted by PSE or returned to PSE's custody.

j) Provide labor and equipment for the off-loading of PSE duct and vault materials delivered to the job site.

k) Promptly following notice from PSE that the Underground Distribution System has been energized, provide notice to customers within the Conversion Area informing them of their obligation and responsibility to convert their overhead service lines to underground service lines as provided by state law or to modify existing underground service lines for connection to the Underground Distribution System. Affected service lines are listed in the Service Lines section of this Project Plan.

l) Facilitate weekly (or as otherwise agreed by the City and PSE) construction coordination meetings to include all relevant parties participating in the conversion including PSE and it's contractor(s), the City and it's contractor(s), and other utilities.

m) Provide any necessary operating rights for the installation of PSE's facilities in accordance with PSE's Schedule 74 Section 3 and as mutually agreed by the PSE and the City. Operating rights are further addressed in the Operating Rights section of this Project Plan.

n) Modify, reroute or replace service lines to City owned facilities to connect to the Underground Distribution System.

o) Following notification from PSE that Construction Work is complete, provide to PSE any Shared Government Costs as provided for in the Construction Agreement.

Puget Sound Energy Responsibilities

a) Provide all duct and vault materials, cables, electrical equipment and components necessary for installation of the Underground Distribution System.

b) Following notice from the City, deliver or cause to be delivered all duct and vault materials to the designated staging/storage area(s). Acknowledge delivered quantities and condition of duct and vault materials by signing shipping manifests.

c) Following notice from the City, provide inspection services needed for overseeing the proper installation of ducts and vaults by the City.

d) Accept delivery of the completed duct and vault system once the new system has been proofed (as described above) by the City. PSE will provide a mandrel to the City to be used in proofing of the duct and vault system.

e) Provide PSE electrical workers to complete duct installation and proofing when such work is performed at or in any energized vault containing energized cables or equipment.

f) Install (except for ducts and vaults installed by the City) and energize the Underground Distribution System. Provide written notice to the City when the Underground Distribution System is energized.

g) Perform cut-over and transfer of existing Underground Distribution System and existing underground service lines from the overhead distribution system to the new Underground Distribution System where applicable (see City Responsibility item "d" concerning trenching responsibility). PSE will notify the City for excavation and the affected customers at least two (2) business days prior to installation, transfer, and connection of underground service lines. Affected service lines are listed in the Service Lines section of this Project Plan.

h) Install and connect replacement underground service lines to single family residences and connect modified and replacement non-residential underground service lines provided by customers within the Conversion Area pursuant to PSE Tariff Schedule 85. Affected service lines are listed in the Service Lines section of this Project Plan.

i) Remove the existing overhead electric distribution system including, conductors, equipment, down guys, anchors and poles after all service lines to customers within the Conversion Area are connected to the Underground Distribution System and all other utilities have been removed from PSE's poles. Holes left following removal of poles will be filled with crushed rock and compacted in accordance with applicable City standards or specifications.

j) Provide flagging and traffic control as required for all work performed by PSE (except as may otherwise be reasonably provided by the City during installation of ducts and vaults in conjunction with City performed trenching, excavation, back-fill and restoration).

k) Attend weekly (or as otherwise agreed by the City and PSE) construction coordination meetings facilitated by the City and its contractor during periods of Conversion Project construction.

Operating Rights

The Underground Distribution System will be located within Public Thoroughfare except as:

Location	Approximate Station & Offset	Facility Type	Party to Secure Easement	Parcel Number
S.E. City Beach St	29+60	PO1 -Pole	PSE	

The Construction Work will not be released by PSE for construction until i) all operating rights necessary for the installation of PSE's facilities have been obtained and have been verified by PSE, or ii) the City otherwise signs an agreement releasing PSE from any and all financial obligations associated with the location or relocation of PSE facilities resulting from commencement of construction prior to acquisition of all identified necessary operating rights.

Construction Work Schedule

The work will be performed in accordance with the following Work Schedule, unless this schedule is revised by mutual agreement of the City and PSE or circumstances beyond the reasonable control of the City and/or PSE preclude such performance.

Installation of ducts and vaults: Start at City Beach to Dock Street on April 11th, 2011, and Dock Street to Midway Boulevard on May 5th, 2011

Installation and energization of the Underground Distribution System: Duration is approximately twenty-eight (28) days. Installation to start from City Beach to Dock Street when the entire Duct and Vault system is installed and accepted by PSE in that section. Installation from Dock Street to Midway Boulevard to start when the underground system in the first section has been energized and service conversions can commence.

Removal of overhead facilities Duration is approximately twelve (12) days. Removal to start after all electric services on the entire project have been converted. Pole but removal to start after all utility facilities have been removed from all of the poles within the project.

Work Schedule Restrictions: Work prohibited during Oak Harbor's Holland Happening (April 27th through May 1st, 2011)

Construction Cost Estimate

The estimated costs to perform the Construction Work and the allocation of costs between the parties are presented in the attached Construction Costs Estimate Summary. These estimated costs are valid for ninety (90) days from the date shown on the attached Construction Costs Estimate Summary. If this Project Plan and a Schedule 74 Construction Agreement are not fully executed within ninety (90) days from this date, the estimated costs shall be subject to revision.

Estimated Inspection and Service Provider Outside Services costs are based on year contract rates. Costs for work performed by PSE after December 31, 2010 shall be subject to revision to reflect contract rates which become effective after this date. Further, in the event performance of the Construction Work does not proceed substantially as provided in this Project Plan, PSE's estimated construction costs shall be subject to revision.

Changes in Construction Work scope, performance and/or schedule can result in actual Construction Costs which significantly differ from estimated costs shown in the Construction Cost Estimate Summary. Such changes shall promptly be brought to the attention of PSE and the City when anticipated or known to occur and shall be documented in a Change Order mutually agreed by the City and PSE.

Project Assumptions

The project design, construction plans and cost estimates are based on and reflect the following assumptions. Construction conditions that are not consistent with these assumptions may result in a request for change or an equitable adjustment to project compensation under Section 6 of the Construction Agreement.

Cost Assumptions

1. The Construction Work will be performed in accordance with the Construction Drawings and Construction Work Schedule.
2. Prior to PSE crew or Inspector move in, PSE project manager to attend up to five (5) planning or preconstruction meetings.
3. City's contractors can elect to work on holidays, Saturdays, Sundays, or before 7:00 A.M. or after 6:00 P.M. on any day. It is anticipated that PSE's crews or Inspector may be asked to work weekend days, if so, the appropriate change orders will be created. Work on weekend days will be requested by the City a minimum of five days in advance.
4. PSE's Project Manager will accept or reject (with written justification) the duct and vault installation work performed by the City within five (5) business days notice of completion from the City. In the event PSE rejects any of the ducts or vaults (with reasonable written justification), the City will perform the necessary remedial work. The City will then re-notify PSE and PSE shall have five (5) business days to accept or reject the remedial work.

5. All PSE cables can be pulled through the ducts and vaults system, including existing ducts and vaults if applicable, to be used for the Conversion Project utilizing normal cable pulling equipment and methods.
6. A City Street Use permit is the only permit necessary for PSE to perform its work for this Conversion Project and will be issued within two (2) weeks of PSE submitting a complete permit application (including any supporting documentation reasonably required by the City). There will be no charge for the permit or inspection fees.
7. The estimated daily productivity rate for PSE duct and vault installation is based on the City's contractor opening a minimum of **60 feet of trench per working day**. The daily productivity rate is used to estimate the number of days a PSE Inspector will be required during installation of ducts & vaults. Actual time spent, more or less than the 60 feet per day will be trued up by Change Order. This Inspector budget is independent of the estimated schedule listed in the "Construction Work Schedule" above. The Inspector will be scheduled in full day increments and in one continuous effort. Changes to a continuous schedule require a minimum of five days advance notice and must be mutually agreed between the City and PSE.
8. Traffic control provided by PSE assumes the use of two flaggers, basic signage and simple channelization. Additional traffic control measures are not included.
9. Work to be performed by PSE does not include installation and/or removal of Temporary Service facilities at the request of others during construction.
10. All cut-over and transfer work will be completed during regular working hours.
11. New guy anchors shall be installed prior to installation of new ducts in the same area.
12. When Fluidized Thermal Backfill (FTB) is used, associated cost will be allocated 100% to PSE when required for a Company Initiated Upgrade and otherwise 100% to the City.
13. Installation of protective bollards may be necessary at some locations and may not be included in the project design. In the event unplanned bollards are required, associated costs will be a Shared Cost.

Schedule

1. There will be a total of three (3) PSE crew mobilizations as follows: i) 2 mobilization (phase 1 Beach to Dock Street, and phase 2 Dock Street to Midway Boulevard) of an underground line crew for installation of underground conductors and equipment; and ii) one mobilization of an overhead line crew for removal of the existing overhead facilities. Once mobilized PSE crews will have continuous productive work until all PSE Construction Work is complete.
2. All PSE Construction Work will be performed during regular working hours shall be between 7 A.M. to 6:00 P.M. and a 5-day workweek excluding holidays
3. In the event that lane closures are necessary for performance of work, PSE and the City will mutually agree to weekly work schedules for the Construction Work. PSE shall be allowed to perform PSE work as scheduled without changes or interruptions caused by other construction activities.
4. Work requiring scheduled interruption of electric service (cut-overs and transfers) will be performed during the working hours specified in Schedule Assumption #2 above, and will be

scheduled with at least two (2) business days notice. PSE will notify customers of scheduled service interruptions.

Additional Considerations

Service Lines

Service lines within the Conversion Area must be modified or replaced to provide underground service from the Underground Distribution System as described within the PSE's Construction Drawings. Performance of the work and associated costs shall be governed by PSE Tariff Schedule 85.

Cut-overs and Transfers

PSE customers within the Conversion Area will experience interruption of electric service during performance of the Construction Work when transferring system and customer loads from the overhead distribution system to the Underground Distribution System. PSE will notify customers at least two (2) business days in advance of expected service interruptions. Customers may request that cut-over and transfer work affecting their service be performed outside the regular working hours listed above subject to the customer's written agreement to reimburse PSE for the additional cost (at overtime rates) to perform such work outside the regular working hours.

New Service

Connection of new or increased load for City facilities (such as new traffic signals) under terms of PSE Tariff Schedule 85 will be addressed on a separate work order and work sketch. Additional costs may apply and will be quoted separately.

PSE Design & Construction Standards

This Conversion Project has been designed and will be constructed in accordance with PSE design and construction standards in effect as of the date of this Project Plan. PSE standards applicable to Construction Work to be performed by the City have been provided to the City in PSE's "Electric Distribution Trench/Duct/Vault Construction Standards, 2009". All relevant PSE standard described above are attached to this Project Plan by this reference.

Temporary Support (Holding) of PSE Poles

Whenever any pole(s) are required to be temporarily supported (held) due to excavation in proximity to such poles, the City will coordinate with PSE to provide such support. The need to temporarily support such poles shall be determined by PSE, and if required, such support shall be provided by PSE. As used herein, "temporary support" means supporting one or more poles for a continuous working period of ten hours or less.

Acceptance of Project Plan

The City and PSE mutually agree to and accept this Project Plan as of the date indicated below:

For the City:

By: _____

Its: _____

Date: _____

For PSE:

By: _____

Its: Municipal Liaison Manager

Date: _____

PUGET SOUND ENERGY

The Energy To Do Great Things

Date: 2/1/2011
Project Title: SE Pioneer Way Conversion
Project Description: Convert the existing OH distribution along SE Pioneer Way to UG from SE City Beach St to SE Midway Blvd

Rate Schedule: 74
Project Manager / Phone #: Jason Downing 360-661-2987
Project Engineer / Phone #: Jason Downing 360-661-2987
Municipal Liaison Mgr / Phone #: Dave Matulich 425-424-6442
Project #: 101064957
Revision #: 0
Revision Date:

Construction Costs Estimate Summary [1,2,5]

	Shared Costs[3]	100% Government Entity Reimbursable Costs					100% PSE Costs	Construction Costs Totals[4,5]
		Private Conversion	Gov Req Upgrade	Temporary Services	Prior Conv/Reloc Within 5 Years	Total 100% GE Reimbursable Costs		
	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate
Company								
Labor	$ 1,000	$ -	$ -	$ -	$ -	$ -	$ -	$ 1,000
Materials	$ 180,300	$ -	$ 40,300	$ -	$ -	$ 40,300	$ -	$ 220,600
Equipment	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Inspection	$ 66,700	$ -	$ -	$ -	$ -	$ -	$ -	$ 66,700
Service Provider Outside Services	$ 233,000	$ -	$ -	$ -	$ -	$ -	$ -	$ 233,000
Operating Rights	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Overhead	$ 76,400	$ -	$ 6,400	$ -	$ -	$ 6,400	$ -	$ 82,800
Government Entity [5]								
Labor	$ 75,400	$ -	$ -	$ -	$ -	$ -	$ -	$ 75,400
Operating Rights	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Construction Costs Totals[4,5]	$ 632,800	$ -	$ 46,700	$ -	$ -	$ 46,700	$ -	$ 679,500

Projected allocation of Estimated Construction Costs at Completion of Construction Work

Company	$ 379,700						$ -	$ 379,700
Government Entity	$ 253,100					$ 46,700		$ 299,800

Notes:
[1] Estimate prepared in accordance with Sections 6 & 11 of Schedule 74 Design Agreement and Section 7 of Schedule 74 Construction Agreement
[2] All amounts shown in this estimate are rounded up to the next $100
[3] Shared Costs are allocated 40% to the Government Entity and 60% to the Company if the Conversion Project is completed
[4] Total Costs excludes Government Entity costs of trenching, restoration, and surveying
[5] This estimate presentation may not include eligible estimated Government Entity costs and may be incomplete