

**PLANNING COMMISSION  
REGULAR MEETING  
CITY HALL – COUNCIL CHAMBERS  
January 25, 2011**

**ROLL CALL:**     **Present:** Kristi Jensen, Keith Fakkema, Greg Wasinger, Gerry Oliver and Jeff Wallin. **Absent:** Bruce Neil. **Staff Present:** Development Services Director, Steve Powers; Senior Planner Ethan Spoo; and Associate Planner; Melissa Sartorius

**Vice Chair Fakkema called the meeting to order at 7:30 p.m.**

**MINUTES:**       **MR. WASINGER MOVED, MR. OLIVER SECONDED, MOTION CARRIED TO APPROVE THE DECEMBER 28, 2010 MINUTES AS PRESENTED.**

**PUBLIC COMMENT:** No comments.

**PROPOSED CHANGES TO CHAPTER 21.80 OHMC PERTAINING TO BINDING SITE PLANS – Public Hearing (continued)**

Mr. Spoo summarized research and presented concepts for further discussion.

Mr. Spoo reported that State law requires an alteration process for binding site plans (BSP) and currently the City does not have an alteration process. State law also indicates that all development within a binding site plan shall be consistent with the approved binding site plan. Local jurisdictions are given the latitude and flexibility to shape that process to meet local circumstances.

Mr. Spoo reported that staff looked at 13 other jurisdictions across the State and found that 8 jurisdictions require all property owners within a BSP to sign a binding site plan alteration, and 5 jurisdictions require something less than all of the property owners to sign. Mr. Spoo further stated that staff believes that a balance is needed which allows for alterations but respects the rights of property owners within a BSP. Mr. Spoo stated that staff is proposing a two-tier process for requesting alterations to BSP's based on the findings and comments received at the last Planning Commission meeting.

Tier 1 provides for BSP's which exist at the time the code is adopted, assuming the code is adopted those BSP's would require the signatures of all owners within the BSP in order for an alteration to be made. Tier 2 would provide for future BSP's. Those BSP's would require the signatures of only the property owners whose lots are proposed to be altered.

In addition to the two-tier process, staff is recommending a change in requirements regarding what is shown on the binding site plan map. Only those things which are in the public interest would be shown on the BSP map. The existing BSP map requirements have required information which is not in the public interest to be recorded on the binding site plan. Once that information gets recorded, the City must settle disputes between property owners, even if those disputes don't pertain to the public interest. By reducing the requirements for what is shown on the binding site plan map, the City won't be in the position in deciding between private issues between property owners.

Mr. Spoo concluded by recommending that the Planning Commission accept public testimony and continue the hearing to February 22, 2011.

Mr. Fakkema opened the public hearing.

**Bill Massey** (41 NE Midway Blvd. Ste. 101) pointed out that OHMC 21.80.200 allows for minor modifications and has been used for minor modifications in the past. Mr. Massey supported keeping the existing code in place. Mr. Massey also used the Oak Tree Village Binding Site Plan as an example to demonstrate how a modification could be stopped by one person even though their lot may not even be connected. Mr. Massey also pointed that some of the Goldie Road properties that may be annexed in the future already have binding site plans through the County. Mr. Massey stated that there were more implications to the proposed changes than just the specific binding site plan that was discussed at the previous meeting.

**Kenneth Manny** (2094 SW Dillard Lane) stated he was a property owner within the Oak Tree Village BSP. He noted that this BSP is separated by Cabot Drive and that making changes, minor or otherwise, would require him to get the consent of the property owners on the other side of Cabot Drive. Mr. Manny stated that the issue was of procedural fairness for people that own property in a situation where the interest of one group of owners is entirely different and separate from the interest of another group of owners. Mr. Manny believed if the Planning Commission were to adopt the plan that requires 100 percent unanimity; it would stop any type of development or modifications. Mr. Manny stated that it gives a disproportionate advantage to persons who simply say no for the reasons of saying no or they're too busy to read the document or they are not inclined to be cooperative or worst yet they want to get something out of it in exchange for their willingness to cooperate even though they are in no way affected. Mr. Manny asked the Planning Commission to carefully consider the options so that we don't find ourselves in a position where people with a legitimate interest in making a change to a BSP are essentially thwarted simply because it is impossible to get 100 percent unanimity among all of the owners. Mr. Manny stated that Oak Tree Village was a perfect example of why 100 percent unanimity can never be enforced and be fair at the same time.

Mr. Powers commented that the ideas that have been presented are only concepts at this stage and there is no specific draft language before the Planning Commission at this time.

**Mel Vance** (PO Box 2882) stated that he was torn between requiring a simple majority or a super majority and he was in favor of everyone having input regarding a BSP amendment. He also stated that he didn't think Oak Tree Village was a good example because he believed it was an extremely unusual situation to have a BSP that is split by a street. He suggested that Oak Tree Village be split into two BSP's if possible.

**Chris Anderson** (390 NE Midway Blvd.) stated that he was also a property owner within Oak Tree Village. Mr. Anderson read from RCW 58.17.035 and noted that it singles out commercial and industrial binding site plans and says that the approval for improvements and finalization of specific individual commercial or industrial lots shall be done by administrative approval. Mr. Anderson suggested treating commercial/industrial and residential BSP's separately as the RCW seems to do.

**Bob Severns** (1085 SE Regatta Dr., C201) agreed that common ownership of facilities such as driveways, parking spaces and stormwater facilities is appropriate and are commonly found in BSP's. Mr. Severns also noted that BSP's get changed even without alteration language by getting the proper parties together and execute documents to allow the change. Mr. Severns asked that the Planning Commission to not be confused that BSP's can't be changed because they can. Mr. Severns urged the Planning Commission not to make it too easy to change a BSP because to say that we're going to change the BSP and we're going to ignore the other parties even though they purchased their properties after the fact is not something the City wants to do. Mr. Severns pointed out that the majority of the 13 jurisdictions require all parties

to participate in alterations. Mr. Severns agreed with a simpler BSP process on a go-forward basis but suggested that there needs to be a proper search done on people that have an interest in the property and they need to be included in major alterations.

**Sue Karahalios** (1085 SE Regatta Dr., B-101) thanked staff for acknowledging that there are rights given to those that have an existing BSP. She also appreciated that there is consistency in how people are treated. She supported having all the owners involved in a BSP alteration.

**Tom Moser** (1204 Cleveland Ave., Mount Vernon WA) detailed his background and experience in land use law. Mr. Moser pointed out that the option to say that everyone gets to vote and you have to have 100 percent gives tremendous veto power to somebody who may own a lot or have an interest in a piece of property. He encouraged the Planning Commission to reconsider that option.

Mr. Moser noted that the language proposed uses the term “restrictive covenants”. He asked if the term meant the face of the BSP or does it mean the CC&R’s or the declarations of CC&R’s. He suggested defining the term.

Mr. Moser stated that the City should divide between public and private as Mr. Spoo has suggested.

Mr. Moser presented a letter dated November 3, 2004 from the City of Oak Harbor’s City Attorney Phil Bleyhl (Attachment 1). Mr. Moser noted the following points Mr. Bleyhl made in the letter:

- The City should not be in the business of deciding ownership.
- Minor modifications to BSP’s are allowed under the code.
- Sign-off by parties to the BSP is not necessary because it gives too much control.

Mr. Moser noted that there is a history of the City doing fine on amending BSP’s until very recently. The BSP amendments were done administratively and he didn’t see any reason that couldn’t continue.

Mr. Moser concluded by stating that just because somebody hasn’t built on a lot yet doesn’t make it the property of the people who have built and that doesn’t transfer ownership to somebody who hasn’t purchased the land.

Being not further public comment, Mr. Fakkema closed the public hearing.

#### Commission Discussion

Commissioners asked the following questions:

How many jurisdictions were looked at? Mr. Spoo said staff only looked at jurisdictions that had the information readily available on the internet which are the 13 jurisdictions listed in the staff report.

Did staff also consider commercial verses residential BSP’s? Mr. Powers said that staff did consider whether it is necessary to have a different process for commercial and industrial BSP’s and BSP’s used for condominiums but tried an approach that covers all the bases with a single set of procedures and then deal with the specifics of each application as they come forth.

The public hearing was continued to February 22, 2011.

## **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

- ✓ Advantages over tree retention concept:
    - Cross over with critical areas and landscape areas
    - Focus on area instead of number
- Chapter 19.47 “Clearing and Grading”
  - ✓ Performance standards – the how and when of grading.
    - Phased grading – where possible
    - Dust suppression
    - Preserve duff layer
    - Approval required for wet season grading
- Title 21 – “Subdivisions”
  - ✓ New street sections consistent with Title 11
  - ✓ Corridor buffers as LID facilities

Mr. Spoo reported that future scheduling could be as follows:

- February – Revisions by staff, pending PC comments.
- February – Open public hearing. Possible recommendation to Council?
- March – present to council, Council hearing.
- April – adoption by Council

#### Commission Discussion

Commissioners asked the following questions:

Why is the entire development cleared when some of the lots are not built on for a long time?

Mr. Spoo said that it is cheaper to have the grading equipment on site one time rather than bringing the equipment back. In some cases, developers specify a phasing plan and there may be a few years between phases. In that case, it may be more appropriate to have phased grading.

Does the City offer any incentives to encourage phased grading? Mr. Spoo said that there were none at this point. Mr. Powers said it was an interesting idea that the City could consider. Mr. Powers also explained that the mass grading that occurs relates to the installation of the utilities as well. Depending upon how the subdivision is being served by utilities and where those utility lines may be; there is a need to grade more than what you might see in the first phase of building. But that doesn't mean there can't be some ways that we might see to limit that grading through this kind of ordinance.

Forty years ago developers saved trees and built around the trees. What has changed that makes it necessary to clear the entire site? Mr. Powers said that two things have changed; lot size and home size. Over the years we have seen lot sizes get smaller and home sizes get larger. When there was a smaller home on a larger lot it was possible and made good sense to grade just the area that for the home.

Where does the oil and sludge from the run-off go? Mr. Spoo said that it goes into the rain garden or the bioretention area. The oil settles into the soil and there are microbes that break down the hydrocarbon naturally into something that is not harmful to the environment.

Is this something the County is adopting as well? Mr. Spoo said that the County received the same grant and they are just now starting to look at LID.

**BEING NO FURTHER BUSINESS BEFORE THE PLANNING COMMISSION, THE MEETING WAS ADJOURNED AT 9:08 P.M.**

**LAW DEPARTMENT**

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November 3, 2004

Scott M. Missall  
Short Cressman & Burgess  
999 Third Avenue, Suite 3000  
Seattle, WA 98104-4088

Re: Pier Point

Dear Mr. Missall:

This letter is in response to your letter of October 15, 2004 concerning title to the lots which are undeveloped in the Pier Point Condominium Binding Site Plan area.

It seems to me there are four major issues:

1. Whether the development rights to these lots still exist as property rights of the title holder.
2. Whether the City can process a change in the development schedule as a minor modification of the site plan or for a change in intensity of use for a lot.
3. Who must sign-off on an application or approved site plan change.
4. Whether the owner of the vacant lots can shift units from one lot to another on the plat.

P.C. HRG.  
REC'D. 1/25/11  
RSP

1. Ownership is a predicate to processing of a permit change. Because the City does not adjudicate ownership, the City does not have to process a land use permit where ownership is disputed. See for example, Taylor v. Board of Adjustment of the Town of South Bethany (Del. Supr.) 1985 WL 188302 . However, since the City permit process is not actually the place to adjudicate ownership disputes, the City may proceed with processing a permit even when there might be questions concerning title. MacDonald v. Board of Adjustment of the Town of Dewey Beach, 558 A.2d 1083, 1086 (Dela. 1989) This is especially true where the applicant, as you have now provided, shows recognition of ownership interest by a title company, the City can move forward with processing the application for a binding site plan change. Sun Oil Company v. Railroad Commission, 390 S.W.2d 803, 807 (Tex, 1965). Such processing or even approval, however, is not made in derogation of any property rights of others who own or rent property in Pier Point Condominiums. Rather, in a sense the City is looking at the site plan -- i.e., the plan for development and not the binding site plan -- i.e., the division into lots, easements and other reciprocal rights. Thus, the City can approve changes again to the site plan without adjudicating other's ownership interests. The difficulty for your client is that both types of information are on the same document.
  
2. Minor modification process. It is apparent that the previous Planning Director followed a long process of dealing with these issues by allowing amendments of the binding site plan under OHMC 21.80.200. It is my understanding that such long standing interpretation will not be disturbed by the City at this time, although, it seems a bit strained.  
  
Minor modification, however, cannot mean the shifting of residential units from one location to another in the same development.
  
3. Sign-off by parties on the binding site plan. A question was raised as to who had to sign off on any change to the binding site plan map. That issue is not addressed in the City Code. RCW 58.17.215 et seq., provides some guidance. It authorizes a partial amendment which covers only certain lots. So long as the owners of the lots are wanting to make the change to their lots, they can sign-off to an amendment which covers the "site plan" elements of the lots. It would seem, therefore, an amending document should only show the lots for which change is being sought and that the person's needing to sign-off on the site plan are the owners of record for the site plan and not all of the owners of the binding site plan. Such an approval would not affect the other owners' interests. In fact, as the RCW sections above cited: an easement interest will not be affected by such amendment. However, again, the City has no authority to affect the others' interests in the condominium and because site plan elements are located on the binding site plan map, it is arguable such rights may be claimed. In short, the new map would only cover the lots

involved. The issue then is access easements. I understand you feel those are acceptably handled. We would take no position on that.

4. Change in development schedule. It is my understanding that you are claiming the development schedule is purely a creature of City regulation. Therefore, it is part of the site plan and not an issue of ownership and a property right of others in the condominium association. As such, it is subject to amendment by the City and should be allowed subject to any changes in regulatory law which have occurred since then. I can conceive of no reason why it should not be permitted. Approval of the schedule change, however, would subject the owner into applying for and obtaining all of the necessary permits.

Yours truly,



Phillip L. Bleyhl  
City Attorney

PLB/kp

cc: Development Services