

**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

application rather than just a majority unless you have a situation where there is commonly owned properties; then all owners within the binding site plan would have to sign the binding site plan application.

The draft ordinance also addresses the submittal process and review process. Alterations are a Review Process Type 2 which means that staff reviews the application and make a decision which is appealable to the Hearing Examiner.

Mr. Spoo concluded by recommending that the Planning Commission open the public hearing, take public comment and then continue the hearing until next month.

Mr. Powers added the there was a public comment letter that was submitted and distributed to the Planning Commission (Attachment 1).

Mr. Spoo stated that the letter was submitted by Alice Smith and her opinion was that she doesn't think that alterations to binding site plans should be allowed unless all property owners within the binding site plan sign onto the alterations.

Commission Discussion

Commissioners asked the following questions:

Doesn't Alice Smith's letter say the same thing that Mr. Spoo just explained? Mr. Spoo said no, that actually what he said was that all property owners who are proposing to alter their lots would have to sign e.g. if you have 10 lots and someone proposed to alter three of those lots, all three of those property owners would have to sign the application because they own the lots that are proposed to be altered. What Ms. Smith is saying is that all 10 property owners would have to sign the alteration application even though the alterations would only directly affect 3 lots.

What has happened that brought this to staff's attention? Mr. Spoo said that an application was submitted to alter an existing binding site plan for some residential condominiums and that application was what brought to staffs attention that our code doesn't have an alteration process.

Chairman Neil opened the public hearing for public comment.

Sue Karahalios (1085 SE Regatta Dr., B-101) expressed concern that the City was changing the binding site plan rules midstream while the Pier Point Condominiums are in litigation with the applicant. She suggested that the Pier Point Condominiums should be "grandfathered". She noted that applicant has come before City staff twice and has been turned down and this appears to be a backdoor means to get what they want. Ms. Karahalios asked the Commission to think about themselves being in a situation where they had bought a condominium they believed had common area on the full plat, and because they didn't have enough money to keep going through litigation they get rolled over and then to have the rules changed again. Ms. Karahalios stated that is a very difficult thing to live with. She asked the Commission not to be a part of that.

Bob Severns (1085 SE Regatta Dr., C201) spoke as a resident of Pier Point Condominiums. Mr. Severns stated that he believed that the code change before the Commission comes from one particular binding site plan which is the Pier Point Condominium Binding site plan. Mr. Severns believed that the modification language in the current binding site plan ordinance has been fine up until now. Mr. Severns believed that the existing applicant has moved this process along so that the code change went into affect just before the Hearing Examiner hears yet

another appeal of the Pier Point Condominium Binding site plan. Mr. Severns also shared details about the legal process they had been through with the applicant regarding the Pier Point Condominium Binding site plan. Mr. Severns stated that the issue is who participates when you are altering an existing binding site plan and in Pier Point's case, it is an existing binding site plan with an expired construction schedule on the binding site plan. Mr. Severns stated that his point is that the language that has been proposed should not go forward unless it states that all owners and anyone with an interest in the property signs onto the alteration application. Mr. Severns recommendation was if this code change goes forward the Pier Point Condominium Binding site plan should be exempt.

Commissioners questioned Mr. Severns about the details of the Pier Point Condominium binding site plan and amendments, legal descriptions, easements, and common areas.

Mr. Powers reminded the Planning Commission that they were not being asked to be involved in making a decision on the pending application that Mr. Severns and Ms. Karahalois has spoken about. The Commission's roll will be to make recommendations about the language which should be in the code. Mr. Powers agreed that while it is helpful to hear a real life example as sort of a backdrop, the application that Mr. Severns is referring to is before the Hearing Examiner and it will be his responsibility to make a decision on the specifics.

Mr. Severns noted that he asked Mr. Powers how the proposed code language affects the Pier Point Condominiums ownership and that Mr. Powers stated that the City is not able to answer that. Mr. Severns stated that although he thinks he understands that answer but until the City can tell the eight residential owners what affect that potentially has on them he urged the Planning Commission not to move forward.

Alice Smith (1085 SE Regatta Dr., A-101) stated that all the property owners will be affected if the binding site plan is changed. Ms. Smith explained that prior to her purchase she read all the documents and saw that binding site plan had been expired so she bought it knowing that that property was not going to be built on. She didn't think it was right for the City to make it possible for what she signed as a legal document to change. She also suggested the "grandfathering" option.

Commission Discussion

Commissioners asked if the Hearing Examiner could rule something different for a particular situation and which would take precedence. Mr. Powers stated that neither would take precedence.

Mr. Powers went on to say that he appreciated the comments from citizens of the Pier Point Condominium have offered. He also said that staff apologizes if staff's first draft of the code amendment has created any undue anxiety. Mr. Powers stated that staff is attempting to put in place a process that the City code needs. He emphasized that this was a first draft and staff is already contemplating additional changes to the language as we move forward.

Mr. Powers went back to the question about which decision would take precedence. Mr. Powers stated that one is a decision on a pending application which City staff has already made a decision on: which is that we cannot process the amendment as proposed. That decision has been appeal to the Hearing Examiner. That is not litigation; that is just the land use process still inside of the City's administrative process. The other side is a deficiency in the City code which was discovered at our second look at the application. Upon further review we determined that our code lacks the appropriate process by which we accept and process someone's request to change a binding site plan. Mr. Powers emphasized that the simple act of requesting does not mean that it is approved. He pointed to the two denials that staff has already made on the

application as evidence that just because you ask doesn't mean that is what is approved. Regardless of that; a process is need in the code. That is what has been presented this evening. If the City Council adopted this language it would be in place but we still have to see what the Hearing Examiner's decision might be. That decision could then be appealed to the Court, which is what happened for the previous Hearing Examiner's decision, and depending on that hypothetical Court action we may or may not see the application come back for an amendment to the binding site plan. If that was to happen at least we would have a process in place that would tell us who needs to sign the application and how staff processes the application.

There was further discussion about whether the change in the process allows the applicant to do anything. Mr. Powers noted that there is no process in place today that tells us who needs to sign and that is the issue we have been dealing since the very beginning. Mr. Powers also cautioned against resting the entire conversation on the Pier Point example because there are other binding site plans and other property owners that may at some point in the future wish to amend their binding site plan and we should have a process in place.

Ms. Jensen stated that she would like to see language that concern a change for condominiums to require that anyone that owns at that time all need to sign.

Mr. Wallin asked how the modification process that is currently in place in the code works. Mr. Powers explained that the existing language on page 34 of the agenda packet. Mr. Powers stated that modification process is not very meaningful in terms of process.

Ms. Jensen asked how many times there have been changes to binding site plans during the time Mr. Powers has been with the City. Mr. Power indicated that there have been changes to Oak Tree Village Binding site plan and changes to Acorn Plaza and two requests for Pier Point Condominiums which is the only residential binding site plan.

Mr. Powers stated that there is no outside applicant which has driven staff to propose the amendment. The amendment was the result of an application. The applicant has not said to staff that we need to write the code. This is based upon review by the City Attorney and the City's land use attorney that our code needs to be amended. Mr. Power noted the term "Takings" used earlier; and stated that that term would be truer if there weren't at least a process by which someone can apply. Mr. Power also stated that "Takings" are an action of government which someone feels has deprived them of use of or enjoyment of their property. Mr. Powers stated the suggestion of "Grandfathering" will be looked at.

Mr. Oliver asked if the City should wait until the decision was made on the Pier Point Condominiums since we don't know what the ramifications could be. Mr. Powers stated that without knowing what the Hearing Examiner might say he can't tell how the ordinance would work with that particular decision and that it doesn't trouble staff because one is process and the other is a particular in a very specific instance. They can be done independent of each other. Mr. Powers explained that the timing is not opportune but it is where we are in terms of staff being able to bring something forward. Mr. Powers also noted that the earliest the code revision gets to the Council is in February and the Council has ability to make the decision as to whether they wish to take action or whether they need additional information, or if they think the timing needs to be delayed for a particular reason. Mr. Powers noted that he has tried most of the evening to keep the code amendment separate from the pending application and he acknowledged that the pending application has a hearing date set for early January. If that hearing goes forward we would anticipate that a decision could be reached by the end of January. Mr. Powers referred back to the question of should we wait, and noted that it is not litigation from the City's perspective it is just a land use decision.

Mr. Oliver stated that he believed all interested parties should have a say in what is changed and not changed.

Rhonda Severns (1085 SE Regatta Unit C-101) stated that when she purchased her property in 1994 she was assured by her real estate agent that it was going to be gorgeous and to go and look at the Pier Point binding site plan which would show how the site was going to be developed. Mrs. Severns stated that the owners were told that they needed to work with Mr. Massey and they have tried and find that he has gone in a different direction. She stated that Mr. Massey said that he doesn't want his condos to look the way Pier Point looks. She was concerned that Mr. Massey could put a totally different look which would devalue Pier Point because it would look like an add-on. She was concerned about what protection there is for condominium owners when they buy into a project and what their rights are when the rules can be changed 15 years later.

Mr. Neil commented that he felt that staff was asking the Planning Commission to just simply approve a process to change a binding site plan but for some reason he feels that whatever recommendation they make is sitting in judgment of the Pier Point situation.

Mr. Powers stated that it was reasonable to feel that way, while he has suggested that they should be looked at separately, he is not so naive to say that they are linked as well. Mr. Powers stated that the comment about the construction schedule is one that we didn't address in the draft and needs to be addressed. The issue of a construction schedule is required under the Condominium Act and it is not something that is required under the binding site plan code. We may be better served as a community if binding site plans deal with those things that deal with binding site plans and allow the Condominium Act and to address those things that are intended to protect the rights of condominium owners. Part of the confusing nature of this particular application is that the construction schedule is on the binding site plan which probably isn't necessary but absolutely has to be on the condominium documents that are required. Mr. Powers stated that staff will come back with another draft that addresses the questions raised tonight.

Ms. Jensen asked if Commissioners could e-mail further suggestion. Mr. Powers stated that it was appropriate to communicate with staff but not to courtesy copy fellow Commission members.

ACTION: MR. FAKKEMA MOVED, MR. WASINGER SECONDED, MOTION CARRIED TO CONTINUE THE PUBLIC HEARING UNTIL JANUARY 2011.

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

City of Oak Harbor
865 S.E. Barrington Dr.
Oak Harbor, WA 98277

12/24/2010

RECEIVED

DEC 27 2010

**CITY OF OAK HARBOR
Development Services Department**

RE: Amendments to Chapter 21.80 OHMC Binding Site Plans

Let me begin by saying I am opposed to any change in amendment process that would apply to currently existing site plans.

It may be within the prevue of government to establish a procedure to change a binding site plans going forward, however it's questionable whether there would exist the authority to enact processes that would have the effect of substantially affecting existing plans, retroactively, without the unanimous consent of those property owners individually and specifically affected.

There should be no processes enacted or considered which would allow or assist in retroactive changes ignoring the reliance upon site plans existing property owners have made in making their investments in property.

Property currently under an existing binding site plan should either be exempt from new amendment revisions if adopted or subject to the unanimous assent of those property owners who have already made investments based upon and reliance upon existing plans.

The City always has the right to grant waivers based upon site and/or specific development conditions that meet fully the current property owners rights as well as the Cities broader community wide responsibilities.

Under no conditions, should the city be involved is assisting a single individual or entity to profit at the expense of other property owners immediately adjacent.

Current property owners bought their existing property based on the binding site plan, rules and legal documents existing at the time of the purchase. To allow changes which may significantly change the use of their property is not ethically appropriate. The government should not be able to reach back and make changes in the current regulations that will affect many home owners who relied on the documents that were in place at the time of sale.

What I see is an attempt to change current Municipal Code to allow advantage to certain individuals who have friends and business associates in the City government and on this very City Council. The goal is to have the Planning Commission make it possible to change existing "Binding Site Plans" so an individual developer can individually profit at the expense of others who have previously relied on the word "binding" meaning exactly that.

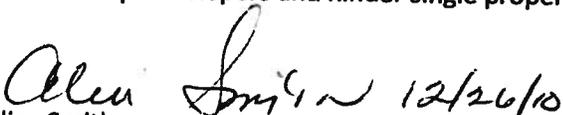
This current discussion is being prompted by one individual so let's provide a little background in order to shine a little light on this less than ethical person.

There is currently case of Alpine vs. City of Oak Harbor in which the binding site plan is allegedly holding back development of a specific property on Pioneer and Regatta. The individual bringing the suit is quite simply an arrogant bully who is used to getting his own way through the use of attorneys, intimidation and the use of friends and business associates currently within city government. He has been told by the hearing examiner in the cases previously brought to the courts he should work things out with us. He is not part of Pier Point condominiums and has no standing to act on its behalf without the majority consent of current owners. This is not his style however. To date all communication has been in the form of unilateral demands, suits or "mutually beneficial" arrangements with individuals he feels may be helpful to him.

He originally "bought" development rights to an undeveloped parcel within the development in which the binding site had expired. Turns out the seller did not own those rights. The title was thus not clear on the property, so he sued the title company and they refunded the money he paid for the rights and, incredibly, he now is trying to manipulate the City to accomplish his goal of developing the property anyway and without regard to the damage this would do the existing development. This should not be allowed. This individual wants to use our easements, utilities and property to build a non appropriate structure when he does not have the legal right to do so.

In November of 2006 the Hearing Examiner, Michael Bobbink, concluded and I quote "you cannot amend a Binding Site Plan to allow the schedule for phased condominium development to be changed after the deadline for completion of the development has passed." *Findings of Fact, Conclusions of Law, and Decision, at 10.*

When I purchased this property in 2001, it was clear from the documents I received at that time that the "Binding Site Plan" had expired and *NO additional building could occur without my specific agreement.* If the city makes retroactive the ability to change the binding site plan then owners like me who bought in good faith have been betrayed by the City of Oak Harbor. Filing suit against the city and the developer and anyone else possibly implicated imposes a burden I should not have to bear. What this man cannot do within the court system he is trying to do politically. I urge you not to allow past binding site plans to be changed. I urge you to not participate in this dishonest approach to changing City code to help developers and hinder single property owners.


Alice Smith 12/26/10

1085 SE Regatta Dr A101

Oak Harbor, WA 98277