

**City Council Meeting**  
**Tuesday, April 20, 2010, 6:00 p.m.**  
**City Hall – Council Chambers**

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

**INVOCATION** Tim Gebhardt, Seventh Day Adventist Church

**ROLL CALL**

Jim Slowik, Mayor	Paul Schmidt, City Administrator
Seven Members of the Council,	Margery Hite, City Attorney
Rick Almberg	Doug Merriman, Finance Director
James M. Campbell	Steve Powers, Development Services Director
Scott Dudley	Cathy Rosen, Public Works Director
Jim Palmer	Eric Johnston, City Engineer
Beth Munns	Arnie Peterschmidt, Engineer
Danny Paggao, Mayor Pro Tem	Hank Nydam, Parks Manager
Bob Severns	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 4/6/10 meeting minutes. The motion was seconded by Councilmember Munns. Councilmembers Almberg, Dudley, Palmer, Munns, Paggao and Severns voted in favor of the motion. Councilmember Campbell abstained from the vote since he did not attend the 4/6/10 meeting. The motion carried.

**NON-ACTION COUNCIL ITEMS**

**Proclamation – Older Americans Month**

Councilmember Dudley read the proclamation and presented it to Councilmember Campbell. Older Americans Month honors older adults and the professionals, family members, and volunteers who care for them.

**Proclamation – Like to Bike**

Councilmember Almberg read the proclamation and presented it to Arnie Peterschmidt. Oak Harbor has been named a bicycle-friendly community by the League of American Bicyclists. Mr. Peterschmidt thanked Mayor and Council for helping raise awareness of biking as transportation and talked about the local grass roots cycling group. The group will be participating in the Holland Happening parade and Councilmembers Almberg, Munns, Palmer, and Severns will join them. Other upcoming group activities include the

Green Fair at Skagit Valley College on May 8<sup>th</sup>, a beater bike giveaway along with maintenance and repair tips for bike ownership, a bike rodeo which teaches basic cycling skills, and a most miles ridden contest in May emphasizing bike trips instead of car trips. May 21<sup>st</sup> is Bike to Work Day. Councilmember Almberg mentioned that Holland Happening parade bike participants will wear pink ribbons in honor of Maribeth Crandell's battle with cancer. Ms. Crandell is a founding member of this grass roots group.

### **Public Comments**

**Mel Vance, P.O. Box 2882.** Mr. Vance congratulated City staff who helped coordinate this year's Whidbey Island Marathon. Mr. Vance has volunteered at the marathon for years and saw fewer problems this year; a wonderful event. Mayor Slowik also thanked Paul Schmidt and Karen Crouch for their hard work noting that a great deal of effort from every City department went into the marathon.

With no other comments coming forth, Mayor Slowik closed public comments at 6:15 p.m.

### **Consent Agenda**

- A. Excused Absence – Mayor Pro Tem Danny Paggao, from the May 18, 2010 meeting.
- B. Noise Permit – Honeycutt/Thomas Wedding.
- C. Approval of Accounts Payable Vouchers.

**MOTION: Councilmember Severns moved to approve consent agenda items A, B, and C with item C paying accounts payable check numbers 141092 – 141257 in the amount of \$355,891.08, payroll check numbers 93756 – 93763 in the amount of \$91,990.00, and payroll check numbers 93764 – 93765 in the amount of \$137.73. The motion was seconded by Councilmember Campbell and carried unanimously.**

### **Oak Harbor Garden Club Proposal**

Public Works Director Cathy Rosen presented this agenda bill for approval of the Oak Harbor Garden Club's donation and installation of a gazebo at Hal Ramaley Park. Garden Club members attended the August 10, 2009 Park Board meeting to request support for their proposal to install a gazebo at this park. The Garden Club adopted the park several years ago and has worked to improve it and maintain the landscape since that time. The Club has raised the necessary funds and is ready to implement their plan to donate a gazebo to be located at the park. At the March 8, 2010 Park Board meeting, the Garden Club received unanimous approval from the Board for their project. The gazebo at Hal Ramaley Park has been included in the City's Parks Gifts and Memorials Catalog for several years and is considered a substantial gift. An agreement for the gazebo donation will be signed by the Mayor and Garden Club President.

Mayor Slowik called for public comments.

**Judy Biddle, Oak Harbor Garden Club, Chair of the gazebo committee.** Ms. Biddle introduced other Garden Club members and noted that this gazebo and the Club's work in the park represent a link to the community. Ms. Biddle talked about other Garden Club projects – plant sale on May 15<sup>th</sup>, Oak Harbor garden tour on June 19<sup>th</sup>, and thanked Hank Nydam and the parks staff for their work and cooperation. Ms. Biddle also thanked those who have volunteered on this project for their continued support of this project. Contributions are welcome for future features.

**Mel Vance, P.O. Box 2882.** Mr. Vance spoke in support of the park and the gazebo but was concerned about its use at night and suggested a timed light which would shut off when the park is closed.

**Hank Nydam, Parks Manager.** Mr. Nydam talked about this wonderful contribution to the park. Hal Ramaley Park is a display garden which takes a great deal of work; 400 – 500 volunteer hours a year. With the addition of the gazebo, weddings and gatherings can be hosted there and the gazebo will be lighted for Christmas. Vandalism in this park has decreased over the last few years (in answer to Mr. Vance's comments). It was noted that noise permits will be needed if a special event has amplified sound.

Council thanked the Garden Club for continuing to beautify the community.

**MOTION: Councilmember Munns moved to approve the Oak Harbor Garden Club request to donate and install a gazebo at Hal Ramaley Park. The motion was seconded by Councilmember Palmer and carried unanimously.**

### **Byrne-Goldie Road Annexation**

Development Services Director Steve Powers presented this agenda bill and ordinance to annex property into the City of Oak Harbor along with an associated annexation agreement. The proposed annexation is for properties owned by Goldie Road LLC along Goldie Road and properties along Easy Street. The annexation agreement applies only to properties owned by Goldie Road LLC. On January 23, 2008, Mr. Sean Byrne, managing partner of Goldie Road LLC, submitted a request to annex two properties which are located approximately 300 feet north of Easy Street, on the west of NE Goldie Street. On February 19, 2008, Mr. Byrne submitted an amendment to the request including an additional property north of the original requested area. The three properties included in the request totaling approximately 13.75 acres in size are all owned by Goldie Road LLC. On March 18, 2008, the City Council considered Mr. Byrne's request for annexation and geographically modified the annexation area to include properties along Easy Street. The modification was done to further Comprehensive Plan policies that recommend avoiding unincorporated areas from being completely surrounded by City property and squaring off City boundaries where possible. The City Council action authorized circulation of the petition and required the simultaneous adoption of the zoning classification and the assumption of all City indebtedness for properties in the annexation area. The City Council also directed staff to prepare an annexation agreement in conjunction with the annexation petition. Following the request for annexation, Mr. Byrne filed a sponsored amendment for consideration with the 2008 Comprehensive Plan amendments. This sponsored

amendment requested changing the land use designation from Planned Industrial Park to Community Commercial. The amendment was approved by the City Council on December 2, 2008. Therefore, the properties owned by Goldie Road LLC considered for annexation are designated as Community Commercial. Mr. Byrne submitted the annexation petition for the area that was approved by the City Council in March 2008. The three properties owned by Goldie Road LLC in the annexation area constitutes 67% of the value of the total annexation area and therefore meet the requirements of RCW 35A.14.120 for a valid petition. The County has reviewed the annexation petition and has made a Determination of Sufficiency beginning January 29, 2010. The Determination of Sufficiency is valid for six months. With the submittal of a valid petition and the Determination of Sufficiency complete, the final action on the annexation may now be considered by the City Council in a public hearing. In the pursuit of annexation and eventual development of his properties, Mr. Byrne has been negotiating with the City for purchase of City-owned property adjacent to the annexation area. If Mr. Byrne acquires the City-owned property it would be combined with his properties as part of the overall development site. Details regarding the purchase of the property are addressed separate from the annexation agreement in a purchase and sale agreement. The initial intent to annex and the Comprehensive Plan Amendment in 2008 drew attention from the property owners and residents in the annexation area. Recently, Mr. Byrne has contacted the property owners along Easy Street by mail regarding the annexation petition. City staff notified the property owners and residents regarding the annexation and the date of public hearing. In reviewing the proposed annexation against the policies in the Comprehensive Plan, it can be concluded that the annexation as proposed furthers the City's goals regarding growth and annexation. The geographical modification by the City Council on March 18, 2008 to include properties that will be surrounded by the annexation will further the goal to avoid annexations that would result in unincorporated enclaves and inclusion of the properties to the north and west of Easy Street will further the goal to square off City boundaries when possible.

Mayor Slowik opened the public hearing at 6:30 p.m. but there were no public comments so the public hearing was closed.

#### Council Discussion

Discussion followed about the Evergreen Mobile Home Park which is not part of a development plan at this time. The mobile home park is a non-conforming use today and will remain a non-conforming use upon annexation. Individual units can be improved, but additional mobile home pads/units cannot be added. Discussion followed about the properties along Easy Street and their obligations (no mandatory connection to City water, garbage collection will stay the same; the essential difference will be City property tax instead of County property tax). Discussion continued about hooking into City sewer (only if within 200 feet of the property), and the use of the word "compelled" in reference to connections. A compelling action falls to the City Engineer. Easy Street may not presently hold City sewer line. There is nothing developed today triggering half-street development.

Council asked that the word “Auditor” in the second whereas paragraph on page one of the ordinance be changed to the word “Assessor” and a hanging sentence ending in “the” should add the word “same.” Discussion followed about the owner’s responsibility to construct NE 16<sup>th</sup> Avenue to standards established in the Transportation Plan and whether the City has any obligation (the owners assume responsibility for street construction).

**MOTION: Councilmember Almberg moved to approve the annexation agreement between the City and Goldie Road LLC and adopt the annexation ordinance. The motion carried unanimously.**

### **Agreement – SR-20 Cleanup, Oak Harbor Fire Department Adopt-A-Highway Program**

Fire Chief Mark Soptich presented this agenda bill. Oak Harbor Fire Department personnel have participated in the Adopt-A-Highway program since 1991. The agreement requires that litter be picked up for 2.7 miles along SR-20 within the City limits no less than four times per year. WSDOT provides warning signs, litter bags, and safety equipment to perform the task. The litter is placed along the shoulder of the highway for pickup and disposal by WSDOT. This program is an opportunity for department members to serve their community in a different way. The program requires a small amount of time and helps beautify the City along the SR-20 corridor.

There were no public comments.

**MOTION: Councilmember Munns moved to approve the Adopt-A-Highway Agreement AAH-1-2-284 with the Washington State Department of Transportation and authorize the Mayor to sign the agreement. The motion was seconded by Councilmember Campbell and carried unanimously.**

### **Shoreline Management Plan – State Grant and Consultant Selection Process**

Development Services Director Steve Powers presented this agenda bill which requested City Council approval to pursue a grant for \$125,000 with the Washington State Department of Ecology (DOE) for the purposes of updating the City’s Shoreline Master Program (SMP). The agenda bill also requests approval to begin the architectural/engineering services selection process so that a qualified consultant can be selected to perform the SMP updates.

There were no public comments.

### **Council Discussion**

Discussion followed regarding combining or separating the motions, whether the grant process would be completed before the contract is assigned, and mention that this is not an unfunded mandate and state funds are being obtained; matching funds are not required. Discussion continued regarding the grant amount, benefit to the Shoreline Management Plan other than compliance, and response time for the grant award.

**MOTION:** Councilmember Dudley moved to authorize staff to submit the Department of Ecology grant. The motion was seconded by Councilmember Severns and carried unanimously.

**MOTION:** Councilmember Dudley moved to authorize the Mayor or his designee to enter into a grant agreement with the Department of Ecology. The motion was seconded by Councilmember Palmer and carried unanimously.

**MOTION:** Councilmember Dudley moved to authorize staff to proceed with the consultant selection process. The motion was seconded by Councilmember Palmer and carried unanimously.

### **Interlocal Agreements – North Whidbey Park and Recreation District**

Public Works Director Cathy Rosen presented this agenda bill for interlocal agreements with North Whidbey Park and Recreation District. The District will be responsible for all aspects of the lifeguarding program, including providing a safety monitor for the lagoon area, scheduling, hiring, training and some general maintenance (housekeeping) responsibilities within a designated area. The District will ensure that all lifeguards are certified, and will provide liability insurance for the lifeguarding program. The District will also be responsible for wading pool maintenance, including daily cleaning, water testing, purification and the daily opening and closing of the pool(s). The District will carry liability insurance on the staff members assigned to maintain and operate the wading pool(s). The 2009-2010 Parks Budget provides funding in the amount of \$29,072 for these services. Also, under a separate agreement, the District will once again be providing paddle boat and canoe rentals at the windmill, and will pay the City \$100 per month for use of the windmill for this purpose. This fee will cover the cost to the City for utilities and overhead and includes any leasehold excise tax that will be due. With 2010, the Parks Division would like to implement a third interlocal agreement with North Whidbey Park and Recreation District for Recreational Services, which includes such programs as a Running Club, Sailing Program, Kids Love Soccer Program, as well as supporting the Teen Activity Council and other mutually agreed upon programs at City-owned parks and facilities. This agreement would support a continuing goal of the City, as stated in the Six-Year Parks, Recreation and Open Space Plan, to work with North Whidbey Park and Recreation District to establish recreational programs in the community. There would be no cost to the City for the District to provide these services and there would be no cost to the District to use City facilities.

Mayor Slowik called for public comments.

**Mel Vance, P.O. Box 2882.** Mr. Vance asked for clarification regarding the fees and lifeguard services.

### Council Discussion

Discussion followed about the agreement amounts, the time frame for the agreements and services, and if there was any conflict with the sailing program (no, the same program).

**MOTION: Councilmember Palmer moved to approve the Interlocal Agreements with the North Whidbey Park and Recreation District for Water Recreational Protection Services, Boat Rental Services, and Recreational Services, and authorize the Mayor to sign the agreements. The motion was seconded by Councilmember Almberg and carried unanimously.**

### **Pioneer Way Right-of-Way (ROW) Acquisition Authorization**

City Attorney Margery Hite presented this agenda bill concerning the issue of legal action regarding settlement of the City's title to the right-of-way for the Pioneer Way Improvement Project. City Engineer Eric Johnston, Richard Langabeer, and Christina Farnham of Langabeer and Tull were also present.

Mayor Slowik called for a five minute break at 7:10 p.m. to load a PowerPoint presentation for this agenda bill. The meeting reconvened at 7:15 p.m.

Pioneer Way has been a City street since the outset of Oak Harbor's incorporation as a town. Originally known as Barrington Drive, Pioneer Way appears as a dirt road through town in earliest pictures of Oak Harbor. Members of the public have driven and walked along Pioneer Way for decades. From the 1970s forward, the sidewalks along Pioneer Way were created and maintained by the City. However, there are no historical legal documents establishing the City's ownership of the right-of-way for some of the sidewalk areas. As a legal matter, though, the City has what is known as a "prescriptive easement" to the right-of-way since the City has used and maintained the right-of-way as a public thoroughfare for over ten years. The City likewise has responsibility for the state of the sidewalks and the street in the City's right-of-way. Where personal injury or property damage is attributable to the disrepair of the sidewalks and street, the City may have liability for the injuries and damage occurring within the City right-of-way. For the Pioneer Way Improvement Project, the City believes it has a prescriptive easement that it can rely upon to perform the sidewalk work. The most conservative approach would be for the City to obtain clear legal documents setting out the City's ownership of the right-of-way. This may be obtained through deeds from property owners or through legal action in the courts to declare the City's right to public right-of-way. Staff proposes that the property owners be offered an opportunity to confirm the City's existing prescriptive right-of-way easement by executing an express easement to the City rather than going through a trial. Payment would be nominal and reflect the litigation costs that could, pro rata, be attributed to that parcel of property. The estimated costs of litigation are assumed to be \$40,000 so the payment for making a trial unnecessary is \$1,290 per parcel. For those property owners who would not confirm the City's prescriptive easement, the City would institute a quiet title action in Island County

Superior Court. This would give the property owners an opportunity to appear and defend if they wish to argue that the City does not have a prescriptive easement.

Richard Langebeer, Langabeer and Tull, continued this presentation beginning with the PowerPoint slide indicating where Pioneer Way right-of-way had not been called out. Mr. Langabeer talked about the City's historical and continuing use of Pioneer Way for street and sidewalk purposes noting that the City already has a prescriptive easement on Pioneer Way. If the public already has this right, it would be contrary for the City to pay for it via public funds; the public has the easement, the City has the ability to establish and use the right-of-way. Citizens have established the public use. If the true owner knows that the easement is being used and for a period of ten years does nothing, that is the statute of limitation and they are barred from other use. The public has the right to use that property as it has been used. Mr. Langabeer referred to this definitive use as open, uninterrupted, exclusive, notorious for a ten-year period. There is no basis to preclude; it becomes clear that there is a prescriptive right. What "historically" means is that permission was not given by the true owner. If there is a permissive use, it will not ripen into a prescriptive easement. With public use, it is clear from cases that there has to be some expression of conveyance beyond the oral, "sure, you can use the sidewalk." Courts look at the public's right for continuous use and unless there is a definitive permissive use, absent that, it is a public right-of-way. A court may infer a permissive use in private context but we do not see that in a public context. Mr. Langabeer complimented Eric Johnston, Rich Tyhuis, Russ Parbarcus, Paul Schmidt and other City employees and City officials who have provided Langabeer and Tull with a considerable amount of information that has been under review since early March. There is clear historical evidence that the sidewalk has been in place since 1975 and earlier. The public has a prescriptive easement which means the City has a prescriptive easement and that right of use. If, after a ten-year period, a property owner said the City does not have that right of use, it would be ineffective. Once a prescriptive easement is established, it is there. Mr. Langabeer talked about the need for a quiet title; a treatise – adverse possession and prescriptive use is unwritten title. The public owns the use of the property but there is not a paper title so a quiet title action is brought forward. The public cannot bring this action, but the City can bring quiet title action on the public's behalf. Mr. Langabeer repeated the terms: open, notorious, continuous, uninterrupted use for ten years makes it prescriptive use and the burden shifts to the true owner to show it is permissive. That is their opportunity. It is not in the City's interest to bring a lawsuit for quiet title against the property owners. Prescriptive right is a matter of law and a question of fact and there is no dispute or facts from the property owners indicating permissive use. The property owners have an option to arguably step out. The public does not use taxpayer money for property the public already has. New sidewalks will bring a significant enhancement and improvement to Pioneer Way and it seems that there would be a strong interest by the property owners toward an easement. The expense figure was calculated on what is estimated for a quiet title action, a settlement figure; this is not payment for property. With regard to a Councilmember's question about excise tax, this is not a conveyance of title but rather is a use of property which would not incur excise tax.

Mayor Slowik called for public comments.

**Mel Vance, P.O. Box 2882.** Mr. Vance expressed his discomfort with this agenda bill and felt some of the arguments were mistaken. He did not want to see an adversarial position created between property owners and the City and felt the City should work with the property owners.

#### Council Discussion

Discussion followed about the timeframe for quiet title action, whether the City could contact the property owners (response was a considerable amount of time has been spent on informing the City and what process the City can rely on), how the \$40,000/\$1,290 would be paid out (noting it is not property compensation), where this action is heard (Superior Court), and further clarification about excise tax. Discussion continued about the property owners' disagreement with the Pioneer Way Improvement Project, that quiet title action is common with County roads held as an example, and that not every property on Pioneer Way is affected with clarification that there are 22 and not 31 property owners. Proper documentation is needed. City Engineer Eric Johnston was asked to describe the configuration slivers that this action addresses which is only a matter of several feet between public and private use. The City will attempt to make personal contacts, but the City needs to move forward. Discussion continued about the benefit to improving Pioneer Way and the sidewalks, how the property owners will respond, and that this has been discussed with property owners beginning with the series of open houses presented by the Mayor and staff. A schedule was established and reviewed/approved by Council. Council also had an executive session concerning this recommendation. Mayor Slowik noted that this evening's discussion could have been done in executive session but Mayor and staff felt it was important for the public to hear this discussion.

**MOTION:** Councilmember Munns moved to approve a resolution authorizing the City to pay property owners who confirm the City's prescriptive easement to Pioneer Way without the need for litigation. The motion was seconded by Councilmember Almberg. Councilmembers Almberg, Campbell, Munns, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Dudley opposed. The motion carried.

**MOTION:** Councilmember Munns moved to approve a resolution authorizing the City to institute a quiet title action to settle the City's prescriptive easement to the Pioneer Way right-of-way through a quiet title action. The motion was seconded by Councilmember Almberg. Councilmembers Almberg, Campbell, Munns, Paggao, Palmer, and Severns voted in favor of the motion. Councilmember Dudley opposed. The motion carried.

Mayor Slowik called for a five-minute break at 8:40 p.m. and the meeting reconvened at 8:45 p.m.

### **City Administrator's Comments**

Mr. Schmidt talked about the successful Whidbey Island Marathon event and the team effort that went into the event. Final numbers are still being assembled, but 1,911 timing chips were registered. AWC has once again awarded a Well City Award of Excellence to Oak Harbor for the fifth consecutive year. 35 cities out of 281 cities received this award. Mr. Schmidt thanked the Wellness Committee for their hard work. The Committee is working on 2011, and if the City receives an award in 2011, we will also receive a two percent discount on our health benefits premium which amounts to a five-figure savings. Mr. Schmidt also talked about the utility rates workshop scheduled for May 27, 2010, 6:00 p.m., at City Hall.

### **Councilmembers' Comments**

Council Members gave their respective standing committee reports. Councilmember Palmer talked about the Marathon and his mother's photo. Councilmember Munns talked about AWC and the close of the legislative session and how much she enjoyed helping in the Marathon and the number of countries and states represented by the participants. Councilmember Almberg thanked Mr. Schmidt, Ms. Crouch, Ms. Sipes, and Mr. Smithson along with all of the staff and volunteers who made this event a success. Councilmember Dudley talked about the 2010 Commander in Chief's installation and that NASWI is considered the best base in the Navy and second overall for base excellence.

### **Mayor's Comments**

Mayor Slowik complimented Council on this evening's brisk meeting in spite of a number of heavy subjects, and talked about his appreciation of Council's professionalism. Mayor Slowik's third grandchild was just born and is named James. Mayor Slowik had also updated the Chamber at a luncheon meeting along with a more detailed update during the Chamber's After Hours Event on Pioneer Way. He will be attending the Mayor's Summit in Sammamish which allows for discussion of regional issues. Mayor Slowik also thanked everyone for their hard work on the Marathon.

### **ADJOURN**

With no other business coming forth, the Mayor adjourned the meeting at 9:00 p.m.

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Connie T. Wheeler  
City Clerk