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WHATCOM COUNTY COUNCIL
Special Committee Of The Whole

October 2, 2007

Council Chair Carl Weimer called the meeting to order at 12:15 p.m. in the Council Committee Room, 311 Grand Avenue, Bellingham, Washington.

<u>Present:</u>	<u>Absent:</u>
Barbara Brenner	None
Dan McShane	
Sam Crawford	
Seth Fleetwood	
Laurie Caskey-Schreiber	
L. Ward Nelson	

1. COUNCIL CONSIDERATION OF A REQUEST FOR ORAL ARGUMENT ON A PENDING APPEAL (AB2007-018)

Karen Frakes, Prosecutor's Office, stated the Council talked to her about a request for oral argument submitted by Dave Bricklin in the conditional use appeal.

Weimer stated this is about the Lake Whatcom Treatment Center. Dave Bricklin represents the plaintiffs. He has asked to make oral arguments to the Council, which hasn't been allowed before.

Fleetwood asked the basis of Mr. Bricklin's request.

Nelson stated it's a judiciary body.

Frakes stated there isn't anything unique about his request for oral argument.

Weimer stated he doesn't know how to keep someone to the record in an oral argument. Frakes stated she agreed.

Crawford stated he read both the Hearing Examiner's file and the appeal file. He didn't see anything. There is one reference to Exhibit 20, but there is no Exhibit 20. The exhibits go from one to 19. That might have been a scrivener's error. He suggests they don't allow an oral argument. The file is very complete.

Brenner stated she is more inclined to hear it, but she doesn't want to set a precedent. If the Council shouldn't do this, it shouldn't be in the County Code. Frakes stated that is a good point. They don't need that provision in the Code. There probably should be some criteria. No criteria is listed. If the Council decides to hear oral argument in this case, then distinguish it from other cases.

Nelson stated this is an appeal process, not a judiciary process where the decision may be appealed. Any appeal would be limited in scope. Any oral argument can go off into tangents, when it becomes unfair to the other side. The allowance should be stricken from the code. Limit the information to what is in the record.

1 Brenner asked if the communication would be exparte' if both sides get to make
2 presentations. Frakes stated the appeal is on the record. The danger of opening it up for
3 oral argument is that people will say things outside the record.
4

5 McShane stated the Hearing Examiner is serving the purpose of the Council, but from
6 a more legal interpretation. If there is a clear error of interpretation, the Council can
7 overturn the Hearing Examiner, which the Council has done in the past. If they have an
8 oral argument, they are likely to start the process anew. He asked if that is okay or not,
9 legally. Frakes stated it is not okay. The County Code says specifically that the Council can
10 only consider the Hearing Examiner record.
11

12 Weimer stated the Council's option is to remand the issue back to the Hearing
13 Examiner to reopen the record. Frakes stated that is correct.
14

15 **Crawford moved** to deny the request for verbal arguments on this case.
16

17 Fleetwood asked if the reason for the request is because the Council might want to
18 ask him some questions. Frakes stated the request was generic.
19

20 Nelson stated he supports the motion. He is very nervous about hearing oral
21 arguments from either side while sitting as an appeal body.
22

23 Fleetwood stated oral arguments are permitted in most legal appeals. It's not
24 unusual.
25

26 Nelson stated the Hearing Examiner heard the oral arguments. The Council is only
27 being asked if there is an erroneous interpretation of the law.
28

29 Fleetwood stated that is the standard of review on every appeal level. There is
30 nothing unusual about oral arguments.
31

32 Frakes stated this is a judicial setting.
33

34 Fleetwood stated this is a quasi-judicial setting. The same rules apply. Frakes
35 stated they don't, necessarily. She's had appeals beyond the trial court and been denied
36 oral argument. There are occasions when the Court of Appeals does not allow oral
37 argument. The difference is that they are dealing with judges who are used to filtering out
38 things, not lay people.
39

40 Crawford read the letter requesting the opportunity to provide oral arguments from
41 David Bricklin.
42

43 Brenner stated she would like to hear this oral argument, but remove that section
44 from the code so they don't set a precedent for future requests.
45

46 Frakes read the response letter from the district regarding the request for oral
47 argument.
48

49 McShane stated the argument against oral argument is that additional information,
50 beyond the record, may come up. He asked if the arguments they get in writing are the
51 same thing. Frakes stated they are already.
52

53 McShane stated it seems that attorneys like to slip in additional information to sway
54 the Council from the essence of the issue before the Hearing Examiner. He doesn't need
55 any more information at this time.

1
2 Caskey-Schreiber stated that to honor the process, she doesn't want to hear any
3 more information. She wants to see how Mr. Bobbink based his decision and find out if
4 there was an error of law. She doesn't need more information from the attorneys to do
5 that.
6

7 Brenner stated this is part of the process, if they want to honor the process. She
8 doesn't remember receiving a request to do this in the past. Frakes stated they have
9 received these requests. Frankly, she recalls that the Council Chair has made the decision
10 in those previous cases.
11

12 ***Motion carried 5-2 with Brenner and Fleetwood opposed.***
13

14 Frakes stated there are a couple of other things regarding this case. The City
15 attempted to submit a letter in this case. Council staff informed her when it received that
16 letter. The City wasn't a party, it's not a part of the record, so staff didn't pass that letter
17 on. That needs to be disclosed at the time the Council makes its decision. The district's
18 attorney submitted a response to that as well, which the Council hasn't seen either. The
19 Council shouldn't have the letter. Leave it where it is at this point.
20

21 Today, they got a motion to intervene by the City. They don't have a response to
22 that from the other side, yet. It's inappropriate for the Council to make a decision on it, but
23 the Council should be aware of it. To discuss that further, they should do that in executive
24 session.
25

26 Fleetwood stated there is the original appeal from the group and a response from the
27 district. He asked if that is all the Council received. Frakes stated there is also the letter
28 from the City, the request for oral argument, the response from the water district's attorney
29 regarding the request for oral argument, and the City's motion to intervene.
30

31 Fleetwood stated the Council makes its decision on the original appeal and response.
32 Frakes stated that's correct.
33

34 Crawford stated they also have the Hearing Examiner file. Frakes stated that's
35 correct. The record is quick to read through.
36

37 One attachment to the City's motion to intervene is the City's original letter, which
38 she advised Council staff to remove. There is also a feasibility study attached to Bricklin's
39 case and isn't a part of the record. She told Council staff it was fine to keep the motion to
40 intervene in the file. The Council can look at that.
41

42 Caskey-Schreiber stated this is a case where there is a lot of pressure to look at the
43 decision, not whether there was an error in the process. That makes her nervous about
44 getting more information. She is totally focused on the process.
45

46 Crawford stated he requests Ms. Frakes to look into the reference in the appeal to an
47 Exhibit 20 to find out if the file is incomplete. Frakes stated she will look into it.
48

49 McShane asked if there is interest in reviewing the overall Hearing Examiner appeal
50 process, outside of this issue. In the past, there has been concern about some people being
51 cut out of the appeal process because they don't understand the timing. Frakes stated it is
52 very easy to get standing and appeal, even without any real direct interest in a case.
53

54 McShane stated the difficulty is more about the grounds on which there can be an
55 appeal. The record built before the Hearing Examiner is often done with an amateur

1 approach. Things that may be of use in the decision aren't brought up until after the
2 Hearing Examiner has made his decision. The Council is stuck with reviewing just what was
3 before the Hearing Examiner. He asked if there is an opportunity to allow an expanded
4 record. Frakes stated there is an opportunity. If the Council finds that it can't make a
5 reasoned decision based on the current record, the Council can remand the issue back to
6 the Hearing Examiner. There is broad language that allows the Council to require the
7 Hearing Examiner to supplement the record.

8
9 McShane asked if there is an opportunity for other parties to become involved once
10 an appeal has been remanded. Frakes stated that as long as they attend the Hearing
11 Examiner hearings, they become a party, whether its under a remand or not. She hasn't
12 looked at that issue before.

13
14 Brenner asked about the motion to intervene and taking that section out of the code.
15 Frakes stated this motion to intervene from the City is because the City wants to add
16 conditions. Because the Council hasn't received a response to the motion to intervene, it's
17 premature to discuss it. If the Council decides to allow the City to intervene, the Council
18 already has the City's material. They can address it next Tuesday night.

19
20 Caskey-Schreiber asked if consideration of material from additional interveners goes
21 outside what the Hearing Examiner considered. She asked if that goes to consideration of
22 the Hearing Examiner's decision instead of determining whether there was an error of
23 interpretation of the law. Frakes stated she doesn't advocate for the Council to allow this
24 process that doesn't exist in the Code. If they want to discuss it further, do it in executive
25 session.

26
27 Brenner asked about taking the language out of the Code. Frakes stated it's a
28 process thing. It doesn't have to go through the Planning Commission.

29
30 **Nelson moved** to go into executive session for five minutes to discuss the motion
31 for intervention in an appeal with their attorney.

32
33 **Motion carried unanimously.**

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36 **OTHER BUSINESS**

37
38 **ADJOURN**

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40 The meeting adjourned at approximately 12:40 p.m.

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44 Jill Nixon, Minutes Transcription

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46 The Council approved these minutes on December 4, 2007.

47
48 ATT:SS

49 WHATCOM COUNTY COUNCIL
50 WHATCOM COUNTY, WASHINGTON

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54 Dana Brown-Davis, Council Clerk

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54 Carl Weimer, Council Chair