

Depoe Bay City Council
Special Meeting - Public Hearing
Thursday, April 29, 2004 - 7:00 PM
Depoe Bay City Hall

PRESENT: Mayor B. Silver, J. White, P. Taunton, A. Brown, B. Romans, J. Brown,
M. Lavery

STAFF: City Attorney D. Gordon, City Planner L. Lewis, City Recorder P. Murray

Mayor Silver called the meeting to order and established a quorum.

Public Hearing - Appeal of Planning Commission Decision on Allyn/Real Estate Centre/
Grey Investments Application for Development in Coastal Shorelands Overlay Zone, to
Construct Two Stabilization Walls on Public Park Property, Case File # 1-CS -PC-04

Silver announced the opening of public hearing on the matter of the appeal, reviewed the applicable criteria, presented the statement of rights and relevance and right to appeal. (copy of procedure attached to the original of these minutes). Silver then called for the Planning Commission's report, which was presented by Planning Commission Chair Dick Johnson (copy attached to the original of these minutes). Silver asked if there were any questions of Johnson. White asked about the City Planner's determination of completeness of the application. Johnson said the application had been determined complete but the commission found that the application lacked sufficient information to allow approval. A. Brown asked about the statement in the staff report regarding both houses having had geo-tech reports done. Johnson deferred to the staff report, which is presented by Lewis. Romans asked what is the basis of the Planning Commission's knowledge to override the Planner's determination. Johnson explained that the seven members have much experience and often the commission's review of an application brings up matters that may not have been addressed at the Planner's review for determination of completeness.

Silver asked Lewis to present his staff report. Lewis reviewed his report (copy attached to the original of these minutes). Lewis entered into the record three items of written testimony (copies attached to the original of these minutes), submitted by Susan Krein, Ruth Moreland, and Fran Recht; and briefly summarized each letter. Lewis noted the Summary and Staff Analysis section of the staff report, reviewing the points of the Planning Commission's denial with the appellants' responses on each point. Finally he outlined the options for Council action on the appeal, 1) to uphold the Planning Commission's denial, 2) to remand the application back to the Planning Commission, and 3) to overturn the Planning Commission's denial and approve the application with conditions. Silver asked if there were any questions of Lewis. A. Brown asked if there existed a geo-tech report for the (former) Stan Allyn house. Lewis said there is none in the city records. J. Brown asked for clarification on the matter of the deck on the west side of Rich Allyn's house, that there is no building permit for the deck and that a building permit is required for such a deck. Lewis confirmed there is no record of a building permit for the existing deck, which is

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different in configuration and sits closer to the edge of the bluff than the deck shown on the original house plans which were approved.

Silver asked Gordon to present his staff report. Gordon stated this hearing is “de novo”, not “on the record”, and as such the Council considers the application as brand new, just as was before the Planning Commission. Gordon agreed with the options for Council action included in the City Planner’s report. He reminded everyone that while much of the appeal is information relating to allegations of bias of a Planning Commission member, that is not what is before the Council tonight, the Council needs to consider the application and determine whether it complies with city laws and if it is appropriate to approve or deny the application pursuant to those laws.

Silver called for declarations of conflict of interest, ex-parte contact, or bias. Lavery said he had received a letter from Real Estate Centre, Inc. dated March 4, 2004 and copies of photos of the area taken by J. Brown on March 15, 2004. J. Brown said he has no conflict of interest and he has spoken with Rich Allyn and walked on his deck to take photos of the erosion area. Romans said he’d received the letter from Real Estate Centre, Inc.; has copies of the photos taken by J. Brown; he spoke with Bart at the post office about a month ago about scheduling the date of this hearing; he has received copies of all the information that was provided in advance from them as well as information from staff and the discussions that have taken place with the City Attorney; he owns an oceanfront home, but he has 19 feet to the bluff edge. White said he has no conflict of interest; he has received the letter from Real Estate Centre, Inc. and has copies of the photos taken by J. Brown. Taunton said he received the letter from Real Estate Centre, Inc. and copies of the photos taken by J. Brown; report from Larry Lewis; advice from Mr. Gordon; and the Planning Commission letter. A. Brown said she has no conflict of interest or bias; she received the letter from Real Estate Centre, Inc.; prior to the meeting where Mr. Gordon provided instruction regarding ex-parte contact she visited the site and the Channel House retaining wall site and asked the Channel House manager if public access is provided there, the reply was no access is allowed due to liability concerns; she obtained copies of Goal 17 and Goal 18 from the City Recorder; and reviewed information submitted by J. Brown. Silver said he has no conflict of interest; he has received correspondence from Real Estate Centre, Inc. and Grey Investments, Inc. postmarked March 4, 2004 and March 10, 2004; has received a March 15 series of photos submitted by J. Brown; as acting liaison to the Planning Commission, he was present at the January 21, 2004 regular meeting where this case was heard and the February 18, 2004 regular meeting where the Findings, Conclusions and Final Order were discussed and voted on; over that past 10 years in his capacity as an appointed and as an elected official of the city, he has been a part of a number of circumstances referred to in the appeal; he is ready to consider this case with objectivity and without bias.

Silver asked if there is any opposition to any member of the Council hearing this case, noting that pursuant to Council Rules a party to the matter wishing to disqualify a member must have provided written notice at least 24 hours before the hearing. It was confirmed

that no notice had been submitted by any party to the matter. Silver asked if anyone in the audience had opposition to any member of the Council hearing this matter. Fran Recht asked Romans to recuse himself, she believes he is biased, has pre-judged the issue, and is incapable of rendering a fair decision on the matter. Recht submitted a written objection in support of her belief, which includes transcriptions of Romans’ statements at previous

council meetings (copy attached to the original of these minutes). Ruth Moreland said she has concerns about Romans sitting on the matter because he has similar property in the same area. There were no further objections presented. Silver asked Romans for his response. Romans said while he does own an oceanfront home, his situation is different since he has 19 feet to the top of the bluff; and he did say some of the things Recht said. Silver asked Romans if he can render an unbiased decision. Romans responded that he believes he can, his answers and opinions are as unbiased as Fran Recht's.

Silver called for appellants' testimony. Dennis Bartoldus, attorney representing the appellants, said he agrees with Gordon in that the issue is the application for the retaining walls and he would begin by addressing the points identified in Lewis' staff report. He stated that the applicants believed that the application they had submitted was a complete application which included survey work by Russ Johnson and information provided by Andy Stricker, a professional licensed engineer. Bartoldus said the February 10 letter by Andy Stricker, Stricker Engineering, addresses many of the points, he feels if this letter had been a part of the original application, the outcome would have been different, and he plans to proceed now anticipating that when the points in the staff report are addressed there will be no further requests for additional information. Bartoldus asked if the city's code addresses retaining walls as a separate item, stating that he finds no objection to retaining walls in the code. He added that retaining walls on public property are common practice, and briefly reviewed other existing retaining walls on public property, including the process relating to the Channel House retaining wall. Bartoldus reminded everyone that at the December 2, 2003 council meeting, the Council said they would deal with the issue of owner approval after land use approvals are obtained, so owner approval should not have been an a reason to deny the application. Regarding vegetation and backfill, re-vegetation will occur in short order. Bartoldus said review of the final design by the city is understandable, and there is no objection to that review, but the applicants are seeking approval before going to the expense of final engineering and design. Regarding the FEMA requirements, a retaining wall is not a habitable structure, the purpose of these walls is to prevent destruction of property and ensuing FEMA claims. Backfill is commonly used to elevate houses, or pilings are used, this case is different in that the backfill becomes part of the structural integrity of the wall itself. Bartoldus displayed a plot plan and charts noting that Stricker's Feb. 10 letter certifies there will be no negative impact on neighboring properties. Bartoldus stated there will be no impingement of public access, any physical access now would deteriorate the slope, and there will be no fences on public property. Goal 17 issues are directly addressed in Stricker's Feb 10 letter, the actual erosion rate is more severe than what was predicted, the letter addresses the need for the walls. Bartoldus summarized that the Council's role is to look at the Feb. 10th letter from Andy Stricker, and the applicants understand that there will be conditions of approval such as professional certification and coloring the walls to blend with the natural landscape. The applicants are asking for approval with conditions.

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Silver asked if there were any questions of the appellant. J. Brown asked if the appellants feel the land has no value to the public. Bartoldus responded that public land does have value and it is the applicants desire to make the walls as pleasing as possible and plan to mitigate impacts. J. Brown said he does not question the engineer's expertise, but the ability to analyze the impact to adjoining properties, would the applicants assume this liability? Bartoldus said they would potentially be liable since they are building the walls. J. Brown said calculations are needed. Bartoldus said the applicants would like this to be a

condition of approval opposed to a requirement for a complete application. J. Brown said with only preliminary sketches and the under-analysis of the situation makes a decision impossible, it seems backwards to get approval first then do the necessary analysis and design work. He also questioned whether this will lead to more walls along the shoreline. Bartoldus said that would be up to the city to determine whether or not to allow more walls. A. Brown referred to the retaining wall plan, asking if Lot 7 will be protected by the proposed walls or negatively impacted. Bartoldus said the most severe erosion in the area is occurring at the Rich Allyn property and the intent of the wall would be to push it westerly rather than to put it in toward lot 7. Silver said the water velocity engineering report says there will be a negative impact on neighboring properties and the applicants' response was to look at alternatives. Bartoldus clarified that statement meant alternative wall designs, not alternatives to the walls. A. Brown said there appears to be an objection to conducting a geo-technical report. Bartoldus, said he didn't believe there is an objection, but again, the applicants desire a comfort level on approval of the project before incurring that additional expense.

J. Brown asked for clarification on the matter of the building permit for Rich Allyn's deck. Rich Allyn said Greg Booth, their builder at the time of original construction of their home, drew up the plans and built the house, he has no knowledge of any discrepancy. Lewis explained that the actual deck is of a different configuration and size than what is shown on the building permit plans. Allyn said there have been no additions to the house since original construction.

A brief recess was called from 8:44 to 8:49 PM.

Silver called for proponent testimony.

Richard Allyn, applicant, provided additional clarification regarding the deck on his home, that the deck was part of the original construction in 1991, there was no removal of vegetation for the construction of the deck, and there have been no additions made since the original construction. Richard Larrett, a geologist, provided an erosion rate factor at the time, which turned out to be less than the actual rate.

Peggy Leoni, said that from a business person's point of view the application should be approved, noting that the Finseth house and four others in the area produce income for the owners and the city (transient room tax). As a neighbor, she hopes the city will find a way for the applicants to preserve their homes. A. Brown asked Leoni if the Chamber of Commerce has any concerns regarding the aesthetic deterioration of the rocky coastline and impacts to tourism. Leoni responded that tourists are more interested in beaches than rocky shorelines.

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Silver called for opponent testimony.

Ruth Moreland, said she is not opposed to protection of personal properties, but the city should be provided with evidence of non-structural stabilization alternatives, such as using rocks or vegetation, or removing the deck to provide room on the private property to build a stabilizing wall, eliminating the need to encroach on public land. She explained the rocky shore has value to the community, whether it is physical access or visual.

Silver called for testimony from any other interested party. There was none.

Silver called for rebuttal by the appellant.

Bartoldus said the applicants are concerned about aesthetics and have looked at mitigation methods relating to vegetation and design so the walls will blend in with the rocky shoreline. Preservation of the homes is the goal and they understand engineering needs to be done and there will be conditions of approval that will have to be met.

Silver asked for any requests to leave the record open. In response to a question from the audience, Gordon explained this part of the procedure. There were no requests to keep the record open.

Silver stated the record is closed and no more testimony will be accepted. Silver then asked if the Council wished to enter into deliberations tonight or continue the hearing to another date. By consensus, it was agreed to continue until 10:00 PM and deliberations began. Lavery asked Lewis if a geo-technical report is required for development on any oceanfront property. Lewis explained that if the coastal erosion setback standard can be met, a geo-technical report is not automatically required. Any substantial development proposal in the Coastal Shorelands Overlay Zone is reviewed by the Planning Commission and the Planning Commission may request additional information. Lavery is concerned about potential negative impacts to neighboring properties, asking how the city could obtain a guarantee that there would be none. J. Brown said he feels strongly that public property needs to be protected and private property owners have the right to protect their property. He referred to the shoreline as "precious property", it being the transition zone between land and water. He holds the Planning Commission in high regard and is inclined to go with the commission's recommendation. Romans said in his review of city ordinances, he'd noted information relating to preservation of historic sites, suggesting perhaps the (former) Stan Allyn house may be applicable. He suggests approving the application with the condition that all the city's questions be answered and requests be met, understanding the applicants not wanting to spend a lot of money before getting approval. White thinks the Planning Commission's denial should be overturned and the application should be approved with conditions. He feels it is the Council's job to protect the citizens of Depoe Bay and denying the Allyn's the right to protect their property is wrong. He added that there is no way to guarantee that there will be no negative impacts to neighboring properties with, or without, the walls. Taunton said Rich Larrett is very experienced in coastal situations. He feels the Planning Commission's decision should be overturned and the application should be approved with conditions such as more engineering and design work. He

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suggests the applicants work with the City Planner and Council since the Council can be more cooperative than the Planning Commission, if there had been better communication at that level, this hearing would not have been necessary. A. Brown is concerned over the lack of a geo-technical report on the former Stan Allyn property and the fact that it appears there has been a change to the erosion rate at the Rich Allyn property. She feels a geo-technical report should be provided for review and there should be a nexus between the geo-technical report and final design to show the least impact to the public land and wildlife. She added that she is not totally happy with the Channel House wall aesthetics, specifically the texture and reflectivity compared to the rocky shore. Silver reviewed that testimony has been received regarding concerns of coastline preservation, that there are no guarantees in protection efforts, and geo-technical reports are needed. He feels the Planning

Commission identified the information needed for a favorable review and suggests using Lewis' option 2, to remand the matter back to the Planning Commission with the new information provided by the applicants. Romans said he could move to accept the application with conditions stated by J. Brown and A. Brown.

MOTION: Romans moved to approve the application with the conditions stated by J. Brown and A. Brown, asking J. Brown and A. Brown to restate their conditions to be included in the motion. J. Brown stated that in order to obtain a preliminary approval, 1) the appellants evaluate the alternative of building the stabilization walls on their own properties and that this option be looked at as a serious alternative to the proposed solution, providing the same information as required for the existing application, 2) the required information will include a complete wave analysis, addressing discontinuity issues created by the proposed walls, impacts of the walls on wave energy and the shoreline. A. Brown stated her concern that building on the property line will result in a loss of public property during the construction process, her conditions are 1) to address safety concerns a geo-technical report is required and there be a nexus between the geo-technical report and the final design addressing impacts to lots 4 and 7, 2) that concerns of wildlife protection be addressed with public access for wildlife being maintained, and 3) that aesthetics regarding texture and reflective qualities be included. J. Brown clarified that the alternative to build the walls on their own properties includes wave analysis, design and cost analysis.

Motion died for lack of a second.

MOTION: Lavery moved to take staff's option 2, sending the request back to the Planning Commission with the additional information provided with the appeal plus the additional information required by the Council. J. Brown seconded the motion.

Silver said it was moved and seconded, suggesting a friendly amendment, that the matter be treated as a continuation and there be no application fee required. Lavery and J. Brown agreed to the amendment.

Silver called for discussion. Gordon noted that Romans had said he and Councilor A. Brown had discussed the appeal, this discussion was not mentioned in the earlier ex-parte contact declaration statements and should be disclosed for the record. Gordon also advised a time frame should be set for the Planning Commission's consideration of the

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matter and response back to the Council. Romans and A. Brown said their discussion related to A. Brown's concern over the lack of a geo-technical report. Silver asked if anyone in the audience had any comments regarding this ex-parte contact. Ruth Moreland asked when the conversation occurred. Romans and A. Brown responded it occurred on the way to the meeting tonight. Moreland asked if Council members are forbidden from discussing cases (outside of the hearing). Gordon explained that, in quasi-judicial proceedings, councilors are not supposed to discuss cases outside of the hearing on the matter. Silver explained that if such discussions do occur, it must be disclosed as ex-parte contact for the public's information. Moreland said she is confused as to whether that discussion and agreement between two council members would influence the final vote. Silver said that now that it has been declared, everyone is aware of the matter. Silver asked for any further discussion. White explained he has a concern relating to sending the matter back to the Planning Commission. He is in favor of the matter going back to the commission if there is

no further expense incurred by the Allyn's and would like to see Fran remove herself from any decision-making on the matter. Silver asked if White wished to amend the motion, White concurred that he does. Silver restated the motion to amend:

AMENDMENT TO MOTION: White moved to amend the motion to add that Fran Recht recuse herself from the Planning Commission's consideration of the matter. Romans seconded the motion.

Silver said it was moved to amend the motion and called for discussion on the amendment. Gordon provided clarification on the recusal process, that it is the individual's responsibility to determine whether or not to remove oneself from sitting on a matter. White rephrased his motion is to *request* that Fran Recht recuse herself when this matter is considered by the Planning Commission. J. Brown said that while he understands the amendment, he strongly opposes it, no one should be excluded just to avoid controversy unless it is their own decision to do so. Silver referred to information from LUBA relating to a standard for determining bias, and agreed with J. Brown.

VOTE on AMENDMENT: Motion to amend failed.

AYES: White, Taunton, Romans

NAYS: A. Brown, Silver, J. Brown, Laverty

Returning to discussion on the original motion, Silver asked for staff's input on a time frame for the continuation of the hearing, the remand of the issue to the Planning Commission and response to the Council.

A brief recess was called from 9:49 to 9:58 PM.

Silver restated the motion: the matter is remanded to the Planning Commission, there is no new application fee, city costs incurred will be reimbursed by applicant's deposit, the Planning Commission will consider the request at their May 19, 2004 regular meeting, the Council will continue this hearing to the June 1, 2004 regular council meeting at which time the Council will consider the Planning Commission's recommendation and make a decision, the findings would be voted on at the June 15, 2004 regular council meeting.

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Brief discussion occurred including a request of the appellants for a time extension to June 16th, which was agreed to by Bartoldus. At Gordon's request, Bartoldus confirmed the applicants will provide agreement to the extension in writing. Silver reviewed the time frame: Planning Commission consideration of the matter at the May 19, 2004 regular Planning Commission meeting, their recommendation will be considered by the Council at the June 1, 2004 regular council meeting, Council's findings will be voted on at the June 15, 2004 regular council meeting.

Gordon said Fran Recht has requested a disclosure of ex-parte contact between Councilor Romans and Rick Beasley that occurred during the recess. Romans said his brief discussion with Mr. Beasley during the recess had nothing to do with this issue. Taunton asked about the discussion that occurred during the recess between Dick Johnson, Silver and Gordon. Silver said it involved discussion of the timeline for the process.

VOTE: Motion passed.

AYES: A. Brown, Silver, J. Brown, Laverty

NAYS: White, Taunton, Romans

The matter of the public hearing is continued to June 1, 2004 at 7:00 PM at City Hall.

The meeting was adjourned at 10:04 PM.

Mayor Bruce Silver

Pery Murray, City Recorder