

1 Depoe Bay City Council  
2 Regular Meeting  
3 Tuesday, February 1, 2005 - 7:00 PM  
4 Depoe Bay City Hall  
5  
6

7 PRESENT: Mayor J. White, P. Cameron, P. Taunton, A. Brown, G. Romans, J. Brown, M. Lavery  
8  
9 STAFF: City Recorder P. Murray, City Field Superintendent T. Owings, City Planner L. Lewis,  
10 City Attorney D. Gordon, Recording Secretary S. Fox  
11

12 I. PLEDGE OF ALLEGIANCE

13 Mayor White called for all to stand for the Pledge of Allegiance.  
14

15 II. CALL TO ORDER

16 Mayor White called the meeting to order and established a quorum at 7:00 PM.  
17

18 III. APPROVE MINUTES: January 18, 2005 Regular Meeting

19 Motion 1: Lavery moved to accept the minutes of the January 18, 2005 regular meeting as written.  
20 Taunton seconded the motion.  
21

22 Mayor White said it was moved and seconded, and called for discussion. There was none.  
23

24 Vote: Motion 1 passed.

25 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Lavery  
26

27 IV. ACCOUNTS PAYABLE

28 Motion 2: Romans moved to pay the accounts payable. Alice Brown seconded the motion.  
29

30 Mayor White said it was moved and seconded, and called for discussion. There was none.  
31

32 Vote: Motion 2 passed.

33 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown  
34

35 Abstain: Lavery  
36

37 V. SPECIAL ORDERS

38 A. Public Hearing: LUBA Remand to Depoe Bay City Council – Moreland vs. City of Depoe Bay,  
39 LUBA No. 2004-101

40 Gordon read the *Hearing Officer Opening Statement* (copy attached to original of these minutes) into the  
41 record. Mayor White asked for statements of ex-parte contact, conflict of interest, or bias. None was  
42 declared. He then asked if anyone had any objection to any official hearing the case. Fran Recht, 66 NE  
43 Williams, stated she objected to Mayor White and Councilor Cameron not declaring ex-parte contact  
44 and disclosing bias, saying they should recuse themselves from the hearing because they were given  
45 campaign parties and donations from one of the applicants after the appeal had been filed. She submitted  
46 this request in writing, with copies of newspaper articles and contribution reports for White and  
Cameron (copies attached to original of these minutes). Dennis Bartoldus, attorney representing the

1 applicants (Grey Investments, Real Estate Centre, and Rich and Val Allyn), stated he did not see any  
2 conflict of interest, there was no indication this matter had been discussed, and everyone has the right to  
3 make campaign contributions. Gordon advised that the decision to recuse is ultimately up to the  
4 individual, and noted that if it is later determined that bias was involved, it puts the Council's decision at  
5 risk. He added that campaign contributions are typically not considered sufficient bias to disqualify  
6 someone from participating in a decision. White and Cameron both stated they had not spoken with any  
7 parties involved and had no conflict of interest or bias. There were no other objections to any Councilor  
8 or the Mayor hearing the case. Lewis reviewed the staff report (copy attached to original of these  
9 minutes).

10  
11 Mayor White offered the applicants the opportunity to testify. Bartoldus, again speaking on behalf of the  
12 applicants, addressed two issues he wanted reflected in the record: 1) Written testimony submitted by  
13 Ruth Moreland indicated the City should address issues other than the two items remanded by LUBA  
14 (Land Use Board of Appeals), and that the only issues the City should be addressing were those on  
15 remand, and he cited a case heard by the Supreme Court in support of this, as well as ORS197.763(7).  
16 He noted that wording in Depoe Bay Zoning Ordinance (DPZO) 10.070(76) quoted in Moreland's  
17 correspondence is taken directly from the State statute, and the Supreme Court's decision on its meaning  
18 is that only new evidence as relates to the remanded issues is to be accepted (see Beck v. City of  
19 Tillamook, attached to original of these minutes). 2) He said that Lewis received a letter from Jerry  
20 Hogevoll (copy attached to original of these minutes) claiming to be a property owner who should have  
21 been notified of the original public hearing and the subsequent appeal to the Council. Bartoldus  
22 submitted information (copy attached to original of these minutes) confirming that the property owner on  
23 record had been properly notified in accordance with Oregon land use law. Therefore, Hogevoll is not  
24 entitled to request a new hearing due to not receiving notice. Bartoldus reviewed items previously  
25 submitted regarding the appeal, including a summary of written testimony, a detailed plan and structural  
26 calculations from Stricker Engineering, and a geotechnical report and letter from David Wright. He said  
27 Steve Williams of the Oregon Parks Dept. visited the site and indicated that the proposed retaining wall  
28 would be out of jurisdiction of the Parks Dept. as long as it stays behind the designated line (copy of  
29 Williams' letter dated 12/1/04 attached to original of these minutes). Bartoldus also submitted copies of  
30 Stricker's letters dated 2/10/04 and 5/15/04 (copies attached to original of these minutes), which indicate  
31 that the only solution to protecting the bluff and the applicants' property is a structural solution. He  
32 noted that Oregon law allows cities to interpret their own ordinances as long as it's a reasonable  
33 interpretation. He said that while "wall" is in the DBZO, the term "retaining wall" is not. He cited  
34 examples of existing structures (defined as "anything on a base") with legitimate uses not specifically  
35 listed in the zoning ordinance, including sidewalks, street lights, and flag poles. He said that retaining  
36 walls are commonly used to retain property (see copies of submitted photographs attached to original of  
37 these minutes), including other property along the oceanfront, and that existing retaining walls have not  
38 changed the use of public park land and are compatible with park land. He said a retaining wall at this  
39 location would be a legitimate government use in order to preserve the public park land, as well as  
40 protecting the applicants' property. He noted there is a survey by Russell Johnson in the record that  
41 shows the location of mean higher high tide is far more than the 50' required in the zoning ordinance, so  
42 the proposed retaining walls would not be in the riparian vegetation zone. The applicants have  
43 investigated camouflaging the wall with texturing, and have planned vegetation that will cascade down  
44 the wall, keeping the area as natural looking as possible, but aesthetics are difficult to determine. He said  
45 that DBZO Section 10.060 says the Planning Commission may allow uses or similar uses not listed in  
46 the ordinance, providing the use is compatible to permitted uses. A Councilor asked Bartoldus to

1 confirm that the 1990 geotech report estimated annual erosion would be 3.7” per year, and the new  
2 report indicates erosion is occurring at 8.3” per year, and that any vegetation used in restoration would  
3 be native vegetation. At a Councilor’s request, Gordon confirmed that the only issues being addressed at  
4 this public hearing were the two items remanded to the City from LUBA: 1) the interpretation of what a  
5 retaining wall is, and 2) a standard for an “adequate aesthetic vegetation plan”, so Staff can make a  
6 determination on the Condition of Approval that requires the vegetation plan. Mayor White called for  
7 other testimony in favor of the application; there was none.

8  
9 Mayor White called for testimony in opposition to the application. Ruth Moreland, 30 SW Hawkins,  
10 submitted a written copy of her oral testimony (copy attached to original of these minutes). She said  
11 Bartoldus’ comments about her letter to Gordon regarding the scope of the remand and Hogevoll’s letter  
12 to Lewis did not negate the contents of either letter. She stated she opposed the application because: 1)  
13 She felt it doesn’t comply with State law or City code. 2) The application was incomplete because it  
14 does not address riparian vegetation requirements. 3) The geologist recommended a 25’ setback, and  
15 there are now structures within that setback that were not part of the original approval. 4) The proposed  
16 retaining walls would not maintain the visual character of the area and there is no evidence of a public  
17 need for them. 5) Stabilization walls are a structure as defined by DBZO Section 1.030(126), are not an  
18 outright, conditional, or similar use in the P-F zone, do not qualify as an accessory use, and are not  
19 allowed in a P-F zone. Moreland said the applicants should find someone to provide a non-structural  
20 solution to the problem, the solution should be affected on the applicants’ property rather than public  
21 park land, and that appropriate management of vegetation would minimize wave action. In response to a  
22 question of what harm would the retaining walls cause Depoe Bay, she said financial and tourist  
23 industry, and that she wants to protect unique aesthetics of Depoe Bay that draw people here. She also  
24 felt approving construction of the retaining walls would put the City at risk because the application is not  
25 in compliance with the law.

26  
27 Fran Recht rebutted Bartoldus’ testimony: 1) The applicants’ claim the proposed retaining walls are  
28 similar to the one by the City’s water storage tank, but they are not. The retaining wall by the water tank  
29 was put on private property because a neighboring property owner had excavated nearby and  
30 undermined the water tank, resulting in a lawsuit, and that retaining wall is an accessory structure to the  
31 house on the same property. 2) The applicants claim ODOT would not be able to build a retaining wall  
32 along the seawall, but they would be able to because they own the property and it would be a public  
33 improvement. 3) The applicants claim there would be no interference with use of the public park land,  
34 but it would interfere by impacting visual aesthetics, active and passive enjoyment of the park, and  
35 riparian vegetation. 4) The applicants stated the retaining walls would protect public property, but they  
36 would deflect wave action onto surrounding properties. Recht then reviewed her written testimony (copy  
37 attached to original of these minutes), stating the City should deny the application because it does not  
38 meet requirements of Depoe Bay ordinances or Oregon State law, and she quoted several sections of  
39 DBZO, Oregon law, and Depoe Bay Comprehensive Plan Goal 17. Bartoldus objected that Recht’s  
40 testimony was inconsistent with the two remanded items and asked that it be stricken from the record;  
41 Gordon said it should be allowed as it was relevant. A typo was noted at the bottom of page 6: “within  
42 ~~1,000~~ 100 feet of the ocean shore.”) Recht said she didn’t feel there is a legal way to put a retaining wall  
43 on public property. Mayor White called for other testimony in opposition to the application; there was  
44 none.

45  
46 Mayor White called a five minute recess at 8:51 P.M. The meeting reconvened at 8:59 P.M.

1  
2 Mayor White offered the applicants the opportunity to rebut testimony in opposition to the application.  
3 Bartoldus spoke for the applicants, making the following observations: 1) Both opponents were asked  
4 what a non-structural solution would be; neither opponent could provide one. 2) A claim was made that  
5 the application was “seemingly unlawful” but no proof of this was provided. 3) He stated that drainage  
6 is hardlined to the bottom of the bluff and asked where was proof that drainage caused the problem. 4)  
7 The Allyns have revegetated, but the vegetation washes away. 5) Regarding the aesthetic resources of a  
8 retaining wall, the seawall by the spouting horns doesn’t detract from tourism, as it is a popular  
9 attraction for tourists and locals alike. 6) Regarding accessory uses, he said that mailboxes and utility  
10 poles are private structures located in the public right-of-way, and many existing retaining walls are  
11 being used as accessory structures. 7) He said that compliance with Goal 17 is measured by City  
12 ordinances. 8) Moreland’s response of non-compliance (to the question of what harm would be caused  
13 to Depoe Bay) was inaccurate because the application does meet legal requirements. 9) The Allyn’s  
14 deck has been there for 13-14 years and was approved when the house was approved. 10) He thought  
15 the City would want to save City property, but maybe the applicants approached it backwards and should  
16 be asking the City to fix the problem. Bartoldus closed by requesting the record be kept open for seven  
17 days due to the amount of written testimony received tonight. Recht requested an additional seven-day  
18 period for rebuttal. Bruce Silver, 420 Cardinal, asked to testify because there was new information  
19 presented during the rebuttal, and he was allowed to do so. He stated he believed Bartoldus raised an  
20 ultimatum in his rebuttal when he said maybe the applicants were going about this the wrong way and  
21 should insist the City put up a wall to protect the property, and Silver took issue with that statement.  
22 Bartoldus responded that he only postulated “what ifs” and it was not meant to be taken as a threat. He  
23 said it seems the applicants have proposed a reasonable scenario that works for all parties. What’s  
24 eroding is not the applicants’ property, it’s public property, and the applicants are asking to be given a  
25 chance to work out a solution that will help save the public property and their private property. He  
26 apologized if it sounded like a threat, and said he did not feel that was new evidence.

27  
28 It was the consensus of the Council to begin deliberations at the March 1, 2005 regular meeting, and  
29 Mayor White noted the record will remain open for additional testimony for seven days, and for rebuttals  
30 an additional seven days after that concluding at 5 P.M. on February 15, 2005.

31  
32 B. Public Hearing Continued – Council Deliberations: Proposed Amendments to Zoning Ordinance  
33 and Inventory Map Relating to Natural Resources Inventory (12/7/04 City Council Meeting)  
34 Lewis said Councilors were given a packet (copy attached to original of these minutes) containing copies  
35 of all written testimony received, and summarized the testimony received from Dawn Pavitt, Katherine  
36 Pyle, Mike Van, Elaine and Frank Helle, Boise Cascade, and Depoe Bay Salmon Enhancement  
37 Commission. Deliberations began. There was much discussion centered around setbacks, with a general  
38 consensus that maintaining the current setbacks of 25’ for wetlands not associated with streams and 50’  
39 for streams, and allowing for flexibility in certain areas on a case-by-case basis, with input from a  
40 qualified expert such as a professional fish biologist would be an acceptable arrangement for all involved  
41 parties. A Councilor questioned whether copies of the original wetlands study and recommendations  
42 were distributed; Lewis said copies of the consultant’s report had been distributed, and the setbacks  
43 could apply to all areas of the stream, or just to certain areas. He noted he would encourage a minimum  
44 standard, with the option for individual applicants to apply for a variance.  
45

1 Motion 3: Jack Brown moved to direct Staff to develop draft language incorporating a minimum  
2 standard setback, overlaid with direction to developers that involves collaboration with a professional  
3 fish biologist, to protect the land owner against unnecessary setbacks and to protect streams against  
4 damage which would cause them to become non-fish bearing. Alice Brown seconded the motion.

5  
6 Mayor White said it was moved and seconded, and called for discussion. Lewis asked that certain other  
7 information be included in the motion.

8  
9 Amendment: Jack Brown amended the motion to include direction to Staff to develop draft language  
10 regarding Kathryn Pyle's editing and formatting suggestions, and the Helles' comments about significant  
11 and non-significant wetlands, and amendments to the map that were discussed during testimony. Alice  
12 Brown seconded the amendment.

13  
14 Mayor White said it was moved and seconded, and called for discussion. A Councilor said there is an  
15 existing law against silt screening; the motion was expounded on to explain that the current system is  
16 flawed and the proposed changes are for the better environmentally.

17  
18 Vote: Motion 3 as amended, passed.

19 Ayes: Cameron, Alice Brown, White, Romans, Jack Brown, Laverty

20 Noes: Taunton  
21

## 22 VI. REPORTS OF OFFICERS, BOARDS, OR STANDING COMMITTEES

23 Dick Johnson, Planning Commission Chairman, asked the Council to schedule a date for a public  
24 hearing on the "Matrix" at the March 1, 2005 regular Council meeting.

25  
26 Motion 4: Romans moved that Gordon review the Matrix for Measure 37 issues before March 1, 2005.  
27 Alice Brown seconded the motion.

28  
29 Mayor White said it was moved and seconded, and called for discussion. There was none.

30  
31 Vote: Motion 4 passed.

32 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Laverty  
33

## 34 VII. PUBLIC COMMENTS

35 Tony Stein extended an invitation to join him, the Salmon Enhancement Commission, and the Dept. of  
36 Fish & Wildlife for a tour of South Depoe Bay Creek tomorrow. They will be meeting at City Park at  
37 10 A.M.

## 38 39 VIII. UNFINISHED BUSINESS

40 There was no unfinished business.  
41

## 42 IX. NEW BUSINESS

43 A. Proposed Engineering Services Agreement – Water System Improvements Project  
44 Owings reported that the proposed agreement (copy attached to original of these minutes) from Murray,  
45 Smith, and Associates (MSA) was received today, and has been reviewed by Gordon. The agreement is  
46 for water storage and distribution and plant improvements. He noted that Meyer Engineering assisted the

1 review committee with negotiations. He recommended the City enter into the agreement and authorize  
2 the mayor to sign the agreement after legal counsel has reviewed it one last time.

3  
4 Motion 5: Laverty moved to enter into the agreement with MSA after Gordon has reviewed it, and  
5 authorize the mayor to sign the agreement. Taunton seconded the motion.

6  
7 Mayor White said it was moved and seconded, and called for discussion. There was none.

8  
9 Vote: Motion 5 passed.

10 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Laverty

11  
12 X. CORRESPONDENCE

13 Murray reported there were three items of correspondence (copies attached to original of these minutes):

14 1) A letter from Larry Hardy regarding the area south of the bridge. 2) A letter from Congresswoman  
15 Darlene Hooley asking if there is anything the City would like her to pursue funding for. Murray  
16 suggested scheduling this as an agenda item for the February 15, 2005 regular Council meeting.

17  
18 Motion 6: Jack Brown moved to authorize Congresswoman Hooley to request \$400,000 from Peter  
19 Friedman, per Army Corps of Engineers' recommendation, for harbor landslide stabilization work, with  
20 a new sidewalk, and gravel, blacktop, and painting for the parking lot. Romans seconded the motion.

21  
22 Mayor White said it was moved and seconded, and called for discussion. There was none.

23  
24 Vote: Motion 6 passed.

25 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Laverty

26  
27 Correspondence, continued: Murray asked if there were any other projects to forward to Hooley. A  
28 Councilor suggested acquisition of additional property around City Park, specifically two lots owned by  
29 Grace Strom. This item will appear on the next agenda. 3) A letter from Pat Osuna and Betty Taunton,  
30 which they requested be read into the record. Per Council procedure adopted 10/21/03, the Council was  
31 asked whether they wanted the letter read into the record, and it was their consensus to do so. Murray  
32 read the letter regarding Salmon Enhancement Commission goals into the record.

33  
34 XI. CITY STAFF REPORT

35 Owings reviewed his written report (copy attached to original of these minutes), with updates on the  
36 Pirate's Cove Sidewalk Project, flushing water lines, the Harbor Fuel Project, and a request to purchase a  
37 pump for the wastewater treatment plant.

38  
39 Motion 7: Romans moved to authorize Owings to obtain structural engineering services for the Harbor  
40 Fuel Project, at a cost not to exceed \$3,000. Laverty seconded the motion.

41  
42 Mayor White said it was moved and seconded, and called for discussion. There was none.

43  
44 Vote: Motion 7 passed.

45 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Laverty

1 Motion 8: Lavery moved to authorize Owings to purchase an RAS pump at a cost of \$7,920. Alice  
2 Brown seconded the motion.

3  
4 Mayor White said it was moved and seconded, and called for discussion. There was none.

5  
6 Vote: Motion 8 passed.

7 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Lavery  
8

9 Murray: 1) Reminded everyone that the City is still advertising for vacant positions on various  
10 Commissions, all with a closing date of 2/9/05, except for Budget Committee, which has a closing date  
11 of 2/10/05. 2) Reminded Councilors that the goals and priorities workshop needs to be scheduled soon.  
12 3) The public contracting ordinance as amended is in need of updating, and she hopes to have a draft to  
13 present to the Council at the next regular meeting. 4) Mayors' Day at the Capitol is February 23, 2005  
14 and Mayor White would like to attend. The cost would be a \$30 registration fee, plus mileage  
15 reimbursement.  
16

17 Motion 9: Lavery moved to allow the mayor to attend Mayors' Day at the Capitol. Alice Brown  
18 seconded the motion.

19  
20 Mayor White said it was moved and seconded, and called for discussion. There was none.

21  
22 Vote: Motion 9 passed.

23 Ayes: Cameron, Taunton, Alice Brown, White, Romans, Jack Brown, Lavery  
24

## 25 XII. COUNCIL COMMENTS

26 Alice Brown: 1) Had spoken with some of the Traffic Safety Commission, and suggested the  
27 Commission be expanded to the "Traffic and Public Safety Commission". She requested this be  
28 scheduled as an agenda item. 2) Said it would be nice if the whale watching center could be listed in the  
29 Oregon Parks and Heritage Guide, and suggested discussing this at the joint meeting with County  
30 Commissioners.  
31

32 Lavery: Attended two Council of Governments (COG) meetings. The Meals on Wheels program will  
33 have a \$171,500 shortfall in fiscal year 2005-06. He said if you can keep a senior fed, they can usually  
34 remain in their own homes rather than a care center, at less cost to taxpayers. Meals on Wheels usually  
35 requests \$100 from the Budget Committee for the 11 Depoe Bay seniors they provide meals for, and the  
36 City awards them \$1,000. Lavery suggested the City consider giving them \$4,040, which would cover  
37 the shortfall for the Depoe Bay seniors, and indicated he would pursue this at the upcoming Budget  
38 Committee meetings. 3) Hwy 20 funding is still pending, and last year, COG requested letters from  
39 cities serviced from Hwy 20. He requested that the letter Depoe Bay submitted last year be resubmitted,  
40 or a new letter be written and submitted within the next couple of weeks.  
41

42 Cameron: Thanked the Mayor for supplying pizza for the dinnertime workshop meeting this evening.  
43

44 White: Said he is glad to see the community come out and attend Council meetings.  
45  
46

1 XIII. ADJOURN

2 There being no further business, the meeting was adjourned at 10:40 PM.

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Mayor James White

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9 Silver Fox, Recording Secretary