

**ISLAND COUNTY PLANNING COMMISSION
SUMMARY MINUTES
COMMISSIONERS HEARING ROOM
TUESDAY, MAY 9, 2006**

MEMBERS PRESENT: Mike Joselyn Ray Gabelein
Bill Massey Val Hillers
Deb Eidsness Alan Schell

MEMBERS ABSENT: Sheilah Crider Wayne Havens
Scott Yonkman

APPROVAL OF THE MINUTES

Mike Joselyn moved to approve the minutes of April 11, 2006 as written. The motion was seconded by Alan Schell and carried unanimously.

ITEMS FROM THE PUBLIC

There were no items from the public.

PLANNING DIRECTOR'S REPORT

Phil Bakke, Planning Director, welcomed Deb Eidsness, representing District 3, to the Planning Commission.

He provided an update of the wetlands schedule noting that it will be split into three phases, the survey, the analysis of Best Available Science and the recommendations. As part of the public outreach process the Department plans on sending out a countywide mailing during each phase.

He also noted that the BICC adopted the Findings of Fact for the Surface Water Quality Monitoring Program and the AG ordinance. They authorized a budget amendment for the 2006 budget to aid in implementation of both ordinances. Funding has also been included to represent staffing requirements for the surface water quality monitoring program. The BICC decided to transfer all of the County's salmon recovery and surface water efforts, not related to construction projects, from Public Works to Planning.

The BICC also signed Interlocal Agreements with both the Whidbey Island and Snohomish Conservation Districts to provide custom farm planning services.

Ray Gabelein said as a result of the proposed initiative sponsored by the Farm Bureau will the County be looking at getting a legal opinion from either the prosecuting attorney

or the state attorney general with regard to compensation. In other words will it matter who puts the restrictions on the property, the state or the county, as to who will pay the compensation.

Phil Bakke said the Association of Washington Counties, at their last set of meetings, established a subcommittee to address those questions. He was sure that the answer would be forthcoming.

UNFINISHED BUSINESS

Adoption of County code provisions pertaining to appeals of SEPA Threshold Determinations issued in conjunction with Type IV legislative actions initiated pursuant to Chapter 36.70A RCW (the Growth Management Act).

Handouts:

Revised Draft- Ordinance PLG-005-06- May 9, 2006 – Planning Commission (Growth Management Record #8771

Jeff Tate noted that on April 11th the Planning Commission conducted its first public hearing on this matter and it was been continued to this date. In anticipation of the April 11, 2006 hearing staff transmitted a report to the Planning Commission outlining some suggested changes to a couple of sections of the county's administrative codes.

Essentially what staff has recommended to the Planning Commission is to incorporate changes to the process related to SEPA Threshold Determinations. SEPA Threshold Determinations are an administrative decision by the Department on all sorts of different decisions and determinations made on land use proposals for the development of property and code and Comprehensive Plan amendments.

There are three different threshold determinations, a Determination of Non-Significance (DNS), a Mitigated Determination of Non-Significance (MDNS) and a Determination of Significance (DS) which triggers an Environmental Impact Statement (EIS).

The Department has always had a pretty clear process for the issuance and appeal of threshold determinations issued in conjunction with development proposals. The process is muddier for threshold determinations that are issued in conjunction with legislative actions/Type IV decisions. Chapter 16.19 sets forth all the policies and procedures for the process. When a legislative action is brought forward to the Planning Commission to deliberate on the Planning Department is evaluating that proposal for its potential environmental impacts and will issue a threshold determination in conjunction with the proposed legislative action. A decision is rendered on the legislative action by the Board of County Commissioners based on the Planning Commission's recommendation. The threshold determination is a different type of decision. Staff evaluates the proposed legislative action to determine whether there is likely to be any environmental impacts as

a result of the proposed action. A legal notice is put in the paper and there is a two week comment period.

This proposal is attempting to clear up the process for appeals of threshold determinations. Staff has presented a proposal where threshold determinations issued on legislative actions are clearly appealable to the Hearing Examiner.

At the April 11th hearing staff presented some amendments and discussed why they felt it was important to include the Hearing Examiner process in these threshold determinations. One of the questions that came up at the hearing was with respect to the definition of “aggrieved party”. It was pointed out that the definition seemed to pertain to project actions and not legislative actions. Staff has made a couple of changes which attempt to clarify the aggrieved person definition.

One of the changes proposed is to add the language “or determination” to the definition of aggrieved person which expands it out of the realm of just a land use decision on a project action. The definition would read as follows:

Aggrieved person: A Person is aggrieved or adversely affected within the meaning of this Chapter only when all of the following conditions are present:

- A. The decision *or determination* has prejudiced or is likely to prejudice that Person;
- B. That Person’s asserted interests are among those that the County was required to consider when it made the decision *or determination*; and
- C. A judgment in favor of that Person would substantially eliminate or redress the prejudice to that Person caused or likely to be caused by the decision *or determination*.

Alan Schell said staff has not really defined the “aggrieved person” any differently. If he recalled correctly, there was the question of whether an aggrieved party was somebody who had spoken out against the determination or could it be someone whose property may not be affected directly but as a resident of the area they feel they are aggrieved by the determination.

Jeff Tate noted that 16.19.190B.1 is where you will find the “aggrieved person” language in the text of how you appeal a decision. There was a question during the last hearing and it has been raised in comments that the Planning Commission has received since the last hearing of how an aggrieved person relates to standing and whether you need to participate in writing, or show that you have some injury in fact. The Departments position is that when you appeal a threshold determination it is appropriate to have to meet a certain test of standing. There are various ways to determine standing. The County has existing code that requires an aggrieved person to meet all three conditions, as noted above. The Department believes that the same standard should hold for appeal of threshold determinations on legislative action.

The point has been raised that the GHMB test for standing is that you participate orally or in writing before the Planning Commission or the BICC. There is no question that is the case for the GMHB when they hear the appeal of a legislative action but the legislative action and the appeal of the legislative action are different decisions than the threshold determination. The threshold determination evaluates the environmental impacts as a separate decision. If you look at the State Environmental Policy Act under which these threshold determinations are issued, RCW 43.21C, and the case law that has been established under that Chapter you will see that it is more consistent with the aggrieved person test that is spelled out in the County code.

Staff did some legal research to try and figure out what SEPA is saying and how the County code reads to see if they are consistent and they found the following citation “any person aggrieved by a SEPA determination may obtain judicial review.” The term “person aggrieved” has been interpreted to include anyone with standing. Washington Courts apply a two part test for determining standing.

1. The interest that the party is seeking to protect must be arguable within the zone of interest to be protected or regulated by SEPA; and
2. The party must allege an injury in fact that he or she will be specifically and perceptively harmed by the proposed action.

Staff feels that the appeal process should follow case law that has already been established, *Trepanier v. City of Everett*. The aggrieved person definition that is established in County code is verbatim text from Chapter 36.70C RCW which is the Land Use Procedures Act (LUPA), LUPA, which does deal with project actions but that is the foundation of how the aggrieved person definition is written. The County has a three prong test, LUPA has a 4 prong test, but the 4th prong is the Hearing Examiner process, the local appeal process, and staff felt it was redundant to include it in the definition. Building off of that definition and SEPA case law staff feels that it is certainly not inconsistent to have a SEPA appeal process that follows through to the Hearing Examiner to evaluate threshold determinations.

Alan Schell said if the Hearing Examiner determined the appellant was not an aggrieved party would that person eventually be allowed to appeal to the Growth Management Hearings Board.

Jeff Tate said he did not know where it would go but someone could certainly raise the argument that the County erred in its decision regarding aggrieved party status.

COMMENTS FROM THE PUBLIC

Steve Erickson , WEAN, pointed out that having that early appeal causes a problem for the Planning Commission. If the proposal is changed later on you then have a SEPA determination based on a different proposal. In other words somebody appeals, the

Hearing Examiner bounces them for lack of standing or issues a decision, at that point it goes back to the Planning Commission for action, the Planning Commission changes the legislative proposal which is then forwarded to the BICC who adopt it or make their own changes. At that point you have a SEPA determination that is for a different proposal and all an appellant has to argue later up the line is simply that you haven't done environmental review on the proposal you adopted.

He noted that he provided the Planning Commission with three decisions issued by the WWGMHB in Island County cases that address standing to bring SEPA claims under GMA. Both the Western and Eastern Growth Management Hearings Boards have consistently ruled that to appeal a SEPA action relating to a GMA action all you have to do is show the same standing requirements as you normally have for any other GMA appeal. That requirement is in RCW 36.70A.280, Matters subject to board review. A GMHB shall hear and determine only those petitions alleging either that a state agency, county or city planning under this chapter is not in compliance with requirements of this chapter, chapter 43.21 RCW as it relates to development regulations or amendments adopted under GMA 36.70A. A petition may be filed only by a person who has participated orally or in writing before the county or city regarding the matter on which the review is being requested. The County has never challenged that holding at any level above the GMHB, neither has any other party as far as I am aware.

In the third decision he provided, which is a final decision from the WWGMHB, the author talks about the constitutional underpinnings of the aggrieved party requirement and why that is not really appropriate in this decision. To put it simply, we have in this country a very basic principal called the separation of powers. The court can't just on its own say we don't like what the legislative branch or the executive branch has done so we are going to step in. There has to be what is known as a "cause of action" that comes from the constitutions requirement that the courts hear causes and controversies.

A cause means that you basically have an underlying law that is very consistent with SEPA where SEPA itself does not create a cause of action. SEPA is always attached to another action. A threshold determination is of an action which is always undergoing a permitting process or other legal process whether it is a legislative action or for a private project. You don't appeal a threshold determination when there is no application for a permit and nobody gets a threshold determination when they are not also trying to get an approval for something else, the underlying action. An appeal of SEPA threshold determinations must always be of the underlying action and SEPA simultaneously.

This requirement for causes and controversies makes a lot of sense when you look at it in terms of a private action. For instance, John Jones who lives in Maine paints his house pink. Suzy Smith happens to live in California and decides she doesn't like the color and sues John Jones. A court will first determine if there are any regulations against it and then they are going to look at how it impacts her and determine that it doesn't and she has no standing. If Suzy Smith lived across the street from John Jones and has to look at the pink house all day then that starts to approach having standing.

In looking at this issue in terms of legislative actions he used as an example South Dakota's recent passage of a bill that basically bans all abortions. Somebody living in Texas can't challenge that, they have no interest in it. It is not a federal law it doesn't affect them, it is a state law. It is certainly going to be challenged in court but the person bringing the challenge is going to be somebody who lives in South Dakota who is likely either seeking an abortion or somebody who provides them.

You have the same situation with GMA actions they are county wide, they affect everybody in the county. In the case of critical area regulations the aggrieved party standard in many respects does not make sense when you try to show you are going to have a specific impact because environmental impacts don't follow neat boundaries like property lines. It is a perspective action, you don't know for sure what actions are going to be proposed, but you do know they could likely affect somebody within the County. So there is a question whether that aggrieved party standard is even appropriate for those broad scale legislative actions.

The Planning Department's claim that it wishes to re-establish this local appeal process so that it will have an opportunity to correct its mistakes rings hollow. Every SEPA appeal since 1998, and not just those brought by WEAN, has been challenged first and foremost on the basis that the appellant lacked standing, not the substantive issue of whether the adverse environmental impacts were significant.

Val Hillers said if a person was to submit something in writing at a hearing in Island County could they then be an aggrieved party and challenge the legislative decision.

Steve Erickson said they wouldn't be an aggrieved party in the sense in which that term is defined. They would however have participated orally or in writing and have standing before the GMHB. .

He commented on Jeff's suggestion that a SEPA appeal is somehow different than the appeal of a legislative action noting that SEPA is really explicit that you have to appeal both simultaneously.

Bill Massey moved to continue the public hearing to May 23, 2006. The motion was seconded by Mike Joselyn and carried unanimously.

NEW BUSINESS

Staff presentation of Comprehensive Plan Annual Review Amendments

CPA 167/06 – Amendments to the Island County Comprehensive Plan and ICC Chapter 17.02 for the inclusion of development standards within Accident Potential Zones (APZ) surrounding NAS Whidbey Island.

Mike Kershner, Planner, noted that the current Comprehensive Plan understates the importance of NAS Whidbey to the character of Island County. New Comprehensive Plan language has been proposed that will ensure that future development does not hinder the use of NAS Whidbey as well as increase the level of public health and safety.

The Navy has recently released an AICUZ report which delineates noise zones and Accident Potential Zones (APZ). The Planning Department proposes to address the issue associated with the three APZ areas through the creation of a new Comprehensive Plan Overlay and additions to the ICC. A new section of code will be added to Chapter 17.02 which will create development standards within the APZ's.

A copy of the AICUZ report is available upon request.

Bill Massey inquired as to whether the County has considered the fact that the City of Oak Harbor passed legislation that made the uses in the APZ areas more restrictive than the Navy's recommendations.

Mike Kershner noted that staff did consider the City of Oak Harbor's ordinance in their review. He pointed out that the City of Oak Harbor is dealing with mainly industrial and commercial uses while the County APZ areas are mainly residential.

Alan Schell pointed out that Table 17.02.050.D indicates that fire stations are not allowed in APZ-I however there is currently a fire station off of Silver Lake.

Mike Kershner explained that existing uses are exempt from this proposed amendment.

Alan Schell noted that a third of the City of Oak Harbor is in the APZ-II area.

Phil Bakke noted that this amendment only pertains to the unincorporated areas. Staff will provide the Planning Commission with a map that shows the parcel configuration, boundary lines, and the Joint Planning Area.

Bill Massey questioned why Coupeville Outlying Landing Field contains no APZ's.

Mike Kershner explained that APZ's are only provided for runways that experience 5,000 or more departures or arrivals per year.

ZAA 475/05 – Amendment to change parcel R33014-369-2330 from the Rural Service zoning classification to the rural Village zoning classification.

Andrew Hicks, Planner, noted that the amendment was submitted by the landowner who is proposing to change the zoning classification of a 9.82 acre parcel from the Rural Service Zone to the Rural Village Zone. The purpose of the Rural Service Zone is to provide for the identification of existing commercial activities associated with the provision of daily convenience goods and services for rural area populations. The change

in zoning classification would allow the parcel to be developed for the retail sale of convenience goods as well as personal and business services needed to support persons residing in the rural areas.

A Temporary Use Permit (TEM 257/03) was applied for in 2003 to allow for a music festival on the subject parcel. The permit was eventually withdrawn due to the fact that Cultural Event Centers and Temporary uses are not permitted in the Rural Service Zone.

Multiple structures currently exist on the parcel, all of which are located in the northwestern corner. The Planning Department was unable to determine when each of the structures was established. Aerial photographs from 1983 confirm that the building layout for the commercial uses existed at that time, though they do not confirm what uses were being carried out in them. The previous zoning maps, adopted in 1984, classified the parcel as non-residential. This provides some insight as to when the non-residential uses on this parcel were established.

A wetland exists on the property and it is believed to be man-altered. Aerial photos from 1958, 1968 and 1983 show the creation of a pond from an apparently smaller wetland area.

The Comprehensive Plan includes a Potential Rural Service Lands Study as part of the Technical Appendix. This study illustrates the thought process behind the zoning of the Rural Service areas.

The subject parcel does not meet all of the designation criteria of the Island County Comprehensive Plan for land zoned Rural Village. The parcel fits precisely within the parameters of the Rural Service Zone as established in the study and therefore the department is recommending denial of the zoning amendment.

Jeff Tate indicated that the Commission will be provided with a copy of the Rural Service Lands Study. The Rural Service Zone is the least intense commercial zone in the County and the Tye Grocery, which is situated on this parcel, has been identified in the study. Approval of this zoning amendment would have a significant impact on the surrounding Rural zoned properties in terms of the intensity of development. The Rural Village Zone allows for multiple structures of up to 10,000 square feet. The Rural Service Zone limits it to a total of 4,000 square feet of commercial use.

ZAA 047/06 – Amendment to change parcel R33228-448-4330 from the Rural zoning classification to the Rural Village zoning classification.

Andrew Hicks noted that Lenz Enterprises is proposing to change the zoning classification of a 5.32 acre parcel from the Rural Zone to the Rural Village Zone. The purpose of the Rural Zone is to maintain low residential densities to preserve rural character and to provide buffers between urban activities and agricultural and forestry uses. The change in zoning classification would allow the parcel to be developed for the

retail sale of convenience goods as well as personal and business services needed to support persons residing in the rural areas.

The parcel was dramatically expanded from 0.83 acres to 5.32 acres through a Boundary Line Adjustment in February of 2002. At one time the parent parcel was zoned commercial and had an active restaurant operating on it. The restaurant was subsequently closed by the Health Department due to a failed drain field. A new septic system was approved in 1988 and a new restaurant continued operation until 1993. Currently the subject parcel is vacant, except for an empty, 30' x 90' structure that covers the sand filter septic system.

This parcel does not meet all of the designation criteria of the Island County Comprehensive Plan for lands zoned Rural Village. Additionally, the area described in the application as once having commercial uses on it has since expanded from 0.83 acres to 5.32 acres. Approval of this zoning amendment would have a large impact on the surrounding Rural zoned properties in terms of the intensity of development. The Planning Department is recommending denial of this zoning amendment.

Deb Eidsness pointed out that the parcel fronts Hwy 532 and there is commercial activity across the street.

Andrew Hicks noted that there is a lot of highway frontage throughout Island County that is zoned Rural and it is not a consideration as far as the Comprehensive Plan goes in determining what is zoned Rural Village.

Jeff Tate added that one of the constraints of the GMA in rural areas is once you draw your boundaries around a RAID you are not allowed to expand it unless it becomes an UGA. The designation criteria for the Rural Village zone was based on what the GMA requires for defining those boundaries and staff feels that the zoning change is inconsistent with the GMA restriction and the County's designation criteria as well.

Ray Gabelein asked if the fact that there was a commercial business on the property in the past had any bearing on the decision.

Andrew Hicks noted that one of the designation criteria in the Comprehensive Plan specifically says "characterized by existing development that is predominately non-residential and mixed-use." At the time of the adoption of the Comprehensive Plan there were no existing commercial uses on that property.

Jeff Tate explained that from 1984 to 1998 that piece of property was zoned Non-Residential. In 1998 when the new zoning ordinance was established there were no commercial uses on that property and the zoning was changed to Rural.

Val Hillers asked if there was a point when a place like Camano Island needs enough services that some growth will be allowed in these areas.

Jeff Tate noted that the GMA allows for the infill of RAIDs. The next question is whether there is enough area for infill. You are allowed to have some new uses and infill between existing uses but you are not allowed to expand the boundary around what is existing. The whole concept of a RAID is to contain development that is no longer consistent with what the rural area is allowed or should have under GMA principals. It's a very valid philosophical question, at some point there is going to be a time when there is no available land supply.

Phil Bakke said there are a couple of options available if that happens, one is to look at NMUGA status and the other is to take an area and incorporate it as a city.

Deb Eidsness said it was her opinion that this piece of property should not be zoned rural due to the surrounding uses.

Jeff Tate said when staff reviews a proposal they look at the compatibility between adjacent land use designations. The challenge is avoiding this kind of incremental domino affect. If you allow one person to establish a commercial use is it then appropriate for the next door neighbor to get a commercial use as well.

CPA 191/06 – Approval of amendments to enable the Stanwood/Camano School District to impose impact fees on newly created lots on Camano Island.

John Coleman noted that the Stanwood/Camano School District has requested that the ICC and Comprehensive Plan be amended to enable the incorporation of the Stanwood Camano School District Capital Facilities Plan (CFP) into the Capital Facilities Element of the Island County Comprehensive Plan. Incorporation of the CFP will allow the school district to collect school impact fees on newly created lots on Camano Island through the subdivision process for future capital improvements within the school district after the date of adoption of these amendments.

In order for the CFP to be incorporated into the Comprehensive Plan and impact fees to be imposed the ICC will need to be amended to set standards and procedures for collecting the impact fees. There are two options as to when in the review process fees are collected; one is at the time of the parcel subdivision that creates the new parcels and the other is to collect the fees as part of the building permit process. There are benefits and drawbacks to both options; therefore staff is seeking the guidance of the Planning Commission. The school district currently collects impact fees for newly created parcels in Snohomish County and the City of Stanwood.

Phil Bakke indicated that the Commission would be provided with code specific recommendations for both options. The other component that would come later, if this is incorporated into the Comprehensive Plan, is an interlocal agreement between the Board of County Commissioners and the Stanwood/Camano School District specifying all of the details of how this will get done.

Jeff Tate added that staff's review is somewhat limited to whether or not the proposed CFP meets the requirements of the state law as well as the County's Adequacy Ordinance. At the public hearing the Stanwood/Camano School District will be available to answer questions on why they feel impact fees are needed, what capital facilities are needed over the long term and the dollar amount to be levied.

John Coleman noted that the proposed fees are reflected in the schools CFP. The impact fee for a single family detached residence would be \$458.00. A Duplex/Townhouse unit would be \$660.00.

Bill Massey pointed out that the emphasis has been placed on when to collect the fees when in fact the Planning Commission's recommendation may be not to adopt the amendment. In addition, he was concerned that the one area that has the potential for affordable housing, duplex/townhouse units, is being hit harder by the impact fees than single family residences.

Val Hillers asked if any of the other school districts in Island County has a similar type process.

Phil Bakke noted that none of the other school districts in Island County collect impact fees.

John Coleman said one thing that needs to be considered is that when impact fee are levied the school can only apply those impact fee towards new development. They cannot address past deficiencies in the school district facilities. There is also a 6 year limitation on the fee. If the fee is levied in 2006 and there are no improvements by 2012 the fee would have to be returned to the payee.

Ray Gabelein concurred with Mr. Massey's comment regarding affordable housing noting that those most affected would be young couples and senior citizens.

The meeting adjourned at 11:05 a.m.

Respectfully submitted,

Pam Dill
Administrative Assistant