MINUTES
KITSAP COUNTY PLANNING COMMISSION
Administration Building - Commissioner’s Chambers
February 12, 2008, 9:00 am

These minutes are intended to provide a summary of the meeting flow and content and should not be relied upon for specific statements from individuals at the meeting.

The Kitsap County Planning Commission met on the above-stated date at the Kitsap County Administration Building – Commissioner’s Chambers located at 619 Division Street, Port Orchard, WA 98366.

Members present: Chair Fred Depee, John Taylor, Vice Chair Linda Paralez, Michael Gustavson, Tom Nevins, Lou Foritano, Jim Sommerhauser and Lary Coppola.

Staff present: Larry Keeton, Scott Diener, Katrina Knutson, Eric Baker, Angie Silva, and Shelley Kneip.

Others present: Allison O’Sullivan (Suquamish Tribe) and Chris Dunagan (Kitsap Sun) in attendance.

9:00:29

A. Call Meeting to Order, Introductions:

B. Director’s Update:

Keeton: Gives an overview of the new fee policy and structure. Discusses revisions to and increase in volume of the Hearing Examiner’s schedule. Discusses Paladin’s efforts and progress on systems improvements and upgrades to the LIS (Land Information System) programs.

We are looking at some changes to our code that have caused or will cause our processes to change. The County Commissioners’ approved the DCD Advisory Board. These people from the industry and public will be looking at our business practices and helping guide us as we continue to refine our processes and streamlining.

9:06:21

Sommerhauser: Can Planning Commissioners receive a roster and schedule of Advisory Board meetings?

Keeton: We will provide a roster and the first meeting is scheduled for the 25th. Once we get a schedule for future meetings, you will receive it as well.

Foritano: Recent history has seen a lot of staff turnover. What can the Department do to keep continuity in the planning department?

Keeton: The shortage of experienced planners is not exclusive to us. Planners make more money in the private sector and don’t have to defend their work or be attacked for doing their job in the public forum the way ours do. We are still recruiting and evaluating what our recruitment target is.
(Commissioner Coppola arrives)

Keeton: Experienced planners are hard to find. Do we keep waiting or do we try to grow planners here to a point where their capabilities grow and they are successful? Katrina is a great example of someone who has blossomed into a great Planner and has continued to do very well. Long Range Planning is a difficult field in the public sector.

Foritano: Once you find a good planner, what can you or we do to keep them? Can we look at the pay scales; effectiveness of management and creativity; try to protect them from the public outcry? How can we support what you are doing?

Keeton: Yes. I started attending these meetings because the Planners need to have and feel the support of Senior Management and others. We need to reinforce that confidence and trust. Leadership is taking responsibility and not blaming planners. The Board is treating the Planners differently and looking at their opinions and work as professional advice; whether or not it is taken. Department turnover is 8% and is primarily in Long Range Planners. We do work with the Board on compensation and other factors as well.

Taylor: When the Board has a question regarding DCD, who do they call?

Keeton: Depending on the question, they call the Director, Assistant Directors, Managers and then the Planners themselves, which is the proper chain of command. One of the conditions of employment is that the Commissioners cannot just assign work or projects to Staff.

An example is the RWIP (Rural Wooded Incentive Program). The Board wants to see action on it, so we told the Board that something else will need to come off the plate if we take that on. They are very cognizant of our workload and the challenges.

Sommerhauser: How many Long Range Planners do you have?

Keeton: We are allocated to four long range planner positions and one frozen position. We are a victim of the Personnel system, who also faced budget cuts and reduced staff this year and led to a backlog in recruiting.

Gustavson: People in the industry need an expectation of how long to get through the process. We have seen three years for a 20 year plat. If a developer comes to the counter, they should be able to get an estimated time frame.

Keeton: In some cases, three years on a 20 year plat is justified. There are times when a project in on a planner's desk because they haven't had any new information or the applicant hasn't made any move forward. There have also been times when it should have been moved more quickly.
(Chair Depee defers discussion on this topic)

Gustavson: Another issue I hear is ad hoc requirements added by the planners in the course of the project. (Gives example of Puget Highlands East project).

Keeton: In certain portions of our code, different things are required. Situations can be similar but not identical and code may require different things. Scott has been instrumental in meeting with the planners or managers to make things work and to look at cases where some requirements do or don't make sense. Plan review is being cleaned up, but it will take time. Our managers are on board and making an effort to help educate staff on which instances require these kinds of decisions or if they should be deferred to a manager.

Gustavson: I'm not lobbying for a more detailed code.

Keeton: An example is the Bethel road corridor design standards. The Staff is applying the Design Standards; the applicant disagrees with the standard, so who is right? It's in the code. The Director can request additional information as required. The Planners and the public are dealing with past requirements of past Directors, which can confuse things even more. We are looking at this and we are cleaning it up.

Paralez: Would you welcome any recommendations or suggestions relating to your Permit Manager position and would they be helpful?

Keeton: Yes, please give us any possible applicants or suggestions. (Pay Scale has not been approved yet, but will get Linda a copy of the Job Description).

Coppola: How does the Planner pay scale compare to other jurisdictions?

Keeton: It depends on who you compare us to. We are comparable to our like-sized counties, which are Snohomish, Clark, Yakima and Whatcom Counties. Geographically, we are not comparable to Pierce or King County, but they are much, much larger. Salary is not the only thing that is competitive and a factor in DCD. Senior Planners know what goes on in the Department and what our reputation has been in the past.

Coppola: You have already outlasted the two previous Directors. Good job!

Keeton: It is the people here who have given me any success.

Sommerhauser: In the fee proposal, a visual tracking system for users was discussed. What is the timeline for this?

Keeton: You can track permit status online now to see all the required steps and what has been completed, but you cannot see comments from reviewers and until a step is completed, it lists status as Pending. What does that mean?
Keeton:  You don’t know unless you can see the comments. It also doesn’t show where your permit is in the queue. We are working with Paladin to get the capabilities to post enough information on the web for users to get a good picture of status; this will also help us provide realistic timeframes to applicants.

There is a also permit bill of rights enacted by the legislature that we are not required to use, but we are trying to implement it to show a point of contact and to outline expectations. We will try to launch this in March, but accurate tracking will probably not be online until next year.

9:25:42

C. Approval of Minutes:

Sommerhauser questions whether minutes are written using a word processing program that checks for double words or extraneous words. Microsoft Word is used.

A motion is made by Commissioner Taylor and seconded by Commissioner Gustavson to approve the minutes of January 8, 2008.

The VOTE:
Yes: 8
No: 0

The Motion Carries

A motion is made by Commissioner Taylor and seconded by Commissioner Gustavson to approve the minutes of January 22, 2008.

9:26:55

Depee: On page 20, it should read, “Review Title 16,” referring to the Large Lot portion, instead of Title 11. Also, when Commissioner Depee recused himself and left the room, it was at the request of Commissioner Nevins. (Submitted changed document for your records)

The motion is amended to approve the minutes of January 22, 2008 with the changes submitted by Chair Depee.

The VOTE:
Yes: 8
No: 0

The motion carries
9:30:00

D. Best Available Science: Overview of Recent Decisions; Overview of Appearance of Fairness Doctrine – Shelley Kneip, Kitsap County Legal

Kneip: Right now Kitsap County’s Critical Areas Ordinance is under appeal. Some of our Planning Commission members are part of that appeal, and that case will not be discussed at all today.

(Gives an overview of Exhibit C, Swinomish Tribe vs. Western Washington Growth Management Hearings Board Superior Court case in Skagit County. County Commissioners have also been briefed on this case.)

Under the Growth Management Act, there are two competing preservation areas which are resource lands and agricultural lands. In areas where there were pre-existing agricultural areas, they instituted Performance Standards instead of buffers. The only place these Performance Standards were applied was to pre-existing agricultural areas, not streams or other critical areas. Kitsap County has no designated commercial agriculture lands.

The Growth Board upheld the ordinance, but said enforcement standards were not strict enough, they lacked specificity in the monitoring, and had no adaptive management program. The Supreme Court’s decision notes the conflicting goals of the Growth Management Act and the difficulty jurisdictions face when trying to protect and balance both affordable housing and rural character.

9:35:40

Kneip: The Court discussed Best Available Science which must be considered and must be included in the record. Protection of critical areas is required by the Growth Management Act, enhanced buffers are not required. A ‘County or City may opt not to use buffers if they provide a reasoned justification for not using buffers.’ The Court found their system to be adequate, but upheld the Growth Board’s findings related to the monitoring, adaptive management program and benchmarks.

Kitsap County would have to include an Adaptive Management Program, a monitoring program and benchmarks if we were to institute Performance Standards instead of Best Available Science. This is very time consuming and probably not workable in Kitsap County. We do not have the agricultural lands, or some of the other conditions in this Skagit County case. This would be on a case by case basis.

9:40:15

Foritano: From a common sense standpoint, this seems like a confirmation of the obvious. If you have Best Available Science, you should follow it unless you have a good reason. If you have a good reason, you should back it up with Performance Standards.

Kneip: Yes.
Gustavson: Performance standards are intriguing. If there were a definition of the standards, it would help the citizens and property owners. It would be beneficial to define these for things like streams and run-off and other issues. Blanket buffers tend to cause people to get excited.

Kneip: It is possible, but the burden would fall to the property owner to propose these. Skagit County might be a good starting point if someone wanted to try, but they would have to wait until it is finalized. I don’t think these regulations are documented yet, so Skagit will have to go back with a revised plan that addresses the concerns that the Growth Board had and once those are approved and adopted, they will then be able to document and go ahead with their regulations.

Gustavson: There are many well-qualified individual natural resource researchers in our community who would be happy to participate in a forum to help develop these kinds of measures and projects.

(Questions the difference in Best Available Science between the Growth Management Act and the Shoreline Management Act.)

Kneip: That is an issue on appeal, so I will give some brief history. The Shoreline Management Act was adopted in the 1970s and the Growth Management Act was adopted in the 1990s. There wasn’t much connectivity between them until recently. Legislature adopted changes to connect the two. The goals and policies of the Shoreline Management Act is now considered the 14th goal of the GMA and we do need to be sure that they are considered in our next Critical Areas Ordinance update, which is due in 2011.

Kneip hands out exhibits A – Washington State Appearance of Fairness Doctrine Cases and B – Chapter 42.36 RCW Appearance of Fairness Doctrine – Limitations.

Kneip: Planning Commissioners need to be cognizant of this as public planning officials. The Appearance of Fairness Doctrine was established by the Courts as pertaining to Land Use and Zoning regulations and state that proceedings must not only be fair, but must also appear to be fair. It has been relaxed a lot and tempered over the year. I will review these, because there are times when you will be subject to the appearance of fairness doctrine.

Legislature enacted and limited the Doctrine in RCW 42.36 to quasi-judicial decisions, which are defined as ‘when the Board will determine the legal rights, duties or privileges of specific parties in a hearing or other contested case proceeding’.

This is generally individual parcels and does not apply to legislative acts; a lot of the Comprehensive Plans and development regulations that come before you are legislative acts. Current use assessments are considered quasi-judicial.
Kneip: Site specific re-zones are questionable. Before the Growth Management Act and RCW 42.36, these were similar to a permit process where it was a contested case and the court held them as quasi-judicial actions. We will discuss this more in reference to case law.

The other limitation in RCW 42.36 states the action must actually be pending. The application must be in or pending before the Doctrine can be applied.

Continues overview of Exhibit A including candidates running for office and campaign contributions and any prior participation in an advisory committee does not prohibit you from making later decisions in a different capacity or elected position.

It also prohibits private or ex-parte conversations about a specific pending action or case between a public official and another party if it is not part of a hearing or other public record. If a conversation leads to this before the official can prevent it, the remedy is to announce during the public meeting, for the record, with whom you spoke and what your conversation entailed and then to recuse yourself or to state that you do not believe it will affect your decision on the action. If that is not challenged, that is legally allowable.

If the recusal causes the committee to be at odds and prevents a decision, the Rule of Necessity allows that person to come back to the committee, despite the appearance of fairness, to move the decision forward. In the case of the Planning Commission, the quorum is five.

Commissioner Sommerhauser asks for some examples in context with our Planning Commission.

Kneip: References Exhibit A and reviews several cases listed in the Summary.

Gustavson: Questions past case in which Commissioner Depee recused himself from the Commission, but wanted to and did speak from the floor as a member of the public involved in the project. Should he have left the room during the vote?

Kneip: It goes further than that. If a Planning Commissioner is involved in a project, they must recuse themselves from the Commission, leave the room and may not testify regarding the project in any capacity.

Depee questions further and Kneip clarifies that although he was an affected property owner in the project, his duty to protect the Appearance of Fairness Doctrine as a Planning Commissioner would preclude his rights to participate as a property owner at both the Planning Commission and Board of County Commissioner levels. The only option is to have an agent speak on your behalf or to step down from the Planning Commission.

(Kneip continues reviewing cases in Exhibit A.)
10:18:45

Sommerhauser: Several members of this Commission are members of groups that regularly provide testimony before us, so when do these rules apply assuming we are dealing with a quasi-judicial action?

Kneip: If it is quasi-judicial, it will depend on the facts.

Sommerhauser: A conservation organization will be testifying on a rezone application and one of the Planning Commissioners is a member of that organization. Does that trigger these laws?

10:20:11

Kneip: In the past yes, but the remedy for this, is to make a statement to the record declaring that membership will not affect your decisions and if it is not challenged, you are legally safe to continue.

Sommerhauser: What if they are a presiding member or official of the Board in that organization?

Kneip: This will depend on whether the Planning Commissioner feels they can be impartial. You would disclose it to the record regardless. If there is any challenge, they would need to step down.

10:21:44

Foritano: Four of the Planning Commission members attended and testified at the County Commissioners meeting last night on the Rural Wooded Incentive Program. Where does this leave us?

Kneip: References two other cases in the Exhibit A summary to wrap that up.

(Commissioner Paralez leaves the meeting at 10:21:53)

10:26:16

Kneip: Regarding testimony before the County Commissioners, you need to discuss and decide as a body, how if and how you want to restrict yourselves. Commissioner Foritano disclosed your involvement as a Planning Commission member during your testimony and I think it was fine as a policy decision. Commissioner Sommerhauser attends a majority of the County Commissioner meetings and when testifying, you sometimes do or don’t as a Planning Commission member depending on whether your testimony pertains to policy or opinion.

If you want to have a representative of the Planning Commission attend and speak on your behalf at the County Commissioner meetings, I think you need to agree on that and designate someone. You need to decide if it should be a quorum or a majority. You have the right to attend and testify as a citizen, but you should most likely disclose your involvement anyway.
10:28:00

Chair Depee asks to keep additional questions and comments brief. Commissioner Sommerhauser asks that additional time be given to the subject

Taylor: Asks about the NASCAR project and if case law prevented application.

Kneip: I don’t know their motives, but I think they just weren’t ready.

10:30:42

Kneip: Regarding the pending application stipulation. If you have a conversation about a project before the application is in, it could still be viewed that you pre-judged the matter and violated due process. We have to be very cognizant of this.

Gustavson: There is a constitutional right to free association.

Kneip: Absolutely. But you also have a duty as a Planning Commissioner to disclose that association when it pertains to a matter before you.

Coppola: If a Planning Commissioner gives their opinion or testifies as a citizen before the County Commissioners on an issue, and if that issue is sent back before the Planning Commission, should you recuse yourself?

Kneip: If it comes back to you, not necessarily. It is fact dependent. Was there new information, was your opinion affected, are you able to judge it fairly? We can also help guide you through these questions if they arise.

10:32:42

Depee: We will be doing Code Revisions soon. I have a specific interest, because it directly affects my business. What about some of these other boards like Wastewater Task force, Business Procedures and others. Will I be in conflict?

Kneip: No. Those are all legislative acts and those are not covered under the Appearance of Fairness doctrine. Only quasi-judicial decisions, such as Site-Specifics or Current Use Assessments apply.

Sommerhauser: Is it possible to ask for the Commissioners to approve you to go forward for an AG opinion, so we would know? It could affect us.

Kneip: I will pass that on.

Foritano and Kneip clarify that his testimony on the Rural Wooded Incentive Program was relative to a legislative act, so it did not violate the Doctrine.

Sommerhauser: What does stepping down or recusal mean? We know they can’t testify, but do they have to leave the room?
Kneip references the Hayden vs. Port Townsend case and states that if you recuse yourself, you should also leave the room.

10:38:05

BREAK

10:52:15

RECONVENE

Sommerhauser still has questions for Shelley and asks the Chair to have her back to answer them. Depee agrees and asks Scott Diener to coordinate.

E. Work Study: Wastewater Infrastructure Taskforce Status Update – Eric Baker, Special Projects

10:54:00

Baker: Gives an overview of the Wastewater Infrastructure Taskforce is looking at how we will provide necessary sewer in urban areas. There are three goals; first, a Regional Sewer Plan; second, funding mechanisms and third, phasing implementation. The program will run through 2008 and also includes discussing alternative sewer system.

10:58:35

Sommerhauser: Of those updates, which will be coming to the Planning Commission for action?

Baker: The update to the Capital Facilities Plan will return in the end of 2008.

11:01:44

Gustavson: When will we get the Code Amendment proposal and how long will we have to review it?

Baker: The draft we are giving you contains the entire document. Only about 10 percent will actually be changing. You will also get a matrix addressing all the changes and references.

Gustavson: Will there be a list of items that will not be addressed in this revision? On the Comprehensive Plan, there was a timeframe proposed for implementation, do we have any update on that?

Baker: Title 11, the Implementation chapter is broken out, and a number of them have been moving forward, but we may be looking at years two and three if they have not moved before then.
Baker: The County Commissioners is having discussion about Accessory Dwelling Units on what should be included in the draft that will be coming before you. Last week, we discussed the concerns of changing our code due to the possibility of opening it up to appeals when our code may not be ready for them. Staff may be directed not to make any changes to this portion during Code Review, but will instead be addressed when the changes are ensured to be in compliance with the Growth Management Act.

Gustavson: Could we just follow what other counties are doing with Accessory Dwelling Units?

Baker: Many of those cases have not been challenged, and we are being cognizant in what we bring forward and mindful of creating unnecessary appeals. The County has a series of existing issues with Growth Management, and the Board is discussing whether we want to add this in, or address it when we update for GMA.

Sommerhauser: When I attended the Commissioner briefing, they were not as soft in their discussion. They said they would not be addressing the Accessory Dwelling Units at all due to legal risk, but they do want to work on part of it administratively.

Baker: Special care manufactured homes and the accessory living quarters sections are the ones being examined, although that does not mean action will be taken on them.

F: For the Good of the Order

Depee: Our newest member, John Hough is on vacation.

The public should be allowed to address the Planning Commission during the meetings if they wish, so we will be adding a For the Good of the Order/Public Comments item to the beginning of the agenda after the Introductions.

Discussion continues regarding time limits for speaking and that items addressed must not be on the agenda. Depee will coordinate with Scott Diener to get a procedure similar to that of the County Commissioners.

Coppola: Unlimited parking passes have been extended to the members of all Advisory Boards by the Port Orchard City Council.

Sommerhauser: Will be missing next three meetings, but will be in touch via email and phone.

Depee: Check on the conditions for attendance.

Sommerhauser asks and Depee agrees to request a timeline for receiving answers to many of the questions raised at the January 8th Joint Meeting.
A motion is made by Commissioner Coppola and seconded by Commissioner Taylor to adjourn the meeting.

The VOTE:
Yes: Unanimous

Time of Adjournment: 11:15:21

EXHIBITS
A. Summary of Washington Appearance of Fairness Doctrine Cases
B. Chapter 42.36 of the Revised Code of Washington
C. Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board.

MINUTES approved this _______ day of _______ 2008.

________________________________________
Fred Depee, Planning Commission Chair

________________________________________
Amanda Walston, Planning Commission Secretary