

MINUTES
City of Newport
Joint City Council/Planning Commission Work Session
City Hall Conference Room "A"
Monday, August 9, 2010

City Council Members Present: Bill Bain, Patricia Patrick, Lon Brusselback, Terry Obteshka, Mark McConnell, Richard Kilbride, and Jeff Bertuleit.

Planning Commissioners Present: Jim Patrick, Melanie Sarazin, Glen Small, Mark Fisher, and Rod Croteau.

Planning Commissioners Absent: John Rehfuss and Gary East.

Citizens Advisory Committee Members Absent: Dustin Capri and Lisa Mulcahy.

City Staff Present: Community Development Director (CDD) Derrick Tokos, Senior Administrative Assistant Wanda Haney, City Manager Jim Voetberg, City Attorney Penelope McCarthy, and City Recorder Peggy Hawker.

A. New Business.

1. Discussion regarding proposed amendments to NZO Section 2-4-7 (Geologic Hazards).

PC Chair Patrick called the Planning Commission work session to order at 6:00 p.m. He stated that this was a joint work session only, and that no public testimony would be received. He then turned the meeting over to CDD Tokos for a brief PowerPoint presentation. Tokos' presentation began by explaining what geologic hazards are, which is a new definition added into the proposed ordinance and is borrowed from statute. He then explained the City's interest in geologic hazards. He noted that the City's comprehensive plan gives guidance in this and is consistent with statewide planning. The existing comprehensive plan policy is implemented through the geologic hazards section of the zoning code. Tokos explained what the zoning code recognizes as geologic hazard areas. These include areas shown in the 1973 DOGAMI report (Bulletin 81), areas with weak foundation soils (which Tokos explained has been litigated through LUBA and hasn't been enforced by the City for many years because it is so vague), areas identified on the 1977 RKNR maps to determine setback from the coastline, and any other documented hazard area. The proposed ordinance updates to the 2004 DOGAMI report, which is the most current maps of our area. Those maps are used to trigger when site-specific analysis is necessary. He noted that our existing code doesn't do that. Also identified as hazardous are areas of dune and bluff backed coastal erosion, and other documented areas. For comparison, Tokos showed examples of the 1973 maps and the 2004 maps. He showed an example of the 70s RKNR map used on the coastline. He explained that this map uses bars of varying widths along the coastline to distinguish erosion in that area. Then staff determines if a survey is needed to determine if a property is in the geologic setback area, and it is a judgment call whether a survey is needed or not. He noted that the 2004 DOGAMI maps approach erosion differently by defining relative risk areas. The areas are distinguished by colors. The pink is currently active, red is high area (next 60 years), orange is moderate (60-100 years), and yellow is low. Tokos next showed a schematic out of the DOGAMI report showing bluff erosion hazard mapping technique. He explained that you have action that chips away and then there is a block that goes down. The next frame of his presentation explained why this geologic update is being considered now. He explained that the Planning Commission has been updating the zoning code and got to the geologic section, and there were a couple of problems that needed to be corrected. Also the City will be going into periodic review. Listing the problems in the existing code, Tokos noted that the maps are outdated, the language regarding weak foundation soils is vague, it is overly strict in that anything requiring a building permit needs geologic review, it does not prohibit development on beaches and fore dunes consistent with state law and city policy, there is inadequate provisions requiring erosion control during construction, there was nothing requiring that recommendations were actually followed by the contractors, and there is no language included that the owners acknowledge they are in a geologic hazardous area and assume the risk. Tokos covered the process to date. The Planning Commission held eight work sessions; there was a direct mailing; there was a public workshop in February; there was outreach with geologic firms, lenders, title companies, and insurance agencies; the Planning Commission had four hearings; we received approximately 118 written comments; and the proposal was updated in response. Tokos highlighted the changes recommended by the Planning Commission as follows: the 2004 maps are used; in some cases a reconnaissance form is allowed instead of a full report; exemptions are now tailored with the need for geologic review in mind allowing for modest development or vegetation removal without review; use of erosion control measures are required; when there are recommendations of how construction is done, there is follow up required; and in subdividing there is a clause regarding new developable lots being outside a hazard area. Tokos noted that hazard disclosure is not something the Planning Commission recommends be adopted, so when the ordinance is

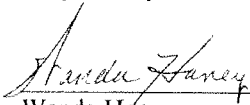
presented to the City Council, that will not be included. Staff will most likely recommend that the City Council add that back in, which would have to be by a City Council motion. Tokos noted that the disclosure started out as a recorded document, but the Commission dropped that based on testimony and changed that to a statement rather than a recorded document. He said that testimony went both ways as to whether this type of statement is needed. Tokos said that the Commission felt that the existing real estate disclosures are adequate and that this singles out those developing versus those already there. The Commission felt there was no compelling need for the statement. Tokos said that those in favor of the statement felt that the existing disclosures are inadequate, that those developing in high risk areas should accept responsibility, and that the City would have more risk as more permits are issued. Tokos showed the 2004 maps showing landslides and explained that the red is active (those areas with measurable movement), and the yellow are areas of potential risk or prehistoric landslides. Tokos covered what he had included in the meeting packets. First was the recommendation coming out of the Planning Commission with that one provision related to the waiver and disclosure that is not being recommended by the Planning Commission indicated in bold type. He included the changes to the comprehensive plan, which is background information as to what these zones mean and an explanation of why the zoning code is structured the way it would be. He had included the draft reconnaissance form, and he explained that we are still working with the State Board of Geologists on this form. He included a memo from City Attorney Penelope McCarthy regarding the hazard statement. Also included was a copy of the Planning Commission meeting minutes from July 12th with their recommendation. And finally, he had provided a copy of the existing code. Members of the Council asked Derrick if he would provide them with a hard copy of his PowerPoint presentation. McConnell noted that they had also received copies of the comments received since the Planning Commission closed the record and a new comment from today.

Mayor Bain thanked the Planning Commission for working through this issue. He said that having been on the Planning Commission himself for six years, he recognizes that the process is daunting. Bain reminded the City Council that the purpose of this session is not to debate or take a position on the issue but rather to ask the Planning Commission how they came to the decisions they did. He added that tonight is an opportunity to ask questions and get a better understanding of the Commission's decision. Bain noted that the Council had received letters from Ward and Dalon regarding the waiver statement, which was not recommended by the Planning Commission. He said that the Council understands that the Commission unanimously approved the ordinance without the waiver statement in it. They realize that there was a motion to include it, but that it failed on a 4-3 vote. He said that in reading the staff report, the Council understands that. Bain asked the Commissioners to direct their questions through Planning Commission Chair Patrick. Bain began by asking Patrick to discuss the positives and negatives that were raised with regards to the waiver and disclosure statement. Commissioner Patrick noted that it was a split decision, and he was on the losing side. He said that he could have voted either way. He thought we needed something, but he didn't think what we had was exactly right. He thought it was flawed. Personally, he believes people need to take responsibility for building in a geologic zone. Commissioner Croteau took the other side. Again, he disclosed a potential conflict of interest because his home is in a moderate zone, and he could be financially impacted in the future. Croteau said that when he looked at the ordinance and the site-specific reporting before permitting is allowed, he believes it gives expert guidance. As far as he is concerned, that is the keystone of the ordinance. He opposed the hazard and liability statement because he felt it was unnecessary and unfair. He feels disclosure is covered by state law. He said that the Commission received considerable testimony from those in the real estate field that disclosure was covered. He noted that this statement only applied to those that sought to permit. He also felt that the liability and indemnification was unfair. He said that they couldn't see that the City had a liability issue. All that was really offered was Jumpoff Joe, which is thirty years old. Commissioner Croteau said that the Commission also had comprehensive testimony about the weakness of the indemnification statement with regard to legal issues of a clear financial cap or time limit. He felt that was a sufficient basis to question the indemnification. He said the liability is unfair because it applies to just one subset of people, those in the active or high zones; and not to those in tsunami, earthquake, or flood zones. Croteau gave the example of two families living next to each other. The one needs to sign the disclosure because they get a permit; the other next door doesn't get a permit, so they don't have to sign the disclosure. Essentially the same houses in the same zone; one has disclosure and one has no obligation. Croteau gave another example that two families wanted to build, so they get their report, sign the waiver, and build their houses. Two months later one family sells, and the disclosure and indemnification disappears on that house. One house still has disclosure and indemnification, and the other doesn't because there is a new owner. He said there are two classes of citizens under this rule. He said that if we do a hazard ordinance, it has to be a model ordinance; something that will have to apply to everyone including earthquake and wind. Councilor Kilbride asked if this wouldn't run with the land. Commissioner Croteau replied that if it were recorded in the deed it would. With a statement filed with the permit and geologic report, it applies to the first family; but if the property sells, it disappears with the second owner. City Attorney McCarthy explained that the waiver does run with the land, the only piece that doesn't is the indemnification. She referred to paragraph 10, which indicates that with the exception of the indemnification (paragraph 7), the rest of the statement would run from owner to owner. Commissioner Fisher asked how that would happen if it is not recorded. McCarthy said it would bind new owners as paragraph 10 states "bind my successors, assigns, heirs, and executors." Councilor Patrick had a question about the reason for the difference widths of the red zone. CDD Tokos explained that DOGAMI personnel had physically walked the coastline and identified

where there is active earth movement. On the landslide maps, the yellow areas were pulled from other sources. He noted that with the new LIDAR methods, what they expect is some cleanup, but much the same. Commissioner Fisher said that the Commission had heard 10-15 hours of testimony, received letters, heard from realtors, lenders, attorneys; and not one said this disclosure statement is a good idea. He said that only government employees are in favor of it. If the City Council decides to adopt it, they have every right. He said it is not the desire of the people, the lenders, the lawyers, and particularly the citizens. He hopes that government remembers that government belongs to the citizens of the community to whom they have a personal obligation. Mayor Bain asked Commissioner Fisher to come to the City Council meeting to express his thoughts. Councilor Brusselback asked Commissioner Croteau what kind of liability he was talking about when he said the Commission could find no liability for the City. Croteau said the Commission was asked specifically where the City had been sued or lost money over a geologic situation. It has not happened. Councilor Patrick asked if the Planning Commission had taken testimony as to properties no longer being used as building sites and can only be used for parks. Commissioners Patrick and Croteau said no. Commissioner Fisher said he recalled something being said about donating a piece of land to the City; but Commissioner Croteau said he wasn't sure of the context. Mayor Bain asked if when the Commission considered the City's liability if they considered the larger context of the city including the citizens and adjacent property owners who might be aggrieved by someone's use and not waiving liability to the City. He wondered if the larger context of the City not just as an entity but as representing all of its citizens came into play. PC Chair Patrick said that the Commission didn't get any testimony, but it was mentioned in passing. Commissioner Small said that several things concerned him. He believes that it's not the City's job to protect him from himself. If he knows the risk and chooses to build anyway, there should be the opportunity to do that. If a property owner knows the risk and he follows the guidelines, there is an obligation to protect him from neighbors. In that case, he believes the erosion control pieces are very good. It has been addressed by language that no additional hazard is created by the removal of vegetation and protecting neighboring properties. He said that if they know it and assume the risk, then that should be sufficient. He said that a geologic report would address that issue. If they follow the report, they know the risk. Mayor Bain said that there are some specific examples he is aware of where, in his opinion, there were not sufficient guidance and oversight of an engineering geologist that always gets a report that allows for development without those important protections. PC Chair Patrick said one thing they do have in the ordinance is that the engineering geologist has to sign off on recommendations they made. He noted that for Jumpoff Joe, there was a geologic report, the geologist signed it, and then he lost his license. They didn't follow what he recommended; but it wouldn't have made a difference anyway. His recommendations wouldn't have stopped it. In the new code, they do have to certify that it is done. Commissioner Patrick said it is better protection than anything else we put in there. Councilor McConnell asked that if this is a Type One review, if that includes notification or not. CDD Tokos explained that Type One is notice after the permit is issued, not in advance; and there is an opportunity to appeal. Councilor McConnell asked if the Planning Commission discussed what kind of land use to follow. CDD Tokos said that once a permit is issued, people are given notice and an opportunity to appeal it. Councilor McConnell asked if someone wants to appeal, they have to hire their own engineer and challenge the decision. CDD Tokos confirmed that was correct, and it is appealed to the Planning Commission. Commissioner Patrick added that we are trying to keep within the time line for the 120-day rule. CDD Tokos said they were trying to standardize the appeal process because we had several types. Councilor Brusselback said that there is talk about engineering geologist and standard geologists, and wondered if there was a recommendation of which kind. Commissioner Patrick said that in the yellow zones you have the opportunity to use the lower degree; but in the active or high zones, you are automatically into using the higher. CDD Tokos added that in the lower zones, you have the option to use the reconnaissance form, and in the higher you are automatically into the full form. Councilor McConnell asked that when a permit is issued on a reconnaissance form, if the neighbors are still notified. CDD Tokos said a permit is still issued based on the reconnaissance form, and there still is notification. It is just a different degree or level that went into the permit. PC Chair Patrick added that a person could hire their own geologist and appeal to the Planning Commission if they didn't believe they were in that hazard zone. For clarification, Councilor Kilbride asked that the Planning Commission was fine with everything except for Section 2-4-7.025 (D), and the Planning Commission didn't forward that to the City Council. PC Chair Patrick said that is an additional recommendation from staff that the Planning Commission doesn't know about. Councilor McConnell also thanked the Planning Commission for sitting through all hours of testimony and time. Commissioner Patrick said this is not his favorite process, but it is the only way to get people's attention. Mayor Bain suggested meeting in more routine joint work sessions just to talk about the entire field of things that the Planning Commission has had put on its plate and is working on. He said often the City Council doesn't see that until it boils up to the surface. PC Chair Patrick said that there are at least two areas the Planning Commission would like City Council input on; one with zoning, and one with RVs. Commissioner Small said that as to this process it wasn't always pleasant, but the overall result is that the process worked as it was designed. He noted that the Commission dealt with the ordinance in theory and then heard about potential impacts from citizens. He said that adjustments were made, and what we have is a good ordinance if Section D is removed. Mayor Bain agreed that we have a better product for the process. Councilor Kilbride noted that there was a letter from Attorney Dennis Bartoldus that raised some concerns about the appeal process. Bartoldus is concerned that once the decision is made, the appeal process could drag it out. Commissioner Kilbride wondered if this issue had been discussed. PC Chair Patrick remembered discussing it. Commissioner Croteau thought the issue was discussed, but there were a lot of hotter issues. He felt it was a legitimate issue.

C. **Adjournment.** Having no further time for discussion, the work session meeting was adjourned at 6:54 p.m.

Respectfully submitted,



Wanda Haney
Senior Administrative Assistant