EDMONDS CITY COUNCIL APPROVED MINUTES

August 13, 2002

Following a Special Meeting at 6:45 p.m. for an Executive Session regarding legal matters, the Edmonds City Council meeting was called to order at 7:07 p.m. by Mayor Haakenson in the Council Chambers, 250 5th Avenue North, Edmonds. The meeting was opened with the flag salute.

ELECTED OFFICIALS PRESENT

Gary Haakenson, Mayor
Dave Earling, Council President
Jeff Wilson, Councilmember
Michael Plunkett, Councilmember
Lora Petso, Councilmember
Dave Orvis, Councilmember
Deanna Dawson, Councilmember

ELECTED OFFICIALS ABSENT

Richard Marin, Councilmember

STAFF PRESENT

David Stern, Chief of Police
Duane Bowman, Development Serv. Director
Peggy Hetzler, Administrative Services Director
Noel Miller, Public Works Director
Brent Hunter, Human Resources Director
Dave Gebert, City Engineer
Phil Olbrechts, City Attorney
Sandy Chase, City Clerk
Jana Spellman, Senior Executive Council Asst.

Mayor Haakenson explained King County announced their preferred site selection today and selected Route 9 for the site of the Brightwater treatment plant. The conveyance routes will be in King County and the outfall will be on the line between Woodway and Shoreline on the King/Snohomish County border. He noted as of today, nothing came through Edmonds, which was very good news.

1. APPROVAL OF AGENDA

COUNCILMEMBER PLUNKETT MOVED, SECONDED BY COUNCILMEMBER ORVIS, TO APPROVE THE AGENDA AS PRESENTED. MOTION CARRIED UNANIMOUSLY.

2. CONSENT AGENDA ITEMS

COUNCILMEMBER ORVIS MOVED, SECONDED BY COUNCILMEMBER PLUNKETT, TO APPROVE THE CONSENT AGENDA AS PRESENTED. MOTION CARRIED UNANIMOUSLY. The agenda items approved are as follows:

(A) ROLL CALL

(B) APPROVAL OF CITY COUNCIL MEETING MINUTES OF AUGUST 6, 2002

(C) APPROVAL OF CLAIM CHECKS #57215 THROUGH #57384 FOR THE WEEK OF AUGUST 5, 2002, IN THE AMOUNT OF $336,779.94. APPROVAL OF PAYROLL DIRECT DEPOSITS AND CHECKS #33487 THROUGH #33663 FOR THE PERIOD JULY 16 THROUGH JULY 31, 2002, IN THE AMOUNT OF $792,521.20.

(D) REPORT ON BIDS OPENED AUGUST 6, 2002 FOR THE 74TH PLACE WEST SLOPE STABILIZATION PROJECT AND AWARD OF CONTRACT TO EMERALD SERVICES, INC. ($132,695.00)

3. PROPOSED INTERIM ZONING ORDINANCE AMENDING ECDC 20.35.080 IN ORDER TO CLARIFY THAT THE CITY COUNCIL, INSTEAD OF THE HEARING EXAMINER, SHALL MAKE FINAL DECISIONS ON PLANNED RESIDENTIAL DEVELOPMENT APPLICATIONS

Development Services Director Duane Bowman explained this matter was continued from last week's Council meeting, a proposed interim ordinance that would establish the City Council as making the final decision on Planned Residential Development (PRD) applications as an interim ordinance for six months. He noted a public hearing date must be set within 60 days.

Mr. Bowman explained at last week's Council meeting, a number of questions arose regarding what other jurisdictions were doing as well as the legal ramifications. He referred to a memo in the Council packet from the City Attorney that included a comparison of other cities' regulations. He noted the interim ordinance provided at the August 6 Council meeting gave the Council the final authority. The additional ordinance provided to the Council gave the Hearing Examiner final authority under an interim ordinance.

Mr. Bowman explained the Planning Board would be reviewing the PRD ordinance, beginning on August 12 with a work meeting to collect public input as well as public hearings in the future in preparation for a recommendation to the City Council.

City Attorney Phil Olbrechts explained this issue arose due to a conflict in the development regulations where one set of regulations indicated the Hearing Examiner made the recommendation to the Council and another regulation indicated the Hearing Examiner made the final decision. The question regarding which regulation applied was posed to the City Attorney's office by the Hearing Examiner. Due to the case law that applied to Planned Unit Development (PUD), it was the City Attorney's opinion that the final decision should be made by the Council. He noted the Council had two proposed interim ordinances before them to resolve the conflict, one providing the authority for the final decision to the Hearing Examiner, appealable to the City Council, and a second ordinance that provided the authority for the final decision to the City Council.

Mr. Olbrechts explained there were several cases where the courts have uniformly said PUDs are considered rezones because the PUD reviewed in the case included a change in use or change in density. A brief was submitted today that indicated the cases involved changes in use; however, this was incorrect as one of the cases, Johnson v. Mt. Vernon was a change in density only. A brief was also submitted by the Talbot Group today that referenced another case that involved a change in density that triggered the concept that the issue was a rezone and subject to consideration by the Council. Mr. Olbrechts acknowledged there were arguments on both sides of this issue; the Master Builders Association's survey found that some jurisdictions consider PUD/PRDs to be a rezone and others do not. Communities such as Everett and Snohomish allow the Hearing Examiner to make decisions on plat applications but not on PUDs, because they consider them to be rezones. He summarized the reason for recommending the final decision be made by the City Council was because this was still an open issue, whether it applied to variations other than changes in use and changes in density. He noted there was a good chance, due to the history of this issue, that a court would find other types of variations such as setbacks are considered rezones and that the Council must make the final decision.

Councilmember Petso commented that although Mr. Olbrechts stated this was an open issue, he cited the case of Johnson v. Mt. Vernon indicating it was not an open issue, that a PRD involving a change in density was a rezone. Mr. Olbrechts clarified whether it would apply to issues other than change in use or density such as changes in setbacks was an open issue. He noted the focus of the Edmonds' PRD was a change in setbacks

that allowed a nominal change in density by allowing rounding up in density calculations and allowing for an arguable change in use for attached single family dwellings. If the Council chose to allow the City Council to make the final decision, he recommended taking out items that could be considered changes in use or density. He said applying the general rule applied by the courts over the past 50 years, it was likely the courts would rule that any variation to development standards under the PUD process would qualify as a rezone.

Councilmember Orvis verified if the Council opted to have the Hearing Examiner make the final decision, it was appealable to the City Council. Mr. Olbrechts agreed. Councilmember Orvis acknowledged a review by the Council would be the step before the courts.

Councilmember Dawson said if this was a rezone, if the Hearing Examiner had the authority to make the final decision, and even with appeal to the Council, the ordinance was unconstitutional. Mr. Olbrechts agreed, explaining it would be unconstitutional in the sense that the City's ordinance would be contrary to State law which requires the Council to make the final decision on legislative determinations such as rezones. Councilmember Dawson clarified it would be an unlawful delegation of authority.

Councilmember Dawson pointed out that stating in the ordinance that the City did not consider a PRD a rezone, as suggested by the Master Builders Association, would not have any effect on whether it was a rezone. She noted there were some changes that could be made to the PRD ordinance so that it was less of a rezone such as not allowing the rounding up that allowed additional density and not allowing duplexes. Mr. Olbrechts agreed, noting there would then not be a change in density or use. Councilmember Dawson commented it still "might not fly" but under existing case law, there was no way the ordinance would fly if duplexes were allowed in a PRD when duplexes were not otherwise allowed. Mr. Olbrechts said the argument could be made that an attached, common-wall single family residence was not a duplex or multifamily use, it was still single family residential and would not be considered a change in use. He noted multifamily was typically defined as more than one dwelling unit in one building. He acknowledged there was a great deal of gray area; providing the Council with the authority for final approval would avoid the risk that a court would find the City's PRD a rezone and void the review procedures.

Council President Earling recalled he requested comparables last week in other cities and the Master Builders Association developed a list of the surrounding communities. He questioned whether the City staff had prepared a comparison. Mr. Bowman responded staff had not gathered any specifics other than the information provided by the City Attorney and the information submitted by the Master Builders Association. He explained staff was in the process of reviewing regulations via Municipal Research Services Center (MRSC) and would discuss that information with the Planning Board during their review of the PRD regulations. He recommended the Council adopt the interim ordinance as proposed last week (Council having final authority) as it was an interim ordinance with a public hearing within 60 days, it would provide consistency in the processing of applications currently under review, and the Planning Board would be providing a recommendation. Council President Earling clarified staff had not developed the information regarding comparables.

Council President Earling recalled he requested further information regarding how PRDs may/may not affect property values. Mr. Bowman answered that information would take time to develop and would be provided to the Planning Board. He was confident that information could be gathered within the 60 day period prior to the public hearing.

Mr. Olbrechts cautioned that when considering other jurisdictions, particularly large charter jurisdictions such as Snohomish County and Seattle, they were not bound by the planning enabling statutes that require the City Council to make the final decision on a rezone.

Council President Earling asked whether staff had an opportunity to consider the question he raised with regard to issues regarding the Growth Management Act and zoning of 20,000 and 12,000 square foot lots. Mr. Bowman advised staff planned to present the Buildable Lands Report to the Council on August 27. The Central Puget Sound Growth Management Hearings Board has said the density in urbanized areas should be four dwelling units per acre. He noted that posed potential problems for Edmonds with regard to the RS12 and RS20 zones. The Growth Management Hearings Board stated that critical areas could be considered; therefore, in the RS20 zone where there are steep slopes and landslide hazard areas, a lower density may be appropriate. However, that zoning could be problematic in areas that did not have those features, particularly the RS12 zone.

Council President Earling clarified the 12,000 square foot issue may affect neighborhoods such as the Seaview area. Mr. Bowman agreed, noting the City had arguments that countered the Growth Management Hearings Board's determination because accessory dwelling units had been used to make provisions for affordable housing to allow the City to meet its housing projections.

Councilmember Wilson asked whether the predominant body of case law relating to these decisions predated 1990. Mr. Olbrechts answered yes, however, there were some cases in the 1990's also. Councilmember Wilson noted the cases that established precedence occurred in 1990 and did not consider the affect policies enacted by the State under GMA and direction to cities. Mr. Olbrechts explained there were some cases in 1990's that addressed the GMA and the courts still found a PUD/PRD was a rezone.

Councilmember Wilson recalled previous discussions indicated the courts did not give deference to GMA, thus their decisions were contrary to laws adopted by the State that require cities to implement policies to address growth in a management manner. Mr. Olbrechts agreed.

Using the rounding up of density as an example, Councilmember Wilson asked whether it would be considered a rezone if a city was implementing a Comprehensive Plan policy that indicated density could be 5-8 units per acre and that density could only be achievable if protection of environmentally sensitive areas, providing public benefit, etc. Mr. Olbrechts said that was guidance regarding development standards and whether it was a rezone would depend on the development regulations. Councilmember Wilson clarified a PRD could be used as a tool to implement the policies in the Comprehensive Plan and it would not be

considered a rezone. Mr. Olbrechts clarified it would be considered a rezone if the densities allowed in that zoning district were allowed to vary from what was allowed outside the PUD process.

Councilmember Wilson used downtown Seattle as an example, noting Seattle gave densities/bonuses to development in downtown business towers if they provided greater public benefit and amenities as a method of allowing them to achieve higher densities and/or building heights. Councilmember Wilson asked whether it would be considered a rezone if Edmonds' PRD ordinance were structured to allow ranges of densities to reach the upper limit of densities and the evaluation of whether a development complied with certain tests was done via a PRD ordinance. Mr. Olbrechts answered the courts had not addressed that issue. He noted there was clear direction from the courts that varying densities via the PUD/PRD process constituted a rezone.

Councilmember Wilson asked whether the Planning Board could evaluate procedures, standards and tests to use the PRD as a mechanism and the Hearing Examiner would have the final authority but there would be sufficient legislative guidance provided in the ordinance that it would not be considered a rezone. Mr. Olbrechts took Councilmember Wilson's comments to mean that he was suggesting more specific standards which did not resolve the delegation issue. He clarified the ultimate result was densities that differed from the surrounding properties, noting the courts considered these to be spot zones because they differed from the surrounding zones. Regardless of how specific the standards were, it would still be considered a rezone by the court.

Responding to Councilmember Wilson, Mr. Olbrechts explained accessory dwelling units were allowed anywhere in the city, thus there would not be one neighborhood with accessory structures and another neighborhood without. Conversely, a PUD/PRD was one neighborhood that was completely different.

Councilmember Wilson referred to Mr. Olbrechts' definition of multifamily as more than one unit in a building, noting that via the building code, there were methods of building attached structures that were considered separate and distinct structures when each had a fire rated wall. He noted most jurisdictions considered these attached single family units. Mr. Olbrechts agreed the building code was often used to clarify zoning terms; however, a building code would be limited assistance regarding uses when the issue was whether the use of property differed from neighboring uses. He summarized zoning was about regulating the impacts, exterior impacts for the most part, of development. On that basis, the court would likely find there was no difference whether the term common wall dwelling or duplex were used.

Councilmember Wilson remarked that duplexes shared a common wall, a wall that met the fire rating for a wall within a structure, whereas attached units built separately with attached exterior walls were independent, separate structures. Mr. Olbrechts pointed out multiple townhomes could be constructed in that manner but would not be considered the same as a single family residential neighborhood and would constitute a change in use. He noted the issue of whether this was considered multifamily just arose today and he wanted an opportunity to research that issue further.

Councilmember Plunkett referred to the existing PRD ordinance, noting the decision on a PRD was appealable to the City Council. Would that still occur if the Council did nothing tonight? Mr. Olbrechts commented that if the Council did nothing, the conflict in the Code would still exist. Councilmember Plunkett asked whether the constitutional issue could be resolved if the conflict in the code were addressed but an interim ordinance were not adopted. Mr. Olbrechts responded that if it was conceded that a constitutional problem existed, the only way to resolve it was to have the Council make the final decision. The other alternative was adopting an interim ordinance that provides the Hearing Examiner authority to make the final decision.

For Councilmember Plunkett, Mr. Olbrechts agreed that under the Master Builders Association's amendment, which leaves the PRD ordinance intact and allows the right of appeal to the City Council, citizens would have the right to appeal to the City Council.

Councilmember Petso referred to the Johnson case which states, the City argues if Johnson desires to develop lots under 13,500 square feet on acres presently zoned for 13,500 square feet, he in essence desires a rezone and the court agreed. Councilmember Petso clarified if the City's ordinance allowed a lot size under the size prescribed by the existing zoning, it was a rezone. Mr. Olbrechts agreed that was the City Attorney's opinion.

Councilmember Dawson pointed out the distinction between appeal to the City Council and the City Council making the final decision. Mr. Olbrechts agreed an appeal to the City Council would not resolve the constitutionality problem under the case law. Councilmember Dawson noted the appeal to the Council was a closed record review where no new testimony could be provided. If the Council had the authority to make the final decision, there were other benefits should the matter be appealed to the court. Mr. Olbrechts said if it was considered a rezone, approval of a PRD would be more difficult as there were more standards that applied because an applicant for a rezone had the burden of proving that, 1) there had been a substantial change in circumstances since the zoning for the area was adopted, 2) there is a substantial relationship between the need for the rezone and public health, safety and welfare. He noted there was some case law that indicated the Council's decision was given a great deal of deference in a rezone, particularly when the rezone was denied.

Councilmember Dawson commented whether the Council felt a PRD was a rezone was irrelevant as it was an issue for the court to decide. She noted case law indicates the courts have found a PUD or PRD to be a rezone. Mr. Olbrechts noted if the courts ultimately decided a PRD was not a rezone, the City's regulations would still be valid if the Council was authorized to make the final decision. There was nothing wrong with the Council making the final decision under either scenario. However, if the Council chose to provide the Hearing Examiner with the authority to make the final decision, the City's regulations would be invalid if the courts decide a PRD was a rezone.

Councilmember Dawson inquired whether there was any risk to having the Council make the final decision. Mr. Olbrechts said all the benefits associated with having a Hearing Examiner make a decision applied in this instance.

Councilmember Wilson inquired if there was case law indicating that density was established on a per acre basis, the policy basis under the GMA and the policy basis under which most cities adopt their Comprehensive Plan. He noted the Comprehensive Plan did not designate the per lot square footage. Mr. Olbrechts noted planners thought of density as number of units in a particular area, however, the courts look at it both ways.

Councilmember Wilson asked whether it would be considered a rezone under the court's definition if the City had regulations in place that allowed an individual to short plat their property and required dedication of right-of-way and lot sizes to be smaller to account for the dedication of right-of-way for the public's benefit. Mr. Olbrechts noted it would depend on how each jurisdiction defined lot size as that issue had not yet been resolved by a court decision. If a decision were contrary to lot size, it would be a violation of the Zoning Code.

Councilmember Wilson noted there were some things that could be accomplished via a variance process that could not be accomplished via a PRD process. Mr. Olbrechts agreed, noting the statutes specifically allowed that. Mr. Olbrechts stated the planning enabling statutes required the Council to make final decisions on rezones but allowed the Hearing Examiner to make decisions on variances, Board of Adjustment to make decisions on CUPs, etc. However, there was no language that allowed a Hearing Examiner to make a final decision on a rezone.

COUNCILMEMBER PETSO MOVED, SECONDED BY COUNCILMEMBER DAWSON, TO APPROVE ORDINANCE NO. 3416, ADOPTING A SIX MONTH INTERIM ORDINANCE AMENDING ECDC 20.35.080 IN ORDER TO CLARIFY THAT THE CITY COUNCIL, INSTEAD OF THE HEARING EXAMINER, SHALL MAKE THE FINAL DECISION ON PLANNED RESIDENTIAL DEVELOPMENT APPLICATIONS AND FIXING A TIME WHEN THE SAME SHALL BECOME EFFECTIVE.

Councilmember Dawson expressed her support for the proposed interim ordinance, noting this was the safest course of action and the path of most consistency was to adopt the proposed interim ordinance and make a change later if necessary once the issue had been considered further by the Planning Board.

Councilmember Orvis indicated he would vote against the motion, noting the most credible evidence for using the Hearing Examiner was the number of other cities that allowed the Hearing Examiner to make the final decision for PRDs. He noted that regardless of the decision made today, the Council was involved in the process although he acknowledged the Council had a different role if the Hearing Examiner were to make the final decision.

Councilmember Wilson explained his professional training and background made him disagree with the City Attorney and the courts' decisions. He agreed there were actions pending that required guidance in order to

allow those decisions to move forward. He noted that adopting this as an interim ordinance required the Council to also direct the Planning Board to study this further. There were benefits to PRDs and to allowing a professional Hearing Examiner to make the final decision. The role of the Council was to provide the policy basis and the foundation for laws; if the Council provided a strong policy basis, it should not matter who made the decision. He requested the Planning Board consider how regulations could be crafted to allow for a clean and direct process for all parties.

Council President Earling commented staff has put the Council in a nearly untenable position because of the pressure to reach a conclusion so as to make a decision on an issue before the Council at the next meeting. He recalled asking staff tonight how much of the work he requested had been done, noting those that did the best work were the Master Builders Association who created a matrix that showed what other cities were doing. He favored the concept of PRDs, commenting "they are a quality way to solve some problems in our community." He personally favored the Hearing Examiner making the ultimate decision because after observing several PRD discussions, it becomes a political issue for the Council to decide and therefore the Hearing Examiner was the forum in which such decisions should be made. Ultimately, however, because of the Council's fiduciary responsibility to the citizens and because it was clear that it may place the City in some jeopardy if the proposed interim ordinance were not adopted, he would support the motion.

Council President Earling pointed out that interim ordinances often became permanent ordinances and he did not necessarily want that to happen. With the insufficient information provided and the slight subtleties in the policies of the cities cited by the Master Builders Association, he supported a thorough review of this issue and intended to pursue it to ensure a fresh decision beyond the interim ordinance was made.

MOTION CARRIED (4-2), COUNCILMEMBERS ORVIS AND PLUNKETT OPPOSED.

Council President Earling asked whether the Planning Board was aware their review of the PRD ordinance needed to be on a fast track. Mr. Bowman explained the Planning Board had a work session scheduled on August 14 to review the issues and was seeking input from the public regarding the issues.

Following discussion regarding an appropriate date for the public hearing when most Councilmembers would be in attendance, Council President Earling advised a public hearing would be scheduled over the next few days.

4. MAYOR'S REPORT

Mayor Haakenson noted a public meeting was scheduled for Thursday, August 15 from 6:00 – 8:00 p.m. at Westgate Elementary to discuss the status of the 220th Street Improvement Project and to outline opportunities for public involvement in the project. He noted improvements on 220th were from 84th to 9th Avenue/100th and will include the addition of a center turn lane, bike lanes, and sidewalks to improve safety

for pedestrians, bicycles, and motorists. The one mile project will also include the installation of a signal at 220th and 84th Avenue West as well as stormwater improvements. The construction period is planned for 2003 through 2005. He noted it was a great opportunity for the residents along the 220th corridor to advise the City how they wanted the project to proceed.

Mayor Haakenson requested Council President Earling appoint a Councilmember to serve on the Budget Review Committee.

5. COUNCIL REPORTS

In response to Mayor Haakenson's request, Council President Earling asked that any Councilmember interested in participating on the Budget Review Committee contact him.

Council President Earling congratulated the Chamber of Commerce on the Taste of Edmonds this past weekend.

Council President Earling noted with the action taken by the King County Executive regarding his preference for the Hwy. 9 site, some Edmonds citizens may believe Councilmembers can become emotionally involved with the decision. He reminded the community that the potential remained for a land use issue related to the King County application. Although that may appear more remote after today's announcement, the Council must ensure they were able to adjudicate any future King County request fairly. He recalled the Council took a strong position in the resolution that was passed previously regarding the siting of Brightwater at Unocal that clearly outlined the City's legal basis.

With no further business, Mayor Haakenson adjourned the Council meeting to Committee meetings at 8:00 p.m.