



Council Study Session Minutes – September 13, 2010

At 8:13 p.m. Mayor Maxwell called the regularly scheduled Anacortes City Council study session of September 13, 2010 to order. Councilors Nick Petrish, Erica Pickett, Brad Adams, Bill Turner, Cynthia Richardson and Brian Geer were present. Kevin McKeown was excused. Planning Commissioners Laurie Gere, Bertis Rasco, Lin Folsom, Clay Leming, Stuart Janke, Larry Nelson and Marty Laumbattus were also present for this joint study session. Mayor Maxwell recognized members of the Board of Adjustment who were present in the audience: Ken Wilson, George Mehler and Charles (Bud) Bourbeau.

WCIA – Hearing Examiner Presentation

Planning Director Ryan Larsen introduced attorney Michael Walter of Keating, Bucklin & McCormack to present the concept of using a hearing examiner for all the city's quasi-judicial land use matters. Mr. Larsen said Mr. Walter also represents the city's insurance carrier, Washington Cities Insurance Authority (WCIA), which has suggested that the City move towards use of a hearing examiner. He said that after Mr. Walter's PowerPoint presentation councilmembers would be welcome to ask questions.

Mr. Walter explained that WCIA provides cities with insurance and litigation defense. His firm works for WCIA to represent cities in lawsuits against them. He said his presentation was intended to encourage Anacortes to use a hearing examiner for land use matters but that neither he nor his firm are hearing examiners and they have no vested interest. However, he said he is biased in favor of the hearing examiner system because he believes in its merits, efficiency and cost effectiveness and added that 80-90% of the cities in the state use the system.

Mr. Walter described a hearing examiner as someone specialized in hearing and deciding land use matters. The examiner is appointed by the City to serve hear and decide quasi-judicial matters and is bound by the same rules of procedure and standards of conduct that apply to judges. Mr. Walter said state law recognizes hearing examiners as a good and viable way to make land use decisions. They are typically lawyers but don't have to be; they may be other experts in land use and permitting issues. Mr. Walter said a hearing examiner is better able than elected officials to ensure just and unbiased decisions. He said the constraints on all land use decision makers are the same: they are bound by procedural rules and substantive rules. He suggested that historically when elected officials or citizen decision makers make the decisions, mistakes happen in procedural rules and these can lead to litigation and invalidated decisions whereas hearing examiners are experts in following procedural rules. Regarding substantive rules, he said the RCW and city municipal code define what evidence can and must be considered in making a decision. He said with citizen decision makers mistakes may be made and litigation follows, decisions are overturned, and/or the public loses confidence in the body making the decision.

Mr. Walter then addressed the scope of a hearing examiner's authority and the effect of hearing examiner decisions. According to state law hearing examiners can hear and decide a broad array of permit and land use matters and can also rule on administrative types of permits and make code interpretations. Cities decide how many of these functions the hearing examiner will perform. Mr. Walter said the only two things a hearing examiner cannot decide are final plats and area-wide rezones or zoning decisions; those two items as well as policy and planning issues and contract issues all remain the City Council's domain. Regarding the effect of a hearing examiner's decisions, again, said Mr. Walter, state law allows cities to determine that. The three main options are 1) the decision can be a recommendation to the City Council, 2) the decision can be a final administrative decision that can be appealed to City Council, or 3) the decision can be a final binding decision in lieu of action by City Council. Mr. Walter said he urges cities to use the third option so that anyone who wants to appeal a hearing examiner decision has to go to court. Mr. Walter said to use a hearing effectively a city should: adopt the hearing examiner system by ordinance; empower the examiner to make all land use decisions allowed by law; specify which kinds of decisions will be final and binding and which may be only recommendations; require all decisions to be issued in writing within ten days and supported by findings of fact and conclusions of law; and educate the public about the benefits of using a hearing examiner.

Mr. Walter said there are very few if any disadvantages to using a hearing examiner. He then gave a list of advantages. 1) Examiners are not subject to political influence or pressure like elected or appointed officials. 2) They are professional, trained experts familiar with the law and procedures, hence make more legally defensible decisions. Their decisions are far less likely to be contested and when they are contested, cities typically prevail. 3) Examiners are experienced in land use matters; most work for multiple jurisdictions and can offer examples of how other jurisdictions have handled similar issues and how code can be modified to provide better law. 4) Examiners are technically adept. Many have planning degrees or have worked in the planning field and can understand technical details. 5) Examiners are cost effective. Administrative appeals are typically decreased which offsets the fees paid to the examiner. 6) Examiners get through contested hearings faster and more efficiently because they can organize and control meetings better. 7) Examiners offer a substantial reduction in judicial reversal of land use decisions. 8) Personal liability for elected officials is avoided. 9) The examiner instills public confidence and the public has exact same rights to view and participate in hearings that it would have before City Council. 10) Examiners ensure constitutional protection of due process. 11) Examiners ensure decisions are issued timely. 12) Examiners are skilled in understanding and interpreting the law and the city code and in helping cities resolve any conflicts between the two. 13) Examiners satisfy the Regulatory Reform Act to separate quasi-judicial functions from legislative functions. 14) Examiners free up City Council and Planning Commission for the more important tasks of visioning and setting land use policy. 15) By removing councilmembers from decision making, examiners allow them to discuss issues with citizens without violating the appearance of fairness doctrine. In closing, Mr. Walter reiterated that to efficiently use a hearing examiner a city should talk to other cities who use them, find out what kind of fee arrangements they have and how the fees are paid or recovered from applicants, use the examiner for all final land use decisions, share examiner services with neighboring cities to save costs, and adopt the hearing examiner system by ordinance.

Mrs. Richardson asked why a hearing examiner would be used to rule on building permits since engineering and building code knowledge is a separate set of knowledge from land use code. Mr. Walter agreed building permits are the least appropriate items for a hearing examiner to decide but added that a hearing examiner may usefully hear *appeals* of building permits. Mr. Laumbattus asked what sort of things can go wrong when a hearing examiner is used. Mr. Walter said the overwhelming number of land use lawsuits spring from decisions made by elected officials, not hearing examiners. Mr. Petrish disputed that a hearing examiner would not be subject to political pressure and said he is not in favor of the system which seems more concerned with WCIA's bottom line than with good government. Mr. Walter responded that a hearing examiner is not subject to re-election pressure. Ms. Folsom asked if any cities have instituted a hearing examiner system and then gone back. Mr. Walter couldn't think of any. Ms. Folsom asked how many cities of 20,000 or less use examiners. Mr. Walter said he didn't know statewide but said most of the cities he works for are smaller than 20,000 and that the smallest ones get the most benefit. Mr. Geer asked if a hearing examiner can condition a project. Mr. Walter said yes. Mr. Geer asked to what extent. Mr. Walter said within the bounds of state law and city code. Mr. Turner agreed it would be safer to use a hearing examiner but warned that city code has been written assuming nuanced decision making by the City Council so adopting a hearing examiner might require reviewing the entire code. Mr. Bourbeau and Mr. Rasco noted that Mr. Walter was fully in support of the hearing examiner system and asked that someone present the other side of the issue. Mrs. Gere asked if applicants are more likely to use attorneys before a hearing examiner. Mr. Walter said no, it might even be less likely because citizens and developers both trust the hearing examiner to be a lawyer. City Attorney Brad Furlong said in his experience unrepresented parties are the norm before a hearing examiner. Mrs. Richardson said she could see the advantage to having a professional, trained expert making land use decisions but contrasted that one person making decisions with Council decisions that bring a breadth of experience and points of view from different councilmembers to arrive at well balanced decisions. Mr. Walter agreed with Mrs. Richardson that is the appropriate approach to legislative work and policy development but said it's not appropriate for a contested land use matter. He said a city council and a hearing examiner are subject to the same legal constraints in a given matter and they should arrive at the same result; he argued that a sole Hearing Examiner is more likely to do so.

There being no further business, at approximately 9:21 p.m. Mayor Maxwell adjourned the regularly scheduled study session of September 13, 2010.