



Special Council Meeting
Special Planning Commission
COMMUNITY DEVELOPMENT COMMITTEE MEETING MINUTES

4:00 PM July 22, 2020
Virtual and 1st Floor Conference Room, City Hall

ROLL CALL

Council: Mayor Scott Korthuis, Kyle Strengholt, Mark Wohlrab, Brent Lenssen, Gary Bode

Planning Commission: Tim Faber, Diane Veltkamp, Gerald Veltkamp, Nikki Turner, Bryan Korthuis

Staff: Mike Martin, Heidi Gudde, Korene Samec, City Attorney Bob Carmichael

DISCUSSION ITEMS

Initiative to Utilize a Hearing Examiner (HE)

BL introduced the topic. City attorney to present an amendment to LMC to add a hearing examiner to the city's application review. Staff and the attorney's office has put some time into this initiative. Reviewed the options that the Council has regarding the proposal. Introduced Bob Carmichael.

(Summary of Bob Carmichael's presentation.)

BC began by clarifying that the purpose of the meeting was not so much to make a presentation but to provide context on the issue and take questions from the Council and staff members. Discussion on this topic of a hearing examiner began in the City of Lynden a couple years ago. Bob described his wide variety of experience in working with an HE. Also, local familiarity as he has worked with nearly every HE in Whatcom and Skagit counties.

Initial draft of the ordinance is lengthy, but focus should be on Section 1 which outlines what the HE would do for Lynden and why the City would employ an HE. The following pages of the ordinance are implementation of those items. BC noted that the ordinance is currently draft and belongs to the Council. It should be reviewed with the understanding that it can be shaped to be a better fit for the City as the Council sees fit.

Section 1 of the ordinance is divided into two parts. The first, section 040 (B), shows what the HE would decide on and make a final decision. These decisions are not appealable to the Council or any other group in the City. Generally, these are items like appeals, decisions about dangerous dogs, etc.

The second part, subsection C, lists items that the HE would hear and make a decision that is appealable to the City Council. These are more substantive. These decisions go to the Council if the HE's decision is appealed. This category includes conditional use permits, site specific rezones, decisions by the Public Works Director, Shoreline Decisions, to name a few.

The amendment aims to shift some quasi-judicial items from the Planning Commission to the HE. However, legislative ordinances (policy decisions) would be exclusively heard by the Planning Commission and then the City Council. These include code amendments, Comp plan amendments, long range planning decisions – the policies that shape the City's growth. Additionally, quasi-judicial items such as subdivisions such as long plats and PRDs still would remain with the Planning Commission.

The purpose behind the initiative is to address some of the recent changes we have seen in Lynden. This includes more frequent appeals and more involvement of attorneys in land use actions such as those filed in 2015, 2017 and another that is currently pending. These appeals are time consuming and usually related to details of a permit rather than the growth policies of the City. Usually, in other jurisdictions, 9 times out of 10 these detailed appeals are reviewed and decided on by a HE. The current process typically requires the use of multiple attorneys which makes the process inefficient and expensive for the City.

The City's decisions about approval generally occur when the code and the associated criteria are written. Approvals hinge on these points while appeals generally hinge on permit details - technical legal issues.

In BC's opinion communities are better off leaving technical issue to appointed individuals who have been trained and educated to apply the code in an objective manor – to do so consistently over time and have experience in running a hearing including sustaining or overruling objections. This greatly increases the efficiency, effectiveness, and consistency in the implementation of the City's code.

BC noted to the group that the appointed HE is answerable to the City. If an appointed HE is not a good fit for the City then another HE could be appointed. The ordinance is drafted so that the mayor appoints HE but it could also be written so that the Council chooses the HE. It is done in multiple ways.

Because an HE reviews the application against criteria of the City's code and details the decision, the decisions of the HE are usually final. BC noted that it is very unusual to see a HE's decision overturned. This is not because the officials aren't involved but because the HE almost always makes the right decision based on legal criteria. Some issues are more subjective than others but most of the time the HE can deduce the right decision based on the code's set criteria – not opinion. The Council is not losing control in this way as they are still involved in the process. Decisions that are appealable to the Council can be overturned by the Council but must be based on criteria. "What I want" or "what most people want" is not the criteria for approval or overturning an item. It is based on criteria because the hearing body is acting as a "quasi-judge". Approval is based on an application meeting the criteria. The code which sets these criteria is always under the jurisdiction of the Council.

An appeal beyond the Council decision is also available. Land Use Petition Act (LUPA) would allow an appeal to go to Superior Court. Following the criteria of the code prevents challenges at this level. Using a trained professional who is experienced in applying the facts to the law, decreases the chances of having to defend a LUPA in court. Although the Planning Commission is a great group they are not trained in these fields. When decisions are challenged the City then needs to hire an attorney to defend the Planning Commission.

BC concluded by stating that he wanted to the Council and PC to understand his position and support for the HE.

(Discussion)

RDV asked for BC's opinion regarding statements that the HE may be taking away authority of the Council. BC reiterated that the Council is ultimately responsible for the criteria set in code – by which permits are reviewed. This authority stays with the Council. The Council also has the ability to maintain review of items if the applicable quasi-judicial items are appealed and routed to the Council after an HE decision.

The Council will not hear items that are successfully decided (without appeal) by the HE.

GB asked about the choosing of the HE. The amendment is drafted to show that the appointment of the HE is done by the Mayor subject to the Council's approval. However, this could be amended to have the HE selected by the Council.

BL asked if the HE would work under a contract. And, if by contract, could it be cancelled at anytime. BC responded that the terms of the contract have not been written. If the Council wanted the contract to be approved and signed by Council the contract could be written that way. BC said you could put any termination provision in the contract then find someone who is willing to sign that contract.

BC noted that the HE will be a very part time position. There will not be many Lynden applications that he/she will hear. The City will be finding someone who may be the HE for a number of other jurisdictions.

BL asked about the number of hours this HE would work. BC responded that he had not talked with Heidi about that and didn't have an answer to that questions. BL asked if the City, at one time, had \$35,000 set aside for an HE. The Mayor and HG noted this amount was \$20,000. HG noted that the funds set aside were partly intended to establish the HE position and not necessary a running expense. Research into the issue showed that jurisdictions used a variety of contracts to retain a HE. Some are on retainer and some are paid per item heard. The City has had appeals in 2015, 2017, and now a 2020 appeal. Typically about 2-3 Conditional Use Permits per year, about 1 site specific rezone per year. Many decisions would never or rarely be appealed. HG noted that some attending the in the meeting, such as Kyle Strengholt, had been through an appeal as a Planning Commissioner (2015) but also as a City Council member (2017).

Kyle agreed that the HE is a good thing for the City. That the appeals that came forward can be a liability to the City and a big time ask of volunteers. KS expressed support for a process that included the Mayor hiring and council approving the HE position. And, then the council able to dismiss. However, noted that this process may not be fair to the Mayor.

BL agreed with KS. Also, added that the Planning Commission may play a role in vetting the HE position. That the citizenry should participate in the hiring and firing.

DVK agreed that the HE should see appeals. She has experienced a number of appeal hearings herself. She also wanted to hear from other Planning Commissioners.

TF expressed support for HE to hear appeals but thought that Shoreline Substantial Development (SSD) permits and Site Specific Rezones should stay with the Planning Commission. But, issues with more technical aspects such as appeals and potentially Conditional Use permits should go to the HE. In his opinion there is value in having the SSDs and site specific rezones stay with the Planning Commission.

KS asked if appeals to a Planning Commission items could go to the HE afterwards. BC noted that the Council has a lot of latitude in creating the process but they should be wary of adding too many steps to the process. An appeal of the Planning Commission's recommendation could go to the HE but then, we'd expect, it would also go to Council. This would be a lot of steps.

BC noted that Shoreline Permits in Lynden, to date, have not been contentious or complicated however, by nature, shoreline permits are very technical issues. The group will recall the review of the shoreline master plan with the oversight by the Department of Ecology.

BC discussed Site Specific Rezones. This could reasonably go with the HE but a strong case for this staying with the Planning Commission could be made as zoning has a strong impact on the shape of the community.

BC encouraged the group to leave Shoreline permits and Conditional Use permits with the HE. Almost every jurisdiction that Bob knows has a HE reviewing these.

SK noted that the “low hanging fruit” could be an initial step of adding some applications at first and then adding other later – once the City is more familiar with the process.

BL leaning toward having an HE take on appeals but recommended that we review code sections in Chapter 19 before releasing additional processes to the HE. This sort of review was done in the past with a number of individuals participating. He believes this would be fair to do before additional applications go to the review of the HE. Noted that the group consensus seemed to be that appeals and some others would go to the HE.

Next steps will include the amendment would go to the Planning Commission and they could finalize their recommendation there. HG confirmed that the amendment would be put into an ordinance and brought forward through the hearing process.

HG noted that another important change is that the HE could take over the role of the Board of Adjustment and the Board of Appeals. Additionally, the petition process that exists in the code is another area that should be cleaned up as soon as possible. BL confirmed this was his understanding as well.

DVK confirmed support for HE to see appeals, petitions and replace the boards noted previously. Asked that the code be reviewed step by step before additional applications are reviewed by the HE. Believed that adding additional reviews later would be easier than trying to remove them from the HE’s review.

BC confirmed that a phase approach to adding applications to the HE review is possible. BC noted that it is not uncommon for an appeal to move along with another land use application. Asked if the group preferred that the appeal go to the HE and the other applications go to the Planning Commission or do the applications stay together and go to the Planning Commission.

DVK said that issues related to SEPA have not come to the Planning Commission in the past and rely on staff to make these determinations. Do the appeals of SEPA decisions need to be resolved before coming to the Planning Commission? Or, do the application(s) and the appeal stay together. BC noted that keeping them together is more efficient.

Final conclusions: Staff and BC's office will work on a redline that will amend the draft so that SSD's, CUP's and site-specific rezones remain with the Planning Commission for now. The appeals and petitions that are currently drafted to go to the HE remain as proposed. The redline will also come forward with a solution regarding the separation or combining of appeals with other land use applications.

Special meeting of the Planning Commission portion closed.

Downtown Business Association (DBA) Sign Proposal

BL raised the issue of a recent sign proposal brought forward by the Downtown Business Association (DBA) for the new planter at the northeast corner of Front and 7th Street. As there is no formal process for DBA signs on City property the CDC discussed the proposal. GB and Gary Vis (Chamber) expressed support for the sign. Mock-up of the sign in the new planter was displayed. The group discussed whether or not the sign should coordinate with other entrance signs in the City – such as those by Front and the Guide Meridian – or the Wayfinding program that was initiated by the County. The CDC concluded that the DBA could establish their own unique branding identity. And, that the sign and the location were agreeable and could be installed as long as it avoided any underground utilities.

Mayor Scott Korthuis adjourned the Special meeting of the City Council at 5:18pm.

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4:00 PM July 22, 2020

1st Floor Conference Room, City Hall

Heidi Gudde, Planning Director

Scott Korthuis, Mayor