

City of Creswell
Council Minutes
January 23, 2006

Mayor Petitti called the Creswell City Council meeting to order and the pledge of allegiance was given.

Council Present:

Tim Demanett	Ron Hanson
Nathan Marple	Bill McCoy
Ron Petitti	Bob Millam

Council Absent:

Cathy Morgan

Staff Present:

Mark Shrives	City Administrator
Layli Nichols	Finance Director/ Recorder
Roy Sprout	Public Works Director
Megan Banks	City Planner
Gary Darnell	Lane Council of Governments
Carrie Connelly	City Attorney

Press: 2

Audience: 17

Mayor Petitti said there is a sign up sheet for anyone wishing to give testimony. Mayor Petitti polled the Council for ex parte contacts or conflict of interest. Mr. Petitti declared he had an ex parte contact. Mr. Petitti polled the council for any prejudice or pre judgment of the facts relating to the Fairways development proposal, there being no declarations he announced he would be turning the meeting over to Mayor Pro-Tem, Ron Hanson.

Mr. Hanson asked if anyone in the audience would like to challenge the impartiality of any of the elected officials, none were received. Mr. Hanson opened the public hearing on the Planning Commission's decision on the Fairways Planned Unit Development and Subdivision Plat, case numbers PUD 2005-01 and SUB 2005-01. In order to move expediently through the issues, he would like to poll the audience to see if three minutes would be acceptable for testimony. A request was made and granted for five minutes per person, with no limit for legal counsel and technical staff. He explained testimony would be received from both sides, then Council would convene the Executive Session to consult with legal counsel, then the regular council meeting would reconvene to make a final decision.

Gary Darnell of Lane Council of Governments said there are two applications on appeal, and said it would normally require two public hearings; he would like to consolidate the applications in order to receive all of the information at once. Mr. Darnell said the Planning Commission held hearings on the Subdivision and Planned Unit Development on August 4, 2005 and September 29, 2005 and approved the applications on October 27, 2005. Subsequently findings of fact were signed on November 17, 2005 after which an appeal was filed.

The proposed development is surrounded by the Emerald Valley Golf Course and existing residential homes. A course hazard (pond) lies to the east of the proposed development. Access to the property is off Dale Kuni Road via Emerald Valley Drive, giving way to the proposed Emerald Valley Loop. The first 300' of road would be 24' in width and would allow two-way traffic to flow; thereafter Emerald Valley Loop would be reduced to 20' in

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width and would allow single direction traffic. There would be a 6" rolled curb and 5' wide sidewalk bordering the street. The development would be serviced by the municipal water system and sewer service through the Emerald Valley Wastewater Treatment Facility. The property is currently owned by McDougal Bros. Investments. The development would be serviced by an 8" line constructed to city standards. Storm water would be treated through a private system that directs most of the water easterly to an existing irrigation pond. This system would be designed to existing city standards to be able to handle a ten year 24 hr storm event. Mr. Darnell then referred to the applicable sections of the Development Code. In terms of the development the relevant standards must be met prior to applying for a building permit. Staff reviewed the applications and found them complete and compliant with federal, state and local laws. The minimum acreage for a PUD is three acres; the proposed development is 4.3 acres. 54% of the area would remain undeveloped meeting the open space requirement. Tree standards would be met, solar orientation standards must be met, the proposal was found consistent with the Comprehensive Land Use Plan, the proposed development must integrate into the surroundings, and a traffic impact study must be completed. This proposal replaces the 60 to 80 units originally proposed with 19 units.

City Attorney Carrie Connelly noted only the issues raised in the appeal may be addressed by council this evening.

Liam Sherlock of 777 High Street, Eugene 97401, attorney for Joni Bezates, Carl Swenson and other concerned homeowners, addressed the council and expressed concern by an email received from the applicant's attorney this afternoon, which raised the issue of what appeal was filed in this action in relation to the decision made by the Planning Commission on November 17th. He stated the singular word is important because it implies one decision was made not more than one. He said if there were two decisions made, then they should have filed two appeals. He feels effectively two appeals were filed, as they are both listed in the appeal document. Mr. Sherlock said if the council wants to determine whether or not to allow the appeal to stand as written, please consider allowing the Planning Commission to make a decision on each of the applications again, then re-notice and they would file appeal again individually and we would be back here again in a month or so.

Mr. Sherlock handed out a statement of mandatory duties and legal principles governing the City Council decision on the proposed Fairways at Emerald Valley PUD and Subdivision applications. It is his opinion the PUD is not legal according to the current Development Code. Had the Magnolia PUD been appealed he feels it would not have been constructed, especially if the appeal had gone to the Land Use Board of Appeals (LUBA). The reason for his opinion is the resort commercial overlay zone in the area. He said there is no allowance for residential housing in this overlay zone. The stated purpose of the zone is says regular residential construction would not be permitted unless it supports the recreational use directly, which he interprets as time-share. He noted section 2.5.0 of the Development Code says if there is a section more restrictive than another the more restrictive rule shall prevail. The overlay zone is the more restrictive use. Mr. Sherlock said there is a discrepancy in the code; the floodplain overlay zone defines how developments within it should be handled and Section 14.6.14 says No land subject to slippage or inundation shall be developed and fill equals development, therefore this property could not have fill placed on it to allow construction of homes and as a result the code is in conflict with itself. He feels if this is appealed to LUBA, the appellant would prevail. He noted the job of the Council is to adjudicate not legislate, which he feels the applicant is asking the Council to do.

Ron Hanson asked Bob Millam, who arrived late, if he had any ex parte contacts, conflicts or prejudice regarding the issue before the council. Mr. Millam replied he had no conflict, ex parte contact, or pre prejudice on the issue.

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Joni Bezates, of 80 Magnolia Drive, addressed the Council to discuss her opposition to the applications for development. She said the applicant submitted a map showing development would occur in a zone X and noted her adjacent property is in a zone AE. She presented several pictures in front of her home after rainwater, the most recent of which was January 18, 2006. The pictures showed the drive by her house and feels the problem would be augmented by construction of the proposed road. Another picture showed rainwater collecting to the north of her home. She feels the proposed development would increase the flood hazard to the existing homes. Mrs. Bezates said she spoke to the Division of State Lands, the Army Corps of Engineers (who sent her a letter), Lane County Land Management, and FEMA, who all agree that the FEMA maps in our area are outdated and should be updated before any further development occurs.

Mrs. Bezates spoke to Denise Atkinson at FEMA, who agreed the data in Creswell is outdated and with all the new data gathered, the city should file for a letter of map revision. She met with County Commissioner Faye Stewart, who expressed interest in updating the maps because the adjacent land that would flood would be county property. She stated the City of Florence has not regulated their flood plains enough and is now in fear of being sued by the property owners.

Gunnar Schlieder, Geotechnical consultant for Joni Bezates, said the crux of his argument is what Council is being asked to do is to approve a development the applicant feels is on the fringe of the floodway, and he feels it is in the floodway. There is the regulatory floodway which we are forced to deal with, with FEMA. Then there is the real floodway. Everything in this development is engineered in a manner where there is no room for error. It is his opinion there are errors on the FEMA map, and if the map is wrong, the City should not be using it. He said FEMA only looks at cross-sections, they do not tell you how water flows through the cross-section. If the assumption is made that everything always flows downhill, then there is no problem, but water in this area flows upstream and all of the neighbors are going to be under water. He did not purport to know all of the answers, but suggested there have been enough questions raised to warrant additional review of the project. He said he is not sure but what the existing homes would flood already, and the proposed development would aggravate the issue. He said with the recent topographic data from the Army Corps of Engineers, the City should look at updating the flood mapping in the area before allowing further development.

City Administrator Mark Shrives said he received letters today in opposition of the project, and handed out a letter from Ron and Sharon Stirtz, a letter from Carl Sorenson and an elevation certificate from Carl Sorenson as well as the applicant's hearing memorandum to the Council. Tim Demanett requested a moment to review the materials distributed.

Bill Kloos, 375 w 4th Suite 204, Eugene, addressed the council as attorney for the applicant. He said he has a jurisdictional statement, then the merits of the appeal.

He feels that the council needs to make a lawful determination and that would be to apply the existing code. The appellants have made great weather about the notice given, not the code. An action may be appealed within 12 days after the Planning Commission signs the final order. It is his opinion that two decisions were made by the Planning Commission and therefore two applications for appeal should have been filed. He explained that when only one appeal was received by the City, Mr. Shrives called the appellant and noted there may be an issue with the appeal application, stating another appeal may need to be filed. As a result the appellant filed a second appeal. He suggested denying the appeal as improperly filed. It is his opinion the Council has three choices, consider one appeal has been filed, two appeals have been filed, or no appeals have been filed.

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Mr. Kloos said the major issue to the opponents is a residential development obstructing their view. The appellants are currently enjoying a use they are now saying is illegal. If a use is allowed in the resort commercial sub zone, then it is allowed in the commercial base zone. Mr. Kloos said purpose statements are introductory; they are not standards or criteria. He said you can find purpose statements that support or oppose almost anything, but when you approve a subdivision you must look only at the code, not the plan. Mr. Kloos said in regard to the zoning issues, the Planning Commission, as did the developer, make the determination that residential development is allowed in the resort commercial sub zone and referred to section 13.2.0.B of the Creswell Development Code.

Using the appellant's application for appeal as a guideline, Mr. Kloos addressed what he considers the major issues in the appeal. 1) Adequacy of the access loop road being constructed one foot below base flood elevation. He said city staff and the Fire Marshall are accepting of the elevation of road construction. 2) Outline in the Comprehensive Plan which says there is to be a conditional use process when constructing in a flood hazard area. He says process is process, it does not say a Conditional Use Permit is required. The applicant is complying with the flood hazard standards in the context of the PUD and the Subdivision and that is sufficient. 3) Compliance with flood hazard standards. Planning Commission determined the proposed development meets the flood hazard standards of the City. The key issue is there is a difference between placing something in the flood hazard area that has no impact, and placing something in the flood hazard that has some impact, but is still within the standards of the flood hazard ordinance. He feels the proposed development is within the standards. 4) Request by the opponents to not apply the flood hazard portion of the code. The FEMA maps adopted by the code are the most recent maps, and the city is obligated to use them when reviewing applications within the zone.

Mr. Kloos noted the development was like its surroundings, provided adequate access for emergency vehicles, and is able to meet the solar requirements. If you agree with the opponents, you could never allow one shovel of fill to be placed in a flood zone. He feels there are whole sections of the code premised on the assumption some fill is going to be placed in a flood hazard area.

Shane Hughes of EGR & Associates, 2535 B Prairie Road, Eugene, engineer for the applicant, addressed the Council and requested to keep the record open for a period of seven days in order to allow appropriate response time to newly submitted data.

He said there is the regulatory floodway and then there is where the water goes. The information provided by FEMA is what every city uses as a guideline for floodplain administration. He distributed several items which were previously included in the record, but felt it would be useful. Mr. Hughes explained the definition of a flood zone is not where the water goes. If you look at item 10 of his handout, about the middle of the page you see a zone x. If you look at the cross section marked #7 you will notice that to the west, Cloverdale Road is acting as a dam. If you look at #10 again, you would see anything that would be underwater during a flood in the grey area. If you look at #8 you will notice the red and green shaded areas. You see the property to the south where there is actually site-specific topography. It is higher in elevation than the base flood, which is different than what is mapped. Those existing homes are built in zone AE, and are in a flood zone.

If you read carefully the army corps of engineer letter, it states that development may occur in the 100-year flood zone. 1995 was a 25-year flood, and 1964 was at best a 50-year flood. He handed out information regarding the elevation at cross section Z at each of these events. It lists the depth and flow rate (cfs). He stated that there is nothing wrong with the FEMA information for this area. If he believed the FIS study was incorrect, he would have engineered this project to more stringent standards.

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Dennis Grice of 420 Magnolia Drive addressed the Council and said the golfers do not care if there are houses on the course, if they did, there would not be courses in Sun River, Palm Springs, etc. People on the north end of Magnolia do not particularly care if there is new development.

Liam Sherlock addressed the council again stating the map produced by EGR and Associates shows the green shaded area as the floodway, he contends the floodway is truly the blue lines depicted on the map. He feels the map produced by EGR and Associates demonstrates the FEMA maps are incorrect. He would like the City of Creswell to hop on board and request the flood map be updated. He said the proposed road would create a causeway, or reservoir between the two developments increasing the flood hazard. He stated that the decision should be based on the code, and when there are conflicts within the code the more stringent rule should apply.

Mr. Sherlock said there is no dispute that an appeal was filed. He stated there is no prejudice they treated this as the city staff treated the applications, as a consolidated issue. On general commercial vs. resort commercial, Mr. Kloos indicated the interpretation should be allowed to include residential uses and the city does not have to adhere to the purpose statement. Mr. Sherlock said ORS 197.829 (1) says that you do. There is no caveat in the code that says you do not have to adhere to the purpose statement. There is no evidence that the development in question is in conformance with the purpose statement in the resort commercial overlay zone. He said the proposed development allows emergency ingress-egress in any direction, ignoring the directional flow of traffic which he feels does not preserve the health and safety of the affected residents.

Gunnar Schlieder, Geotechnical consultant for Joni Bezates, referred to the Army Corps of Engineers letter and said the Corps has new geological data showing the need for a flood insurance study in the area. He and Mrs. Bezates met with these engineers at her residence on November 17, 2005, and said the engineers had no argument for what he proposes are the flood issues in that area. He proposes to have the flood maps updated for the area before allowing new development.

Mr. Kloos said there is not an absolute right to keep the record open for a period of seven days but suggested the appellant has submitted new technical information and EGR and Associates engineer, Shane Hughes would like the seven days to review the data and submit rebuttal.

There being no further testimony received, Mayor Pro-Tem Ron Hanson closed the public hearing.

Ron Hanson asked for a motion to grant or deny the request for a one-week review period, and to keep the record open during that seven-day period. Tim Demanett so moved, Bill McCoy seconded to allow the record to remain open for a seven-day period from today or January 31, 2006 for the applicant and seven days following January 31, 2006 for the opponents, in order to provide rebuttal regarding the new technical evidence submitted. Voted on and unanimously carried.

Mayor Pro-Tem Ron Hanson closed the special scheduled council meeting and called for a two-minute recess before entering into executive session per ORS 192.660(2)(f) and ORS 192.660(2)(h), to consult with legal council.

Mayor Pro-Tem Ron Hanson closed the executive session and reconvened the special scheduled Council Meeting.

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The issue before the Council is whether two appeals were filed as defined by Creswell Development Code, and in a timely manner. Bill McCoy moved Tim Demanett seconded to accept that two appeals were timely filed. Voted on and carried unanimously.

Ron Hanson said there has been a two-week postponement on taking any formal action on the appeal, and asked if staff would have enough time to review the information before the next regular council meeting in February, and staff indicated it was sufficient.

Gary Darnell asked for council to authorize staff to accept input from the applicant in preparing the draft findings. Council gave consensus.

There being no further business to come before the Council, Mayor Pro-Tem Hanson adjourned the special Scheduled Council Meeting.

Ron Hanson, Mayor Pro-Tem

Layli Nichols, City Recorder