

CITY OF ROCKAWAY BEACH

SPECIAL PLANNING COMMISSION MEETING

JANUARY 26, 2016

CALL TO ORDER President Rae Owens called the meeting to order at 6:02 p.m. There were thirty-five (35) guests present.

ROLL CALL Present: Planning Commission President Rae Owens, Commissioners Greg Baumgart, Penny Cheek, Lynda Holm, Janet McIntire, Pat Olson and Charles Sheckler. Also present; City Planner Ryan Crater.

CONSENT CALENDAR Cheek made a motion, seconded by Baumgart, to approve the minutes of the January 26, 2016, regular Planning Commission meeting as written: Cheek, Baumgart, Owens, Holm, McIntire, Olson and Sheckler voted in favor; motion carried.

CITIZEN INPUT NON-AGENDA ITEMS None.

CONTINUANCE OF APPEAL AAD#15-04 President Owens stated this was a continuance of the public hearing. opened at the Planning Commission's special meeting of January 12, 2016. He said the appellant, Tai Dang, was requesting a review and reversal of a decision/interpretation of the former City Planner regarding a letter sent to Oregon State Parks and Recreation reversing the City's decision that Dang's Ocean Shore Permit Application was consistent with the City's comprehensive plan and zoning ordinance. He read the requirements of testimony and procedures for the hearing giving everyone 5 minutes for testimony. Crater pointed out there was nothing more other than the memorandum of law.

Tai Dang stated in the last 10 years he had invested in Rockaway Beach. He stated he cared about the City and he had created jobs in Rockaway Beach. He said he wanted to share the state laws and City ordinances with the Planning Commission and how they could move forward with this. Dang stated he was using local attorney and geologic/hazard consultant to help explain the situation and make it clear to all. He stated he wanted his attorney, Michael Kittell, to explain everything to the Planning Commission and have Sabrina Pearson give testimony because she was the City Planner who gave him permission to build.

Michael Kittell presented his power point and distributed it to the Planning Commission. He stated he was present on behalf of the appellant and this was a continuance of the hearing he had requested. He presented a letter from an affected property to the south that he stated was not in the record. He noted the presence of Planning Commissioner Greg Baumgart and asked that he recuse himself under the Rockaway Beach Zoning Ordinance Section 11.060(a). Baumgart commented that he didn't consider him and Kittell as being adversarial, but he would comply, if Kittell wanted. City Attorney John Putman stated he would need to advise

his client as the Planning Commission is a subset of his client the City and the hearing might need to be suspended so he could consider that point and advise as appropriate. He stated Kittell could proceed so the Commission could get through this or if Baumgart wanted to get legal advice, that was something that could be announced later, but for right now Baumgart was a member of the Planning Commission and Kittell's objection had been raised. Kittell presented some aerial photos of the structure at 211 S 6th Avenue. He showed Jay Sennewald's initial approval of the Oregon Parks and Recreation Department (OPRD) permit then showed his letter of revocation to OPRD acknowledging that it was not consistent with the Rockaway Beach Comprehensive Plan or Zoning Ordinance. He said Sennewald determined that the structure did not meet the Ocean Setback Line and was ineligible for a Goal 18 Exception. He stated no other aspects were pointed out and Sennewald's only reasoning was because of this OSL. Kittell pointed out the applicable ordinances as 3.030(1)(a) and 4.120(c)(10) where it stated beachfront protective structures for beach and dune areas shall be permitted only where development existed as of January 1, 1977. He stated City staff derailed when they misinterpreted these provisions to require a Goal 18 Exception. He pointed out the provision for emergency permits. He pointed out a couple of case laws that went to LUBA and were beach front properties. He stated there was not a single case that required a Goal 18 Exception to place rip rap. He said the property was developed on January 1, 1977, and pointed out a statement made by Sennewald on September 1, 2009, saying it had been developed since the 1930s and a report by Horning Geosciences of August 5, 2003, that there had been a plank retaining wall. He showed old aerial photos showing the old structures on the property. He read from a letter dated April 20, 2009 saying Dang's structure met the setbacks. Kittell quoted from McQuillin, Municipal Corporations, 3rd edition that this was an arbitrary reinterpretation of an existing OSL ordinance. He noted this was unconstitutional. He referred to it as inverse condemnation and pointed out *Portland v. Yates* where a permit was issued for a sign and then revoked when the ordinance changed. He said there were a host of problems here in basic zoning. He continued to reiterate that a Goal 18 Exception did not apply and it was all dependent on development in 1977 and nothing else mattered. He stated staff misinterpreted its own ordinances and then the City made a decision that there was a mistake. He said the City staff action was illegal. He asked what does it say if the City lets Dang's house fall into the ocean what does it say to future developers. He said it says the City was in the business of re-examining a property at any time. He read his conclusion that the property was zoned R-R, Residential Resort, and the property was developed prior to January 1, 1977, that a Goal 18 Exception was not required, and that the property was correctly partitioned and constructed. He said the Planning Commission should adopt the findings of fact presented by the applicant, appeal issue #1 to reverse the administrative decision by the City Planner to withhold certification, and instruct the City Planner to certify that the applicant's OPRD application as soon as

possible and appeal issue #2 to reverse the administrative decision by the City Planner finding the applicant's property out of compliance with the OSL.

Alice Pyne, owner of 515 S Miller St., stated the property north of Dang's was reclaimed by the ocean many years ago. She stated in 1995 she wanted to buy the property, there was a house on it at the time, and the City said it would be condemned and would never be built on so she was surprised to see a house built in 2008. She said once the rip rap was placed it caused a lot of damage to her properties and others. She stated Dang's house was way west, he had habitable space in the basement which is in a floodplain, a fire pit on the dune and she would ask the City to deny his request.

Donald Bryan, 1275 SW 27th Court, Gresham, representing Jan Hopman, 525 S Miller St., stated the erosion was habitual it changed all the time and had changed since the last time he'd been there. He described the massive changes in the creek and the amount of the erosion that came with it. He stated Dang took a chance building on this lot and everyone knows that he built further west than what was there before. He said the City needed to weigh all issues here because if it should decide to grant the reversal he could guarantee there would be a class action suit, if Dang's rip rap caused damage to surrounding properties.

Howard Harmon, 503 & 505 S Miller St., stated he felt this was most critical as he had been told Goal 18 had been set aside and felt it shouldn't be. He said Dang's house was further to the west and he had thought it would be built in the same footprint as the original house. He stated it was way further west and he felt sorry for Dang, but if he puts a wall in there the creek would come to the north and the property in front of his house would be gone. He wanted to encourage the Planning Commission to deny the request and apply Goal 18.

Keith Jenke, 1785 SW Atteglia, Gresham, representing 525 S Miller St., stated his mother in-law's house was the first house on the north side of the creek. He said the Goal 18 Exception says if something was built after 1977 there was a chance for house to be taken or not by the ocean. He believed Goal 18 should apply and pointed out the mysterious rip rap that was placed with no permit in 2011 or 2012. He added that since that time the properties to the north had eroded. Jenke stated if Dang was allowed to place the rip rap everyone would have to do rip rap and not everyone had the money to do that. He stated Dang's property was now eroding quickly and he was now catching up to the properties to the north and south. He added that they shouldn't have to rip rap because Dang could afford to.

Courtney Johnson, Oregon Shores Conservation Coalition, stated a lot of new information had been presented so she was asking to keep the record open for at least another 7 days for them to review the new information.

She stated she believed the City had interpreted the ordinances correctly and the comprehensive plan. She stated even if the City said that development in 1977 was the sole issue, LUBA would say no, that Goal 18 applied. She stated this house was not built in the same footprint, so the question becomes was the house placed further to the west and should it be protected by Goal 18. Johnson stated the appellant was present and making not even veiled threats to the City and she didn't think those would count, she was not here to advise the City, but it was not the City taking the property it was being taken by the ocean. She said the City had an obligation to all of its citizens and it had heard from them and the erosion. Johnson stated the appellant's attorney had framed this as a revocation of the permit and that is not what is happening here.

Owens asked for final comments. Crater asked to confer with the City Attorney John Putman.

Putman stated he was in attendance to advise staff and the Commission and not to argue the case. He pointed out this had been brought to the City by a permit from OPRD asking the City if the property met the Goal 18 Exception. He explained Sennewald had reviewed this and required that for building on the ocean front there be an oceanfront averaging of 200' to both north and south of the property. Putman pointed out that Sabrina Pearson had been the planner at the time of the permit, so there were ethical issues involved with this. He explained that Sennewald had looked at the calculations and after a previous decision, he had determined that the law had not been applied correctly by the former city planner at the time and on the southern side there was more than 1 property where only one was used and to the north there were structures, but 0' had been used. Putman stated zero (0) should not have been used in the calculation as determined by Jay Sennewald and he concurred. He explained the City was not looking to reverse the building permit. He stated the City had an issue where the previous planner made an error and the next planner caught it. He explained this matter came to the City via an OPRD permit in April and Sennewald made a decision and then rescinded the decision and sent a letter to Dang. He further explained that Dang said he was appealing the decision and Sennewald sent a letter in May saying that the appeal was not complete. Putman stated Sennewald specifically addressed what Dang needed to do to appeal the decision and he was also supposed to pay an application fee, which was done, but no additional information was provided. He stated these were procedural issues that need to be addressed prior to the substantive issues that have been heard here. He said regardless of the Commission's decision this may be heard at the City Council and had already been noticed as such and then the City would have 120 or 180 days to make their decision. Kittell asked to rebut. Putman stated a decision was not being made tonight since there had been a request to keep the record open, which he believed should be in writing. Holm asked if the retaining wall that was used in the OSL determination was a permitted structure. Crater replied that he didn't know, but he could not find a permit which it would need, if it were holding back a

load. He stated the retaining wall didn't look as though it had a surcharge it looked like a garden wall. He said he wouldn't have used the wall and that the intent of the ordinance was to use structures in planning as in a primary structure and there were other structures that could have been used. He asked if it was fair to other citizens to use a birdhouse in an OSL calculation and that he didn't think that was right. Cheek commented that she had gone to the site and couldn't find the retaining wall. McIntire asked Crater if he would explain the process of keeping the record open for 7 days. Crater explained that there was some new information introduced at this meeting so a person could request that the record be kept open so more information could be processed for consideration. McIntire asked if the Commission needed to make a motion to keep the record open. Crater said that they would. McIntire asked if it was not optional. Putman replied that it was. Crater explained that as a planner, the planning part was dealing with a unique property and when he looked at the record and went back to the partition in 2003 one of the lots did not meet City standards and that started the crux of the problems the Planning Commission faced. He added that now the City had lost all the structures to the north that would have been used to make a decision in the OSL. He stated he had seen that the structure was to be built in the original footprint and it hadn't and he wouldn't have approved the permit. He said in his opinion he wouldn't continue to make bad decisions. He stated he wouldn't have reviewed a file with one lot not consistent with the standards then the home being removed and then Dang submitting an application where a 0' was used to the north and a retaining wall used to the south to calculate the OSL. He asked would that then allow someone to build on the beach. He stated he didn't think so it didn't make sense. Crater stated this case was complicated, both sides make very good points and he was not saying his view was right, he was only saying that if it had come to him today he would not do the same thing.

Sabrina Pearson, Bay City, stated concerning the partition the criteria for the lot depth had to be 65' and both lots exceeded that so the Commission had heard erroneous testimony which they needed to disregard. She stated for the request to place rip rap on the beach Dang had to hire a geologist who would fully describe the history of the property and what the affects would be and prove that there wouldn't be adverse impacts to the site or surrounding properties. She stated OPRD had to review that report and determine that there would not be adverse impacts to the site or surrounding areas. She stated in the OPRD decision they said there would not be any impacts to surrounding areas. She stated the only criteria that was not met consistent with the criteria was the City had to make a finding that development existed on January 1, 1977 and that was the only criteria before the Commission today, this was not a complicated issue. She stated this was about protecting property not a house or who allowed what in the development of that property. Cheek asked who Pearson represented. Pearson stated she represented herself. She stated she had only found out about this issue because Crater had asked her to come and talk to him about it. Cheek pointed out Pearson had been here before representing

Dang in other matters. Pearson admitted she had and her involvement with Dang was his Nedonna Estates subdivision and her passion to get a second access in Nedonna Beach. McIntire asked Pearson if she had submitted the 29 page document they had received in their packets. Pearson asked to see it because she wasn't familiar with it and there were so many documents out there. McIntire stated that Dang's attorney had the document because she had asked him if anything would be submitted that was different from before and he said there would be and this was what was submitted. She stated all she wanted to know was if it were Pearson's. Pearson said it may have been, but she was only working for herself. She stated the only question was if this property was eligible for protection.

Crater stated that in his discussions with some of the experts on Goal 18 Exceptions they had said if there were a structure present in 1977 and then removed and new development was significantly larger or placed further to the west than original structure, then it was not eligible for rip rap. Owens asked if the applicant wished to keep the record open. Putman stated he believed it was the Oregon Shores Conservation Coalition who had asked for the record to be kept open. He stated the applicant could submit rebuttal argument or final written argument to counter the new evidence. He stated the record would stay open with no decision tonight and keep the record open at least 7 days or more. Putman explained the hearing was open until the gavel was banged and it's over and Kittell had asked for a few more minutes. He stated when the hearing was closed the Commission could ask staff questions and once the hearing was closed then the motion should be made to keep record open for 7 days, then they could submit written testimony and the Commission would meet and make a decision.

Kittell stated there were some questions about Pearson and her representation of Dang and that doesn't undermine the validity of what she had to say. He stated he understood neighboring properties being concerned and he would be too, that was what OPRD does, they analyze to see what impacts this would have on neighboring properties. He stated the applicant had to provide the burden of proof which he did with geologists and geo engineers. He said the applicant had done all that and incurred the expense. Kittell stated that had been addressed at the state level and the only decision for the City was if it complied with local laws and that was why they needed the certification from the City. He stated the issue was whether the structure met the OSL and previous staff determined it did and now current staff said it does not. He said Oregon Shores Conservation Coalition said it wasn't the City taking the property it was the ocean, but it's the City. He said the reinterpretation of the OSL had the effect of penalizing the applicant. He reiterated previous case law.

Dang gave additional testimony stating he had hired geologists and built this house in 2008. He stated this could happen to any other property

owner and he had property rights. He mentioned the tax revenue that came to the City as a result of this house.

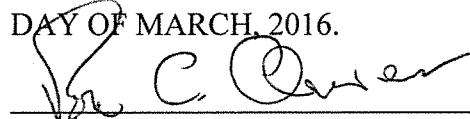
Jenke stated he would like to request the Planning Commission look at the aeriels he had provided and look at the erosion from 2003-2012 and then look at erosion after the rip rap was placed and look at the erosion from 2011-2014 and use that for a measurement. He also requested that the City look into the rip rap that was built in 2011 that was not permitted it wasn't an accident, no one knew of a permit, but no one made him take it down.

Baumgart made a motion, seconded by Holm, to close the public hearing; Baumgart, Holm, Olson, Owens, Sheckler, McIntire, and Cheek voted in favor; motion carried. Owens pointed out the 4 items on the last page of the staff report that the Commission needed to consider. He stated they would need to set another meeting date. Crater pointed out that they would need all the evidence before they looked at these questions. Putman recommended the Commission didn't deliberate on a decision until they had all the information. Cheek made a motion, seconded by Holm, to keep the record open for 7 days; Baumgart, Holm, Olson, Owens, Sheckler, McIntire, and Cheek voted in favor; motion carried.

ADJOURN

Owens adjourned the meeting at 7:30 p.m.

MINUTES APPROVED THIS 8TH
DAY OF MARCH, 2016.



Rae Owens, President