

BOARD OF COUNTY COMMISSIONERS - REGULAR SESSION - JULY 11, 2005

The Board of Island County Commissioners (including Diking Improvement District #4) met in Regular Session on July 11, 2005 at 9:30 a.m. in the Island County Courthouse Annex, Hearing Room, 1 N. E. 6th Street, Coupeville, Wa. Mike Shelton, Chairman, Wm. L. McDowell, Member, and William J. Byrd, Member, were present. The meeting began with the Pledge of Allegiance. By unanimous motion, the Board approved the minutes from the June 20, 2005 and June 27, 2005 minutes.

VOUCHERS AND PAYMENT OF BILLS

By unanimous motion, the Board approved the payroll dated June 30, 2005, along with the following vouchers/warrants were approved for payment by unanimous motion of the Board:

Voucher (War.) #216889-217323 \$390,960.70

Hiring Requests & Personnel Actions

As presented by Dick Toft, Human Resources Director, the Board by unanimous motion, approved the following personnel action authorizations:

| Dept. PAA # | Description | Position # | Action | Eff. Date |
|--------------------|---------------------|-------------------|-------------------|------------------|
| Juvenile 056/05 | Work Crew Supv. | 1402.08 | Replacement | 7-11-05 |
| Sheriff 057/05 | Deputized Officer | 4014.32 | Replacement | 12-12-05 |
| Sheriff 058/05 | Corrections Officer | 4015.12 | Replacement | 9-28-05 |
| Auditor 059/05 | Dep. Auditor A/P I | 211.00 | Increase in hours | 7-11-05 |

Appointments and/or re-appointments to various boards and committees

By unanimous motion, the Board made the following appointments to Drainage District No. 6:

Appointed Hal Allmer, Casey's Cove. Coupeville, to Commissioner Position No. 2, Drainage District No. 6, effective immediately to serve until the outcome of the February 2006 election

Appointed Robert C. Huber, Seattle Pacific University, to Commissioner Position No. 3, Drainage District No. 6, effective immediately to serve until the February 2006 election.

The Board by unanimous motion appointed Robin Bernardy, Oak Harbor, representing the Island County Historical Society on the 2% Lodging Tax Advisory Committee.

By unanimous motion, the Board reappointed William F. "Bill" Thorn, Camano Island, representing the private business sector of Island County for a term until July 27, 2008 on the Workforce Development Council.

Application for Special Occasion Liquor License #091793 by Goosefoot Community Fund

Having received recommendations of approval from the appropriate County Departments, the Board by unanimous motion approved application for Special Occasion Liquor License #091793

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by Goosefoot Community Fund for special occasions to be held on July 27, August 10 and August 24, 2005 from 5:00 p.m. to 9:00 p.m. at the Bayview Corner Cash Store, located at 5603 Bayview Road, Langley, WA

Juvenile Accountability Block Grant Agreement with DSHS Juvenile Rehabilitation Administration Contract

The Board approved by unanimous motion, Juvenile Accountability Block Grant Agreement with DSHS Juvenile Rehabilitation Administration to provide funding for Alternative-to-Confinement Work Crew program under Contract #0563-76577 (RM-JUV-05-0075), the grant amount \$10,000.

RESOLUTION #C-73-05, A PROCLAMATION ACKNOWLEDGING ACCOMPLISHMENTS OF TINA MARIE MARES, MISS WASHINGTON 2005

By unanimous motion the Board adopted Resolution #C-73-05, acknowledging Tina Marie Mares, the Snohomish and Island County representative who has now won the Miss Washington title and will be representing the State of Washington for the Miss America title in August.

[Resolution #C-73-05 on file with the Clerk of the Board]

Interagency Agreement Between the Washington State Department of Agriculture and Island County and its agent the Island County Noxious Weed Control Board - 2005-2007 Biennium – Control and Eradication of *Spartina*

Contract #IA 07-03-05 (RM-EXT-05-0077) Interagency Agreement Between the Washington State Department of Agriculture and Island County and its agent the Island County Noxious Weed Control Board - 2005-2007 Biennium providing funding for the control and eradication of *Spartina* within Island County, not to exceed \$100,000 was approved by unanimous motion of the Board.

On-Site Repair Financial Assistance Program - Washington State Water Pollution Control Revolving Fund Loan 2002 - Contract Collection Agreement

On-Site Repair Financial Assistance Program - Washington State Water Pollution Control Revolving Fund Loan 2002, Contract Collection Agreement with Whidbey Island Bank for Promissory Note and

Deed of Trust between Island County Water Quality (Sellers) and Gerald and Bobbie Busig (Buyers), for unpaid balance of principal \$18,000.06 was approved by unanimous motion of the Board.

DIKING IMPROVEMENT DISTRICT NO. 4

PUBLIC HEARING: Resolution #C-74-05/R-30-05 – Approving the Apportionment of Benefits for Diking Improvement District No. 4

A Public Hearing was held at 10:15 a.m. as scheduled and advertised, for the purpose of considering Resolution #C-74-05/R-30-05 Approving the Apportionment of Benefits for Diking

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Improvement District No. 4 (DID#4).

Bill Oakes, Public Works Director, reminded that the Board appointed a Board of Appraisers including the County Engineer as the administrator of DID#4, and approved a ten year maintenance budget of \$38,177. The Board of Appraisers approved a uniform fee per parcel for all parcels within DID#4 in the amount of \$194.78 per parcel for ten years' maintenance. Staff recommends approval of the resolution as presented.

At the time of hearing when the Chairman called for comments from the public, no one appeared to speak either for or against said resolution.

By unanimous motion the Board adopted Resolution #C-74-05/R-30-05 Approving the Apportionment of Benefits for Diking Improvement District No. 4. *[Resolution #C-74-05/R-30-05]*

Certification of Road Fund Expenditures for Fish Passage Barrier Removal – County Road Administration Board Report – Revision to 2003 and 2004

As presented and recommended by Mr. Oakes, the Board approved Certification of Road Fund Expenditures for Fish Passage Barrier Removal, Revision to the 2003 County Road Administration Board Report and Certification of Road Fund Expenditures for Fish Passage Barrier Removal, Revision to 2004 County Road Administration Board Report, to correct per project costs reported due to a misinterpretation of the forms.

Escrow Agreement – Island County and Krieg Construction, Inc. Whidbey Island Overlays

Escrow Agreement between Island County and Krieg Construction, Inc. for the Whidbey Island Overlays contract under CRP 05-02, Work Order No. 344 was approved by unanimous motion of the Board.

Resolution #C-75-05/R-31-05 Approving Specifications & Authorizing Call for Bids for Sign Shop Truck Service Body & Hydraulic Post Hole Digger/Post Driver

By unanimous motion, the Board approved Resolution #C-75-05/R-31-05 In the Matter of Approving Specifications and Authorizing Call for Bids for Sign Shop Truck Service Body & Hydraulic Post Hole Digger/Post Driver. *[Resolution C-75-05/R-31-05 on file with the Clerk of the Board]*

Bayview Road Improvement - Construction Easements – Quit Claim Deed and Property Voucher

The following Construction Easements, Quit Claim Deed and Property Voucher were approved by unanimous motion of the Board, all in conjunction with the Bayview Road Improvements, CRP 98-17, Work Order No. 229:

Construction Easement #PW-0420-22 - Eugene L. & Mildred S. Cochran Revocable Family Joint Living Trust; \$100/land; Parcel 043-5710; Sec. 7, Twp 29N, R 3E.

Construction Easement #PW-0420-59 (mutual benefit) - Eugene L. & Mildred S. Cochran Revocable Family Joint Living Trust; Parcel 043-5710; Sec. 7, Twp 29N, R 3E.

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Quit Claim Deed – Eugene L. & Mildred S. Cochran Revocable Family Joint Living Trust; \$15,812.32 (\$1,300.00/land, \$6,600.00/landscaping & fencing, \$100.00/construction easement, \$7,812.32/Administrative); Parcel 043-5710; Sec. 7, Twp 29N, R 3E.

Property Voucher – Authorization for Property Acquisition per Real Property Acquisition & Right-of-Way Procedures (C-46-03/R-16-03) in the amount of \$15,812.32 to Eugene L. & Mildred S. Cochran Revocable Family Joint Living Trust

Construction Easement #PW-0420-64 - Matthew J. Swett & Sarah A. Birger; Parcel 077-5890, Sec. 7, Twp 29N, R 3E.

Stormwater Mitigation Agreements and Covenants - Plat of Holmes Harbor Golf & Yacht Club

Stormwater Mitigation Agreements and Covenants within the Plat of Holmes Harbor Golf & Yacht Club were approved by unanimous motion of the Board as follows:

Agreement #PW-0520-155; Island County and Phillip James & Lyn Ann Fauth; Lot 11, Div. No. 1; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-212; Island County and Edozie Edoga & Maya Kilmer; Lot E-2, Div. No. 8, Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-257; Island County and Island Construction, Inc.; Lot 23, Blk. 2, Div. No. 1, Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-258; Island County and Eric G. & Heather B. Winter; Lot 6, Blk 2, Div. No. 1, Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-263; Island County and Island Construction, Inc.; Lot 6, Blk. 1, Div. No. 1; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-264; Island County and Island construction, Inc.; Lot 23, Blk. 4, Div. No. 6; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-265; Island County and Island Construction, Inc.; Lot 5, Blk 5, Div. No. 7; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-266; Island County and Island Construction, Inc.; Lot 26, Blk. 4, Div. No. 8; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-267; Island County and Island Construction, Inc.; Lot 27, Blk. 4, Div. No. 8; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-268; Island County and Island Construction, Inc., Lot 38, Blk. 4, Div. No. 8; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-269; Island County and Island Construction, Inc.; Lot 13, Blk. 3, Div. No. 9; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

Agreement #PW-0520-270; Island County and Island Construction, Inc.; Lot 29, Blk. 1, Div. No. 5; Plat of Holmes Harbor Golf & Yacht Club; Sec. 3, Twp 29N, R 2E.

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Resolution #C-76-05/R-32-05 Adding a Title Restriction to the Deer Lagoon Land Purchase

Resolution #C-76-05/R-32-05 In the Matter of Adding a Title Restriction to the Deer Lagoon Land Purchase was presented by Mr. Oakes for the Board's approval. He explained that the grant funding requires a restriction for use of the property be placed on the title of the land, and the following would be placed on the title of each parcel:

"The property has been acquired with funds from a Federal financial assistance award. Title of the property conveyed by this deed shall vest in Island county subject to disposition instruction from National Oceanic and Atmospheric Administration or its successor agencies. Island County shall not dispose of or encumber its title or other interests in this property without the approval of NOAA or its successor agencies."

By unanimous motion, the Board approved Resolution #C-76-05/R-32-05 in the matter of adding a Title Restriction to the Deer Lagoon Land Purchase. *[Resolution #C-76 -05 on file with the Clerk of the Board]*

**Resolution #C-77-05/R-33-05 Sale or Disposal of Surplus County Property
(Modular Units)**

The Board by unanimous motion approved Resolution #C-77-05/R-33-05 In the Matter of the Sale or Disposal of Surplus County Property (Modular Units). *[Resolution #C-77-05 on file with the Clerk of the Board.]*

**Amendment No. 2 – Department of Ecology - revision to Grant Agreement No. G0300038,
Scope of Work and Special Terms & Conditions**

Amendment No. 2 [PW-0520-180] between Island County and Department of Ecology, revising Grant Agreement #G0300038 Scope of Work and Special Terms & Conditions was approved by unanimous motion of the Board.

CLOSED RECORD APPEAL – APP #195/05 – VICTOR HANZELI, APPELLANT

**Appeal of Hearing Examiner's Decision on PLP 334/04, John Robinette; Applicant
Westcoast Inc.**

At 10:30 a.m. as scheduled and advertised, a closed record appeal was held on Appeal #195/05 by Victor Hanzeli, appealing the Hearing Examiner's Decision on PLP 334/04, John Robinette, Westcoast Inc., for preliminary long subdivision approval by the Hearing Examiner on May 2, 2005 for the proposed subdivision of an approximately 17.72 acre parcel into 21 lots, 690 Camano View Drive, Camano Island.

Appellant: Mr. And Mrs. Victor Hanzeli
Applicant: John Robinette. Applicant Westcoast Inc., represented by
Jeff S. Weber, Buck & Gordon LLP
County Staff: Phil Bakke, Planning Director
Jeff Tate, Assistant Planning Director
Michael Kershner, Planner

The Board received previously a complete copy of the Hearing Examiner's Record and Exhibit

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Log [BOCC Exhibit #1]. The Appeal was filed by Victor and Julia Hanzeli by letter dated May 15, 2005, received at the Island County Camano Annex on May 16, 2005 [BOCC Exhibit #2].

As explained by Chairman Shelton, the hearing was a closed record appeal pursuant to ICC 16.19.170 and the Board's Procedure to Hear Closed Record Appeals from which he read [BOCC Exhibit #3]. With regard to Item #8 "unless otherwise indicated during the hearing, a decision will be announced at public meeting within 14 days based on the record of the Hearing Examiner and applicable laws", Chairman Shelton indicated that the Board's decision would be announced on July 25, 2005 at 2:30 p.m.

Additionally, the Board previously received for today's hearing:

- West Coast, Inc. response brief, Jeff S. Weber, Buck & Gordon LLP, dated July 6, 2005 [BOCC Exhibit #4]
- Staff Report dated July 8, 2005 by Michael Kershner [BOCC Exhibit #5]

Announcement of Ex Parte Communication

Commissioner McDowell stated that on July 7, 2005 he spoke with two County staff members to better understand some maps included in the Hearing Examiner's record, to receive a larger copy and also explain the location of the disputed area.

Staff Statement

Mr. Kershner summarized from Staff Report dated July 8, 2005.

Application accepted as complete on September 17, 2004. October 19, 2004 a review letter sent informing applicant of some inconsistencies between the surveys and map shown. Applicant submitted more information as to the details of the survey. Staff met with applicant at which time the issue of the boundary line was discussed but not resolved. In between that time Jeff Tate, Assistant Planning Director, discussed the issue numerous times with the applicant and told him that the Planning Department could recommend approval with the condition of preliminary approval that no work be done in that area until the boundary line issue was resolved. That was a condition in staff recommendation, and the Hearing Examiner issued a variation of that in his final decision. Three main issues raised in the appeal require attention of the Board.

1. Applicability of the court case Halverson v. City of Bellevue

Staff not qualified to comment on the applicability of a court case and recommend that the Board either remand this issue to the Hearing Examiner to address the applicability of the case, seek legal counsel from the Prosecutor's Office, or accept the Hearing Examiner's use of the case and the decision.

1. True configuration of the boundary line in question.

Staff is not in a position to determine the correct boundary line at this time nor is it the proper time to get into the fine points of survey techniques, etc.; that would be best-proven through a judicial process.

2. Burden of Proof.

The Hearing Examiner's decision was based on the understanding that both Mr. Hanzeli and the applicant could settle the boundary line dispute. Hearing Examiner's Finding IX, Paragraph 6, states: "It appears from the record

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that the applicant and the property owner can probably resolve this dispute by agreement in the near future". The two parties could not resolve the issue. and the Hearing Examiner required that the applicant give the homeowner 30 days' notice prior to any clearing or grading in that area.

Staff does believe the Board is in a position to determine whether the condition of approval pertaining to the boundary line discrepancy is valid or if the condition should be retooled based on the fact that Mr. Hanzeli and Westcoast Inc. could not resolve boundary line dispute.

Mr. Kershner's understanding with regard to Item #3 was that if Mr. Hanzeli were to take WestCoast to court, he would partially share the burden of proof through that process.

Jeff Tate added to clarify that the first two items in the staff report are major elements of the appeal; much of those issues Planning staff is not in a position to address. The third issue, while not stated in the appeal directly, is the crux of the issue, and the Staff Report prepared to draw attention to that particular condition and the basis for that condition. Many of the conditions are fully under control of the applicant; this is the one condition that brings the applicant and the Hanzelis into a requirement to negotiate with each other.

Appellant: Victor Hanzeli

Mr. Hanzeli provided today the following:

- Written opening comments [BOCC Exhibit #6]
- Appeal Hearing Comments and Citations [BOCC Exhibit #7]
- May 15, 2005 Appeal Letter, with added marked reference numbers 1 through 8 representing the eight key points he will make [BOCC Exhibit #8]

Overview - opening comments. The developer became neighbor in 2004; 2001 Hanzeli's built in reliance on professional and recorded surveys. Hearing Examiner's decision would force them to bring quiet title action in court to protect their backyard, unfairly placing on them the burden of proof of ownership, a violation of accepted notions of fair play and substantial justice. Their surveyor checked the developer's predecessor's survey, and because Hanzeli's commissioned a survey before they built their home, the burden of proof should be on the developer.

Developer relied on an unrecorded uncontested theory of the last paragraph of the legal description from Hanzeli's statutory warranty deed and the developer's exception to exception 7 to claim that he can use 5,000 sq. ft. of Hanzeli's backyard to construct a detention and sedimentation pond before construction is even permitted by the County. The rule the Hearing Examiner proposed would say that a developer's neighbor, who has obtained a professional survey and builds his house based on that survey, must pay the expense of defending his backyard from an encroachment, rather than the developer paying the expense of challenging title, placing the burden on the wrong shoulders.

The Hanzeli family has multiple grounds for ownership of the 5,000 sq. ft., having:

1. the better interpretation through survey and title of the Hanzeli property's eastern limit and ownership by deed;
2. acquiescence by the developer's predecessor to the Hanzeli property footprint. The

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developer's predecessor let the 1987 survey stand for 18 years, confirming the footprint of their property as it stands today; those metal stakes still in the ground. The developer's predecessor could have changed or challenged that survey, but he left it on record. The Hanzeli's surveyor used it; other surveyors may have used it, and Hanzeli's built a house based on it.

3. If needed, the rules for adverse possession could be considered for application to this situation. The previous owner of the Hanzeli property and the Hanzelis have both paid taxes on the property, including the portion in question, for well over the 7 years needed. In addition, have had possession of the property as staked by the 1987 and 2001 survey for well over the 10 years needed to demonstrate adverse possession.

As to the specifics of the appeal Mr. Hanzeli turned to his Appeal Hearing Comments and Citations, the eight items side by side with the letter of appeal, and pointed out that item No. 4a had been inadvertently included, an argument now known not to be accurate and the submittal now has that section lined out. Summarizing:

1. Detention/sedimentation pond is considered an integral part of the proposed development [ICPCD staff recommendation to Hearing Examiner p. 8 (1.c)]. RCW 58.17.020 (4) defines *preliminary plat* as "a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision [RCW 58.17.020 (4)].".

Nothing in that definition allows a developer to move from a "neat and approximate" drawing to actually constructing an integral structure in this development located in a critical drainage area.

The two previously recorded surveys County planners located reflect current and accurate boundaries of the Hanzeli property. Hanzelis commissioned the 2001 survey prior to building; survey stakes placed in 1987 and 2001 visibly support their boundary line.

The Hearing Examiner erred when he relied upon staff description that they "...became aware of the two surveys that are not consistent with the submitted map" [ICPCD staff recommendation to Hearing Examiner p. 8 (1.c)]. His reliance upon that turn of phrase by the planners diminishes the actual facts. The map provided by the developer in 2004 is not consistent with those recorded surveys.

2. Conclusive determination and documentation for Island County was the reasonable expectation originally set forth by Island County planners [ICPCD staff recommendation to Hearing Examiner p. 8]. Before someone is allowed to build on property in dispute and still at the stage of seeking pre-approval, conclusive determination and documentation prior to constructing a major element is an appropriate expectation. County staff was accurate in making that recommendation [ICPCD staff recommendation to Hearing Examiner p. 8 (1.c)].

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3. The Hearing Examiner relies on *Halverson v. Bellevue*. 41 Wash. App. 457, 704P.2nd 1232 and RCW 58.17.255 as his only sources for setting in place the conditions of his decision.

If it does apply, Mr. Hanzeli could not find a single reference that would allow or suggest that an administrative body could authorize, even with conditions, a developer to begin moving earth, grading, and/or construct a massive sedimentation and detention facility on disputed property immediately following only the pre-approval of a plat. By relying only on *Halverson v. Bellevue* and RCW 58.17.255, Mr. Bobbink erred and his decision should be thrown out. Attached four pages that make up the official record of *Halveson v. Bellevue*. Mr. Bobbink's revision of suggested condition 1.c by the planning staff is not supported by substantial evidence when it comes to shifting the burden of proof from the developer to the single-family landowner.

- Hanzeli has title for his entire property based on good and correct application of the legal description by surveyor William Lloyd, Cascade Surveying, and survey.
- Title and legal description affirmed by the acquiescence of John A. King, previous owner of the parcel currently being considered for development as Saratoga Ridge.

In 1987 Don Hagen did a survey of that area including the properties in question and Mr. Hanzeli placed his house based on that line.

- Hanzeli family (and before, the Swanson family) continuously had possession of the land as staked during the 1987 survey, have been paying taxes for the years it has been in their ownership (assume the Swanson family before did the same).

Combined, it is much longer than seven years needed to establish adverse possession.

- From the developer the Examiner had only the unrecorded, unchallenged map supported by technical theory, done by the developer's surveyor, to suggest any claim of ownership to the disputed property. The Hearing Examiner did not have substantial evidence of ownership by the developer that would allow shifting the burden of proof to the homeowner.

1. Hearing Examiner erred when he took into account the applicant's concern that he might be unreasonably delayed.
2. Hearing Examiner erred by allowing for just a 30 day written notice in order to begin moving earth and building a detention pond, and unreasonably shifts the burden of ownership proof from those who hope to profit from the development to those who purchased the land, surveyed the property, established title, maintain a home, pay taxes and pay a mortgage to a lender. The property is not vacant, unoccupied land. It is the backyard of a home that he and his wife live with their

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three children, landscaped with the planting of grass and trees and often sit to observe wildlife and sunsets.

3. The Deed for Steve Foray's property, a neighbor to the north and sharing a boundary with West Coast and Hanzeli, may not contain the same exception to exception 7 that is shown on the Hanzeli warranty deed. Mr. Hanzeli retains the concern because the developer's surveyor has placed a survey stake that is on Mr. Foray's side of the fence.

4. Appeal concerns placement and construction of a most important element, the sedimentation and detention pond, integral to the development, proposed in what the staff

identified in their site description and consistency review as a critical drainage area. Hearing Examiner erred when he shifted the burden of proof from the developer to the homeowner.

The remedy Mr. Hanzeli seeks is that Island County find that until the title dispute that exists between the two properties is fully resolved, recorded and reported in writing to Island County that no earthwork or construction be allowed and that pre-approval not be granted.

Note: Mr. Hanzeli indicated he had pictures of the stakes mentioned in item #2; pictures of his backyard and views as mentioned in item #6; and pictures to help illustrate as mentioned in item #7. Inasmuch as those may be classified as "new information" and not allowed in the closed record appeal, Chairman Shelton instructed Mr. Hanzeli to hand the pictures to the Planning Director, to be turned over to made available to the Board only after legal counsel review and clarification as to whether or not whether in fact those are considered new information. If determined "new information" the pictures will not be provided to the Board.

Project Applicant Designated Representative – Jeff S. Weber, Buck & Gordon LLP, Seattle

Mr. Weber contended that the appeal should be dismissed as untimely as set forth in the brief. As a procedural matter, he reviewed as Mr. Hanzeli was talking the submittal which has Mr. Hanzeli's address at the top and indicates "Appeal Hearing, Island County Board of Commissioners, July 11, 2005" which he thought probably contained new information, and lodged an objection to the extent there new information is contained in that submittal that was not in Hearing Examiner's record, and therefore not proper. Although there is a question of a boundary dispute in this case, it was his contention that it was not relevant to the issue before the Commissioners today. The issue is what is the County's authority to condition this preliminary plat approval and the Applicant's position is that the County does not have the authority to either hold up preliminary plat approval or to prevent construction of plat improvements pending resolution of this dispute. That is properly a matter for final plat approval which is some time off in the future.

As to the third point in Staff presentation, Mr. Weber believed the question is not whether West Coast and Mr. Hanzeli have been successful in resolving the dispute since the Hearing Examiner ruled, and any evidence to that is outside the record and irrelevant. The Hearing Examiner hoped that the discrepancy would be resolved but the condition placed was that in the event it could not

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be resolved amicably by the parties, the only requirement was that the Applicant give 30 days pre-construction notice prior to construction of plat improvements. At this point the parties have not been able to work that out. Mr. Weber suggests that was an appropriate condition and to go any further than that would be outside County authority.

This is an issue of the subdivision statute setting forth specific sequence of events: preliminary plat approval; construction of plat improvements; and then final plat approval. Nothing in the subdivision statute requires issues of title or boundary be resolved at this stage. It is a different matter at plat stage, because everyone who has an interest in the plat needs to sign the final plat; if by the time the final plat the dispute has not been resolved, Mr. Hanzeli would have to sign the plat and if not, the applicant could not obtain final plat approval. The Hearing Examiner's citation of RCW 57.17.255 was apro-pos'; it is a specific section talking about boundary discrepancies being resolved at the final plat stage. It is clear that the County cannot hold up the preliminary plat approval, nor did Mr. Weber believe the County could impose a condition requiring the discrepancy be resolved prior to construction of plat improvements. The Halverson case everyone agrees does not directly address this issue and is not the primary source of authority for what the Hearing Examiner did. All substantive issues raised by the neighbors were dismissed by the Hearing Examiner, who approved the plat as complying with all Island County requirements. If by raising this kind of issue the whole process can be held up, Mr. Weber suggested an equally large injustice would take place. The proper way to resolve this issue is exactly what the Hearing Examiner did: recognized if the parties cannot agree, there would have to be a quiet title action. The merits of the dispute are not for the County; rather a question for Superior Court. At a minimum Mr. Weber asked that the Commissioners resolve the issue of whether this is an appropriate decision. He saw no basis for sending it back to the Hearing Examiner to look at again, and respectfully requested the Board affirm the Hearing Examiner's decision and let the project go forward with the condition that the Hearing Examiner imposed.

Other Members of the Public

Daniel Anderson, 1166 S. West Camano Drive, Camano Island, indicated this his comments were included in the Hearing Examiner's record. Those comments addressed the manner in which the area is created, demographics, pointed out that the area would be doubled in size population wise by virtue of Saratoga Ridge's potential infrastructure. Infrastructure is very important to what happens, and as it relates to Saratoga Ridge, really will not occur other than to change the neighborhood in a detrimental fashion. Taking a portion of Mr. Hanzeli's property and putting in a detention pond stretches "in a reasonable fashion". He agreed the courts ultimately would have to be the resolving jurisdiction. He stated that the neighborhood feels so bad they want to put money in the hands Hanzeli's and say "go

for it". Where the detention pond is proposed is in a very wet portion of the development. Further, the Developer is tearing down an entire forest, which will result in a problem down stream where most of the neighborhood is. He spoke in support of Mr. Hanzeli's opposition.

Staff Response on Arguments

Jeff Tate clarified that staff included issue No. 3 in the Staff Report because they felt this issue

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was the fundamental area of concern that the Board could address. Mr. Weber referred to RCW 58.17 commenting that nowhere did it suggest that the County could address issues of title, but Mr. Tate argued would the State legislature in adopting RCW 58.17 intend to shift the burden of proof of property ownership to neighbors. When the application was received, staff filtered through all the evidence in order to figure out how to address the issue. Based on that, staff included originally the condition that the developer not perform any ground disturbing activity on areas where there is a dispute. The evidence before staff showed that that property was in the Hanzeli ownership.

Appellant Rebuttal

Mr. Hanzeli proposed the following language in place of language struck out in item 4a of his submittal [BOCC Exhibit #7]. He did not believe it was not new information, and was submitted in regard to the applicability of Halverson vs. Bellevue.

Item 4, Section a. Halverson v. Bellevue does not apply here because he is formally appealing the pre-approval of the plat by an administrative procedure, as provided to him by the Hearing Examiner along with his decision. While Halverson put the City of Bellevue on notice that she

was making a claim by adverse possession she did not first seek administrative relief. That this case says that an aggrieved party need not pursue administrative remedies, it does not speak to how ownership interest should be handled during the pre-approval plat process.

He appreciated Mr. Anderson's support; although there was mention that the neighborhood offered to provide him money, he is here on his own. Mr. Hanzeli described two distinct issues: his back yard and what will happen to it; and his concern regarding the forest that exists behind.

Mr. Hanzeli now submitted his written response "Reply to West Coast Inc.'s brief in opposition to Appeal" to each Commissioner and Mr. Weber [BOCC Exhibit #9].

An objection was raised by Mr. Weber that the submittal was not rebuttal testimony, rather something that reasonably could have been presented, and the applicant provided a reasonable opportunity to respond. Mr. Hanzeli countered that the submittal was in direct response to Mr. Weber's legal brief as delivered to him on Thursday of this week. Chairman Shelton allowed Mr. Hanzeli the opportunity to proceed with the submittal.

Mr. Hanzeli read his reply [*items summarized*]:

Page 1. Lines 15-18 Mr. Weber re-shaped words of County staff in a way that brings favor to his position.

Page 2, Line 7 – Page 3, Line 12. In the factual background the developer fails to mention that Hanzeli built their house and backyard in reliance upon the predecessor's survey

Page 3, Lines 2-4. After attempting to meet with the developer's representative, Mr. Downing, the process was ended upon their notification that Hanzeli filed an appeal.

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Applicant is not proceeding in good faith when breaking off potential compromise talks in response by the Hanzeli appeal of the Hearing Examiner's decision.

Page 3, Argument A. Hanzeli followed the appeal process outlined in the Hearing Examiner's decision, and as advised by Island County staff.

Page 4, Line 22 – Page 5, Line 8. RCW 58.17.020 defines preliminary plat as "A neat and approximate drawing of a proposed subdivision showing the general layout and streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of the subdivision."

Page 5, Line 15-18. Developer's counsel is wrong when he indirectly claims there would be no effect on Hanzeli property rights.

Page 6, Line 21 – Page 7, Line 4 & Page 7, Line 22. Developer's counsel seemingly dismisses the consideration of posting bond in lieu of plat improvements as described in RCW 58.17.130. Developer argues without any citation, that requiring resolution of boundary discrepancies prior to preliminary plat approval would create substantial practical difficulties for platters.

Page 6/6-7. Halverson v. Bellevue does not apply. The Hearing Examiner relied on it as a turnkey case for his change of conditions. It does not apply to this dispute because it is an appeal of the plat pre-approval process and not a final approval. The applicant did not locate a case that applied directly to the plat pre-approval process.

Applicant Response

Given the fact that Mr. Hanzeli's written submittal [BOCC Exhibit #9] was not submitted to the Applicant, on concurrence of the Board, Chairman Shelton proposed allowing Mr. Weber an opportunity to rebut, to which Mr. Hanzeli objected, recalling that the Chairman at the beginning of the hearing took the time to read the Closed Record Appeal procedure into the record, which does not include further rebuttal.

Commissioner Byrd made the point that if Mr. Hanzeli had provided that in the very beginning Mr. Weber could have rebutted at that time. However, Commissioner McDowell believed that general rebuttal to those comments would not be appropriate, reminding however, that the Commissioners do have the ability to ask both sides any questions they may desire.

The Chairman agreed, and proceeded on that basis. Mr. Weber lodged an objection, agreeing with Commissioner Byrd.

Board Questions and Comments

With regard to Mr. Hanzeli's "Reply to West Coast Inc.'s brief in opposition to Appeal" and Mr. Weber's objection that some of it was new information, Commissioner McDowell requested that Mr. Weber by Noon Friday have to the Board an identification of what portions of that submittal he believes is new information. The Commissioner will wait for that to make a decision on

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whether or not he will take that into consideration when making his decision on the appeal. Mr. Weber agreed to provide a copy to Mr. Hanzeli as a courtesy.

As far as the pictures offered by Mr. Hanzeli, Commissioner McDowell was not sure those would or would not be considered new information and likewise wanted to wait to hear back from legal counsel or Planning Director on that issue. He thought everyone could agree that the Board of Commissioners would not decide who owns what property, rather that would be a matter eventually determined through a court of law unless the two parties can decide mutually.

In response to a question from Commissioner Byrd about the difference in surveys, Mr. Hanzeli clarified that the 1987 and 2001 surveys are the surveys that are consistent; it is the recently done 2004 survey map that is inconsistent.

Responding to Commissioner McDowell about Mr. Hanzeli's original letter indicating he relied on those original surveys and built his house based on that, he asked about the back yard and whether or not it was being used or had been improved. Mr. Hanzeli answered yes to both questions.

Commissioner McDowell asked Mr. Weber if he thought the County should be able in approving a preliminary plat have a fairly good idea of where utilities, roads, lots, etc. were to be when approved.

Mr. Weber answered that he thought it correct that the preliminary plat map was supposed to show the general location of those types of things; but, the key point is it is a preliminary map and things do change.

Should the Applicant lose in court at some point with regard to the disputed area, Commissioner McDowell asked Mr. Weber if the applicant had a way to go forward with the plat in a general manner, i.e. similar number of lots, roads, similar location of utilities, and the detention pond.

Mr. Weber confirmed that the developer would be able to do the plat but the detention pond would have to be designed in a somewhat different way which would be a little bit less effective and a little more expensive.

In response to Commissioner McDowell as far as whether he still agreed with the statement that they were still working towards a resolution of this problem with the neighbor, Mr. Weber clarified intent was that until a lawsuit has been filed, they would certainly hope to resolve it without a lawsuit.

Chairman Shelton asked Mr. Weber his opinion if when developing a piece of property and there is a new survey, is there not responsibility on the part of the developer to perfect title to his property before the development would be underway.

Mr. Weber's reply was that where the burden is will be a question for the Superior Court to address should quiet title action be brought. He suggested the way the subdivision statute established the process is at the preliminary plat stage the developer has to show a survey from a reputable surveyor showing the line is where they think it is and that is sufficient for preliminary

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plat processing and preliminary plat approval. He did not believe there was any obligation for the developer to prove that. The subdivision statute sets a point at which that kind of proof has to be, which is at final plat stage.

Chairman Shelton commented that ultimately the Commissioners are charged with protecting the interest of the taxpayers of Island County. Assume that the Board upheld the Hearing Examiner's decision, and based upon the preliminary plat approval the developer goes ahead with the actual construction work. Mr. Kershner confirmed that under the construction phase the County would depend upon the sediment pond during the construction phase as well as during final completion of the plat.

Further answering questions from the Chair, Mr. Weber explained that they have to have a temporary sediment pond and are proposing to put it partially in area of dispute. However, he thought there ultimately was a way to design it that would not use the disputed area. If they build a temporary pond and at some point because of a court case no longer have the right to that, either they have to redesign it or find some other way to deal with it, or put things back the way they were, and would not receive final plat approval. He did not think the County has any liability; the County's action in approving a preliminary plat clearly would be covered by the public duty doctrine and the county immunized from a negligence claim.

Commissioner McDowell, asked Mr. Weber about his comments on who takes the risk. Mr. Weber stated that under the law if they put something on Mr. Hanzeli's property they had no right to, it was his expectation under the law the court would have the right both to require they take it out and restore Mr. Hanzeli's property, and if they could not, to give him damages for whatever value he lost.

Commissioner McDowell, looking at the map signed by the surveyor, inquired if there was a certain time frame within which a surveyor was to record a map, and was this a recorded survey.

Mr. Robinette, President, West Coast, confirmed that it was not a recorded map. Island County Code does not require a survey; RCW 58.17 provides for a "neat and approximate drawing". He chose to obtain a survey up front to try and identify any potential issues there may be.

Commissioner McDowell still had questions in looking at the map and hearing Mr. Hanzeli's comments that the area in dispute is his back yard; the map in no way distinguishes it is Mr. Hanzeli's back yard. There are "squiggles" on the survey map that would imply a whole row of trees along the boundary. As far as he is aware, normally the surveyor always shows what is on the ground and this map causes concern if the County is to rely upon this information for preliminary plat approval.

Mr. Robinette did not believe the area of dispute was improved or that it was Mr. Hanzeli's back yard; there are no structures there. The last time he talked with Mr. Hanzeli was after the Hearing Examiner's decision, and left with the understanding they would try to get together and go out and find the corners; that has not been done. Quiet title action is being filed this week and that issue will be resolved.

Both Mr. Robinette and Mr. Hanzeli approached the dais and viewed with the Commissioners

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the map in question, in an effort to identify and clarify the squiggly lines, dash lines, and the disputed area. Mr. Robinette confirmed that the "squiggly" lines are not existing trees, but the clearing limit.

Hearing Concluded. As previously indicated, a decision will be announced at public meeting July 25, 2005 at 2:30 p.m. The Board's decision will include the vote of individual Commissioners and a brief statement as to the basis for the decision. Following that, the Planning Director will prepare a written

decision for signature by the Board and a copy of the decision will be provided to the Appellant and Project Applicant by the Planning Department.

HEARING HELD: Ordinance #C-68-05 (PLG-009-05) Technical Amendments to the Island County Comprehensive Plan Future Land Use Plan Map and the Island County Zoning Atlas

A Public Hearing scheduled and advertised for 10:30 a.m., was held following the Closed Record Appeal hearing, for the purpose of considering Ordinance #C-68-05 (PLG-009-05) Technical Amendments to the Island County Comprehensive Plan Future Land Use Plan Map and the Island County Zoning Atlas.

An attendance sheet was circulated and placed on record [GMA record #8145].

| | |
|---------------------------|----------------|
| Staff | Phil Bakke |
| | Jeff Tate |
| | Ryan Morrison |
| Applicant/Property owner: | John McFarland |

Summary of Staff Report was provided by Mr. Morrison. The applicant purchased the property in 1988 at which time the property was split zoned: Rural Residential (RR) and Rural Agriculture (RA). In 1995, Mr. McFarland requested a zone change for the entire parcel to RA. In 2003 when submitting a building permit application, Mr. McFarland learned that the parcel was rezoned in 1998 to Rural (R). The request before the Board is to rezone the entire 10 acre parcel to RA. The parcel meets zoning criteria for RA. Staff recommends approval.

John McFarland acknowledged having gone through a rezone process in 1995 with full support of staff, and received a favorable decision from the Hearing Examiner. It was not until two years' ago when he learned that the property had been rezoned. When applying to have the property rezoned, he was required to ensure that an application notice was posted on the property and that all property owners within 500' of his property were notified of the rezone application. When the County rezoned his property he was not notified; no notice was posted on the property and the neighbors were not notified. Mr. McFarland suggested it in the best interest of the County to promulgate an ordinance requiring property owner notification anytime a rezone action is being considered. His understanding was that the property was rezoned back to Residential based on a "windshield survey" and review of the general land use actions in the area. Driving by his property at the right time of year one cannot see much past 3-1/2 feet of hay along the fence line;

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cannot see the blueberries, soil amendments done, or any of the other agriculture activities in progress on the property.

Mr. Tate explained that the rezone in 1998 was done at the time of review of the Comprehensive Plan and Zoning Maps, a County-wide zoning effort when the County re-created designation criteria for the Rural AG and Commercial AG zones and looked at that criteria and applied it to all of the pieces of

property in the County and some pieces were added into the AG zone and others pulled out of the AG zones. In hind sight a deficiency of that review in 1998 was that work began with the tax programs for AG zones to identify all parcels in a tax program and placed them in an AG zone accordingly, but failed to look at all the rezones that were applied for individual in years' prior and evaluate those individually on their merits.

Chairman Shelton thought it amazing that someone would go through a rezone process in 1995 to have it zoned Rural AG and then by a windshield survey the County pull it out of Rural AG and place it in rural. He apologized to Mr. McFarland on behalf of the County, noting his belief it had been an error.

Mr. McFarland was very appreciative of how helpful and patient staff had been.

By unanimous motion, the Board approved Ordinance #C-68-05 (PLG-009-05) Technical Amendments to the Island County Comprehensive Plan Future Land Use Plan Map and the Island County Zoning Atlas. *[Ordinance #C-68-05 placed on file with the Clerk of the Board] (GMA record #8146)*

Council of Governments

As a part of today's regular agenda, the Commissioners met at 3:00 p.m. with Elected Officials from Island County, City of Oak Harbor, City of Langley, Town of Coupeville, and Port Districts, commonly known as the Council of Governments.

ATTENDANCE :

William J. Byrd, Member, Board of County Commissioners
Nancy Conard, Mayor, Town of Coupeville
Wm. L. McDowell, Member, Board of County Commissioners
Ed Van Patten, Commissioner, Port of Coupeville
Mike Shelton, Chairman, Board of County Commissioners
Lynae Slinden, Commissioner, South Whidbey Port District

Adoption of the Bylaws

The Council of Governments by unanimous motion approved the Bylaws.

[In accordance with the Articles of Incorporation, Section V, bylaws developed by the Council of Governments board must be approved by the governing body of each of the members before becoming effective.]

Election of Officers

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Elected officers through the end of the year:

Nancy Conard, Chair

Mike Shelton, Vice-Chair

2005 Legislation to Reduce Homelessness

Steve Gulliford, Executive Director, Housing Authority of Island County, addressed the Council with regard to the 2005 legislation to reduce homelessness [HB 2163 Homeless Housing and Assistance Act]

Primarily in regard to find out if the cities want to join the County's overall program or develop their own individual programs, which is allowed under the law.

Emergency Preparedness for BioTerrorism

Betty Kemp, Director, Island County General Services Administration and DES staff talked to the Council with respect to emergency preparedness re relation to whether or not the cities want to develop their own plans or adopt the County plan.

Application Process for Rural Economic Development Funds

The group talked in general about the application process for Rural Economic Development Funds. No one knew for sure whether or not anyone would be submitting an application, the only possibility being perhaps Langley.

Next meeting: August 8 at 3:00 p.m.

There being no further business to come before the Board at this time, the meeting adjourned at 4:00 p.m. on conclusion of Council of Governments. The next regular meeting of the Board will be on July 18, 2005 at 9:30 a.m.

**BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON**

Mike Shelton, Chairman

Wm. L. McDowell, Member

William J. Byrd, Member

ATTEST: Elaine Marlow, Clerk of the Board