

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 1 of 17**

CONVENE:: 7:02 p.m.

PRESENT: Mayor Ralph Osgood, Councilmembers Joan Cathey, Ed Hildreth, Judith Hoefling, Neil McClanahan, Ed Stanley, and Bruce Zeller.

Excused absence: Councilmember Pete Kmet.

Staff: City Administrator Doug Baker, City Attorney Karen Kirkpatrick, Finance Director Jim Hendrickson, Planning and Facilities Director Michael Matlock, Public Works Director Jay Eaton, Development Services Director Roger Gellenbeck, Police Chief John Stines, Fire Chief John Carpenter, Planning Managers Chris Carlson and Tim Smith, Engineer II Doug Johnston, Police Detective Jennifer Kolb, Police Officer Tyler Boling, Recording Secretary Valerie Gow.

APPROVAL OF AGENDA Councilmember Zeller moved seconded by Councilmember McClanahan, to approve the agenda as published. Motion carried unanimously.

SPECIAL ITEMS:

LETTER OF APPRECIATION FROM GOLD CREEK HOME OWNER'S ASSOCIATION: Curt Rosler, Gold Creek Property Owners Association, 6419 Miner Drive, thanked and recognized Planning Manager Chris Carlson and Engineer Doug Johnston for their assistance in supporting the Gold Creek Property Owners Association and the neighborhood.

Manager Carlson has been a source of information for land use and other regulations and provides up-to-date information affecting the neighborhood. He juggles the needs of the developer, neighborhood, and the City in an equitable and fair manner. One example is a development involving Troser Woods Homes resulting in a win-win situation for all parties. Manager Carlson provided straightforward advice, which is the hallmark of a valuable City of Tumwater employee. The association will continue seeking support from Manager Carlson.

Engineer Johnson has assisted the neighborhood in dealing with land use, safety, and compliance issues. After years of enduring speeding motorists, Engineer Johnston advised the neighborhood to widen its walking paths to help reduce vehicle speeds. Engineer Johnston assisted in having reflective buttons installed on the road at dangerous curves, reducing danger. Engineer Johnston offered some advice on the disposition of clustered mailboxes and met with US Postal officials and helped resolve the issue.

Mr. Rosler said the excellence by City staff can only come from outstanding City leadership. He thanked Mayor Osgood and the Council for their leadership.

Mr. Rosler presented Manager Carlson and Engineer Johnston with letters of

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 2 of 17**

appreciation.

**CERTIFICATE OF
APPRECIATION,
CINDY FARR, PARKS
BOARD MEMBER:**

Cindy Farr, Parks Board Member, was recognized for her long-time service on the Tumwater Parks Board. She worked on efforts to help secure a swimming pool for the City as well as other activities in support of the City's parks and special events. Mayor Osgood thanked her for her years of dedication and service. He presented her with a clock recognizing her service from 2003 to 2009.

Ms. Farr commented on the City's unsuccessful efforts to build an aquatics center and is hopeful the City will eventually be able to garner community support to build an aquatics center or a swimming pool. Parks are important to the health of a community.

**FLAG OF HEROES
PRESENTATION:**

Police Chief Stines and Fire Chief Carpenter were presented with "Flags of Heroes" by Mayor Osgood on behalf of Bill McGlaughlin. The flag includes the names of all police and fire officers who lost their lives on 9/11. Mr. McGlaughlin donated the flags to the Police and Fire Departments to display.

Police Chief Stines reported on the loss of five police officers by homicide in Washington State during the last month. To focus on the positive following those terrible events, Police Chief Stines recognized several officers and presented awards.

Police Detective Jennifer Kolb was recognized for establishing a Tumwater Police Facebook page to reach out and educate the community about the Police Department and also to receive communication from citizens. Currently, there are over 300 friends on Facebook. Detective Kolb was recommended by her supervisor and the Police Awards Team to receive a Certificate for Meritorious Service. Police Chief Stines presented the certificate. Detective Kolb said she owes much to the support of her coworkers and strives to find ways of using technology to deter crime within the City.

Officer Tyler Boling was presented with a Life Safety Award for his action on November 3, 2009, in saving the life a distraught lady on Trosper Road who tried to take her life by attempting to jump off the I-5 bridge. He was able to reach her as she reached the rail and began to climb and jump over the bridge rail. He saved her life without any regard to his own safety or well-being. Officer Boling upholds the finest traditions of the Tumwater Police Department. Officer Boling thanked the Police Chief and recognized his fellow officers for their support.

**THURSTON
CONSERVATION
DISTRICT'S
PRESENTATION TO
THE CITY – "WILDLIFE
STEWARD OF THE
YEAR" AWARD:**

The presentation was deferred.

**SEPARATION OF
CAPCOM FROM
THURSTON COUNTY:**

Jim Quackenbush, Director of Communications, Thurston County CAPCOM, reported that CAPCOM provides dispatch service to all public safety agencies in Thurston County. The CAPCOM Administration Board is working through several considerations. As the Board worked through the 2010 budget process, some increases in costs totaled over 166% annually for insurance and other indirect costs from the county. Consequently, the Board asked staff to research risk insurance costs. Further research was requested on all costs for services provided by the county. The only way to save a significant amount of money is for CAPCOM to become an independent agency and pursue services and insurance from the Washington Cities Insurance Association (WCIA).

Mr. Quackenbush reviewed the results of the research, which involved comparing similar sized communication centers to ascertain insurance costs based on the number of full time equivalent (FTE) employees. If the Board elects to pursue independence from the county, there are upfront costs necessary for financial services, payroll, and information technology security. In 2010, the savings would result in \$62,000. Beyond 2010, the savings reflect another \$88,000 bringing the total amount in savings to \$150,000 annually by becoming an independent agency. In looking beyond 2011 and undertaking a recurring cost comparison over 10 years, savings could be achieved of approximately \$1,500,430.

Mr. Quackenbush reviewed one-time transition costs to support in-house functions.

CAPCOM was created as an intergovernmental agency under RCW 39.34. CAPCOM has operated as a county agency under the legal authority authorized by the RCW for the last 39 years. RCW 24.03 provides the authority to consider becoming an independent agency, which creates the opportunity to become a non-profit special purpose governmental agency.

Some of the service providers reviewed during the research included insurance coverage for risk insurance with WCIA providing the best coverage at the least cost. Retirement and health care services were also examined. The Board asked for comparison of the research around the Board's strategic plan. There are two goals that can be achieved in the strategic plan through an independent agency:

- Goal: Provide service that fosters trust, respect and confidence with all

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 4 of 17**

users.

- Foster and expand accountability, ownership and commitment to success.

Staff reviewed the existing intergovernmental agreement. The foundation for forming CAPCOM was based on efficiency and economics. Staff identified monetary as well as efficiencies that could be achieved as a separate agency. The agency would continue as a non-profit governmental agency requiring a revision of the interlocal agreement. The control mechanism in place today will remain requiring all parties to the agreement will need to sign a modification of the agreement

Staff recommended the Board pursue establishing CAPCOM as an independent agency effective July 1, 2010, recognizing that the agency continues to reimburse the county for the services received and that a final budget is adopted prior to the effective date. The final break from the county would be on January 1, 2011, to provide the county with a year's notice for its budgeting process.

The next Administration Board meeting is scheduled on December 2. The decision the Board needs to make is whether to remain with the county or to become an independent agency with the target dates as proposed by staff. The county has been briefed on the Board's discussion and the Commission believes that if the Administration Board believes separation is the right move for the agency, the county has no desire to prevent that from occurring.

Mayor Osgood noted that Councilmember Hildreth is Tumwater's representative on CAPCOM. Councilmember Hildreth shared that he briefed the Council on the proposal.

Councilmember Hoefling asked whether the conversion to a non-profit status changes the agency to a community governance board. Mr. Quackenbush said the Board will remain as currently organized.

Mayor Osgood said it's important for government to continue evaluating for effectiveness and efficiencies. CAPCOM has a strong and positive relationship with the community. He stressed the importance of avoiding any action that might harm that relationship. Some concerns involve unintended consequences. He said he appreciates continued review over the next four months. It's important to allow jurisdictions to undertake due diligence as well as an evaluation for the City.

Mr. Quackenbush reassured the Council that the Board and staff are undertaking due diligence. The decision will return to the Council for presentation and consideration and a final vote to support the action.

Councilmember Zeller agreed due diligence is necessary.

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 5 of 17**

MOTION: Councilmember Zeller moved, seconded by Councilmember McClanahan, to refer the issue to the Public Safety Committee for additional review and analysis for the City Council's future action. Motion carried unanimously.

RECOGNITION: Mayor Osgood recognized Councilmember Zeller for his 12 years on the Council. It's been an honor serving with Councilmember Zeller and he will be missed by the Council and City staff. The community is better off for having Councilmember Zeller serve the City during the last 12 years.

Councilmember Zeller said it's been an honor serving the City. It's important to take a firm position when necessary. It's been fun and an all-consuming job, and now it's time for new leadership. He thanked the citizens of Tumwater and urged them to become informed, know what the City Council is doing, and what's occurring in the City. It's important for citizens to become involved. The Council considers citizen feedback during decision-making processes. Better decisions are made when citizens provide diverse opinions. He urged citizens to hold elected officials accountable. He asked Councilmembers to be open, honest, treat people with respect, seek input on issues, thoroughly research all issues, use balanced decision-making that accounts for everyone's opinions, and do the right thing for Tumwater and its citizens. Sometimes that means casting a vote that is contrary to a personal belief because it's right for the citizens of Tumwater.

Councilmember McClanahan presented a card and a gift certificate on behalf of the Council to Councilmember Zeller.

Mayor Osgood reported the meeting is City Administrator Baker's last Council meeting. He hired City Administrator Baker 16 years ago. He acknowledged that his success as Mayor can be attributed to City Administrator Baker. City Administrator Baker is retiring from city government after 30 years on December 31, 2009.

Councilmember McClanahan presented a card and a gift certificate on behalf of the Council to City Administrator Baker.

City Administrator Baker reported that he's attended City Council meetings during the last 21 years. Personally, he said the height of his career achievement occurred last year during the incredible financial struggle facing the nation during the recession. The City had to deal with limited resources and funds and was able to develop a budget that continues the operation of the City without sacrificing any jobs.

Councilmember McClanahan commented on the departure of over 50 years of leadership. He presented a card and gift certificate to Mayor Osgood, who is leaving the Council at the end of December.

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 6 of 17**

Councilmember Hoefling commented on Mayor Osgood's ability to whistle a bosun's call. On behalf of the Council she presented him with a brass and copper ship whistle with sheet music recognizing his service as Mayor to the City of Tumwater.

Councilmember Cathey presented the Mayor with a Tumwater pencil on behalf of all citizens attending Council meetings.

Councilmember Zeller acknowledged Councilmember Hildreth and John Fedor for attending his first and last Council meeting.

Mayor Osgood introduced his wife, daughter, son-in-law, and friends. He thanked his family and friends for their support. He acknowledged the attendance of local citizen, Chester Gill.

Mayor Osgood shared some words of wisdom to the Council and advised them to keep their word, walk the walk, be truthful, be open, be willing to be vulnerable, share your heart and listen to others, criticize constructively, temper your temper, surrender graciously, understand, be understanding, and be kind.

PUBLIC COMMENT:

Tami Dickinson, General Manager, Guest House Inn & Comfort Inn and Chami Joe Ro, Comfort Inn and Guest House Suites, referred to ongoing concerns with directional signs in the area of the hotels. They thanked the Mayor for the opportunity to speak as well as referring them to staff to partner on the issue. Recently, information on the wayfinding signage program indicates the program will not be funded for another six years, which is a concern as it limits customers finding the hotels as well as limiting customers traveling and spending money throughout Tumwater. They would like to partner with groups and businesses when the signs are installed. City staff has provided some information. They asked the Council to reconsider timing for funding the wayfinding signage program and consider funding the program sooner than six years, as currently scheduled. They cited the cost of the various signs and the need to adhere to the adopted sign design because of the extensive reviews that were completed.

Mayor Osgood advised that the public hearing on the Capital Facilities Plan (CFP) is scheduled later in the meeting. However, although the CFP may not be amended to fund the project earlier, the project is a work in progress and efforts should continue with the City, as plans and adjustments can change.

Councilmember McClanahan invited Ms. Dickinson and Ms. Ro to attend the Public Works Committee meeting for continued discussion on the project.

Chester Gill, 410 Hazelhurst, commented that he's really enjoyed working with the Mayor. Mr. Gill shared information on participation on a street committee where he supported the widening of Littlerock Road to four lanes

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 7 of 17**

from Trosper Road to Tumwater Boulevard. That occurred at least 15 years ago and today the project still hasn't been completed. One of the issues of concern with the Council is long-range planning. Another issue is the addition of lanes on Tumwater Boulevard to Yelm Highway, which needs to occur. He expressed appreciation to Mayor Osgood, City Administrator Baker, and Councilmember Zeller for their work and efforts for the City and shared several stories about the water tower and trees, street projects, and the establishment of the senior program at the Old Town Center.

Don Sampson, 6429 Restawhile Court, thanked the Mayor for all the things that he's done for the neighborhood and for keeping his neighbors informed on the annexation process as well as the pros and cons, and making it an easier transition for his family and neighbors. On behalf of his family, he thanked Mayor Osgood for everything he's done and for his leadership.

CONSENT CALENDAR:

- a. Approval of Minutes: Regular Meeting, November 17, 2009; Worksession, November 16, 2009
- b. The City Council authorizes for payment checks #116006 through #116160 in the amount of \$846,024.85
- c. Advisory Board Reappointment
- d. X-52 Memorandum of Understanding (MOU)
- e. First Amendment to Extend Prosecution Services with Thurston County
- f. Intergovernmental Agreement Between Washington State Fire Fighters Joint Apprenticeship and Training Committee and the City of Tumwater
- g. Intergovernmental Agreement between Administrative Office of the Courts and the City of Tumwater

MOTION:

Councilmember Stanley moved, seconded by Councilmember Hildreth, to approve the consent calendar. Motion carried unanimously.

Mayor Osgood recognized Walt White for his reappointment to a six-year term on the Civil Service Commission.

PUBLIC HEARINGS:

**RESOLUTION NO.
R2009-014; 2010-2015
CAPITAL FACILITIES
PLAN:**

Director Eaton reported on the revisions to the General Governmental element of the CFP. The 2010 beginning fund balance increased by \$50,000 because of the decrease in projected expenditures in 2009 for the Police Department's Records Management System. The Pioneer Park Trail project was previously listed as a Trail Restoration and Bank Stabilization project. Based on the Council's discussion, the project was revised only to include the trail restoration and not riverbank stabilization. The Old Town Center fire sprinklers are now included on the list. The sprinklers are revenue neutral. The Parks Board and Historic Preservation Commission funds were reinstated to the previous level based on the Council's previous direction. The Deschutes Riverbank Protection Study will consider stabilization efforts and the total reach of the river from Henderson through the golf course to determine

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 8 of 17**

whether any protective measures should occur on any properties through the area. The ending funding balance in 2015 has decreased by \$5,000 based on the additional carryover from 2009 and additional expenditures added in the CFP as reviewed.

Mayor Osgood opened and closed the public hearing at 8:31 p.m. There was no public testimony.

MOTION

Councilmember Zeller moved, seconded by Councilmember Cathey, to approve Resolution R2009-014; adopting the 2010-2015 Capital Facilities Plan.

Director Eaton reminded the Council of a fee resolution for consideration later in the meeting adjusting several of the fees included in the CFP.

MOTION:

Motion carried unanimously.

**ORDINANCE NO.
O2009-020; ADOPTION
OF THE 2010 BUDGET:**

Mayor Osgood reported that in early 2009, the City took evasive action by leaving numerous positions unfilled reducing the General Fund by over \$300,000. The unfilled positions represent approximately a 10% reduction in positions in the General Fund. The proposed budget maintains the City's 8% reserve in the General Fund. The budget includes the addition of one position of a Fire Inspector to be filled in mid-2010. The Fire Chief is working with the business community for implementing building inspections. The fire inspector will inspect business structures and fees will be charged to the business community.

The City Council previously held a worksession on October 19 on the budget and held the first public hearing on November 17.

Mayor Osgood thanked City Administrator Baker and City staff for their efforts in developing the budget and reducing expenditures to save funds.

Director Hendrickson reviewed changes to the budget since the last presentation. Changes include the addition of two Public Works positions that were previously authorized to be filled, which were not included in the previous budget presented on November 17. The positions are reflected in the combined utilities cash flow analysis.

The second is the addition of discretionary funding to the Parks Board and the Historic Preservation Commission.

Director Hendrickson reviewed the highlights of the proposed budget:

- The General Fund includes a property tax increase of \$125,000 in 2010 based on an increase in assessed value of new construction of \$34.5 million, and the adoption of ordinances by the Council at the

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 9 of 17**

November 17 meeting increasing property tax by 1%.

- The Council maintained the same level of local and regional human services contracts
- Interlocal agreement expenditures have increased by \$20,000 or 5% due to the increase in population from the annexation.
- The General Fund is retaining 1% of the Utility Tax typically transferred to the CFP General Governmental element to support General Fund activities.
- The City is using \$300,000 from the Facilities Cumulative Reserve fund as needed to maintain the 8% reserve fund.
- The Lodging Tax Advisory Committee provided \$125,000 to 11 applicants with the knowledge that 2010 funding may be less due to reduced expectations in lodging tax.
- The budget includes an increase in sewer rates of 5% and a LOTT waste treatment cost increase of 5.6%.
- Capital construction in utilities represents \$4 million, which reflects a 200% increase in the CFP for utilities construction activities.
- The General Government CFP is limited in its activities and programs due to the needs of General Fund to fulfill basic services and programs.
- The Transportation element of the CFP anticipates spending 10% more than in 2009 with much of that additional amount supported by additional federal funding.
- The budget includes utilization of all remaining reserves in the General Fund and includes reductions in revenues for sales tax and Business and Occupation, with no other increases in revenue projected with the exception of a property tax increase.
- The budget continues the freeze of 12 General Fund positions.

Looking forward beyond this initial budget, without a change in the economic landscape looking forward to late 2010 and further into 2011, the City may face another round of difficult decisions. The recession will involve a long-term recovery. Projections will be updated monthly.

Mayor Osgood opened the public hearing at 8:44 p.m.

PUBLIC TESTIMONY:

Mary Segawa, Director, TOGETHER!, reported the organization is a non-profit agency in Thurston County. She provided a copy of letters signed by members of the community associated with non-profits receiving Human Services Review Council (HSRC) funding. She thanked the Council for including HSRC funding in the budget and acknowledged the difficult time in terms of funding and budget allocations. This is a time for everyone to remember those individuals and families in need and to continue funding services to those that are experiencing difficulties during this difficult time. She described the many needs of the community and how funding helps to meet some basic needs for families and children in the community. Meeting these needs now prevents future criminal justice resources and funding by

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 10 of 17**

helping families and children succeed. Additionally, the funding helps the community leverage thousands of dollars from other sources. Most of the service providers rely on grants and other funding sources. It's important to show community support. She thanked the Council for retaining the funding within the budget.

Eileen McKenzieSullivan, Senior Services for South Sound, thanked the Council for including funds in the budget and stressed the importance the funds provide in terms of leveraging other funds. It's important to have local dollars to access federal funds for programs such as Meals on Wheels. She thanked the Council for acknowledging human needs as a priority.

Holly Greenwood, Choice Regional Network, added her thanks to the Council. HSRC funds are critical for the community's safety net. Recently, the City helped fund the free mental health clinic, which has served hundreds of individuals in Thurston County. Those dollars help leverage other funding that wouldn't be available without local government funding. She noted the City will suffer a huge loss with the retirement of City Administrator Baker and Mayor Osgood.

Mayor Osgood closed the public hearing at 8:51 p.m.

MOTION

Councilmember Zeller moved, seconded by Councilmember Hoefling, to approve Resolution O2009-020; adopting the City of Tumwater 2010 Budget.

Councilmember Zeller said there continues to be a degradation of revenues available to the City to operate. Twelve years ago, when he first began serving on the Council, public safety was funded entirely by property tax with some funds remaining. Over the last 12 years with public initiatives and property taxes not increasing at the same rate of inflation, the City is falling behind each year. This year for the first time, public safety is consuming all property tax revenue and all sales tax revenue. If the trend continues, there will be no city. Something needs to happen to change the trend.

Mayor Osgood said the solution to balancing the budget is reducing expenditures or raising revenue through an increase in tax. Raising taxes during a recession is the worst time. The third option is exploring economic development. Other methods include possibly combining services with other cities or looking at pursuing ways to more efficiently and effectively providing services, such as a regional fire authority or a municipal park district.

MOTION:

Motion carried unanimously.

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 11 of 17**

**ORDINANCE NO.
O2009-014; VACATION
OF A PORTION OF 2ND
AVENUE RIGHT-OF-
WAY**

Mayor Osgood presented Engineer Johnston with his 35-year plaque as a City of Tumwater employee. Engineer Johnston commented on his work with Councilmember Zeller, City Administrator Baker, and Mayor Osgood and their outstanding service to the City.

Engineer Johnston reported the applicant, Mr. Bowers, is available to answer any questions from the Council. He outlined the location of the vacation request, which is located at the corner of Division Street and 2nd Avenue. The boundaries are from an 1895 recorded plat on the south and the north boundary from an 1890 recorded plat called Tumwater Addition. A remainder of unplatted property lies between, a portion of which Mr. Bowers owns. The vacation would create a straight line boundary along the east side of 2nd Avenue. Mr. Bowers is also proposing to dedicate some additional right-of-way on the west side of the property that would create a clean line extension on the west side of the property. The request is for vacation of approximately 1,000 square-feet of right-of-way involving 77 feet of frontage and a corresponding width between 11 and 16 feet. The vacation action would create a consistent boundary along the east boundary of the block. The dedication on 3rd Avenue would dedicate 353 square-feet.

The request has been reviewed by Intercity Transit, public and private utilities, and emergency services. All agencies have concurred with the vacation request. One existing utility within the vacation boundary near Division would necessitate a small easement. During a Public Works Committee meeting there were multiple questions about the possibility of Intercity Transit wanting to pursue additional improvements, such as a bus shelter or widening for a lane. However, Intercity Transit advised that at this time there is no need. Staff is retaining a small easement for the hydrant and extending the easement across the frontage to retain a future option.

Staff requests that pursuant to testimony at the public hearing, the Council adopt Ordinance No. O2009-014 vacating a portion of the 2nd Avenue right-of-way lying between Division Street and "B" Street.

If adopted, the ordinance will be held and not published until compensation has been paid.

If the Council adopts the ordinance it has the choice to approve payment or refer the issue to the Public Works Committee. Staff recommends the compensation value at \$1,483.74.

Mayor Osgood opened the public hearing 9:07 p.m.

PUBLIC TESTIMONY:

Dave Bowers, 102 3rd Avenue, said in May he had a presubmission meeting with Planning Manager Carlson for possible subdivision of the property and learned that he is not the owner of the property and that the 18-foot required setback would push any development into the hill creating an expensive

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 12 of 17**

situation. The first option was contacting the City to purchase the right-of-way.

Mayor Osgood closed the public hearing at 9:08 p.m.

Councilmember McClanahan reported that the Public Works Committee spent some time on the issue and the only concern was public transit having a bump out. The committee didn't discuss compensation. Committee members are satisfied with the proposal.

MOTION:

Councilmember McClanahan moved, seconded by Councilmember Hildreth, to adopt Ordinance No. O2009-14 vacating a portion of 2nd Avenue right-of-way lying between Division Street and "B" Street with compensation to be set at \$1,483.74. Motion carried unanimously.

**COUNCIL
CONSIDERATIONS:**

**LAUREL PARK
COMMUNITY LLC VS
CITY OF TUMWATER
COMPLIANCE
PROCEEDING:**

City Attorney Kirkpatrick provided a presentation on the *Laurel Park Community LLC v. City of Tumwater* Compliance Proceeding as a result of two ordinances passed by the Council involving Ordinances Nos. O2008-009 and O2008-027. She reviewed references attached to the staff report including the Attorney General (GA) Advisory Memorandum on "Avoiding Unconstitutional Takings of Private Property" and a letter and attachments from Mr. Woodring, as well as additional analysis from the City Attorney.

The Western Washington Growth Management Hearings Board (WWGMHB) has asked the City to document its process. The ordinances changed the zoning in several areas of the City to Manufactured Home Park zoning. As a result, Laurel Park Community LLC, Manufactured Housing Communities of Washington, and Tumwater Estates Investors appealed the Council's adoption of the ordinances to the Western Washington Growth Management Hearings Board (WWGMHB).

The WWGMHB heard oral argument in September and issued its ruling in October. One allegation was that the City failed to utilize the Attorney General Advisory Memorandum to assure that the actions did not result in an unconstitutional taking of private property. The Advisory Memorandum is part of the City's record. The Advisory Memorandum states, "This Advisory Memorandum is intended as an internal management tool for an agency decision and it is not a formal Attorney General's opinion under RCW 43.10.030(7) and should not be construed as an opinion by the Attorney General." The letter says that legal counsel should be consulted for advice on whether any particular action may result in an unconstitutional taking of property requiring the payment of just compensation or may result in a due process violation.

The City Attorney and outside legal counsel prepared analysis on the two ordinances, based on the Advisory Memorandum and review of case law. However, the City's legal review was contained in attorney client privilege memorandum in executive session materials, which are confidential and not part of the written record. The WWGMHB did not find that a taking occurred. That claim will be addressed in a separate federal court lawsuit filed by the petitioners. Instead, the WWGMHB concluded that the City did not take action affecting legally recognizable property rights. However, due to the determination that insufficient evidence exists in the written record concerning the City's use of the AG memorandum process to evaluate takings, Tumwater was ordered to comply by January 13, 2010. A compliance hearing before the Board is scheduled for February 23, 2010.

City Attorney Kirkpatrick reviewed a summary of the AG Advisory Memorandum and process undertaken by the Council. The Advisory Memorandum is organized into four elements:

- **Part 1 – Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property.** It recommends review and distributing the Advisory Memorandum to legal counsel, decision makers, and key staff, using warning signals to evaluate proposed regulatory actions, developing an internal process for assessing constitutional issues, incorporating constitutional assessments into the agency's review process, and developing an internal process for responding to constitutional issues identified during the review process.
- **Part 2 – General Constitutional Principles Governing Takings and Substantive Due Process.** The section summarizes basic constitutional principles, such as police power, regulatory takings, and substantive due process as well as constitutional principles relating to the regulation of private property. The principles are analyzed more specifically in relationship to the adoption of the ordinances in the attorney-client privilege memorandum.
- **Part 3 – Warning Signals.** The following warning signals are examples of situations that may raise constitutional issues. Warning signals are phrased as questions that state agency or local government staff can use to evaluate the potential impact of a regulatory action on private property. The fact that a warning signal may be present does not mean there has been a taking or substantive due process violation.
 1. Does the regulation or action result in a permanent or temporary physical occupation of private property?
 2. Does the regulation or action deprive the owner of all economically viable uses of the property?
 3. Does the regulation or action deny or substantially diminish a functional attribute of property ownership?
 4. Does the regulation or action require a property owner to dedicate a

portion of property or to grant an easement?

5. Does the regulatory action have a severe impact on the landowner's economic interest?

• **Part 4 – Appendix – Summaries of Significant Takings Cases in the United States Supreme Court.**

Attorney Kirkpatrick presented a summary of the City's utilization of the Advisory Memorandum:

- The memorandum was attached to the staff report and confidential attorney-client analysis was circulated.
- Legal counsel assessed warning signals in separately submitted confidential legal memoranda.
- The Advisory Memorandum states that staff and legal counsel should have a process to assess constitutional issues. The assessments are incorporated in the City's normal review process. A takings analysis is required each time private property rights will potentially be impacted. The internal process is determined to a certain extent by the nature of the action before the City. It includes evaluation of the AG's warning signals by staff, referral of the matter to the City Attorney, discussion of potential constitutional issues internally between staff, City Attorney, City Administrator, and Mayor, supplemental legal analysis indicated by the City Attorney and for outside counsel, making changes to staff recommendations if necessary, providing takings analysis to the Council, Commission, or other decision makers, and further discussion and changes as necessary.

Attorney Kirkpatrick said she's just outlined in detail the process the City used to respond to any identified constitutional issues. Although the specific assessment process was not reflected in the written record, the actual steps taken to evaluate impacts in the case of the manufactured home park ordinance were extensive. It included internal staff review and evaluation of the AG Memorandum and warning signals, a memorandum from the Planning & Facilities Director to the General Government Committee (GGC) on January 24, 2008, attorney-client privilege memorandum to the GGC on April 17, 2008, to the Commission on December 5, 2008 and November 24, 2009, and the Council on December 30, 2008. The Council held at least two executive sessions during the process. The City sought additional advice from outside counsel. The AG Memorandum was distributed to the Council and included in the record. Attorney Kirkpatrick noted she engaged in numerous conversations with staff including the Planning & Facilities Director, City Administrator, and Mayor, as well as Councilmembers regarding the manufactured home park ordinances generally and in particular about constitutional issues. Changes were made to the ordinances based on those communications and advice. The AG Memorandum has been redistributed and additional attorney-client analysis has been redistributed, as well as

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 15 of 17**

reviewing these steps during the presentation.

Based on information provided previously as well as the presentation before the Council, the Council is asked to affirm that the AG process has been utilized to evaluate the action taken by the City in approving Ordinances O2008-009 and O2008-027 to assure that it did not result in an unconstitutional taking of private property in compliance with RCW 36.70A.370(2).

Councilmember Hildreth noted that during the process he was a member of the Planning Commission. The Commission received its first briefing on September 23, 2008 with a public hearing held on November 25, 2008. At the end of the public hearing he had several questions including case matter, taxing, spot zoning, and right of first refusal, etc. The Commission postponed a decision until the questions could be addressed. The Commission reconvened on December 9, 2009, and received all the answers to the questions. He said he felt comfortable with the answers he received and the Commission recommended approval of the ordinances to the City Council. He said he has reviewed the information presented by the City Attorney during the meeting and there is no new information that changes his decision.

Councilmember Zeller said he believes the City complied with the Attorney General Memorandum process. He was the Chair of the General Government Committee during the time the ordinance was considered and reviewed. The committee held at least five meetings and formed a special subcommittee chaired by Councilmember Stanley to work on the issue. The committee received a copy of the Attorney General Memorandum and attorney client privilege communication from the City Attorney including a memorandum containing takings and due process analysis. The memorandum addressed topics from the Attorney General Memorandum including the warning signals and relevant case law. The committee incorporated that information into its decision-making process. He supported the issue moving forward to the City Council and he supported the vote of the City Council. Additionally, he had additional concerns regarding the takings issue and met privately with the City Attorney to discuss the constitutional issues before the committee rendered its recommendation. It's clear the City used the Attorney General Memorandum's recommended process in its decision-making regarding the manufactured home park ordinances. He's reviewed the information presented by the City Attorney during the meeting, and there is no new information that changes his decision.

Additionally, the Growth Management provides many requirements and very limited tools to city councils to achieve meeting density requirements and housing types cities are required to have. Councilmember Zeller said the Council's attempt is one of the limited avenues available to accomplish those requirements.

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 16 of 17**

Mayor Osgood confirmed that the City has an internal process and that the constitutional assessment is incorporated in the City's normal review process. It's a standard course of business as the City Attorney explained, and in this case, he can attest the City used an extensive internal process to determine and provide information about constitutional issues. There was extensive staff evaluation and he met several times with staff, including the City Administrator, Planning and Facilities Director, and City Attorney and discussed the ordinances. He said he received several confidential memos from the City Attorney on the issue and the Council discussed the matter in two executive sessions. The information provided by the City Attorney during the meeting is the same information previously provided to the Council during the process. Changes did occur to the ordinances as it went through the review process based on those assessments and discussions. The City used the process outlined by the Attorney General's Office to evaluate the matter.

MOTION: **Councilmember Zeller moved, seconded by Councilmember, to reaffirm its decision in adoption of the ordinances and affirming that the process was utilized.**

WITHDRAWAL OF MOTION: **The makers of the motion withdraw the motion.**

MOTION **Councilmember Zeller moved, seconded by Councilmember Stanley, to confirm that the City Council received a copy of the attached documents, which includes the Attorney General Advisory Memorandum and the attached plaintiff's legal analysis. The documents are already part of the City's record and were previously reviewed. Motion carried unanimously.**

RESOLUTION NO. R2009-015; AMENDING THE TUMWATER FEE RESOLUTION: Director Eaton reported the action pertains to a 5% increase to the City's sewer connection charge and monthly sewer rate. Additional actions pertain to an update from LOTT for a fee increase that is considered a pass through, and an update to the Olympia School District Impact Fee calculation as revised. Staff recommends adoption of the resolution.

MOTION: **Councilmember Cathey moved, seconded by Councilmember Stanley, to approve Resolution No. R2009-0125, amending the Tumwater Fee Resolution. Motion carried unanimously.**

PUBLIC SAFETY COMMITTEE: *Neil McClanahan* There was no report. A future meeting will be scheduled to discuss CAPCOM and red light photo enforcement.

GENERAL GOVERNMENT: *Bruce Zeller* There was no report.

**TUMWATER CITY COUNCIL
MINUTES OF MEETING
December 1, 2009 Page 17 of 17**

PUBLIC WORKS: The committee's next meeting is December 4, 2009.
Pete Kmet

BUDGET COMMITTEE: No report.

**CITY
ADMINISTRATOR'S
REPORT:** No report.

EXECUTIVE SESSION: There was no executive session.

MOTION **Councilmember Zeller moved, seconded by Councilmember Hildreth, to cancel the December 15, 2009 regular City Council meeting. Motion carried unanimously.**

Mayor Osgood and Councilmember Zeller acknowledged community feedback they have received regarding their service on the Council. Mayor Osgood said he will miss serving the City and will attend the first meeting in January 2010 for the swearing in ceremony of the new Mayor and Councilmembers.

ADJOURNMENT: **With there being no further business, Mayor Osgood adjourned the meeting at 9:39 p.m.**

Prepared by: Valerie Gow, Recording Secretary/President
Puget Sound Meeting Services