

Development Commission—Special Meeting  
9-26-18

**CITY OF ISSAQUAH**  
**Development Commission—Special Meeting**  
**MINUTES**  
**September 26, 2018**

Pickering Room  
City Hall Northwest

1775 12th Ave. NW  
Issaquah, WA 98027

<b>Commission Members Present</b>	<b>Administration/Staff Present</b>
Richard Sowa, Chair	Lucy Sloman, Land Development Mgr.
Mel Morgan, Jr., Vice Chair	Keith Niven , Economic and Dev. Services Dir.
Michael Brennan	
Kevin Price	<b>Others Present</b>
Richard Sanford	Ray Liaw, Van Ness Feldman LLP
<b>Members Not Present/Excused</b>	Zachary Lell, City Attorney's Office
Randy Harrison	Patrick Schneider , Foster Pepper PLLC
Jasmina Milhova	Tia Heim, Shelter Holdings
Mark Rigos, Alt.	
Ryan Roeter, Alt.	
Nischitha Venkatesh, Alt.	

**1. CALL TO ORDER**

SOWA, Chair, called the meeting to order at 7:00 PM.

**2. PUBLIC HEARINGS**

**ISSAQUAH HIGHLANDS RETAIL (HIGH STREET COLLECTION) SITE DEVELOPMENT PERMIT, (Q), Application No. SDP18-00001; PRJ17-00027**

**ISSAQUAH HIGHLANDS MEDICAL OFFICE ADMINISTRATIVE SITE DEVELOPMENT PERMIT, (Q), Application No. ASDP18-00007; PRJ17-00023**

**ISSAQUAH HIGHLANDS SELF-STORAGE ADMINISTRATIVE SITE DEVELOPMENT PERMIT, (Q), Application No. ASDP18-00006; PRJ-00028**

**Preliminary Matters**

Ray Liaw, Van Ness Feldman LLP, legal representative for the Development Commission, referred to a letter received earlier today from the applicant's (Shelter Holding's) legal representative, Patrick Schneider, entitled Applicant's Objection and Motion to Stay, which was addressed to the Development Commission for tonight's hearing. She said she will give the Commission some options they might want to pursue about how to proceed as a result of the request to stay the hearing. She began her remarks by clarifying that tonight's meeting is a special meeting, not a regular meeting, and as a result, the Commission's decisions cannot deviate from the published agenda, which does not include the letter received earlier today. A discussion could be held on that letter and any other items not on the agenda, she continued, but no final action could be taken. She noted there is the possibility of pursuing an option of having all parties agree to an exception, but her recommendation is to presume that this is a special meeting.

She outlined the Commission's choices if they agree to regard tonight's discussion as a special meeting. BRENNAN asked can the Commission still have a discussion on the letter and hear from all parties but not take action. Liaw replied yes. PRICE asked Liaw for her recommendation. Liaw said her recommendation is to not deviate from the agenda and not take action on the letter.

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Whether to take testimony is within the Commission's purview, she said. She suggested that the parties add their comments about how to proceed.

SOWA invited both parties to comment. Patrick Schneider, Foster Pepper PLLC, introduced other members representing IHIF-Commercial, LLC (Shelter Holdings). He gave some background on the request to stay a public hearing on Shelter Holdings' applications. His comments reiterated the primary points made in the letter requesting a stay, including: the Development Services Department Director, Keith Niven, has sole jurisdiction to make all vesting determinations, and he made his determinations in the Staff Reports; the Development Commission does not have appellate jurisdiction to review the Director's vesting determinations; the Development Commission does not have jurisdiction over IHIF-C's SDP and ASDP applications because any such jurisdiction depends on the Replacement Regulations; and the Development Commission cannot take any action except to stay this proceeding until a final vesting determination is made. Because the Development Commission does not have jurisdiction, he continued, the involvement of the Development Commission is a meaningless, wasteful, damaging process.

Zachary Lell, City Attorney's Office, introduced other members of the City's legal representation team. He referred to the letter stating the applicant's objection and motion to stay the hearing received earlier today, and said there has not been adequate time to prepare a formal written response. He said the request for a stay has no basis in the City's procedural regulations, and said the Development Commission has the exclusive jurisdiction to review and issue final decisions on site development permits for projects located within the Issaquah Highlands and that meet certain established thresholds. He continued that a public hearing before the Development Commission is required in this instance and that a staff report is not an appealable document. He continued his comments on the Director's ability to make vesting determinations. He referred to the appeals process available to the applicant and said this issue has already been examined and addressed by the City's Hearing Examiner. He referred to the April 4, 2018 letter from the City (Keith Niven) to Mr. Schneider, which outlines the City's position regarding the vested status of Shelter Holdings' pending project applications. He noted the applicant's counsel attempted to appeal that letter to the Hearing Examiner, and the Examiner ultimately granted in favor of the City's request to dismiss that appeal, concluding that the letter was not a final decision that could be independently appealed. The applicant is now trying to re-litigate that precise point, he added. He said staff is fully prepared tonight to go forward with this hearing as scheduled, and if there is a delay while the applicant pursues an appeal of the staff report, the record should reflect that the delay is due to the actions of the applicant and not of the City. He noted that the City's regulations clearly require a Level 3 review by the Development Commission on the applicant's proposals.

Schneider made comments in response to Lell's remarks, followed by comments by Lell in response to Schneider's remarks.

PRICE said the applicant has stated it is not in the Commission's jurisdiction to review the Director's vesting determinations and the City has stated that it is. Who decides, he asked. MORGAN clarified that the applicant's position is that the Commission has no say over the Director's determinations. Schneider replied yes. Lell said he concurs that the City's code delegates that authority to the Director, but that must occur in the broader context of the review procedure, which in this case is a Level 3 review process. Schneider spoke of the need to create a record on the vesting issue, over which the Commission has no jurisdiction. MORGAN said his understanding is that the Commission would not be making a decision on vesting; we would just be making a decision on the proposal. Schneider said we agree that Shelter Holdings does not comply with the replacement regulations, but we have to make the record on an issue on which you cannot make a decision.

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Liaw said her best answer to the Commission right now is that multiple provisions in the code speak to the scope of the Development Commission's authority, and most of them speak to making a decision on a Level 3 site development permit. She read from the code. It does not speak to vesting at all, she noted.

BRENNAN asked if the Development Commission is reviewing for compliance with applicable standards as defined by the Director, could we limit the amount of testimony to just that, and not extend it to the question of vesting. Liaw replied on the question of whether the Commission can proceed to review the project application and elect to not make a decision on the question of vesting, yes, that is within the Commission's right. BRENNAN asked could the next regularly scheduled Commission meeting include an executive session that includes the vesting issue. Liaw suggested the first decision is how to proceed tonight, and her recommendation is to deal with the issue of a potential executive session later.

MORGAN asked would the City typically delay taking a project to the Commission as part of the review process if the applicant so requested. Niven described the City's code on inactive permits, and said there is the opportunity to agree to a delay, although that is not the case here.

PRICE said the staff report lists three alternatives for the Commission: to remand the retail application to staff to review as is; approve as is; and place the application on hold. He asked the City to speak to the latter. Niven said the alternatives were developed knowing that differences of opinion tonight were likely. The Commission could remand this back to the City to review under the provisions of the now-terminated Development Agreement, which the City could then appeal to the Hearing Examiner. He explained that the City would have choices if the Commission determined that the City was in error in taking its position outlined in the April 4, 2018 letter.

Lell spoke to the need to make a record on these issues that establishes a factual basis for why particular determinations were made, and tonight is the opportunity to do that. Schneider said Niven's comments are not consistent with his understanding of the Commission's responsibilities on the vesting question.

The Commissioners continued discussing how to proceed, specifically whether or not to address the motion to stay the hearing on Shelter Holdings' applications. They asked Liaw for her recommendations, which Liaw provided. She recommended that tonight's meeting be considered a special meeting, and that the motion to stay not be included on tonight's agenda. She said the Commission could decide to put the motion to stay at the end of its discussions and proceed with the public hearing portion of the agenda. After further discussion, the Commissioners decided to place the motion to stay the hearing on the agenda at the next opportunity at a regular meeting, and to proceed with the public hearing on the three site development permit applications listed on the agenda for tonight's meeting. Upon the advice of Liaw, they also noted they will not try to constrain what information is presented for the purpose of creating the record that the applicant needs for an appeal.

SOWA said the motion to stay will be added to the agenda for the Development Commission's regular meeting on October 24, 2018, at 7:00 PM. He asked both parties, if they are willing, to provide a written summary of their positions and submit them a few days in advance of the meeting so that Commissioners can have time to study the issue. Lell asked for an opportunity to provide a written response to Schneider's letter dated September 26, 2018. After additional discussion by all parties, it was determined that:

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- The City will provide a written response to Schneider's September 26, 2018 letter by close of business on Wednesday, October 10, and that the response be limited to no more than five pages;
- The applicant will provide a reply to the City and submit it to the City by noon on Tuesday, October 16, so it can be included in the agenda packet prepared and distributed on week in advance of the October 24 meeting where it will be on the agenda, and that the reply be limited to no more than three pages;
- Staff will provide the materials to Commissioners, the public, and any other interested parties about one week in advance of the October 24 public hearing;
- Tonight's discussion will cease about 9:30 PM and continue at 7:00 PM at the October 24 public hearing; and
- A placeholder for a potential Executive Session will be placed by staff on the October 24 Development Commission public hearing agenda.

SOWA opened the public hearing on the Issaquah Highlands Retail (High Street Collection) Site Development Permit (Q). Schneider noted the applicant is proceeding under protest with the public hearing for the reasons listed in his letter.

SOWA noted that the public hearing is anticipated to be conducted over the course of multiple meeting dates. Public comments will be heard after staff's presentation has been completed, which is anticipated to occur at a future date, so no public comments will be taken tonight.

Lell distributed a suggested procedural format for the order of presentation, time and extent for providing evidence, and so on. He said he prepared this unilateral proposal and shared it with the applicant prior to the meeting, and is submitting it to the Commission for their consideration now. After some discussion, the Commission decided to follow the suggested procedural format for the public hearing.

Sloman displayed a series of questions intended to determine whether Commissioners can be fair and impartial in making decisions on this quasi-judicial matter, and whether they have had any ex parte communications on this issue. There were no disclosures from Commissioners and no challenges to any Commissioners' participation.

### **Staff Presentation/Witnesses**

Lell said the purpose of this hearing is to review and evaluate three project applications submitted by the applicant located in the Issaquah Highlands area. He explained the primary dispute is over which body of regulations and standards should be applied to these applications. He noted the applications were submitted under the auspices of a Development Agreement whose build-out period ended September 2017. The City Council subsequently approved an ordinance that created replacement regulations that would apply to future development in the Issaquah Highlands, which was adopted in March 2018. Staff's position is that the applications should be reviewed and evaluated under the replacement regulations, not the regulations contained in the Development Agreement.

He continued his presentation with information on vesting mechanisms, and said site development permits do not trigger vested rights under state law. He explained that another option for vesting is in the case where sufficient detail about future building plans is included in the preliminary plat application (Noble Manor vs. Pierce County); however that is not the case with the Shelter Holdings applications under discussion tonight. He characterized the primary dispute between the applicant and the City is how the 1996 vesting provisions in the Development Agreement should be construed with respect to the three Shelter Holdings applications. He recommended that Commissioners read the vesting language in the Development Agreement (Section 3.23) and said

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Shelter Holdings' applications were submitted after the build-out period of the Development Agreement had ended. He gave some additional information about the Council's adoption of new replacement regulations in March 2018. He also called attention to Sections 3.2.3.2 and 5.13 in the Development Agreement, both of which apply to this situation. He characterized the vesting issue as basically one of contract interpretation regarding a clause in the Development Agreement that is clear in staff's view.

Keith Niven, Director of Economic Development and Development Services Director for the City, was sworn in as a witness. Lell asked questions of Niven on a variety of topics, including:

- Scope of responsibility and authority for the City of Issaquah;
- Familiarity with the DSD Director's authority and vested rights in IMC 18.01.50, and his interpretation of how the code applies to the Shelter Holdings' applications;
- Description of how new regulations adopted by the City are applied to applications;
- Understanding of the authority granted to the DSD Director in IMC 18.03.70-A;
- Understanding of IMC 18.19-B.040 in the replacement regulations and whether an interpretation was requested by the applicant;
- Whether a separately appealable vesting determination has ever been submitted to the City;
- Understanding of the Development Commission's scope of authority for ASDP and SDP applications;
- Whether the applications under discussion are subject to Level 3 review;
- Purpose, background, and details on the City's 1996 Highlands Development Agreement and annexation agreement with Port Blakeley, King County, and the City, particularly with regard to the build-out period;
- How he construes Section 3.23 in the Development Agreement, "During the build-out period, the City shall not modify or impose new or additional development standards beyond those set forth in this agreement;"
- How he construes the provisions in Section 3.23.2, "After Build-out," and Section 5.13, "Term;"
- Other provisions in the Development Agreement pertaining to the build-out dates, vesting, timelines, and so on;
- Familiarity with and interpretation of Section 5 of Ordinance 2830, "Termination of Development Agreement," and IMC 18.19-B.280, "Vesting of Permits;"
- When and from whom IHIF-C acquired its property in the Issaquah Highlands, how much time remained before the build-out period ended, when IHIF-C filed land use applications to develop its property, actions IHIF-C took instead of developing its property expeditiously, IHIF-C's efforts to gain community support, staff's responses to IHIF-C's actions on behalf of the City, and the actions eventually taken by IHIF-C.

### 3. ADJOURNMENT

Lell indicated that in view of the time, his questioning has reached a good point to stop for tonight. With the consent of the applicant, SOWA adjourned the meeting at 9:25 PM.

Respectfully submitted,

Susan Lowe  
Recording Secretary