

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Special Meeting

October 16, 2019
6:00 p.m.

Council Chambers
Bellevue, Washington

PRESENT: Mayor Chelminiak, Deputy Mayor Robinson, and Councilmembers Lee, Nieuwenhuis, Stokes, and Zahn

ABSENT: Councilmember Robertson

1. Executive Session: None.
2. Special Meeting
 - (a) Hearing regarding Appeal of the Approval of a Conditional Use Permit Application for the South Bellevue Segment of the Energize Eastside Project

Mayor Chelminiak said this is a limited public hearing to consider the appeal of the Hearing Examiner's decision that would approve, with conditions, Puget Sound Energy's application for a conditional use permit (CUP) for the South Bellevue Segment of the Energize Eastside project. Appeals were filed by the Coalition of Eastside Neighborhoods for Sensible Energy (CENSE) represented by attorney Richard Aramburu; the Citizens for Sane Eastside Energy (CSEE) represented by attorney Larry Johnson; and by Warren Halverson, Norm Hansen, and Loretta Lopez, each representing themselves. In addition, the other parties to the proceeding are the applicant, Puget Sound Energy (PSE), represented by Erin Anderson and Sara Leverette, and the City of Bellevue represented by Matt McFarland and Cheryl Zakrzewski.

Mr. Chelminiak said the Council would not be making its decision that evening. He noted that Councilmember Robertson recused herself from the hearing under the Appearance of Fairness Doctrine due to ongoing business negotiations between PSE and Robertson and Associates, LLC. Councilmember Robertson is a member of the latter, and the parties to the appeal were informed in writing on September 16 of her decision.

Mayor Chelminiak asked the City Attorney to describe the rules for considering the appeal. He said the Council would then address the matter of PSE's objection to the Council considering the briefs that were filed by Mr. Halverson, Ms. Lopez, and Mr. Hansen, as well as the request by CENSE and CSEE to continue the hearing to a later date. If the Council decides to not continue the hearing, the Council will open the hearing for oral argument by the parties.

City Attorney Kathy Gerla said the proceeding is a quasi-judicial, limited public hearing on the appeals that have been filed regarding the Hearing Examiner's approval, with conditions, of PSE's CUP application for the South Bellevue Segment of the Energize Eastside project. The Council is not acting in its usual policymaking or legislative role. Instead, the role of the Councilmembers in this proceeding is to act as judges. The limited public hearing is confined to the issues decided by the Hearing Examiner and to the evidence in the record that was considered by the Hearing Examiner. The parties to the appeal are the only individuals allowed to speak this evening.

Ms. Gerla said the Council's role is not to make the decision about whether the CUP should be issued. Instead, the Council's role is to determine whether the Hearing Examiner's decision is supported by material and substantial evidence in the record. In this context, evidence is material if there is a reasonable probability that the presence or absence of the evidence would alter the decision by the fact finder. Evidence is substantial if there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the decision. The Council is sitting as an appellate body to determine whether there is material and substantial evidence in the record.

The appellants bear the burden of proof in this appeal. The Council may only grant the appeal (i.e., reverse the decision of the Hearing Examiner, or grant it with modifications) if the appellants have carried their burden of proof and the City Council finds that the decision is not supported by material and substantial evidence. In all other cases, the appeal must be denied and the Hearing Examiner's decision must be upheld. In making its decision, the Council is required to give substantial weight to the Hearing Examiner's decision.

Ms. Gerla said that each side will have 30 minutes to present their arguments. The appellants will be allowed to make a rebuttal argument if they set aside time for that purpose. The Council may ask questions of the parties during the oral arguments. However, new material that is not in the record made before the Hearing Examiner cannot be presented tonight to the Council. Any such material, if presented, will be disregarded by the Council.

Ms. Gerla said that, under the state's Appearance of Fairness Doctrine, judges must maintain fairness and impartiality in the case. Judges may not engage in ex parte or off-the-record contacts with proponents or opponents of the project in order to maintain impartiality. Local government officials must disclose all ex parte contacts. If a Councilmember acting in a quasi-judicial capacity cannot exclude ex parte information from their consideration, make their decision solely on the record, and affirm that they will maintain their impartiality, they are to be recused from participating in the decision. Ms. Gerla said staff identified approximately 18 emails to Councilmembers as potential ex parte contacts. Those have been disclosed to the parties or representative of the parties.

Ms. Gerla asked Councilmembers to disclose any ex parte contacts received other than through the City's email accounts. If a contact is disclosed, the Councilmember should state the name of the individual involved in the contact, date or approximate date, method of contact, and the substance of the communication. Any transcripts of voicemail messages should be submitted into the record. The City will maintain the emails and verbal disclosures, and preserve them for the

purpose of maintaining a record of the ex parte contacts should there be a need for them in any subsequent legal proceeding. Ms. Gerla said their substance will not be considered by the Council. Responding to Mayor Chelminiak, Ms. Gerla said that Councilmembers should disclose any ex parte contacts since April 8, 2019, which is the date that the Hearing Examiner's hearing was closed.

Responding to Ms. Gerla, Councilmember Stokes said he had no ex parte communications to disclose. He said he was able to affirm that he could exclude any ex parte information from his consideration and to make his decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Deputy Mayor Robinson said she had no ex parte communications to disclose. She said she was able to affirm that she could exclude any ex parte information from her consideration and to make her decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Mayor Chelminiak said he had no ex parte communications to disclose. He said he was able to affirm that he could exclude any ex parte information from his consideration and to make his decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Councilmember Lee said that, as a resident of the Somerset neighborhood, he attended the July 4th picnic and some of the appellants were at the event. However, Mr. Lee said he did not communicate with them. He said he was able to affirm that he could exclude any ex parte information from his consideration and to make his decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Councilmember Zahn said she had one contact on June 13 when she participated with a Seattle Times editorial board. When a question was raised about the Energize Eastside project, Ms. Zahn said she informed the group that she could not discuss the matter. Ms. Zahn said she was able to affirm that she could exclude any ex parte information from her consideration and to make her decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Councilmember Nieuwenhuis said he had no ex parte communications to disclose. He said he was able to affirm that he could exclude any ex parte information from his consideration and to make his decision based solely on the record before the Hearing Examiner in a fair and impartial manner.

Ms. Gerla noted that, under the Appearance of Fairness Doctrine, the parties have an opportunity to rebut the substance of any of the ex parte communications. No one indicated an interest in commenting on any ex parte contacts.

Moving on, Mayor Chelminiak noted PSE's request that written briefs filed by the appellants, Warren Halverson, Norm Hansen, and Loretta Lopez, not be considered by the Council. PSE said the basis of their request is that the briefs were not provided to all of the parties at the same time they were provided to the Council. Mayor Chelminiak said PSE would have up to five minutes to present their request, and the appellants would have five minutes to present their

response. He thanked the parties for providing their briefs three weeks in advance of this hearing, which gave the City Attorney's Office the significant time needed to determine whether the information in the briefs is reflected in the record.

Mr. Chelminiak said the Council's rules of procedures require that any brief or written materials be provided to the Council and served on the other parties no later than 1:00 p.m., two weeks before the appeal hearing. He stated his understanding that when the briefs were not provided to the other parties, the City was contacted. The briefs were subsequently provided to PSE.

Ms. Anderson stated the rationale for PSE's request.

Mr. Halverson, Mr. Hansen, and Ms. Lopez, the appellants, commented regarding the request to not consider their briefs.

Mayor Chelminiak opined that the briefs were provided to PSE in compliance with the two-week advance rule.

→ Deputy Mayor Robinson moved to deny Puget Sound Energy's request that the briefs submitted by Warren Halverson, Norm Hansen, and Loretta Lopez not be considered by the Council. Councilmember Stokes seconded the motion.

→ The motion carried by a vote of 6-0.

Mayor Chelminiak noted a motion received the previous day from CENSE and CSEE to continue the appeal hearing to a later date. Mr. Chelminiak offered both sides up to five minutes each to address the motion.

Mr. Aramburu commented on CENSE's request to continue the hearing. The representative for CSEE provided the group's rationale for the motion.

Responding to the Mayor, City Attorney Gerla said the City's Development Services Department did not respond to the motion for continuance.

The attorney for the applicant commented on the motion for continuance.

→ Deputy Mayor Robinson moved to deny the motion for continuance, and Councilmember Stokes seconded the motion.

→ The motion carried by a vote of 6-0.

Mayor Chelminiak said that at the request of both CENSE and PSE, he granted each side an additional 15 minutes for a total of 30 minutes each for oral argument.

Responding to the Mayor, Mr. Aramburu said the appellants would use 20 minutes for their initial presentation and reserve 10 minutes for rebuttal. Mayor Chelminiak said PSE would use 20 minutes and the Development Services Department would use 10 minutes to speak.

- Deputy Mayor Robinson moved to open the appeal hearing, and Councilmember Stokes seconded the motion.
- The motion carried by a vote of 6-0.

The parties to the appeal presented their oral arguments and responded to brief questions of clarification.

- Deputy Mayor Robinson moved to close the appeal hearing, and Councilmember Stokes seconded the motion.
- The motion carried by a vote of 6-0.

Mayor Chelminiak thanked the parties, residents, and staff for their involvement in this matter. He noted that the Council would take final action during a future regular or special meeting.

At 7:57 p.m., Mayor Chelminiak declared the meeting adjourned.

Charmaine Arredondo, CMC
City Clerk

/kaw