



**CITY COUNCIL
and
COMMUNITY DEVELOPMENT AGENCY
MINUTES**

**Tuesday, March 8, 2005
7:00 p.m.**

**701 Laurel Street, Menlo Park, CA 94025
Menlo Park City Council Chambers**

7:00 p.m. REGULAR MEETING (Menlo Park City Council Chambers)

ROLL CALL – Winkler, Jellins, Cohen, Duboc, Fergusson

STAFF PRESENT - David Boesch, City Manager; William McClure, City Attorney; Audrey Seymour, Assistant City Manager; and Silvia M. Vonderlinden, City Clerk.
Various department heads and other City staff were also present.

PLEDGE OF ALLEGIANCE

Mayor Winkler announced that Council would combine Agenda items G1 and F1 for the sake of cohesion and clarity.

A. COMMISSION VACANCIES AND REPORTS

1. One vacancy on the Environmental Quality Commission to fill an un-expired term that ends in August 2006. The deadline for receipt of applications is April 4, 2005 at 5:30 p.m.
2. Three vacancies on the Las Pulgas Committee to fill terms that will expire in March 2009. The deadline for receipt of applications is April 4, 2005 at 5:30 p.m.
3. Commission Reports.

B. PRESENTATIONS AND PROCLAMATIONS - None

Council Member Fergusson asked for a point of clarification to confirm that Agenda item G1 would be addressed before item F1. Mayor Winkler confirmed that the intention was to address the items simultaneously.

Council Member Fergusson inquired about the Commission vacancies, and Ms. Vonderlinden responded that certain vacancies are for expired terms and one is due to a resignation.

C. PUBLIC COMMENT #1 (*Limited to 30 minutes*)

Hank Lawrence referred to the closure of an auto dealership in Menlo Park. He suggested that Council act quickly on the Haven Avenue area project.

D. CONSENT CALENDAR - None

E. PUBLIC HEARINGS

1. Consideration of a request for rezoning from C-4 (General Commercial District applicable to El Camino Real) to P-D (Planned Development District), a Planned Development Permit to construct six detached residential units, a major subdivision to create six parcels, and a Below Market Rate Housing In Lieu Fee Agreement at 1421 and 1423 San Antonio Street.

Stephen O'Connell, Planning Consultant, explained the staff recommendation providing details on the project. He also said that the Planning Commission unanimously approved the project.

Council asked questions about the densities allowed and Mr. O'Connell explained that this is within what is permitted. Council Member Fergusson inquired about the public benefit of this development permit, and Mr. O'Connell explained that the benefit includes offering affordable and entry level housing. Ms. Fergusson asked about the heritage tree on site, and the maintenance agreement. Mr. O'Connell confirmed the requirement of a 10-year maintenance agreement

Mayor Winkler offered the floor for public comment. There was no public comment.

John Hansen, the applicant, explained that the focal point of the project will be the oak tree. Mr. Hansen elaborated on the planned landscaping.

Council asked about noise impacts deriving from neighboring sites and Mr. O'Connell explained that an acoustic study had been conducted. Staff explained that mitigation requirements were imposed on the windows and walls.

Niles Tekanasua explained that the project complies with multiple requirements such as Title XXIV (energy standards) and probably all units will follow similar building standards.

M/S Jellins/Fergusson to close the public hearing. Motion carries unanimously.

M/S Fergusson/Winkler to approve the staff recommendation.

Council Member Fergusson shared concerns with adding housing that may impact the school district. In her opinion this needs to be coordinated with the school district. Mayor Winkler will support the project but has concerns that condominiums may be difficult to insure.

Motion carries unanimously.

2. Approval of a Mitigated Negative Declaration for a Two Lane Vehicle/Pedestrian Bridge over the Atherton Channel and Bank Stabilization Improvements necessary to protect the building foundation at 3700 Haven Court; authorization to release the applicant from the requirements of an agreement to construct a Pedestrian Bridge; and approval of the project and authorization of staff to issue an Encroachment Permit, subject to conditions.

Pat Stone, Supervising Engineer, presented the staff report covering the flooding challenges at the site. Mr. Stone elaborated on why the alternative vehicle bridge would be helpful to the applicant. He shared a slide presentation illustrating the proposed changes and he covered the conditions of approval.

Council asked about the frequency of the flooding and Mr. Nino, Engineering Services Director, explained that it varies but it floods at least once a year. Council discussed the monitoring plan, and Mr. Stone said that the applicant would enter into a maintenance agreement. Staff provided details on the restoration plan. Council discussed the role of the Environmental Quality Commission (EQC) in this process.

Mayor Winkler opened the Public Hearing.

Demetri Loukas offered to answer Council questions. There were no questions.

Ken Numeister, representing the owner and the applicant, explained that the goal is to have a ratio of 4 to 1 replacement on trees and he believes that going through the EQC would be redundant. Mr. Numeister is pleased with how staff represented the project, and he added that the bridge is designed in a way that is consistent with 100-year flood protection.

Council Member Cohen asked questions about the process and Mr. Boesch explained that the heritage tree permit is an administrative process handled by staff unless an appeal is filed.

M/S Fergusson/Cohen to close the Public Hearing. Motion carries unanimously.

M/S Fergusson/Cohen to approve the staff recommendation. Motion carries unanimously.

AGENDA ITEMS F1 AND G1 ADDRESSED CONCURRENTLY

F. REGULAR BUSINESS

1. Approval of final design for the Menlo Children's Center Project; award of contract to Zaskorn Construction Company dba ZCON Builders in the amount of \$2,080,000; and authorization of a budget of \$3,000,000 for construction, contingencies, testing, engineering, inspection, fees, furniture, equipment and administration.

G. WRITTEN COMMUNICATION

1. Email correspondence from Council Member Fergusson regarding Child Care Task Force Brown Act Issues.

Council Member Fergusson asked for clarification on what items were going to be heard and Mayor Winkler explained she would allow combining items G1 and F1, but first she wanted to hear from staff, followed by discussion and then public comment.

City Manager Boesch concurred with the Mayor's comments in addressing the interrelated items F1, G1, G2 and G3. Mr. Boesch acknowledged that legitimate concerns have arisen and may have bearing on the decision before Council tonight. He believes that there was an unfortunate oversight of not posting the notice of the task force meetings. Mr. Boesch provided an overview of the process explaining that the public would not have been rejected attendance at the meetings, and that agendas were created, but the posting was omitted. The City Manager referred to Agenda item G3 which outlines the issues brought forth by the public.

Council Member Duboc asked if the Brown Act was violated, and Mr. McClure explained that because there was an official vote creating the task force, this body was then considered a legislative body and it was required that an Agenda be posted giving notice of the meeting. He added that the meetings are to be open to the public. Mr. McClure elaborated that agendas were created, invitations sent out to task force members, but the Agenda was not posted in the common areas for public awareness. Mr. McClure responded that these are the grounds for the violation. He clarified there is no requirement to prepare minutes. Mr. McClure explained that these are special meetings and they only require a 24 hour notice. In addition, if a newspaper of general circulation requests notification, staff is required to send the notice to the requestor, but in this case no requests to receive notice were received.

Mr. McClure clarified that there was no intent to prevent the public from attending the meetings. Mr. McClure explained that the statute of limitations to bring forth complaints about a possible violation is 90 days from the decision of the task force. In this case, the decision of the task force was the recommendation summarizing its position. Had the complaint been on time, the task force would have had the ability to cure that defect (which was failure to post notice) before taking action (making the recommendation). He also mentioned that in curing the defect, the task force might have posted a notice and heard public comment, subsequently reviewing its recommendation, and then reporting back to the City Council. The City Attorney explained that the 90 day provision is to have legal finality in decisions.

Council Member Duboc asked if it was legal for the City Council to take the action that it took, and Mr. McClure explained that the questionable part of the process is the task force's lack of posting. The Council's action is not subject to a Brown Act or legal challenge. Council asked staff about the various Council meetings at which this topic was discussed, and Ms. Seymour explained that there were three meetings that were public and properly noticed. In these meetings (March 25, 2003; August 19, 2003; October 21, 2003) the scope of the task force was discussed. Council inquired about the composition of the task force and staff explained that the selection process was outlined in the March 25, 2003 staff report. Council Member Fergusson referenced a motion from the February 25, 2003 minutes that created the task force. Ms. Fergusson added that her goal with the written communication is to cure and correct the violation.

Public Comment

Jean Slocum expressed surprise at the lack of openness in the process. She would like full compliance with the Brown Act.

Mary Gilles referenced the political climate since the 2002 election, and how she believes the public had plenty of opportunity to express its views on this issue. Ms. Gilles questioned the objectivity of Council Members whose children attend the City's child care system. She supports the remodel option.

Heyward Robinson (with time donated by Ross Wilson, Paula Travers, and Diane Walter) addressed the Council speaking as an individual and not as a Commissioner. Mr. Robinson stated that this is a facilities issue, and he is looking towards the future and a legal remedy. He acknowledged the work of the task force, but he stated that these meetings were illegal and the public was not able to provide input. Mr. Robinson opined that this is an opportunity for the City to show that it wants to cure the violation. He also opined that the scope of work was revised without Council direction and he referred to a task force meeting that took place on September 4, 2005 at which meeting the task force members had to rank the options. Mr. Robinson referred to the ranking of the options and what he believes were irregularities in the process. He advocates a new task force and he has names to propose for this new group.

Council Member Duboc asked if the new child care center was one of the options to be ranked and Ms. Seymour confirmed.

Elizabeth Lasensky shared concerns with the open meetings law not being respected. She believes that if the public did not receive notice, then there were no open meetings.

Steve Schmidt referred to campaign literature and an email to drop the children's center and privatize child care. He questioned the selection process of the task force members and how the program got changed to what it is today. Former Mayor Schmidt believes the process has been tainted by the open meeting violation. Mr. Schmidt advocates for a new task force.

Irene Searles thanked Heyward Robinson for bringing this issue to light. In her opinion there was a shift in 2003 and the Council seemed to reverse its path. Ms. Searles said she would have met with staff if she had been invited to the meetings.

Nancy Travers stated that the meetings were not public and there was consensus to not make the contents of the meetings public.

Council Member Duboc asked staff to clarify an email about this issue and Assistant City Manager Seymour referred to an email she sent informing a particular Council Member that staff was not planning to notice the meetings, but that the meetings would be open.

Brielle Johnck commented on the selection process for the task force and the child development expert. She believes some of the people in the task force were opponents of the new building construction, and she questioned their impartiality.

Hank Lawrence believes that another option is to privatize child care just like Redwood City did. He believes that privatized child care in this adjacent city has been a success. Mr. Lawrence supports the Council reopening this issue and privatizing this service.

Karla Daily opined that the remodel is not acceptable. Ms. Daily believes this was a controversial project and she hopes people go back to the drawing board and try another solution.

Ingo Lange opposes the remodel option and instead recommends sending the design back to the table because the numbers are inadequate and some of the materials to be used are unacceptable.

Dick Poe believes the items being discussed occurred a long time ago issue and in his opinion that is why there is a statute of limitations. Mr. Poe shared concerns about one Council Member using the City's child care center and voting on the matter.

Richard Li questioned how the City got in the business of running a child care center. He commented that providing child care using public funds may be questionable. Mr. Li believes that many residents are unaware that the City provides such a service.

Paula Maurano, speaking as an individual, believes the fiscal impact of this decision is being missed. Ms. Maurano believes that Menlo Park experienced a dire situation and a fiscally prudent person would opt to remodel. She pointed out that a new center could cost up to \$6 million and perhaps in the current financial times this is not feasible. Ms. Maurano asked Council to move forward because she believes the Brown Act is being used as a smoke screen for those unhappy with the recommendation.

Toni Stein shared concerns with the Brown Act violation, and she believes that the three scenarios ranked by the task force did not articulate the implications. Ms. Stein asked for a negative declaration, and she opposes the fact that the remodel includes modulars.

Michelle Harbottle addressed the Council saying that the Brown Act violation is an old issue and she believes that Council Member Fergusson should recuse herself. Ms. Harbottle believes the cost of the project should be considered and remodeling seems to be the best solution.

Hossein Razavi believes this controversy is about politics in Menlo Park. In his opinion, since the 90 days are over, it is time to move on.

Maggie Betsock said that her children attended schools in Menlo Park and she felt unsafe about it. She does not believe Menlo Park is being adequately represented when the spirit of the law has been violated.

Chuck Bernstein stated that his children are getting an exceptional education in modular buildings. Mr. Bernstein does not believe that quality in education is tied to a new building. He believes that quality is in teachers and curriculum. He opposes the \$7 million dollar option, and questions if Menlo Park should be in the business of providing child care. He referred to meetings of a previous task force that were not noticed. In his opinion Council should move forward with this plan or reevaluate providing child care at all.

Council Discussion

Council Member Fergusson asked City Attorney McClure to clarify if she had a conflict of interest in this case. Mr. McClure explained that there are two types of conflict of interest, but in this case there is no legal conflict of interest. Mr. McClure stated that while there isn't a legal issue, there may be a perception of conflict of interest but it is not a legal issue.

Council Member Fergusson asked if this program is subsidized by taxpayers and Mr. Boesch explained that fees are charged for child care services but it is not a full cost recovery service, consequently it is just like other city programs. Ms. Winkler alluded to a conversation with previous Finance Director Chokkalingam and she was told that the tuition paid by parents does not include accounting and hiring functions to support the program.

Council Member Duboc shared an overheard covering what she believes has been an exhaustive and open government process. She explained her role in the process, and how the revenues have changed causing a different scenario. Ms. Duboc talked about previous meetings that were closed and the list of task force members wasn't divulged. She referred to various campaign literature and provided a full overview of the project. Council Member Duboc mentioned that in recent years 30 employees were cut and City finances have decreased dramatically. Ms. Duboc explained that numerous study sessions took place with former Mayors and there were no minutes and no record of the meetings. Ms. Duboc believes that the task force studied four options and encouraged public comment at all Council Meetings. The current contract is for \$2,080,000 and this represents a savings of millions of dollars. She believes this Brown Act issue is being used to shift the focus of the discussion.

Council asked about the status of the Measure T fund and Mr. Boesch detailed the original intent for the Measure T funds. Mr. Boesch added that proceeds from future bonds are already being spent since the City had to take a loan out from the General Fund Reserve against future Measure T funds.

Council Member Fergusson asked Council to focus on the Brown Act issue and how it influences this contract. She reiterated her concerns with lack of public oversight, staff not following Council direction regarding putting the new building project out to bid, and the reduced number of slots. In her opinion the task force did not follow Council orders and she believes this is a questionable use of public funds. Ms. Fergusson referred to the minutes of the February 25, 2003 meeting reading a motion that she believes was Council's directive. In her opinion big decisions were made behind the scenes, and staff could not make decisions without the Council direction. Other issues that are of concern to her are: the task force did not meet in a public forum, overlooked the commitment of the 180 slots, and the appointment of the task force members was not ratified in public. Ms. Fergusson admits losing confidence in the task force recommendation because of the chain of events that preceded it. She would have liked to have new figures on the cost of a new building. Council Member Fergusson expressed concerns that the new facility might not be licensable, and wondered if the building will meet code requirements.

M/S Fergusson/Cohen motion to table Agenda Item F1 to the Council Meeting of March 22, 2005 and take the following actions:

- **Council to cure the Brown Act issue by convening a five-member task force**
- **The task force is to meet a minimum of two times before March 22, at which time it may or may not be disbanded**
- **Public comment to be heard at the beginning and end of each meeting**
- **City Manager to hire an expert who has experience in the field of child care facilities (with an economic approach)**
- **City Manager to hire an independent expert to analyze city processes and ask staff questions, making general observations followed by recommendations to Council.**

Council Member Fergusson would like to see these two issues addressed in parallel.

Council discussed the issue of subsidized child care. Council Member Duboc disagrees with putting a project out to bid when there is no intention of moving forward. Staff was asked to explain why ICRI was selected for the job and Ms. Seymour explained that this firm is a non-profit organization experienced in creating quality child care in a variety of settings. Michael Taylor, Senior Recreation Manager, shared that staff has no concerns with licensing the building. Certain walls in the proposed building were discussed and a particular room was discussed because of concerns related to supervision of children. Mr. Taylor explained that the field of vision does not restrict licensing because it is a programming issue.

Council Member Cohen asked if Council Member Fergusson would consider taking 2/3 off her motion and work from there.

Council Member Cohen made a substitute motion that includes:

- **Two meetings taking place by March 22, 2005**
- **The meetings are to be public meetings**
- **Ascertain whether or not the facility will be licensable**

Council Member Fergusson paraphrased his motion to read:

- **Convene a task force to hold a minimum of two meetings with the assistance of a childcare expert**
- **Focus more on the remodeled police building.**

Council Member Fergusson seconded the motion after Mr. Cohen agreed with her interpretation of his motion.

Substitute motion as reiterated by Mr. McClure:

- **Council to appoint a new task force of five members**
- **Task force would meet two times between now and March 22, 2005**
- **On March 22, 2005 agenda item F1 would return to Council for consideration with a report from this task force**

- **The task force is to have a consultant that is experienced in quality child care programs that are reasonably priced**
- **Such consultant would work with the child care task force and look at any issues related to this remodeled facility, such as licensability and standard of quality of care**
- **The meetings are to be publicly noticed and the public is to have an opportunity to address the task force on the items listed on the Agenda.**

Council Member Fergusson wanted to include having an independent person come in and look at City processes. Mr. McClure suggested this is a separate issue, and it could be a second item for staff to bring back suggestions or options such as facilitators, or trainers. Ms. Fergusson said it would be acceptable to her to treat it as a separate option. The City Attorney clarified that technically the motion is a substitute motion unless there is Council consensus to substitute the original motion by this one.

Council agreed to substitute the original motion for the motion made by Cohen/Fergusson. This is now the motion on the floor.

Mayor Winkler said that in her opinion there is no need to create another child care task force to discover if this is licensable or not. Ms. Winkler also believes that current programs at the Burgess center attest to the quality of staff. Council Member Fergusson believes that it is good science to look at the quality of a facility and its impact on the quality of the child care provided. Mayor Pro Tem Jellins explained that in his opinion the evening has been full of hyperbole, and he asked staff if a two week time line is realistic to have a scope, scheduled meetings, and a draft report. Mr. Boesch said that he doesn't know how much work could be done in such a brief time period, and that the task force would have to be selected tonight. Mayor Pro Tem Jellins believes it would be fiscally irresponsible to allow the bids to expire. He accepts that some aspects of this process might have been in the dark but he does not accept that this has tainted the Council in any way. He would like to give the public an opportunity to speak but he is concerned that the current motion is going too far.

Mayor Winkler called for the vote:

Motion fails 2-3 with Duboc, Jellins and Winkler opposing.

Mayor Winkler asked what would be the benefit of a public hearing, and Mayor Pro Tem Jellins stated that it would be good to get more public debate. Mayor Pro Tem Jellins thanked all the speakers for their effort. Council Member Fergusson asked for a point of order, because she would like to hire a person to come in and analyze City processes and prevent this from happening again.

Motion by Council Member Fergusson to hire an independent person to conduct an audit of City processes. Motion fails for lack of a second.

Mayor Winkler stated that staff is very aware of this situation and Mr. Boesch offered alternative approaches. Mr. McClure said that Council could have an audit on meetings procedures, and Mr. McClure believes that training on the Brown Act, done by an independent person, might be beneficial.

M/S Jellins/ motion to have staff undertake the effort necessary to convene a public forum on March 22, 2005 for the purpose of considering all aspects involved in the acceptance or rejection of bids of the Child Care Center as proposed in item F1.

Mayor Winkler asked about scheduling this item to come back at the March 22, 2005 meeting and Mr. Boesch said staff would move other things to accommodate this approach.

Motion fails for lack of a second.

Council took a five-minute break at 10:55 p.m. The meeting reconvened at 11:00 p.m.

M/S Jellins/Duboc to table consideration of F2 until next week so that the community has another opportunity to provide public comment. Motion carries 4-1-0 with Council Member Fergusson opposing.

Council Member Duboc suggested that this item be the first on the agenda. Council discussed whether to start the meeting at 6:00 p.m. or not and some Council members need to check their schedules.

2. Consideration of a recommendation from the Housing Commission to approve a Resolution reserving \$3.5 Million of the Below Market Rate (BMR) Housing Fund for use in the Purchase Assistance Loan Program and establishing preferred uses for the unreserved BMR Housing Fund. (Continued from the City Council Meeting of 1-11-05) (Continued to next week)

This item was tabled to next City Council Meeting.

3. Consideration of state and federal legislative items including decisions to support or oppose any such legislation and items listed under Written Communication or Information Items.

G. WRITTEN COMMUNICATION

2. Email correspondence from Council Member Duboc regarding Child Care Task Force Brown Act Issues.
3. Memorandum from City Manager David Boesch regarding Child Care Task Force Brown Act Issues

H. INFORMATION ITEMS - None

I. COUNCIL MEMBER REPORTS

J. PUBLIC COMMENT #2 (Limited to 30 minutes)

Heyward Robinson shared his disappointment because in his opinion the Council did not address the open meeting violations. He did not appreciate what he viewed were personal attacks on a Council Member. He disclosed how Mr. Bersntein and Ms. Duboc voted while serving in the task force.

Mayor Winkler does not think Council Member Fergusson was personally attacked, because she thinks those were important points to discuss.

Irene Searles shared her disappointment with the Council at not curing the Brown Act violation. She believes that Council Member Duboc is to blame for this and she was told by Nancy Travers that this was a working group that embraced many compromises. She believes the remodel is a big mistake.

Mayor Winkler said that staff is going to address the Brown Act violation.

Hank Lawrence said that these were not deliberate mistakes, and he believes people are using the Brown Act issue to block the City Council from doing its business. Mr. Lawrence believes that privatization is the way to go, and the City has a fiduciary duty to provide the best service at the lowest cost. This might be achieved via privatization. Mr. Lawrence believes that Mr. Bernstein's comments were taken out of context and were off the mark.

Mr. McClure responded to Ms. Searles' comments on the issue of Council Member Duboc not noticing the meeting. The City Attorney explained that this is a staff issue and neither the Commissioners nor the Council Members ask if a meeting is properly noticed. It is staff's responsibility to properly notice the meetings, and in this case the 24 hour notice did not occur.

K. ADJOURNMENT – 11:20 p.m.

Respectfully submitted,

Silvia M. Vonderlinden, CMC

Approved at the Council Meeting of June 14, 2005.