
**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 1, 2016**

CALL TO ORDER

The Regular Meeting of the City Council of the City of Dana Point, California, was called to order by Mayor Tomlinson at 5:02 p.m. in the City Council Chambers, 33282 Golden Lantern, Dana Point.

ROLL CALL OF CITY COUNCIL MEMBERS:

Present: Mayor John A. Tomlinson
Mayor Pro Tem Richard A. Viczorek
Council Member Joseph L. Muller
Council Member Carlos N. Olvera
Council Member J. Scott Schoeffel
Absent: None

CLOSED SESSION

City Attorney Munoz indicated that there was a need for a Closed Session as follows:

- A. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION, Government Code § 54956.9 (a), (1 case) Name of Case: City of Dana Point v. California Coastal Commission, et al Case No. 37-2010-00099827

RECONVENE CITY COUNCIL MEETING

Mayor Tomlinson reconvened the meeting at 6:16 p.m. All Council Members were present.

STAFF PRESENT: Douglas C. Chotkevys, City Manager; Patrick Munoz, City Attorney; Aaron Rosen, Emergency Services Coordinator; Lt. Russ Chilton; Ursula Luna-Reynosa, Director of Community Development; Brad Fowler, Director of Public Works and Engineering; Mark Sutton, Building Official; Kevin Evans, Director of Community Services and Parks; John Tilton, City Architect; Rachel Johnson, Assistant Administrative Analyst; Evan Langan, Associate Planner; Jackie Littler, Executive Assistant; DyAnne Weamire, Senior Administrative Assistant; Bobbi Ogan, Deputy City Clerk; and Gail Enriquez, City Clerk Specialist.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was led by Council Member Schoeffel.

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INVOCATION

The Invocation was provided by Pastor Jens Christy of Capo Beach Church.

PRESENTATIONS AND PROCLAMATIONS

Business of the Month - El Patio

Assistant Administrative Analyst Rachel Johnson provided PowerPoint presentation. She reported that El Patio, formerly known as "Lucy's" (and still known to some locals today), is the City's oldest business. She sold her handmade burritos to all the surfers at San Onofre until she saved enough money to open her own restaurant, "Lucy's" 79 years ago, in 1937. In the 80's she and her son. El Patio is open for Lunch and Dinner Tuesday through Saturday as well as hosts and caters all occasions. The most popular items include the shredded beef taco, which are Lucy's original recipe, the halibut tacos, and the chili relleno. She added that throughout the years, giving back to the community has been very important to Jack. She reported that each year, El Patio supports the Dana Point Historical Society Scholarship, and continues to support many programs at Dana Hills High School, local preschools as well as many local churches. Mayor Tomlinson presented a Certificate of Recognition on being selected as Business of the Month for March 2016. Heather Johnson, CEO of the Chamber of Commerce, presented a Certificate of Appreciation from the Chamber.

Employee of the Month - Robert French

Director of Public Works and Engineering Services Brad Fowler provided a few comments about Robert French. Director Fowler called Robert "Matt's right-hand man". He stated that you don't know much about Robert because he is a pretty quiet person, but he is here every day making sure that the streets and right-of ways are safe. He reported that in addition to ensuring the 75 miles of City streets are kept safe, Robert also manages the 20 miles of storm drains, and the 32 City vehicles are running efficiently. He added that there are a lot of things that this gentle giant does for the City and is so pleased to recognize Robert this evening. Mayor Tomlinson presented a Certificate of Recognition for being selected the Employee of the Month for March 2016.

Certificate of Recognition for Liz Claus

Council Member Schoeffel introduced Liz Claus, retiring Planning Commissioner. He stated that Liz was appointed as an alternate to the Planning Commission originally, and came to Dana Point from the City of West Hollywood where she served as a Planning Commissioner. He added that she has performed brilliantly and that she has had a wonderful career here as a Planning Commissioner. Council Member Schoeffel presented Liz Claus with a Proclamation from the City for her distinguished service to the City. Director of Planning and Community Development Luna-Reynosa presented Liz with flowers and a card of sentiment from the Planning Staff. City Manager Chotkevys made a few comments on how Liz came to become civically involved. He states that she was always so polished and poised and is the epitome of

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class, and presented her with a City tile for her Years of Service to the City. Current and past Planning Commissioners also provided congratulatory remarks to Liz.

CONSENT CALENDAR

A member of the Public removed Item #10 from the Consent Calendar and Council Member Muller removed Item #13 from the Consent Calendar.

IT WAS MOVED BY COUNCIL MEMBER SCHOEFFEL, SECONDED BY COUNCIL MEMBER OLVERA, THAT THE CITY COUNCIL ACCEPT THE RECOMMENDATIONS FOR ALL ITEMS ON THE CONSENT CALENDAR, WITH THE EXCEPTION OF ITEMS #10 AND #13.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Carlos N. Olvera, Council Member J. Scott Schoeffel, Mayor Pro Tem Richard A. Viczorek, and Mayor John A. Tomlinson

NOES: None

1. WAIVE THE READING OF ORDINANCES AND APPROVE READING BY TITLE ONLY

APPROVED THE READING BY TITLE ONLY OF ALL ORDINANCES ON THE CONSENT CALENDAR AND THAT FURTHER READING OF SUCH ORDINANCES BE WAIVED.

2. REGULAR MEETING MINUTES, FEBRUARY 16, 2016

APPROVED THE MINUTES.

3. SPECIAL MEETING MINUTES, FEBRUARY 22, 2016

APPROVED THE MINUTES.

4. PLANNING COMMISSION MEETING MINUTES, FEBRUARY 8, 2016

RECEIVED AND FILED.

5. PLANNING COMMISSION ACTIONS, MEETING OF FEBRUARY 22, 2016

RECEIVED AND FILED.

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6. YOUTH BOARD MEETING MINUTES, JANUARY 21, 2016

RECEIVED AND FILED.

7. TOURISM BUSINESS IMPROVEMENT DISTRICT MINUTES, DECEMBER 11, 2015

RECEIVED AND FILED.

8. MEETING CALENDAR / COMMUNITY SPECIAL EVENTS CALENDAR

RECEIVED AND FILED.

9. CLAIMS AND DEMANDS

RECEIVED AND FILED THE CLAIMS AND DEMANDS.

10. RATIFY AGREEMENT WITH AITKEN, AITKEN & COHN FOR SPECIALIZED LEGAL SERVICES

A member of the public removed this item from the Consent Calendar.

City Manager Chotkevys provided staff report.

Mayor Tomlinson opened for Public Comments.

Denise Erkeneff, Dana Point, representing Surfrider Foundation hoped that the City is able to collect those funds from the Headlands that have been extended from the city coffers. She reported that the Surfrider Foundation has not been able to recover theirs. She stated that under the FOIA, they would like to receive copies of MOUs, Contracts and Agreements, which they have requested in the past.

Carol Kelly, Dana Point, stated six concerns she has with approving additional funds for legal services related to the litigation of the Strands Access Gate.

Steve Stewart, Dana Point Resident, stated that he is not against the City paying Aiken to get money back that the City is owed. He expressed concern on approving additional funds for the additional litigation for the Strands Access Gate issue.

IT WAS MOVED BY COUNCIL MEMBER OLVERA, SECONDED BY COUNCIL MEMBER MULLER THAT THE CITY COUNCIL RATIFY THE AGREEMENT ENTERED BETWEEN THE CITY AND AITKEN, AITKEN AND COHN (AITKEN) FOR LEGAL SERVICES PREVIOUSLY EXECUTED BY THE CITY MANAGER

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PURSUANT TO HIS SPENDING AUTHORITY, IN ORDER TO AUTHORIZE THE CONTINUATION OF SERVICES PURSUANT TO THAT AGREEMENT IN THE EVENT THE COSTS INCURRED EXCEED THE LIMITS OF THE CITY MANAGER'S SPENDING AUTHORITY.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Carlos N. Olvera, Council Member J. Scott Schoeffel, Mayor Pro Tem Richard A. Viczorek and Mayor John A. Tomlinson

NOES: None

11. CONSIDERATION OF A RESOLUTION AUTHORIZING THE SUBMITTAL OF AN APPLICATION FOR THE BEVERAGE CONTAINER RECYCLING CITY/COUNTY PAYMENT PROGRAM

ADOPTED RESOLUTION **16-03-01-01** ENTITLED:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, AUTHORIZING SUBMITTAL OF AN APPLICATION TO THE CALIFORNIA DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY FOR PAYMENT PROGRAMS AND RELATED AUTHORIZATIONS; and

AUTHORIZED THE MAYOR TO SIGN THE RESOLUTION ON BEHALF OF THE CITY.

12. LETTER IN OPPOSITION TO AB 1362

AUTHORIZED THE MAYOR TO SEND A LETTER IN OPPOSITION TO AB 1362 ON BEHALF OF THE CITY COUNCIL.

13. PROFESSIONAL SERVICES AGREEMENT FOR SUPPLEMENTAL DEVELOPMENT COUNTER AND INSPECTION SERVICES

Council Member Muller removed this item from the Consent Calendar.

City Manager Chotkevys provided staff report and Director Luna-Reynosa provided an overview.

Council Member Muller asked if the money allocated for the agreement is coming from General Funds, and how the fees were recovered.

Director Luna-Reynosa replied that it is General Fund money, and that the Council adopted a Fee Resolution that includes plan check fees. She stated

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that when plan check services are contracted out, 65% of the fees collected is paid to the consultant for the plan check services.

City Council Chotkevys stated that this a direct result of higher than anticipated permit activity that is due to the strong economy, and people reinvesting in their homes. He confirmed that the fees were fully reimbursable from the fees collected from the permit application.

Council Member Muller asked if the \$600,000 from the General Fund was allocated for the agreement, how was the 65% that is paid from the plan check fee to the consultant figured in, and the \$600,000 was reimbursed.

Assistant City Manager Killebrew explained that there are line items reflected in the budget that shows the revenue and the expense for these fees. He stated that at mid-year budget, an adjustment was made to allow for a bigger pool of planning consultants to draw from to cover the workload.

Council Member Muller asked for further clarification of how the \$600,000 was paid to the consultant, along with the 65% that is collected from the applicant.

Assistant City Manager Killebrew explained that the consultant is paid from the fee collected.

IT WAS MOVED BY COUNCIL MEMBER JOSEPH L. MULLER, SECONDED BY COUNCIL MEMBER J. SCOTT SCHOEFFEL, THAT THE CITY COUNCIL AUTHORIZE AND DIRECT THE CITY MANAGER TO EXECUTE BUILDING PLAN REVIEW AND INSPECTION PROFESSIONAL SERVICES AGREEMENTS WITH WEST COAST CODE CONSULTANTS, INC. (WC3) AND CSG CONSULTANTS, INC. (CSG).

The motion carried by the following vote:

AYES: Mayor John A. Tomlinson, Mayor Pro Tem Richard A. Viczorek, Council Member Joseph L. Muller, Council Member Carlos N. Olvera, and Council Member J. Scott Schoeffel

NOES: None

PUBLIC COMMENTS

Paul Wyatt, Dana Point, commented on his discontentment on the Town Center Initiative. He stated that he believes that the residents and the Council are supportive of a vibrant community and supports the initiative on the June ballot.

Kim Tilly, Laguna Niguel, spoke on behalf of the Festival of Whales as the co-chair. She thanked the City and staff for their continued support of the Festival of Whales. She stated that this year celebrates 45 years of the festival. She presented the Council

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with a sponsor sweatshirt and invited the Council to all of the events over the next two weeks. She stated for more information go to www.festivalofwhales.com.

Cindy Fleming, Dana Point, stated her concerns with the Town Center Parking Plan. She felt concern that per the current plan, residents would have to wait until the business district reaches 80% at all times before action is taken for a parking program to put into place for the spilling over of parking into the adjacent residential areas.

Betty Hill, Capistrano Beach, submitted a letter into public record, from Stormwater and Woosher on behalf of the proponents of the 2015 Initiative regarding concerns for potential illegal expenditures of public funds for campaign activities in support of the 2016 Town Center and Parking Plan ballot measure.

William Petersen, of Dana Point, stated that he was concerned over the current developments in the City.

Gail Benda, Dana Point, expressed concern over questionable information received from City Hall regarding the two initiatives on the June ballot.

Dr. Greg Van Dyke, Dana Point, commented on a rehab house on Granada that he owns.

Sandie Iverson, Capistrano Beach, commented on a clarification letter she received from an attorney regarding an incident that occurred while gathering signatures for the Town Center Initiative Petition.

City Manager Chotkevys clarified that Andrea Swayne witnessed the exchange and that he did not ask a staff member to approach the person gathering signatures to request her to stop.

Shaun Prestridge, South Orange County Architectural Guild, stated generally the Guild has been very supportive of the great efforts the City has done to revitalize the downtown area. He added that the Guild sees lack of cohesive plan and stated that the parking plan was a key element to the success of the downtown area. He suggested that the City was losing critical time in producing a parking plan now.

PUBLIC HEARINGS

14. APPEAL OF THE PLANNING COMMISSION'S DENIAL OF VARIANCE V15-0004 TO ALLOW THE CONVERSION OF CRAWL SPACE INTO A FOURTH STORY AT A CURRENTLY THREE-STORY DUPLEX LOCATED AT 33895 CALLE LA PRIMAVERA

Director Luna-Reynosa introduced Associate Planner Evan Langan, who provided a PowerPoint Presentation.

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Mayor Tomlinson opened the Public Hearing.

Rodger Borge, Appellant, distributed documents to the City Council that included photos of the space in question and photos of other 4-story buildings in the City. He stated that he did not do any of the unpermitted work on the property, but was unable to prove that since the original structural plans have not been located. He added that he was not provided the CC&Rs, and stated that the only thing that he did to this room is that he put tile down on concrete floor, painted the room, and installed storage cabinets. He stated the room has no gas, no electricity, and no water and is strictly being used for storage. He asked the Council to overturn the Planning Commission's decision and approve the Variance. He added that had he known that there were issues that he would not have purchased the property.

Council Member Muller asked if there was any heat or air conditioning in the room, and about the air vents that he saw in the picture.

Mr. Borge replied there is no heat and that the air vents were already there when he purchased the property.

Council Member Schoeffel asked about items in the picture and stated that it appeared the space was being used for a home office.

Mr. Borge replied that he does not have room in his home to store all his photos, and items for work, and that sometimes he works out of his house. He added that the space allows him to finish up some paperwork.

Mayor Pro Tem Viczorek referred to letters dated December 17, 2015 and February 2016 that referred to the space as a basement and asked the applicant if it was a basement.

Mr. Borge replied that everyone has access through these rooms through a full-size door access.

Council Member Muller asked if space is accessible from inside the house.

Mr. Borge replied, no, that he has to go outside and down the stairs to access the room.

Mayor Tomlinson opened Public Comments.

Lynn Muir, Dana Point, provided his interpretation of what type of building this property was based on the building code when it was built and the way the building code exists today. He stated that in his opinion as a registered architect, that this was a legal, non-conforming, 4-story building. He added that it does not qualify as habitable space, and requested the Council overturn the Planning Commission, and grant the variance.

Director Reynosa clarified that there can be conflicts in definition between the building code and the zoning code; however, the Building Department defers to

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the Planning Department to ensure new development is in conformance with the zoning code before a building permit is issued. She agreed that the permit issued by the County was for a legal 3-story, non-conforming building, but only permitted improvements can be grandfathered in. She clarified that the improvements in the void space were not permitted; therefore, cannot be grandfathered in. She stated that this case came to the attention of the City from a complaint from an adjacent property owner about the work, Code Enforcement was sent out to do an investigation and found work was done without permits. She added that before the Building Department could issue a permit for the previous work, they had to work with the Planning Department to review the zoning codes, standards, definitions to make sure everything was in conformance. She reported that it was the opinion of staff that it is difficult to make variance findings for a building that is currently being occupied under the zoning standards that were effective at the time. She added there was additional concern of structural integrity of the building based on the moving of the dirt and other structural elements.

Mayor Pro Tem Vizorek asked for further definition for a basement and a story, and for staff to show where the exterior finished grade was on the building.

City Architect Tilton provided the definition of a basement under the zoning code. He stated that a basement must be fully subterranean, nothing above grade.

Mayor Pro Tem Viczorek stated that he understood the definition of basement with regard to the City's definition, but was concerned that there may be a conflict between the 1979 edition in terms of grade, and asked the City Attorney to help further define the definition.

City Attorney Munoz replied that he would not use the term conflict. He stated that there is definition for building code purposes and a different definition for zoning code purposes and you must comply with both. He suggested that if the Council were to grant the appeal and variance, that one of the conditions would be that all building code requirements are met.

Mayor Pro Tem Viczorek asked the City Attorney if he could, based on the different codes, offer an opinion on whether or not this was a basement.

City Attorney Munoz replied that he did not think it was a basement. He added, in his opinion, a basement is underground with little exposure. He stated that based on the diagrams and photos presented shows that the space is above ground, and showed that the entire structure is above finished grade.

Council Member Olvera asked staff about a county issued use permit on page 45 of the staff report. He stated document 80-23 from 1980 states that it was a

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construction of a 3-story. He asked what the document says and who issued the document.

City Architect John Tilton replied it was an Orange County approved permit granted by the Orange County Planning Commission, at the time, for a 3-story, 4-unit condominium project.

Mayor Tomlinson closed the Public Hearing.

Mayor Tomlinson stated that he felt bad for the Appellant in this situation.

Council Member Olvera asked staff if the Appellant were to do the work that has been done on this property, would it be allowable now.

Director Luna-Reynosa replied no, that under the current zoning code, 4-stories are not allowed and that even after the hillside ordinance was established, the maximum is 3-stories with certain step backs incorporated to the design of the building.

Council Member Olvera asked if the variance was granted could the work be done.

Director Luna-Reynosa replied, if the variance findings could be met, yes.

Council Member Olvera stated this decision is whether or not a variance should be approved, and it is his opinion it is a variance after the fact and that the decision that needs to be made is unfortunate.

Council Member Schoeffel felt that the Planning Commission and the Planning staff made an excellent analysis which he agreed is an unfortunate situation. He stated that the zoning code prescribes use of the property and the building code prescribes structural integrity and safety, and they were intended to accomplish different purposes. He added that he was concerned that the Appellant stated that the space is a storage area, but it appeared to him it was being put to use as a personal use space and this is not keeping with the zoning for that area. He felt the staff presented a great analysis showing substantial supporting evidence that there were no findings to support a variance, and the findings must be met in order for a governmental agency grant a variance. He added seeing no support for the mandatory findings for a variance; clearly seeing impermissible use; and the fact this was not a legal non-forming use for the reasons clearly stated by the Planning Director; he encouraged the Council to uphold the Planning Commission's decision and deny the variance.

Mayor Tomlinson made a motion that the City Council uphold the Planning Commission's denial of variance V15-0004 for creation of a fourth-story by allowing conversion of crawl space to habitable floor-area at a currently three-story duplex located at 33895 Calle La Primavera. Council Member Olvera seconded the motion.

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Mayor Pro Tem Viczorek stated that he agrees that this is an unfortunate situation, but the Council has to look at the law. He added that he cannot find facts to support the findings. He noted in the proposed findings in the Resolution, particularly on page 7, that they appear to state the opposite of what they say.

City Attorney Munoz clarified that the first sentence is what the finding is, and the text following that is the Planning Commission's response to the finding. He asked Director Luna-Reynosa if he was correct.

Director Luna-Reynosa replied yes.

Council Member Schoeffel asked if the motion on the floor was to approve the denial of the variance made by the Planning Commission's action.

City Attorney Munoz replied yes.

City Attorney Munoz suggested for clarity sake and to correct grammatical errors, the minutes can reflect that the first sentence of each of the "findings" reflect the findings required by the Planning Resolution, and that the sentences following reflect the factual determinations to said findings. He suggested that this be noted in the minutes to reflect this issue that Mayor Pro Tem Viczorek raised.

Mayor Pro Tem Viczorek clarified that the motion was to accept the recommended action but asked to clearly identify the first sentence were the findings that need to be met, and second sentence was the fact to reflect that the finding was not met.

City Attorney Munoz replied correct. He stated that the motion is to deny the appeal with a notation in the record to reflect what you just noted, if that was acceptable with the maker of the motion.

Mayor Tomlinson agreed and accepted City Attorney Munoz's suggestion.

Council Member Muller stated that he agrees with what has been said about this unfortunate situation, and that he was a private property owner advocate. He stated he was concerned whether or not the work that had been done was safe or that they were built to code. He said he would like to vote in the favor of the applicant, but the Council has to abide by the law. He apologized, and stated he would have to support the motion.

IT WAS MOVED BY MAYOR TOMLINSON, SECONDED BY COUNCIL MEMBER OLVERA, THAT

(1) THE CITY COUNCIL HOLD A PUBLIC HEARING AND UPHOLD THE PLANNING COMMISSION ACTION TO DENY THE REQUEST FOR VARIANCE V15-0004 AND ADOPT A RESOLUTION **16-03-01-02** ENTITLED:

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A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA UPHOLDING THE PLANNING COMMISSION'S DENIAL OF VARIANCE V15-0004 FOR CREATION OF A FOURTH-STORY BY ALLOWING CONVERSION OF CRAWL SPACE TO HABITABLE FLOOR-AREA AT A CURRENTLY THREE-STORY DUPLEX LOCATED AT 33895 CALLE LA PRIMAVERA; AND

(2) FOR THE SAKE OF CLARITY, DUE TO EXISTING GRAMMATICAL ERRORS, THE MINUTES SHOULD REFLECT THAT THE FIRST SENTENCE OF EACH OF THE "FINDINGS" IN THE PLANNING COMMISSION RESOLUTION REFLECT THE FINDINGS REQUIRED BY THE CITY'S MUNICIPAL CODE, AND THE SUBSEQUENT SENTENCES REFLECT THE FACTUAL DETERMINATIONS RELATED TO EACH SUCH FINDING.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Carlos N. Olvera, and Council Member J. Scott Schoeffel, Mayor Pro Tem Richard A. Viczorek, and Mayor John A. Tomlinson

NOES: None

UNFINISHED BUSINESS

There were no Unfinished Business items.

NEW BUSINESS

There were no New Business items.

PUBLIC COMMENTS

There were no additional Public Comments received.

STAFF REPORTS

There were no staff reports.

COUNCIL REPORTS, INCLUDING CITY RELATED MEETINGS ATTENDED

Council Member Schoeffel reported the Symphony opened the season on the 27th at St. Edward the Confessor Church with tremendous support. He stated that he hoped to see everyone on the dais at any of the next three concerts, with the next one being on April 16th. He stated that he is looking forward to the Festival of Whales over the next few weekends.

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Council Member Olvera stated that he had nothing to report.

Council Member Muller commented on the linear park on the Zephyr project that was presented at the last Council meeting. He instructed staff to work with the developer and find out exactly what was going to take to get the park built as presented and report back to the Council. He stated that he would submit his list of meetings attended to the City Clerk.

City Manager Chotkevys replied the direction has already been given, and he will be sure to follow-up on it.

Mayor Pro Tem Viczorek stated that he had nothing to report.

Mayor Tomlinson stated that he would turn in his list of meetings attended to the City Clerk.

ADJOURNMENT

There being no further business before the City Council at this session, Mayor Tomlinson adjourned the meeting at 8:21 p.m. and announced that the next Regular Meeting of the City Council will be March 15, 2016, at 5:00 p.m. in the City Council Chamber located at 33282 Golden Lantern, Suite 210, Dana Point, California.



KATHY M. WARD
CITY CLERK

APPROVED AT THE MEETING OF MARCH 15, 2016

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Meetings attended since February 16, 2016:

Mayor John A. Tomlinson

March 4 - R.H. Dana Elementary 50th Anniversary.
March 5 - Festival of the Whales Parade

Council Member Joseph L. Muller

February 22 - City Council Closed Session
February 23 - Sprint Meeting
February 25 - OCFA
February 29 - Zephyr Meeting