
**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MAY 16, 2017**

CALL TO ORDER

The Regular Meeting of the City Council of the City of Dana Point, California, was called to order by Mayor Lewis at 5:00 p.m. in the City Council Chambers, 33282 Golden Lantern, Dana Point.

ROLL CALL OF CITY COUNCIL MEMBERS:

Present: Mayor Debra Lewis
Mayor Pro Tem Paul N Wyatt
Council Member Joseph L. Muller
Council Member John A. Tomlinson
Council Member Richard A. Viczorek
Absent: None

CLOSED SESSION

City Attorney Munoz stated that there would only be one (1) Anticipated Litigation Item discussed and announced a need for Closed Session as follows:

- A. PUBLIC EMPLOYMENT, Government Code § 54957: Title: City Manager recruitment
- B. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION, Government Code § 54956.9 (a), (2 cases) Name of Case: City of Dana Point v. Headlands Reserve LLC, Sanford Edward, et al; Orange County Superior Court Case No. 30-2016-00872051 Name of Case: Dana Point Automotive, Inc. v. City of Dana Point; Orange County Superior Court Case No. 30-2017-00914962-CU-EI-CXC
- C. CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION, SIGNIFICANT EXPOSURE TO LITIGATION, Government Code § 54956.9 (d1), (2 cases)

Mayor Lewis recessed the meeting into a Closed Session at 5:01 p.m. pursuant to Government Code Section 54956 et seq.

RECONVENE CITY COUNCIL MEETING - CALL TO ORDER

Mayor Lewis reconvened the meeting at 6:42 p.m. All Council Members were present.

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STAFF PRESENT

Patrick Munoz, City Attorney; Mike Killebrew, Acting City Manager; Kathy Ward, City Clerk; Mike Rose, Director of Emergency Services; Lt. Russ Chilton; Ursula Luna-Reynosa, Director of Community Development; Mark Denny, Deputy City Manager; Matthew Schneider, Planning Manager; Brian McClure, Deputy Director of Community Services and Parks; Matthew Sinacori, Deputy Director of Public Works and Engineering; Mark Sutton, Building Official; Jackie Littler, Executive Assistant; DyAnne Weamire, Senior Administrative Assistant; and Bobbi Ogan, Deputy City Clerk.

CLOSED SESSION ANNOUNCEMENT

There was no Closed Session announcement.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was led by Mayor Pro Tem Wyatt.

INVOCATION

The Invocation was provided by OCFA Senior Chaplain Greg Keene.

PRESENTATIONS AND PROCLAMATIONS

Drowning Prevention Awareness

Mayor Lewis presented OCFA Division Chief John Abel with a Proclamation on behalf of the City in recognition of Drowning Prevention Awareness. Chief Abel stated that that drownings were trending downward in Dana Point. He suggested that everyone practice the ABCs of drowning prevention; A - active adult supervision; B - barriers; and C - learning with classes. He added that you should never swim alone as that is the leading cause of drowning in adults. He stated for more information on drowning prevention to go to ocfa.org.

Council Member Muller reported that there is a drowning prevention program called "Pass the Stick" which includes a necklace with a card on it that adults wear when watching children. He added that the sticks are free and are available at Station 29 and 30 for those interested.

CONSENT CALENDAR

Mayor Lewis removed Item 7 from the Consent Calendar.

IT WAS MOVED BY COUNCIL MEMBER TOMLINSON, SECONDED BY MAYOR PRO TEM WYATT, THAT THE RECOMMENDATIONS BE ACCEPTED FOR ALL ITEMS ON THE CONSENT CALENDAR WITH THE EXCEPTION OF ITEM 7.

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The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson,
Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and
Mayor Debra Lewis

NOES: None

ABSENT: 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. SPECIAL MEETING MINUTES, MAY 1, 2017

APPROVED THE MINUTES.

3. REGULAR MEETING MINUTES, MAY 2, 2017

APPROVED THE MINUTES.

4. YOUTH BOARD MEETING MINUTES, APRIL 20, 2017

RECEIVED AND FILED.

5. FINANCE REVIEW COMMITTEE MINUTES, APRIL 10, 2017

RECEIVED AND FILED.

6. MEETING CALENDAR / COMMUNITY SPECIAL EVENTS CALENDAR

RECEIVED AND FILED.

7. CITY TREASURER'S REPORT, APRIL 2017

Mayor Lewis removed this item from the Consent Calendar.

Mayor Lewis asked for clarification on pooled cash investments; what is comprised of this and what the unassigned fund balance will be after reserves are taken out.

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Acting City Manager Killebrew replied that staff added an additional level of detail which lists out the funds that make up the total balance in the City's treasury. He stated that included in that total is the \$16,366,809 that breakdowns down to include reserves which are fully funded at 6.75 Million, cash flow reserves 3.37 Million, Capital Projects 2.5 Million, \$117,000 restricted for Art In Public Places with a remaining unassigned cash fund balance of \$3,617,000.

IT WAS MOVED BY MAYOR PRO TEM WYATT, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL RECEIVE AND FILE THE CITY TREASURER'S REPORT FOR THE MONTH OF APRIL 2017.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

8. CLAIMS AND DEMANDS

RECEIVED AND FILED THE CLAIMS AND DEMANDS.

PUBLIC COMMENTS

Lynn Conger, Dana Point, stated that she was the President of Dana Hills High School Foundation. She thanked the City for including them in the recycling event held on May 6 and reported that they raised over \$3,000 which will be used to purchase laptops for the students to use in classes and the homework club. She suggested the following ways the City could partner with the Foundation without affecting the City's budget: 1. add DHHSfoundation.org to the online community organizations directory, 2. include Foundation announcement in Community News publication, 3. allow a Foundation banner in street median and waiving the permit fee, 4. allow a Foundation table at select City events, 5. encourage a City Council or City staff member to join the Foundation Board as a City representative, and 6. engage the Youth Board to become involved with the Foundation.

Joanna Adrian, Dana Point, reminded the Council that Dana Point is blessed with a peaceful, safe, beautiful city because we have a very special Police Services unit throughout the tri-city area. She stated that the Sheriff's department does a magnificent job for Orange County and asked for support of Dana Point Polices Services.

Penny Maynard, Dana Point, asked Council to keep in mind while reviewing the upcoming budget that there should be increases in Police Services and that they will need increases

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to deal with sober living facilities and short term rentals. She asked the Council to not consider cuts in that department. She stated that the residents expect to feel safe and protected.

Bill Mathes, San Clemente, stated that he was opposed to any new traffic patterns in Capistrano Beach. He suggested that the Council should spend money on a survey.

Joe Jaeger, Dana Point, provided a summary of his background. He suggested comparing actual results with a monthly budget, move from a cash basis accounting, and focus initially on cash management procedures to ensure safe guarding of receipts and disbursements. He also suggested the City Council and Finance Review Committee (FRC) obtain a copy of the audit report adjustments; eliminate the two (2) year budget process and go to a yearly budget; update budget rejections on a quarterly basis; adopt a balanced budget policy; create a five (5) year financial plan updated on an annual basis. He spoke highly of Toni Nelson's analysis which was attached to the FRC's March 27 meeting minutes.

Carol Kelly, Dana Point, thanked the City Council and staff for holding the parking workshop last night. She suggested that staff take the recommendations of the citizens and implement them as well as contact owners of vacant lots and negotiate a public parking lot. She stated that the City should encourage the hotels and restaurants to provide parking for employees at no cost. She added that she had enjoyed the Finance Review Committee meeting last week and asked for the meeting to be televised.

Brandon Day, Dana Point, stated that he had moved here because of the potential of the City but he was frustrated over the lack of development in the Town Center. He felt that staff and services should be the last thing to be cut and that the Council needed to look for other revenue sources.

Theresa Bovee, Dana Point, stated that she was concerned about what was happening in Capistrano Beach. She felt that not everyone was aware or understood what the rezoning was about and that the public should know what was going on. She added that the City needed to do a better job of getting the information out.

Hoiyin Ip, Dana Point, asked for a smoking ban to be considered as cigarette butts are trash and they make their way to the ocean. She stated that she would also like to ban plastic straws.

Wayne Yost, Dana Point, addressed the proposed budget reductions to events and how they would affect the vision of the City.

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UNFINISHED BUSINESS

9. DOHENY VILLAGE PLAN UPDATE

Acting City Manager Killebrew asked Director Luna-Reynosa to address the impact to existing business by the Doheny Village Plan along with her report.

Community Development Director Luna-Reynosa provided a staff report. She announced that 70 people were in attendance at last night's public workshop and 163 evaluation forms had been submitted so far. She stated that the results will be summarized into a report and that report will be provided to the Planning Commission for comment and then to the City Council.

She stated that many of the businesses that people are concerned about are currently legal nonconforming if they were legally established or if they are not they are operating illegally. She explained that the "Maker District" actually encourages many of the businesses that are there illegally today to become legal. She added that there will be even more public hearings on the plan that will be advertised with legal notices, on the website and social media. She stated that essentially the goal and desire in the area where she is hearing the most concern and confusion that the City is trying to push out the existing uses in a rezoning effort is opposite of what staff is trying to do.

Council Member Tomlinson asked if the property changed hands would the use have to change.

Director Luna-Reynosa replied that if the use stays even if it transfer hands, it remains legal nonconforming.

Mayor Lewis asked for an explanation about illegal conforming.

Director Luna-Reynosa explained that if a business went in without permits it would be considered illegal.

Council Member Tomlinson asked about the comment that the Doheny Village was being put on hold.

Director Luna-Reynosa replied that part of the parking workshop last night part of the discussion was for Doheny Village and staff would be asking Council for direction.

Council Member Muller stated that he was shocked and wondered where the information came from that the City was putting this on hold. He asked people to be careful and encouraged them to come to staff to ask questions.

Mayor Lewis stated that she understands that government grinds slowly and that Council was trying to resolve the parking in order to attract development to the City.

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IT WAS MOVED BY COUNCIL MEMBER TOMLINSON, SECONDED BY COUNCIL MEMBER MULLER, THAT THE CITY COUNCIL RECEIVE AND FILE THIS REPORT.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

NEW BUSINESS

10. FY2017-18 LAW ENFORCEMENT SERVICES AGREEMENT

Acting City Manager Killebrew provided staff report and Lt. Chilton provided a PowerPoint presentation.

Mayor Pro Tem Wyatt thanked Lt. Chilton for the presentation. He stated that the Finance Review Committee (FRC) wanted to review the contract and felt that the Lieutenant should make his presentation to them. He suggested delaying the approval of the contract until the contract has been reviewed by the FRC. He made a motion to direct Lt. Chilton to present to the FRC by June 13th at the latest and for Lt. Chilton be available for budget workshops between now and June 15th. Mayor Lewis seconded the motion.

Acting City Manager Killebrew confirmed that June 13th was the next scheduled FRC meeting.

Council Member Muller stated that he was confused on what the FRC was expected to do with this contract as there are MOUs in place that dictate salary increases. He added that the City does not have a say on how much we pay for each Deputy, Sergeant, or Lieutenant. He stated that Laguna Hills and Laguna Niguel were very different cities from Dana Point and felt that they should not be used for comparison. He felt that this was a policy decision for the County to make.

Mayor Pro Tem Wyatt replied that the FRC had requested to review the contract and the Council has asked them to look at financial documents and provide feedback. He stated that he was trying to be respectful of them.

Council Member Muller replied that he understood that, but that the Council was the policy making body and the FRC does not dictate to the Council.

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Mayor Pro Tem Wyatt stated that if it were necessary to act on the contract now instead of the next Council meeting that would make sense but there was nothing driving the Council to approve the contract tonight as there was no downside.

Mayor Lewis asked if the deadline wasn't until August.

Acting City Manager Killebrew replied that there was a provision in the contract for continuing services at the new rates, but he did not feel that decisions made in the next six weeks were going to change the response here. He stated that after reviewing the police model and taking advice of our Chief, he does not see any changes coming out of the FRC. He added that 90 percent of the contract was tied up in labor numbers and but agreed that it was important that the FRC understand the content of our single largest expenditure. He recommended that the Council hold the course but to encourage the FRC and City Manager to continue the discussions.

Mayor Lewis stated that the Council does not know what the FRC has to say until they review the contract and felt that there was time to allow their review.

Council Member Viczorek stated that he has not heard a reason not to vote on this tonight. He added that it was a policy call; what kind of service and level of protection does the Council want to provide to the residents. He felt that there was no benefit in pushing this off and asked why was this contract agendized for tonight.

Acting City Manager Killebrew replied that the contract was ready to go.

Council Member Viczorek stated that he supports Police Services and felt that there was no reason to delay the vote. He added that the FRC could review the contract after the Council votes as well as review the last contract to identify any waste, fraud and abuse. He made a substitute motion to vote on the contract tonight.

Mayor Lewis stated that everyone was in support of Police Services, but felt that there was no downside to a delay on the vote. She added that there was a committee set up to look at budget items.

Council Member Tomlinson seconded the substitute motion.

IT WAS MOVED BY COUNCIL MEMBER VICZOREK, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL APPROVE THE LAW ENFORCEMENT SERVICES AGREEMENT WITH THE COUNTY OF ORANGE FOR LAW ENFORCEMENT SERVICES FOR THE 2017-18 FISCAL YEAR AND AUTHORIZE THE CITY MANAGER TO EXECUTE THE AGREEMENT.

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AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson,
Council Member Richard A. Viczorek, and Mayor Pro Tem Paul N Wyatt

NOES: Mayor Debra Lewis

ABSENT: None

11. FISCAL YEARS 2017-18 AND 2018-19 BUDGET WORKSHOP

Acting City Manager Killebrew provided a staff report and PowerPoint presentation.

Council Member Tomlinson asked for an update on the status of the two (2) hotel projects in town.

Director Luna-Reynosa replied that a number of hotel applications have been submitted, but it was difficult to predict when they would be ready for a public hearing.

Council Member Tomlinson asked if one time revenue increases were included in budget.

Acting City Manager Killebrew replied no, that he does not try and predict these.

Mayor Lewis asked if the City has done any projections of what each of these hotels would add to revenue.

Director Luna-Reynosa estimated that a 150 room property would bring in \$500,000 to over One Million annually at a 68% occupancy.

Council Member Muller felt that these were the kinds of conversations that the Council needs to have, not cutting budget. He suggested staff look at franchise agreements to see if we can increase revenue, and sponsorship of events. He asked about a contract the City has to clean trash off the ramps on the 5 Freeway and questioned whether Caltrans should do that.

Acting City Manager Killebrew replied that a number of years ago, the City received complaints about litter on the Beach Cities exit so the City approached Caltrans and asked them to clean it up. He stated that Caltrans replied that it was one of the better areas they maintained, so the City entered into an agreement with them to allow us to send a crew out there from a contract with a private company.

Mayor Pro Tem Wyatt thanked Acting City Manager Killebrew and Deputy City Manager Denny for spending time to get a budget put out to keep the City stable and felt that the Council had a good starting point on the budget. He proposed that the Council schedule another review of the budget next Tuesday. He felt that it would be an opportunity to take it another level deeper before the next Council

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meeting. He spoke of the unfunded maintenance on facilities and stated that he would like to take care of some of the facilities that need attention.

IT WAS MOVED BY MAYOR PRO TEM WYATT, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL DIRECT STAFF TO SCHEDULE ANOTHER BUDGET WORKSHOP BEFORE THE REGULAR COUNCIL MEETING OF JUNE 6, 2017.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

Mayor Lewis stated that no one on the Council was looking to cut services, but increase revenue and reduce expenses. She added that hard decisions need to be made. She thanked the members of the Finance Review Committee as they have selflessly spent their time digging into these numbers and educating the Council on the past, present, and future financial position of the City; especially Toni Nelson for explaining her numbers and providing her chart. She added that this had started the conversation that the City needs to move into a different direction. She reported that she had attended the FRC on the 10th where they all acknowledged the city's financial issues and that the City needs to move in a different direction. She thanked Mayor Pro Tem Wyatt who has spent his time digging into the weeds and stated that the City owes each of these individuals a debt of gratitude. She thanked Acting City Manager Killebrew for working with the FRC and Mayor Pro Tem Wyatt to create a budget that moves the City in the right direction.

12. ADOPTION OF A RESOLUTION APPROVING A NOTICE OF COMPLETION FOR THE CONSTRUCTION OF THE POLICE SERVICES RENOVATION PROJECT 2016

Acting City Manager Killebrew provided a staff report.

Council Member Tomlinson stated that Lt. Chilton covered it well and thanked him for his presentation tonight and made a motion to approve.

Council Member Muller asked how much savings from the project was there.

Acting City Manager replied that there is about \$25,000-35,000 but there may be some pick up items. He stated that staff would bring back any savings to Council to apply to a deferred maintenance project or the General Fund.

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IT WAS MOVED BY COUNCIL MEMBER TOMLINSON, SECONDED BY COUNCIL MEMBER MULLER, THAT THE CITY COUNCIL ADOPT **RESOLUTION 17-05-16-01** ENTITLED:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA, APPROVING A NOTICE OF COMPLETION FOR THE COMPLETION FOR THE POLICE SERVICES RENOVATION PROJECT 2016.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

Mayor Lewis asked what happens now.

Acting City Manager Killebrew replied that Police Services will begin to move in as soon as possible.

13. PARTICIPATION IN ORANGE COUNTY SMALL CITY URBAN PROGRAM

Economic Development Manager Reenders provided a staff report.

IT WAS MOVED BY COUNCIL MEMBER MULLER, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL APPROVE AMENDMENT FOUR TO COOPERATION AGREEMENT BETWEEN THE COUNTY OF ORANGE AND THE CITY OF DANA POINT

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

IT WAS MOVED BY COUNCIL MEMBER MULLER, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL AUTHORIZE THE CITY MANAGER TO SIGN THE COOPERATIVE AGREEMENT AND ANY NON-SUBSTANTIAL AMENDMENTS, INCLUDING TERM EXTENSIONS.

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The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson,
Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and
Mayor Debra Lewis

NOES: None

ABSENT: None

**14. RENEWAL OF PROFESSIONAL SERVICES CONTRACT FOR INFORMATION
TECHNOLOGY SERVICES**

Council Member Tomlinson recused himself from the item due to a potential conflict of interest and left the Council Chambers at 9:28 p.m.

City Attorney Munoz stated that for the record, that there was extensive discussion with Council Member Tomlinson and it was determined that there was no conflict, but under 1090 the ramifications are significant so if anything it is a remote exception issue.

Director Rose provided a staff report.

Council Member Muller felt that it was strange that a City has an IT department. He asked if staff had gone out to bid for this and was there anything special about our system being with a City IT rather than a commercial IT.

Director Rose replied that when the City shifted to BreaIT we had contracted with a commercial IT and that had cost the City more per man hour. He stated that with the City of Brea, we have a partner agency that are doing the same things we are doing in technology which is different from commercial businesses. He added that staff has not bid this out in a while because staff has been happy with the service they provide.

Council Member Muller asked if the City was getting the knowledge base that we need by going to another City to do this.

Director Rose replied that they invest into their training and reach into the industry. He stated that they contract with 13 other agencies to provide the same support they provide Dana Point.

Acting City Manager Killebrew stated that it had been six years since the City had changed and the cost today was still lower from six (6) years ago. He added that the City has migrated the servers to a similar platform as we were making the transition to outside support.

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Council Member Muller stated that what prompted his question was the phone and email system failure we had recently and wondered if another company would have been quicker to resolve the issue.

Director Rose replied that the recent failure was an isolated equipment failure.

Council Member Muller asked if the City did not have a backup system when City phones go down.

Acting City Manager Killebrew replied that included on the list of unfunded projects was an upgrade to the phone system.

Director Rose stated that there is a disaster recovery phone system that staff plans to put into place.

Mayor Pro Tem Wyatt stated that he had the privilege of digging into the system a few months ago and felt that staff was doing the right thing with the money the City has right now.

IT WAS MOVED BY COUNCIL MEMBER MULLER, SECONDED BY COUNCIL MEMBER VICZOREK, THAT THE CITY COUNCIL AUTHORIZE THE CITY MANAGER TO EXECUTE A CONTRACT RENEWAL WITH THE CITY OF BREA (BREAT) FOR CONTRACT INFORMATION TECHNOLOGY SUPPORT SERVICES FOR A ONE YEAR TERM, WITH AN OPTIONAL, ONE YEAR EXTENSION.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: Council Member John A. Tomlinson

Council Member Tomlinson returned to the meeting at 9:39 p.m.

PUBLIC HEARINGS

15. COMPLEMENTARY PARATRANSIT SERVICES AS PART OF THE DANA POINT TROLLEY AND HARBOR SHUTTLE

Deputy City Manager Denny provided a staff report.

Council Member Muller asked if this means the City gets additional trolley.

Deputy City Manager Denny no, this is just a plan for someone who cannot make their way to the trolley and that OCTA access was their alternative.

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Council Member Muller asked if there were ridership requirements.

Deputy City Manager Denny no.

Council Member Muller asked if we were not using the trolley for this.

Deputy City Manager Denny no OCTA access service which is a paratransit van.

Deputy City Manager Denny stated that the City had expanded the trolley route and is now going places that OCTA does not go which triggered the need for this complementary plan.

IT WAS MOVED BY COUNCIL MEMBER TOMLINSON, SECONDED BY MAYOR PRO TEM WYATT, THAT THE CITY COUNCIL ADOPT A COMPLEMENTARY PARATRANSIT PLAN AS REQUIRED BY THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE ORANGE COUNTY TRANSPORTATION AUTHORITY (OCTA) 2016 PROJECT V GRANT FOR FIXED-ROUTE LOCAL TRANSIT SERVICE (THE DANA POINT TROLLEY AND HARBOR SHUTTLE).

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: None

Mayor Lewis recessed the meeting at 9:42 p.m. and reconvened at 9:49 p.m.

- 16. APPEAL OF THE PLANNING COMMISSION'S DECISION TO UPHOLD THE COMMUNITY DEVELOPMENT DIRECTOR'S DETERMINATION THAT "RECREATIONAL VEHICLE STORAGE USE" IS A PROHIBITED USE WITHIN THE COMMUNITY COMMERCIAL/VEHICULAR DISTRICT (CC/V) ZONE AND "MAJOR AUTOMOTIVE REPAIR USE" IS A PROHIBITED USE WITHIN THE TRANSPORTATION CORRIDOR DISTRICT (TC) ZONE. THEREFORE, THE PROPOSED USES AT 25802 AND 25831 VICTORIA BOULEVARD ARE NOT ALLOWED IN ACCORDANCE WITH THE CITY'S MUNICIPAL CODE**

Director Luna-Reynosa stated that the appellant had a death in the family and had requested a continuance to June 6th.

IT WAS MOVED BY COUNCIL MEMBER MULLER, SECONDED BY COUNCIL MEMBER TOMLINSON, THAT THE CITY COUNCIL CONTINUE THIS HEARING TO THE REGULAR MEETING OF JUNE 6, 2017.

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The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member John A. Tomlinson,
Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and
Mayor Debra Lewis

NOES: None

ABSENT: None

Council Member Tomlinson recused himself from Item 17 due to a potential conflict of interest and left the meeting at 9:51 p.m.

17. HEARING ON THE APPEAL OF THE DETERMINATION OF THE DIRECTOR OF COMMUNITY DEVELOPMENT THAT THE PROPERTY LOCATED AT 35715 BEACH ROAD IS WITHIN THE FP3 FLOODPLAIN OVERLAY DISTRICT

Director Luna-Reynosa provided a staff report.

Mayor Lewis opened the Public Hearing.

Jeff Eddington, Counsel for Appellant, stated that the decision being appealed was the Director of Community Development's determination that the subject property lies within the FP3 boundaries by invoking a provision in the Dana Point Municipal Code allowing the city to make such a determination even though the subject property did not appear in the FP3 boundaries on FEMA's FIRM map. He added that Bertha's property was not included in the FP3 map or Zoning Map because it was landward. Mr. Eddington also argued that the subject property's detail which he retrieved from the City's website via a link to a third party evidences that the property is not in the FP3 district. He stated that staff has not produced one document that evidences the Coastal Floodplain Development Study was adopted and incorporated into the Codes of the City.

Mayor Lewis asked if Mr. Eddington could site any authority that indicates how a document such as the Coastal Floodplain Development Study needs to be adopted.

Jeff Eddington replied that there is a government code section that he had cited in his correspondence.

Albert Bertha, Capistrano Beach, stated that this had begun because of a remodel that was started without first obtaining the required permit(s) and the remodel had gone too far. He added that when he later came in to pull a permit the issue with the floodplain came about and they have not been able to enjoy the home.

David Gutierrez, Capistrano Beach, shared his experience in trying to remodel his home on Beach Road. He stated that the City's former Community Development

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Director made the determination that his home on Beach Road was not in the floodplain.

Jeff Eddington, asserted that it was clear that the Director's determination was not an interpretation but rather a changing of the boundaries. He added that invoking interpretation authority now was changing the zoning designation of a property. He felt that the case had been made that the property was outside of the FP3 district.

Mayor Lewis asked if the study he asserted as the document being relied upon by the Director of Community Development was the Coastal Floodplain Development Orange County Coastline.

Jeff Eddington replied yes. He stated that there was nothing in the Code which identifies that document and there is no adoptive language that alerts the public to the study. He added that the City cannot provide the public proper notice if the information is buried in a 1985 document. He felt that the Council needed to apply what the law of the City was today.

Mayor Lewis asked about the property detail exhibit that Mr. Eddington had shown.

Director Luna-Reynosa replied that it came from the City's GIS system which is a subscription to a cloud based system. She stated that there are a number of different layers that can be applied; but the City does not have dedicated staff to create these layers. She added that the existing FEMA map layer is what was populated.

Mayor Lewis asked if there was any disclaimer on the City website.

Director Luna-Reynosa replied that she certain that there was, but she was not sure of the language.

Director Luna-Reynosa stated that staff agreed that the law as it is today is what is to be enforced and not new law that does not exist. She added that there was language in the Dana Point Municipal Code that the FP3 was to be revised due to changing conditions. She stated that when property owners come into the City to pull building permits for improvements they would be notified at that time and as Mr. Bertha indicated, there was work done without permits and that would have been the opportunity for the City to notice Mr. Bertha that his home was within the FP3 district and subject to those standards of regulation. She stated that the sources that were cited were significant in their conclusion relative to Beach Road and it would be negligent for the Community Development Director not to consider those sources. She stated that the intent of the Dana Point Municipal Code was to be flexible based on changing conditions and to not require zone text or local coastal program amendments. She added that the intent of the floodplain ordinance was to protect life, safety and property. She added that staff did not believe the Appellant had raised arguments that the property was not located in the FP3 district.

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City Attorney Munoz added that the Appellant was playing fast and loose with the definitions in the Code. He stated that the definition for this Coastal Floodplain Study was listed in the Code of Ordinances and that to him that language constitutes adoption. Mr. Munoz provided background on discussions the City had with the Appellant regarding the unpermitted improvements to the subject property and when the discussion broke down, ultimately, the City pulled the property's utilities. He stated that the Appellant had not been able to use their home for a year because they chose to break the law. He added that in discussions the Appellant had agreed to the utilize the exception procedure to the Director of Community Development's determination to move forward, but then Appellant decided to ignore the exception procedure process after a four (4) month delay and instead, go ahead with just an appeal of the determination.

Mayor Lewis asked if the staff did not find the information from Geosoils and civil engineer that Appellant provided as evidence for his position persuasive.

City Attorney Munoz replied that there are models that coastal engineers use to calculate wave run-up. He stated that Geosoils did a study and after meeting with the City's engineer from Moffat & Nichols, the City and Appellant came to an agreement on what further evidence Appellant was going to be provide. Mr. Munoz added that the Appellant chose not to provide the agreed upon further evidence but instead chose to rely on Geosoils' opinion that since the property has been safe for the last 40 years, that he believes it will continue to be safe. Mr. Munoz stated that City staff did not find the historical argument persuasive because it does not take into account future conditions.

Mayor Lewis asked about Mr. Gutierrez and his property (the finding that this property was not in the floodplain).

City Attorney Munoz replied that Mr. Gutierrez was a very lucky recipient of a staff error but that since the City's incorporation, City staff has considered all of Beach Road to be in the FP3 zone. He added that there is an acknowledgment that the study is in the Code.

Having been asked about a disclaimer on the website earlier with regard to the subject property's detail being relied upon in this appeal by Appellant as evidence that the subject property is outside the floodplain, Director Luna-Reynosa stated that she had now reviewed the website for a disclaimer and clarified that in fact a comprehensive disclaimer appears on the City's website disclaiming the veracity of information provided by third parties through a link on the City's website. Ms. Luna-Reynosa read the disclaimer for the record.

Council Member Viczorek asked what standard of review Council was using tonight. Jeff Eddington replied a de novo review, that the City was responsible to use their independent judgment.

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Council Member Viczorek asked if the Dana Point Municipal Code does not give the public notice of the Orange County study of 1985 because it was never adopted.

Jeff Eddington replied yes, that a generic study was identified in the Dana Point Municipal Code, but nothing in the definition that indicates the study from 1985.

Council Member Viczorek asked if the study would have given notice to your client if "properly adopted" as asserted by Appellant.

Jeff Eddington replied yes. He stated that the Dana Point Municipal Codes adopts the FEMA maps properly and alerts the public that there is another source of authority. He added that there was no dispute that the City has the authority to expand beyond the FEMA maps, but the City has failed to show that they have exercised their authority in a proper way.

Council Member Viczorek asked if he was asking the Council to find that the Code was unconstitutionally vague.

Jeff Eddington replied that there were constitutional issues with regards to unfettered discretion by the Development Director to rezone property. He stated that there were due process and equal protection issues and felt for the Development Director to unilaterally rezone someone's property and tell them afterwards, with no notice and no opportunity to be heard was an issue.

Council Member Viczorek asked if it was his position that Appellant did not know.

Jeff Eddington replied that it was irrelevant, that the Code was not clear and stated that the subject property was outside of the FP3 district. He felt that the City had not been able to produce a single document showing that the City had adopted the floodplain report referred to earlier.

Council Member Viczorek stated that in our law it talks about coastal high hazard areas which would have given his client notice that his property was in the floodplain zone and would impose requirements on him; did he acknowledge that as the law.

Jeff Eddington replied that no, the City has never taken action to designate the property to be in the FP3 district or coastal high hazard zone.

Council Member Viczorek asked if he acknowledges that if his client had come in to pull permits that he would have been notified.

Jeff Eddington replied that staff could not make up the Municipal Code on the fly and if it was not consistent with the Municipal Code it was not enforceable.

Council Member Viczorek asked if he agreed that the Council needed to consider all 11 factors stated in the staff report for his client to prevail.

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Jeff Eddington replied that they had bifurcated the request and that they were here only to address whether it was in the FP3 district or not. He added that if it is not, then a wave run-up study would not be required.

City Attorney Munoz clarified that the Code states that Council will hear appeals based on the interpretations of the Community Development Director and in acting on such appeals, the City Council shall consider all technical evaluations, all relevant factors, and standards by this chapter and the item A-K in the staff report. He stated that in response to questions that staff in hanging their hat on only the study is not true, that the EIR was certified by the City Council and it found and stated therein that all beach front properties are in the coastal high hazard zone. He added that the definition of the FP3 zone says that it is anything on the FEMA maps and anything the City determined to be in the coastal high hazard zone. He felt that the language puts people on notice that they need to look further. He continued that Section 9.31.020 of the Dana Point Municipal Code which talks about coastal floodplain puts people on notice as well as its reference to other studies. He stated that when you live on the beach you know that there are special rules that apply. He added that people have a reasonable obligation to do their research on requirements and if Appellant had come to the counter to obtain the proper permit(s) before remodeling, the Appellant would have been told.

Mayor Pro Tem Wyatt asked if he had stated that when the Berthas acquired the property, that they didn't know it was in the FP3 zone.

Jeff Eddington replied that the Code does not provide whether this property is in the FP3 zone. He felt that there was consistency that the property was outside of the zone. He stated that every zoning map has shown this property outside of the FP3 area including the most current one.

City Attorney Munoz stated that the definition is what is shown on the FEMA map as well as anything that the City has determined is in the coastal high hazard zone.

Mayor Pro Tem Wyatt asked when Mr. Eddington's client bought the property he had no way to know that he was in the FP3 district do you believe that whether he was told that or not was irrelevant.

Jeff Eddington replied that was between him and the seller whether the seller disclosed the information. He stated that is how all Municipal Codes and statutes are applied, would a reasonable person reading that understand.

Council Member Muller asked if this map exists anywhere else in the City that would have different information.

City Attorney Munoz replied that Mr. Eddington is referring to two different things; first the GIS picture of the property details accessed via the City's website, which carries the disclaimer read by Ms. Luna-Reynosa earlier, and second, the Zoning Map. Mr. Munoz stated that the Zoning Map

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reflects the areas that are on the FEMA maps and includes in the definition anywhere else that has been determined by the City. He added that the Zoning Map on its own may not provide a complete picture, but that the Municipal Code has language that puts a reasonable person on notice.

Council Member Muller asked for clarification.

City Attorney Munoz replied that the definition in Section 9.31.010 says specifically that the FP3 district is applied to coastal areas subject to wave action which are specifically shown as AE, E, VE, V, and V1 through V30 on the FEMA Flood Insurance Rate Maps and areas which the City has determined to be a coastal high hazard area. He stated that the City has determined that all of Beach Road is a coastal high hazard area. He added that City staff has always interpreted that to be the case and the City Council took official action in 1991 when they certified an EIR containing such language, the Zoning Ordinance, the General Plan, and the Local Coastal Plan that all beach front properties are in the coastal high hazard zone.

Council Member Muller asked if the coastal high hazard zone is defined in the General Plan.

City Attorney Munoz replied that in the EIR which certifies the General Plan, there is language that specifically states that all beach front properties are in the coastal high hazard zone.

Council Member Muller asked Jeff Eddington to clarify his position on coastal high hazard areas being within the FP3 district.

Jeff Eddington agreed that property designated as coastal high hazard is in the FP3. He questioned whether the City ever adopted anything making such a designation and that the EIR is not an appropriate document to rely on for this purpose. He agreed that making such a designation is within the authority of the City and that the LCP does grant flexibility to the City but that decision should not be designated to staff.

City Attorney Munoz reminded the City Council that the code indicates "areas in which the City has determined to be a coastal high hazard area". Mr. Munoz added that the code does not use the word "adopt" and that there is no question that the Council never adopted an ordinance or resolution or conducted a zone text amendment to specifically designate this area as a coastal high hazard area. The Appellant's argument that the Council had to "adopt" an ordinance or resolution is not what the code says.

Council Member Muller asked what liability the City would have if the Council were to determine that the home was not in the FP3 zone and the home causes a problem with another.

City Attorney Munoz stated that the City could be fined \$15,000 per day for not enforcing the FEMA regulations.

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Mayor Lewis closed the Public Hearing.

Mayor Lewis stated that she based her decision on three points: 1) Section 9.31.010 of the Dana Point Municipal Code only requires that the City make a determination that property is within the floodplain. The word "determined" is the issue. The City has made that determination. The word "adopt" does not appear in the Code. Mayor Lewis said she was not persuaded that the City Council was required to adopt the 1985 study, as asserted by Appellant; 2) Appellant cited no authority as to what constitutes adoption. She stated that the Appellant acknowledges the 1985 study relied upon by the City in making its determination and that the City did formally adopt the County Codes which referred to the 1985 Study; 3) City's responsibility is to promote public safety and the subject property description was not persuasive because of the City's website disclaimer. Mayor Lewis stated that Appellant's argument is hyper-technical and puts form over substance. Appellant's position that any "determination" must be made by the City Council because the Council is the City's agent, not the Director of Community Development, is too literal and not persuasive. Mayor Lewis stated that City staff is required to make decisions all of the time on behalf of the City and is a proper City agent for this purpose. She felt that the City staff had the ability to make the determination at issue. For all those reasons, Mayor Lewis said she was voting to uphold the staff's determination that the subject property is located in the FP3 district.

IT WAS MOVED BY MAYOR LEWIS, SECONDED BY MAYOR PRO TEM WYATT, THAT THE CITY COUNCIL UPHOLD THE STAFF'S FINDING THAT THIS SUBJECT PROPERTY IS IN A COASTAL HIGH HAZARD AREA AND THEREFORE IN THE FP3 DISTRICT.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: Council Member John A. Tomlinson

IT WAS MOVED BY MAYOR LEWIS, SECONDED BY MAYOR PRO TEM WYATT, THAT THE CITY COUNCIL SUPPORTS THE DETERMINATION BY THE COMMUNITY DEVELOPMENT DIRECTOR THAT THE SUBJECT PROPERTY IS WITHIN THE COASTAL HIGH HAZARD ZONE AND THEREFORE IN THE FP3 ZONE THAT THE CITY COUNCIL ADOPT **RESOLUTION 17-05-16-02** ENTITLED:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA, UPHOLDING THE DETERMINATION OF THE DIRECTOR OF

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COMMUNITY DEVELOPMENT THAT THE PROPERTY AT 35715 BEACH ROAD IS LOCATED IN THE FP-3 FLOODPLAIN OVERLY DISTRICT; AND REAFFIRMING THE COUNCIL'S ADOPTION OF THE COASTAL FLOODPLAIN DEVELOPMENT STUDY, DEFINED IN SECTION 9.75.030.C OF THE MUNICIPAL CODE, FOR PURPOSES OF IDENTIFYING AREAS OF SPECIAL FLOOD HAZARDS, AS RECOMMENDED BY THE FLOODPLAIN ADMINISTRATOR.

Council member Muller asked if there were other homes in this area that are not shown in the FP3 zone.

City Attorney Munoz replied yes, that there are a number of homes not shown on the map. He stated that this is one of three homes that the staff has had to deal with in the last year where this issue has come up.

Council Member Muller asked how staff intends to handle this so that there is no question about this.

City Attorney Munoz replied that staff intends to send out a notice to everyone on Beach Road as well as the governing board there.

The motion carried by the following vote:

AYES: Council Member Joseph L. Muller, Council Member Richard A. Viczorek, Mayor Pro Tem Paul N Wyatt and Mayor Debra Lewis

NOES: None

ABSENT: Council Member John A. Tomlinson

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 Muller announced that the OC Parks Commission has created a Dana Point Harbor Advisory Committee to deal with the new construction in the Harbor and they have appointed the Coastal representative which he sits in the seat and a 5th District representative will serve as the Chair and Co-Chair. He added that there will be nine other members. He stated that if there was any interest in serving on the Advisory Committee, to complete an application which is available on the OC Parks website to be considered. He reported that he had also attended the FRC on May 10th and he wondered whether Council Members should attend other meetings. He stated that there was a policy regarding the Planning Commission which has language in it that states that it is probably not a good idea for Council to attend. He felt that an item should be added

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to the agenda to discuss this issue. He stated that he had forgotten to comment during the Sheriff's contract, but when the FRC reviews the contract he would really like information on the labor MOU with the County and how that affects the contracts with the cities. He added that he would turn in his list of meetings attended to the City Clerk.

Mayor Pro Tem Wyatt stated that he turned in his list of meetings attended to the City Clerk.

Mayor Lewis reported that she would turn in her list of meetings attended to the City Clerk. She stated that no policy of the City Council would keep her from getting information that she was legally entitled to. She added that the Brown Act is violated by discussions, not by attending the meeting. She felt that it was not proper for the Council to make a policy that inhibits her or her individual rights as a Council Member to attend any Commission meeting that she felt was appropriate. She stated that the reason she does not attend the Planning Commission meetings is because of what happened tonight. The Council is in a de novo situation of making decisions on appeals and for that reason that she does not want it to appear that she is making a decision based on information seen or heard outside of the Council meeting.

City Attorney Munoz concluded that there had been no Brown Act violation by three members of the Council attending the FRC meeting. He stated that putting this issue on an agenda for further discussion would be the correct way to handle it.

Mayor Lewis stated that if such a policy was made, she wanted a legal opinion that this Council has the ability to make such a policy binding.

Council Member Viczorek 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 Lewis adjourned the meeting at 11:40 p.m. and announced that the next Regular Meeting of the City Council will be June 6, 2017, 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 JUNE 6, 2017

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Meetings attended after May 2, 2017:

Mayor Debra Lewis

May 3	Chief Chilton & Marla Miller, Niguel Shores Property Manager
May 4-5	South County Association of Governments (SCAGs)
May 8	Ocean Institute
May 9	Laguna Cliffs Marriott
May 10	Financial Review Committee Meeting
May 11	Niguel Shores Women's Club Various Residents Mayor's Office Hours
May 12	Mike Killebrew, Mark Denny Budget Meeting Kerry Ferguson, Mayor San Juan Capistrano; Kathy Ward, Mayor San Clemente
May 15	City Council/Planning Commission Joint Parking Workshop

Mayor Pro Tem Paul N Wyatt

May 3	San Diego Regional Water Quality Meeting
May 4	South OC Watershed Management Area Executive Committee Meeting
May 10	Lisa Bartlett, Ocean Institute Management Meeting
May 11	Orange County Library Advisory Board Meeting San Onofre Citizens' Advisory Panel Meeting
May 12	Kerry Ferguson - Mayor San Juan Capistrano, Kathy Ward - Mayor San Clemente and Debra Lewis – Mayor Dana Point common regional issues discussion.
May 13	Dana Point Symphony
May 15	Joint Dana Point City Council – Planning Commission Parking Workshop

Council Member John A. Tomlinson

May 8	CASA meeting
May 9	Laguna Niguel Rotary Club

Council Member Richard A. Viczorek

May 9	OCMVCD Board of Trustees Budget Meeting
May 11	SJHTCA Board of Directors Meeting
May 15	Dana Point Parking Workshop

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Council Member Muller

May 9	Chamber of Commerce
May 10	OCFA
May 11	TCA
	OCFA