

**WEST LINN
CITY COUNCIL MEETING
MINUTES
JULY 19, 2010**

Council Present:

Mayor John Kovash, Councilor Scott Burgess, Councilor Jody Carson, Councilor Teri Cummings and Councilor Jim Mattis

Staff Present:

City Manager Chris Jordan, Assistant City Manager Kirsten Wyatt, Parks & Recreation Director Ken Worcester, City Engineer Dennis Wright, and City Prosecutor Rhett Bernstein.

Business Meeting

Public Hearing (AP-10-01) to Consider the Appeal Filed by Troy and Gina Bundy of the Planning Director's denial of a Water Resource Area (WRA) Permit (Continued from June 14, 2010)

Mayor Kovash opened the public hearing to consider an appeal of the Planning Director's decision in WAP-09-03 to deny any application for Water Resource Area Protection Permit to allow installation of a swimming pool, patio, grading of property, filling of wetlands, removal of native vegetation, planting of non-native vegetation, and creation of a new drainage way in a conservation easement and in two environmental overlay areas associated with wetland and riparian areas proposed at 1215 9th Street described at the assessor's map 31 East 2ab, Tax Lot 8210.

The appeal has been filed by the property owner applicants, Troy and Gina Bundy. The hearing is Denovo; the record in this case will include all testimony and written submissions received before the close of the hearing or record by City Council. Anyone may testify. Those wishing to speak must focus their comments on the applicable criteria or approval of the land use application. The hearing was originally noticed and scheduled for June 14, 2010; however, the applicant requested a continuation to this evening.

The hearing will be conducted according to the applicable criteria found in the Community Development Code, Section 99.170. Because this hearing is the initial evidentiary hearing, anyone may ask the City Council to continue a public hearing or leave the written record open and the City Council is required to grant the request and either continue the public hearing or leave the written record open for at least 7 days.

City Attorney Tim Ramis stated all persons wishing to speak must be recognized by the Mayor before speaking. For the deliberations tonight the applicable criteria are found in the Community Development Code. The applicable approval criteria are found in Chapter 32, Water Resource Area Protection. The authority of the Council is limited only to those issues that address compliance with the applicable criteria. The applicant has the burden of proving that the application complies with all relevant criteria.

Mayor Kovash reviewed how the public hearing will be conducted. He asked if any members of the Council had visited the site. Council President Burgess stated he has driven by the site, did not walk onto the property but was able to see what was noted in the record at the gate to the property. He

feels he can vote impartially on this issue. Councilor Cummings stated she went down the private drive and knocked on the door. Mr. Bundy showed her the back yard, pool and helped her get oriented to the area. They did not engage in any discussion about the specifics of the case. Councilor Carson stated she has driven and walked often by this property; she has not gone down the private driveway. She did not talk to anyone about this property. Mayor Kovash stated he has driven on the street around the property to get a view of the terrain. He has driven down the driveway to the home and looked through the buildings to the area behind the home. He did not talk to anyone during his visit.

Mayor Kovash asked if there were any conflicts of interest or ex-parte contacts to declare. Councilor Cummings stated at an executive session she made statements that she later realized were incorrect in thinking she had been with Mayor Galle on a certain weekend. She called Ms. Galle to let her know that she was not with her the weekend of the Old Time Fair; it was the Fourth of July Celebration. They did not engage in any further conversation about details of this case. Mayor Kovash noted he met the Bundy's at the Fair yesterday and had a short conversation. There was no discussion about the details of the case.

Mayor Kovash asked the audience if they wished to make a challenge of any council member's impartiality or ability to participate. There were none. He asked if there were any objections to the Council's jurisdiction to consider this matter. There were none.

Staff Presentation

Planner Peter Spir gave a power-point presentation of the staff report of the subject site and surrounding area. He reported this is a public hearing to consider the appeal of the Planning Director's decision that would have allowed the construction of a swimming pool and associated patio, etc. The appellant constructed the swimming pool and patio and undertook activities in protected wetlands, riparian area, transition zones, and in the open space conservation easement. Although the application was for the pool, discussions of the water resource areas (wetlands, drainage ways) are important in determining the setbacks that the pool should meet.

Community Development Code, Chapter 32 is the applicable chapter and states, "...no person may clear, fill, build in, or alter existing water resource areas without having obtained a permit."

The location of the appellant's property was pointed out on the site map showing access along a private driveway. The property constraints and limitations include a Wetland (Water Resource Area) delineation, Water Resource Area Wetland Transition and Setbacks, Water Resource Area Riparian Corridor, and Open Space Conservation Easement. The swimming pool extends between 33 and 38 feet from the rear property line. An aerial photograph was shown with a rough approximation of the natural drainage-way (AKS, Wetland Delineation) and identified on the Surface Water Management Plan as located along the access. The City of West Linn Wetland Inventory adopted in 2005 shows wetlands on the property. Chapter 32 depends on the Westland Inventory as the basis for wetland delineation.

A photograph was showed depicting the location of the trench that represented the northern edge of the property. This trench existed before the Bundy's arrived at the property in 2003. There are

submittals from neighbors that the trench existed long before the Bundy's and it was not created by them.

The wetland boundary has a 50-foot transition zone and a 15-foot setback which takes up almost all of the Bundy property in the rear yard almost to the back and the front of the house. The riparian corridor covers most of the subject property. There is an overlay over the appellant's house.

The wetland conservation easement boundary was recorded in 2001 which extends 32-38 feet into the rear yard of the Bundy property. This easement forbids the construction of fences, buildings, filling, excavation, removal of top soil, any changes in topography, removal of trees and plants (particularly native plants), prohibiting the planting of non-native trees and plants including disturbances or changes in natural habitat in any way, modifications to the topography (placing of fill), manipulation land alteration or water courses, marshes, things that would be detrimental to purity, drainage, flood control, conservation, etc.

Pictures were shown of the rear of their property where the applicants went onto PGE property and modified it significantly. The transitions and setbacks embrace most of the rear yard, pool and patio areas. The trench was not excavated by Mr. Bundy; however, it was subsequently improved by him and his neighbors with new rock and plant materials which slowed down the flow of water through that area. Staff contacted PGE and they reported no authorization of the use of their property. Removal of vegetation accelerates the flow of water during periods of high rain. In wetlands grasses slow and contain the rainwater for a more measured release of the water downstream. In this case the water flow has been changed.

Pictures were shown of 2007 showing the rear of the subject property. Earlier photographs show thick trees and vegetation. 2008 pictures show grading at the rear of the property and removal of most of the vegetation.

The Planning Director found the appellants constructed the swimming pool without a building permit, constructed a patio area around the pool, a water feature in the transition area, graded the rear yard and PGE property to the north, moved native vegetation in the rear yard and PGE property, modified the natural drainage way (replaced by a trench in 2001/2003), and the appellant subsequently lined the trench with rock/gravel to create a 9-15 inch deep channel. There is evidence in the record that the applicant installed piping to direct water from the trench to wetlands to the south of the property to cure flooding in their home which should have been permitted. Non-native grass materials and two footbridges were installed across the trench along with a brick wall in the open space conservation easement area in front of the house. All of these activities were done within the transition zone, riparian corridor or wetland conservation easements.

Chapter 32-032 prohibits any new lawn or garden consisting primarily of non-native vegetation, removal of existing native vegetation from the transition area or setback area. Staff recently received from the Department of State Lands, signed by Mr. Bundy, a consent agreement with findings that the property contained a wetland and that the Bundy's removed and/or filled more than 50 cubic yards of material within the waters of the State without permit or authorization from the Department. In the record is a letter dated May 18, 2010 from the U.S. Army Corps of Engineers stating their site visit revealed a pool,

patio and landscaping may have been placed within wetlands in the back yard of the residence. Fill material was placed in the backyard of the property to create the area prepared for planting.

The proposed development shall be designed to maintain the existing natural drainage ways and utilize them as the primary method of stormwater conveyance. The AKS Wetland Study identified a dry creek channel. The Surface Water Management Plan identified two channels and one of the channels being the one between the applicant's property and PGE.

An email was received from a neighbor Jay Walker dated June 8, 2010 stating they re-graded the ditch and put in three inches of fill to stop erosion. The Bundy's also cleared their ditch at the same time and put in the same fill rock. By modifying the ditch along the rear property and removing the native vegetation the appellants destroyed many of the functions of the natural drainage way, storm water treatment, storm water detention and habitat area. Further pipes directing storm water to the south of the property diminish downstream water flows which impact wetlands northeast of the Bundy property. For that reason staff found the Bundy's have not met the approval criteria.

The next criteria states that development shall be conducted in a manner that will minimize adverse impact on the water resource area, alternatives which avoid all adverse environmental impacts shall be considered first. It was staff's finding that the house is correctly built outside of the conservation easement, outside of the transition zones that were in place at the time of construction. In contrast the modifications of the pool, patio grading, re-directing stormwater, filling of wetlands, removing trees, elimination of habitat areas resulted in significant adverse environmental impacts. Staff finds a significant portion of wetlands on the PGE property was eliminated. For these reasons staff found the criteria was not met.

Chapter 32.050(i) requires sound engineering principles regarding downstream impacts, soil stabilization, erosion control, inadequacy of improvements to accommodate the intended drainage through the drainage basin shall be used. Storm drainage shall not be diverted from the natural water course. Staff finds the drainage was diverted from the water course as depicted on the 2000 AKS delineation. The drainage way was straightened by a prior owner per a letter from Mr. and Mrs. Paulson (included in the record). The appellant subsequently fortified it was gravel. The installation of the pipes by the appellant has diverted the stormwater flow from its natural water course. Staff finds this does not meet the criteria.

Chapter 32.050(e) identifies the appropriate transition areas associated with water features, wetlands, and drainage way. The transition area is a total of 65 feet from the edge of the drainage way. All of the improvements are within that area. Staff finds the approval is not met.

Staff recommends denial of the appeal based on approval criteria in Chapters 32.050(b), (c), (d), (e), (f), (h), (i) and (l) are not met. The applicant must demonstrate compliance with all of these criteria.

Mr. Spir reported that **Christine Haver**, Corps of Engineers, sent an email correcting staff on a number of points:

- Staff stated the permit needed by appellant was the Joint Permit when the required permit name is After the Fact Permit under Nationwide Permit Number 29

- Staff stated the Corps of Engineers and Department of State Lands (DSL) would both pursue enforcement. Ms. Haver corrected staff in a follow-up email stating the Corps of Engineers would, "...not open enforcement action on the alleged activities
- Staff stated, "The preponderance of evidence shows that the provisions of Chapter 32 have been violated. It is the view shared by DSL and U.S. Army Corps of Engineers as well the City engineering staff responsible for management of the storm drainage facilities." Ms. Haver wanted to make it clear that the Corps does not become involved in city regulations or codes therefore would be inappropriate or inaccurate to state that the Corps shares the views of the Planning Director, City Engineering staff on the provisions of the Community Development Code.

These corrections having been made, staff feels the essential points on the approval criteria still stand.

The appellant's attorney asked if the swimming pool is in fact a structure and therefore exempt from water resource area structural setbacks per Chapter 32.050(f). The Community Development Code defines structure as something constructed or built and having a fixed base on or fixed connection to the ground or another structure and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below. It was the feeling that since the 15 x 30 foot pool is not over 30-inches above grade, it is not a structure. Staff feels the CDC definition can be interpreted to define two separate types of structures given the use of the conjunction and (structures with fixed base and structures such as platforms, walks, etc.). The pool is indeed a structure and would not be given accommodation in the transition areas.

The Oregon Residential Specialty Code indicates any structure intended for swimming or recreational bathing that contains water over 24-inches deep will require a permit. A structure is defined as anything which is built or constructed. No building or other structure shall be constructed, improved, altered, and enlarged except in conformity with conditions of the zone.

There is the contention that the swimming pool and patio could be defined as passive recreation facility and therefore permitted in the water resource area transition area. However, there is no clear definition of passive recreation in the Community Development Code. There is language in Chapter 56 relating to passive recreation oriented parks where support facilities, more intent uses (structures) are discouraged.

The Metro Greenspaces Master Plan calls passive recreation as recreation not requiring developed facilities. The Department of State Lands defines passive recreation activities as those that require no structures. With those definitions in mind that define a pool as an active recreation, staff feels the swimming pool is not passive recreation facility; it is more of an active recreation facility.

There is a provision in Chapter 32 addressing the hardship allowance. The idea is not to deprive property owners of all economic use of their land. The County Assessor's Office made a determination the value of the house is \$640,000. The site has achieved some measure of economic viability. If the applicant had been able to prove that they have been denied economic use of the property, they would have been allowed up to 5,000 sqft of site (including area for grading and excavation). Staff found the existing driveway in the front of the property, the sidewalk from the driveway to the house, and the

house footprint combine for 7,175 sqft (not counting pool and recent improvements). The applicants have already exceeded the 5,000 sqft allowed.

Applicability of other land uses, the lot line adjustments and wetland permit involving the property would include the following conditions of approval:

- Willamette River Greenway Permit shall be required for any new structure on the site
- No development shall occur in the flood management, area boundaries, or within the wetland conservation easement without required permits
- The property is within a 100-year flood plain and therefore a Flood Management Permit and Willamette River Greenway Permit will be required for the pool and other improvements
- If this application were approved, it would allow the retention of the pool, patio and associated hard surface improvements but only if Council specifically modifies the open space conservation easement as well. It will not address the fill, grading, loss of native vegetation, drainage way modifications on PGE and Bundy property. The application was for the swimming pool; not for the right to make these site modifications. It will not change the conditions of approval or the original lot line adjustment and wetland permit for the property. It will not solve the continuing environmental problems regarding reduced or modified downstream water flow.

Mr. Ramis reiterated to the Council the question being asked tonight is whether the improvement described in the application satisfies the criteria in the Code. In after-the-fact situations, it is tempting to get into the details of how the improvement came to be. That is a question for another day; however, it is not before the Council in this proceeding tonight. Some of the history may be important in terms of the impacts of the improvement, but the precise of how it came to be is not directly relevant to the criteria.

Mayor Kovash reported the hearing is to consider the appeal of the Planning Director's decision to deny the application for a water resource area protection permit to allow the installation of a swimming pool and patio, grading of property, etc.

Council President Burgess noted Council's decision tonight is focused on the City's enforcement of the standards of Chapter 32 no matter who alters the natural area. The house is in the transition zone; however, it was built before changes in Chapter 32.

Applicant Presentation

Michael Robinson, Applicant's Representative, stated their presentation would include testimony by Mr. and Mrs. Bundy and himself.

Troy Bundy, 1215 9th Street stated the staff report left out some details. They have met and agreed with Department of State Lands and U.S. Army Corps of Engineers to restore the PGE property consistent with their needs and desires. They have retained an independent wetland consultant who is preparing a plan for those improvements, paying a \$3,000 fine, and purchasing wetland remediation credits involving the encroachments.

The delineation relied upon allowing his home to be built initially was not accepted by DSL and it wasn't verified before all the homes were built in the area. His entire half-acre portion of property is overtaken by government regulations. There is nothing he can do. Mr. Spir earlier indicated that the action against him will involve his pool, sod, sprinkler system, landscaping, etc. The wetlands are supposed to be up to his slider. Mr. Bundy stated he tried to settle this matter respectfully and have been dealt with hardship.

In regards to the PGE situation, a Cottonwood tree fell over onto his property from the PGE land. He contacted PGE and at first they denied it was their land and after further investigation they discovered it was their land and came out. Mr. Bundy stated he asked PGE while they were removing the tree if they would remove the construction debris in the back of the property. The response was it was a low priority for them. Mr. Bundy then asked if he could do it and PGE gave him the okay saying it is better to ask for forgiveness than to ask for a permit. The only restrictions were not to drive any tractors underneath the lines, take down any trees or plant any trees under the lines.

Mr. Bundy stated his children were playing in that area and he was concerned for their safety because of the construction debris (rusty nails, boards, rusty metal, broken glass, etc.). He cleaned up the debris from that area. He has come to reasonable agreements with PGE, DSL and U.S. Army Corps of Engineers.

Mr. Bundy noted they put in the pool with good faith; they were relying on representations made to them. It was their understanding they had the authority of someone in power to do these improvements. They have invested \$100,000 into these improvements to improve their home, the quality of their lives and their children lives. The money that was invested has been invested in this community by local businesses at a time when people really needed the work. He does not feel the limitations placed on his property are fair as he can't do the same things as any other West Linn citizens has the right and ability to do. He is asking the City to be reasonable; not to take away his back yard, not to take away their life savings. They have agreed to enter into agreements with the Department of State Lands. The area is still a functioning wetland. He invited the Councilors to come out and see what is going on with his property.

Gina Bundy, 1215 9th Street stated she started talking with the City two years ago regarding these improvements. Everything that was done was based on suggestions by city staff. She has submitted emails and site visits from city staff that approved the process. They did what they thought was right; they did seek permits.

All of her neighbors have yards; that's all they wanted was a yard. There have been two documented wildfires behind their property. There have been sparks from two PGE lines on PGE property. Being concerned about the safety of their children, they cleared the area. This is what their neighbors have done in the same area in their yards. This has been a year battle for them.

Michael Robinson submitted additional materials to the Councilors. He stated there is not a wetland on the vast majority of the Bundy property; it is transition area. The slide shown denoting the wetland is not accurate. Most of the wetland is a little bit on the ditch, which is the far northern portion of the

property. The portion that was delineated in 2000 by AKS is primarily PGE property. It is not in the area of the pool and patio.

The July 16th Consent Order from the Department of State Lands shows a hatched area inside the conservation easement that is not required to be restored. The area required to be restored is the PGE right-of-way. The wetland area the DSL is concerned about is the PGE property and the drain; not the area that the pool and patio are on. There is no delineated wetland or protected wetland on the property.

If it is the City's interpretation that a pool and patio is a structure, there are thousands of people the City must enforce against. That is not how pools have been handled in the past. It is the Community Development Code that controls here, not Metro, not Oregon Administrative Rules nor the Uniform Building Code. He disagrees with staff on how the definition of structure should properly be read.

He appreciates as did the Bundy's staff's recognition that the Corps of Engineers is not going to enforce. They have invited the Bundy's to make an After the Fact Nationwide Permit application. Nor is the Department of State Lands going to do anything further; they are satisfied with the consent order which they entered into on the Bundy's. The important wetland, the only wetland is on the PGE right-of-way and drainage ditch. It has to be restored; not the area of the pool and patio are located on.

There are three physical areas that are important; the PGE right-of-way (delineated wetland in 2000 and protected Goal 5 resource), the ditch (indicated in the AKS delineation as the "dry ditch," and the Bundy property.

The only wetland area, delineated or protected is the ditch area and the drain on the side of the home. Under the relevant approval criteria the pool and the patio are not on resource areas. This is not a case where someone has put improvements on a protected wetland, but where someone has reportedly violated a conservation easement and transition areas. Only a small sliver of the Bundy's property (drainage ditch) is designated as a wetland.

The Bundy's made a good point; their entire property is within the riparian corridor. It is not an idle point when they say they have a house they can't effectively live outside of. They can't have a flower garden, can't have sod, or a wall in the front yard by their car. None of the restrictions on the property protect the resource. All the resource the City and DSL is concerned about go on to the far north side.

For the first time in the proceedings staff agrees the Bundy's did not install the ditch. The ditch was modified in rock before they arrived. They did improve the ditch after; however, they disagree that it has changed the function of the wetland. If the ditch had modified the riparian characteristics (water intake), there wouldn't be a wetland. The fact there is a wetland shows the ditch hasn't modified the characteristics or function of the wetland.

The PGE property is the area designated as the resource. It is the area that DSL was concerned about and the area that was protected in the 2000 delineation that led to the 2001 partition plat that created this parcel. It is the area the City was concerned about in 2005 when it adopted its Goal 5 regulations. The majority of what this being addressed tonight are transition areas, conservation easements and a

number of redundant, overlapping regulations that have tripped the Bundy's up. The Bundy's are sorry they got into this situation; they thought they were doing the right thing. They have reached out to City staff and will continue to meet with them to resolve the problems.

Not all the approval criteria in Chapter 32 are approval criteria for this kind of application. Many of them are simply directions to establish transition areas and conservation easements. He noted that the 2001 conservation easement was not established according to ORS Chapter 271, which controls. Also, the 2000 delineation was rejected by DSL which means the conservation easement may not be accurate. A conservation easement is supposed to relate to an accepted delineation.

In response to the criteria in the Community Development Code, Mr. Robinson noted:

- Chapter 32.050(d) and (e) are not relevant to this application; they are directions to other things. There is no way they are relevant to this kind of permit.
- Chapter 32.050(b) can be met because the dry ditch can be restored and maintained; that is what the DSL Consent Order requires.
- Chapter 32.050(c) does not require avoidance; it requires minimization. If someone reasonably wants to use their back yard, that is minimization. The Bundy's have built a pool and patio; the patio is something that is common in virtually every home in West Linn.
- Chapter 32.050(f) allows passive recreation uses. Definitions from outside the Community Development Code are not relevant; they are not bound by them and need not rely on them. If the city is going to take the position that patios have to meet the definition of structure and the setbacks have to get building permits, there are a lot of people in the city that are out of compliance.
- Chapter 32.090(a) and (b) are the hardship criteria. The applicant originally applied under (b) and the staff decision by Mr. Sonnan it is clear that (a) applies to this situation. The entire property is within a water resource area which means (a) is relevant, (b) is not. Section (a) does not have an economically viable standard on it. The purpose of (a) is to avoid unreasonable hardship. He asked if it is unreasonable for a family to have sod, flower garden, or patio in their front or back yard. It is an unreasonable hardship.

Mr. Robinson stated he feels this can be fixed. They have agreed to apply for post construction building permits and mitigation and will comply with the relevant requirements of Chapter 32. They will cooperatively with City staff to see that the necessary permits are applied for and received.

If Council finds that the pool and patio are passive, the applicant doesn't need a hardship exception under Chapter 32. If Council concludes additional hardship relief beyond 5,000 sqft, they ask that this matter be put on hold and let them apply for a variance under Chapter 75.

If all of this is done the Bundy's will be in City compliance with requirements and they will enter into a written consent agreement under Community Development Code Chapter 106. The City will commit in writing to the things to be done, mirror the DSL Consent Order and require the Bundy's to obtain the necessary building permits and mitigation plans.

Mr. Robinson asked Council to read all the materials submitted. He feels the Bundy's have met the approval criteria. They are willing to accept reasonable conditions of approval. He reiterated that the

important point is that the pool and patio are not on wetlands; they are on a transition area or conservation easement.

Questions from Council to Applicant -- None.

Public Testimony

Frank Lessor, 1301 9th Street stated he is in support of the applicant. It seems unreasonable to have the Bundy's remove the pool.

Alice Richmond, 3939 Parker Road stated she has lived in West Linn since 1959. She has witnessed the changes of the Parker Road which changed private property on both sides. The proposed aquatic center is going to be on Parker Road. When it rains a little, she cannot walk across the aquatic center property unless she is wearing her boots. She does not feel the brick wall installed on the Bundy's property stops the migration of water.

Ms. Richmond noted the important issue here is a person's constitutional rights; the Bundy's should be able to improve their property in a way that they see fit. The entire city of West Linn is built on wetlands. She urged the Council to take time and carefully review this application.

Darleen Sargent, 1325 9th Street stated she too is in support of the applicant. Why did the City allow houses to be built in that area if the wetlands were going to be an issue? She is in favor of the Bundy's keeping their pool and patio. Her house looks down on the Bundy's property and she does not feel they have interfered with any of the wetlands that border their properties. They still have lots of birds, ducks, and all kinds of wildlife.

J.Wallace Walker, 1213 9th Street stated he lives next door to the Bundy's. He is in favor of allowing them to keep the pool and improvements to the back yard. The rules as outlined by staff seem to indicate it is against the law for the Bundy's and himself to even mow their lawn or even to have a lawn. He understands there needs to be conservation of wetlands for various reasons, it is best not to impede the natural water flow, and agree it was an ill-conceived idea to build those homes in this area but the homes are there. At this point he would like to recommend the City consider these slivers of land that compose the Bundy's and his neighbor's backyards not as wetlands, but their private property. They should be allowed some variance to be able to use their property up to the borders of their property lines as they see fit.

The idea of maintaining a wetland up to the back door may not have been thought out with regard to the protection of the home. If there is no allowance for a catch basin, it might propose an adverse affect on their homes in that it would allow the water to accumulate under their homes. Maybe these rules should be reconsidered that do not allow these properties to modify the water and allow it to flow around their properties and back onto the wetlands.

Sharon Paulson, 1250 9th Street stated she lives across the street from the Bundy's. They built their home with permits; they have lots of wetlands. They had to abide by the rules that were in place at that time. They have greatly changed since they built 16 years ago. It is her understanding that the Bundy's

house was built with permits; they should not have to go through this hardship. She has not noticed any change in the amount of water in their field. They have a lot of water, they call it a lake. It is her opinion that the Bundy's have not destroyed a thing. She has seen their backyard and feel it is gorgeous and a real asset to the neighborhood. She would like to see it stay the way it is.

Tim Phillips, 2260 Volt Street stated he has lived here 12 years. He does not feel the houses should have been built there in the first place. However, since they are, the Bundy's should be able to use their property. They pay taxes on it and they should be able to do what they want.

Questions from the Councilors

Council President Burgess asked when the house was built. Ms. Bundy stated the house was built in 2001-2003 and it met the flood plain requirements in place at the time.

Councilor Carson asked for clarification of the request by Mr. Robinson to apply for a variance rather than the hardship clause. Mr. Spir stated you can seek relief from the standards in many of the provisions of the Community Development Code by pursuing a variance. This situation may meet some of those provisions. It would be difficult to meet the requirements of extraordinary or exceptional circumstances if the property did not arise from a violation of the ordinance. If the wetland standards are not met, it would constitute a violation of the ordinance and it would not meet the approval criteria for a variance.

Councilor Carson noted the way the wetlands were explained, no one on this street is allowed to have grass. Mr. Spir stated there is a variety of plant material and landscaping that is allowable for these residents. These alternatives would be much more appropriate to the natural surroundings, wetlands, etc.

Council President Burgess noted in Chapter 32 there is a provision for hardship. No variance has been applied for in this case, the applicant has applied for a Water Resource Area permit.

Councilor Mattis stated the hardship criteria to be acceptable in extraordinary circumstances which would be the criteria to be measured against, not necessarily a violation of the ordinance.

Councilor Cummings stated the issue tonight is reviewing the appropriateness of whether this would be something that is allowed. Some people purchase a piece of land and highly value the fact it is so close to nature. Section 5 of the Park and Recreation Plan indicate the differences between passive and active. A swimming pool is listed as active. The limitations for the conservation easement are for passive. These limitations are clearly spelled out in writing for whoever would have purchased this site. When a person purchases a piece of property, the limitations of the property should be considered beforehand.

Recess was taken and the meeting reconvened at 7:50 p.m.

Applicant's Closing Comments

Michael Robinson noted a portion of his testimony where he referred to the area of the designated wetlands in Goal 5. He read from Page 70 of the bound packet, the first page of the Director's decision that was appealed, second paragraph, "Wetlands designated on the City's adopted West Linn Wetland Riparian Wildlife Inventory lie to the north of the applicant's rear property line. The wetlands are located on property owned by PGE." The protected resource is not on the Bundy property, its PGE. They can deal with that both with the City and have already agreed to deal with it with DSL.

In response to Councilor Carson's question on Chapter 75, Variances, CDC 32.090 is Reduction in Standards for Hardship. There are two subsections (a) and (d). Both of them have in common the idea that you can ask for a hardship, but up to 5,000 sqft of coverage. If Council agrees with the passive use, there is no need for the hardship portion. If Council does not agree, Chapter 32.090(d) states, "Any further reduction of the standards of this Chapter shall require approval of a variance pursuant to CDC Chapter 75. He understands the burden of proof and feels it is possible to get to compliance with all the City codes through both a hardship and potentially a CDC Chapter 75 variance.

Mr. Robinson stated he agrees with staff that native plants are allowed. As heard by testimony tonight by the Bundy's and many of their neighbors in that area, it is important to have a green area that can be enjoyed, especially if you have children. Native vegetation possibly doesn't include sod. Reed Canary Grass is a native species; however, it is considered an invasive species and that is what the Bundy's took out of PGE and the wetlands. The point of the hardship provisions in CDC Chapter 5 is to let people do what others in the community can do.

Mr. Bundy's acknowledges that they violated the transition area and the wetland conservation easement is at issue. Mr. Robinson stated he feels this is an issue that can be resolved and is not relevant to Chapter 32. It is the Bundy's desire to find a minimal solution; they are not interested in litigating with the City. They would like to find a way to protect the City's integrity of its requirements, to make sure the public safety and welfare is preserved through appropriate permits, and give the Bundy's a reasonable use of their back yard.

There was no one testifying in opposition tonight. There is an opposition letter in the record; however an email was sent to staff from Mr. Hitesman indicating he doesn't oppose the application. This is indicative of the spirit of how the community wants to see this matter resolved; there are far more supporters than opponents.

Mr. Robinson suggested an open records schedule that would keep the record open for 21 days. The Bundy's would extend the 120 day clock from its current terminus of August 31st through September 21st.

- For the first open record period the applicants would like the record to remain open for all parties to submit argument and evidence until July 26th at 5:00 p.m. The argument and evidence submittals should be directed to Mr. Spir by personal delivery, fax, or email.
- The second open records period would extend until August 2nd at 5:00 p.m. to Mr. Spir for parties to rebut with argument and evidence what came in during the first open record period and provide an opportunity for staff to submit a new staff report.
- The third open record period would extend until August 9th at 5:00 p.m. to Mr. Spir for the applicant's final written argument only, no new evidence.

Council could then come back and render a final decision by September 21st, 2010. It is hoped that additional conditions of approval and a structured resolution can be met through the open record submittals and hopefully the Council will conclude that the pool and patio shouldn't be removed, they can meet the approval criteria and a reasonable solution can be reached.

Questions from the Council

Councilor Cummings clarified and confirmed the proposed open records schedule with Mr. Robinson.

Staff's Closing Comments -- None.

Council Questions of Staff

Council President Burgess noted the applicant is asking that the conservation easement not be a consideration in this decision. He asked staff if the conservation easement relevant to this issue. Mr. Ramis stated it is relevant to some of the deliberations. This particular proceeding doesn't include within it the authority to do away with the conservation easement or revise it. That would be a subsequent procedure. It can be used as evidence in terms of how it relates to the conditions of the land and what is allowed in these areas.

Mayor Kovash asked staff what the DSL, PGE and the U.S. Army Corps of Engineers to do in their jurisdictions. Mr. Spir stated there is a submittal from PGE where they acknowledge the fact they were made aware of trees on their property that were believed to be hazardous. There is no evidence PGE gave authority to the Bundy's to conduct clearing activities, grading, etc. DSL's position is clear in the Consent Agreement what they require (Page 4). Mr. Bundy testified a civil penalty of \$3,000 would be assessed and they are required to submit a restoration plan for review and approval by the Department of State Lands by August 1st. The U.S. Corps of Engineers have indicated they would consider an After the Fact Permit with conditions.

City Manager Chris Jordon suggested changes in Mr. Robinson's proposed open record schedule:

- Extend the 120 day rule to September 30, 2010.
- The record remains open for all parties to submit argument and evidence until July 26th at 5:00 p.m. The argument and evidence submittals should be directed to Mr. Spir by personal delivery, fax, or email.
- The second open records period would extend until August 2nd at 5:00 p.m. to Mr. Spir for parties to rebut with argument and evidence what came in during the first open record period and provide an opportunity for staff to submit a new staff report.
- The third open record period would extend until August 9th at 5:00 p.m. to Mr. Spir for the applicant's final written argument only, no new evidence.
- Council's final decision made at its regular meeting on September 13, 2010 and possible final written order adopted September 13th or 27th.

Mr. Robinson concurred with the revised schedule suggested by Mr. Jordan. They agree to extend the clock based on the revised schedule until September 30, 2010.

Council President Burgess moved to adopt the open records schedule as follows:

- **Extend the 120 day rule to September 30, 2010.**
- **The record remains open for all parties to submit argument and evidence until July 26th at 5:00 p.m. The argument and evidence submittals should be directed to Mr. Spir by personal delivery, fax, or email.**
- **The second open records period would extend until August 2nd at 5:00 p.m. to Mr. Spir for parties to rebut with argument and evidence what came in during the first open record period and provide an opportunity for staff to submit a new staff report.**
- **The third open record period would extend until August 9th at 5:00 p.m. to Mr. Spir for the applicant's final written argument only, no new evidence.**
- **Council's final decision made at its regular meeting on September 13, 2010 and possible final written order adopted September 13th or 27th.**

Councilor Carson seconded the motion.

Council President Burgess voiced concern about the timing and the fact that it is at the close of the construction season. He would like to see a resolution to this issue before the construction season is over.

Ayes: Carson, Cummings, Burgess, Mattis, Kovash

Nays: None

The motion carried 5-0.

Mayor Kovash opened the hearing up to discussion by the Council.

Councilor Mattis asked the applicant to provide information on how the terms of the conservation easement that was entered into at the time the house was built can be complied with.

Council President Burgess stated he has no problem with leaving the hearing open, it is clear to him that Chapter 32 applies here as it relates to development, required submittals after 32 is in place. The house was there before Chapter 32 so the deliberations are focused on what took place after Chapter 32 was created.

There are others who live in a wetland but this issue is about West Linn residents and how this project applies to Chapter 32. Comments have been made that this is not a wetland; however Chapter 32 doesn't just apply to the wetland and drainageway. It does apply to transitions which are there to protect the resource (wetland, drainageway, riparian area). The transition area is relevant and there has been evidence that construction was done in that area.

Reference was made in terms of hardship and the use of subsection (a) rather than (b) because the staff used the term economically viable. He feels the applicant should read all of (a) as it makes reference to minimum disturbance. The fact that the applicant may get an after-the-fact permit with other entities; it does not address the issues concerning the City codes.

Councilor Carson stated she agrees with many of the concerns raised by Council President Burgess. She would like to have more information on Mr. Robinson's interpretation of Chapter 32.090(a) and how this issue meets the requirements of that section.

Councilor Cummings feels that Chapter 32 is appropriate for this application. The house was built before Chapter 32 and because the pool and patio were built after Chapter 32 they should follow those criteria. The conservation easement was signed over in 2001 and is a permanent easement. The purpose is to retain and protect the property in its natural condition for the purpose of providing a scenic and aesthetic appearance protecting natural processes, providing recreational uses and maintaining natural vegetation. She feels there is a misunderstanding of the term "recreational uses" and recommended the applicant meet with Parks and Recreation Department and review Chapter 5 where the appropriate passive oriented guidelines are spelled out to promote natural resources. Active uses are stated as water playground or interactive water features listed under active oriented parks. This is not a park; it is a conservation easement that was established for the purpose of providing the maintenance and protection of natural features. It is unfortunate when a house where the easement goes up to your back door; however, it is not an impossible situation. Every time someone purchases property there are certain aspects to that land that has to be followed. The rules have to apply to everyone. This is about being logical and reasonable.

Mayor Kovash noted a Water Resource Area Protection after the fact is somewhat difficult. Chapter 32 was adopted after the house was built. Other properties ...the case has been well made and well presented.

Adjournment of Business Meeting

Mayor Kovash adjourned the July 19, 2010 West Linn City Council meeting.