The purpose of this special meeting is to continue discussion of the Critical Areas Ordinance.

Mayor O’Brien stated the Council has listened to the Golder Associates representatives and looked at the first part of the proposed ordinance. He requested the Community Development Director give them a snapshot review of what has transpired to date. The City Attorney will also discuss some issues. The public comments will be limited to five minutes for each person.

Community Development Director Witkowski said there are three things that need to be looked at tonight. The first issue is the approach taken towards looking at the proposed Critical Areas Ordinance. He has looked at the State Law. If the City uses the language that is not based on the best available science, there are certain things you need to do. In regards to the WAC, if you use economic and social information to best available science to develop the regulations, you will need to look at what is available. This is an urban area. It is a very dense area in a sea of open space. Wildlife has been fragmented. There are lots of land use that have been developed in different areas. They have looked at the main functions - erosion, pollution, water quality and aquatic wildlife.

The questions and comments which were collected last evening were answered and reviewed.

**One-hundred foot buffers on Type III streams in the City of Ellensburg is not reasonable given the size of some properties and the minimal benefit to the riparian environment inside the City fish according to charts presented benefit from a twenty to fifty foot buffer. That seems more realistic inside a city that has already paved most of its streams.** Community Development Director Witkowski stated this would also apply to the wetlands. Regarding the Riparian Buffer, 80% of the benefit is within 20 meters. This is another approach to look at.

There could be a variable width buffer. There are two ways to approach this. One is to not have any buffer width, no standard and it will be decided on a case by case basis. This has the benefit of being site specific. The disadvantage would be not letting someone know where they stand. Usually
minimum widths are set, keeping the same square footage. This would be an easier system to work with. Where do you measure the buffer from? In streams, it could be the middle of the stream. This would not apply to the Yakima River. Everyone knows where to measure the buffer from, if the middle of the stream is used. There is usually not an ordinary high water mark. We do not know where this is until someone comes and maps it. Sometimes it can be visible, but not usually. Someone would need to be trained in this.

The new ordinance proposes to measure stream buffers from the center of the stream channel. This includes the active stream zone in the buffer to the steam. The intent of having a buffer is to protect the zone around a stream, so why not measure the buffer from the top of the stream bank? This is an easily identifiable location that meets the intent of a buffer on the stream and is very repeatable. Community Development Director Witkowski said the stream bank is a very identifiable mark. This is another way to look at this.

Regarding Adoption of Best Available Science: I strongly recommend that you create a provision in your adoption to allow annual updates of important information. The notion of best available science suggests an evolving concept. Old science may not be best.

Golder’s report doesn’t take into account that the GMA doesn’t require mandatory buffers. D.O.E. is overly restrictive. (Submitted by Steve Willard). Community Development Director Witkowski reiterated there are several streams which flow through the City of Ellensburg. There is also the silent issue of the wetlands. This could have more effect on an individual’s property than the streams since they are not obvious. Citizens do not know about the wetlands on their property. Many are now active pastures.

City Attorney Jim Pidduck said there is a court case which the Council needs to be aware. It involves the Swinomish Indian Tribal Authority v. Western Washington Growth Management Hearings Board, Skagit County. The conclusion from this court case is that although the Growth Management Act requires cities and counties to use and record the best available science when determining critical area measures, the State Supreme Court has found the best available science measures for mandatory buffers are not necessarily required if local circumstances demonstrate otherwise and the local jurisdiction is able to provide a reasoned justification for a departure from the best available science.

This gives local jurisdictions somewhat broader discretion than previously thought to develop critical areas regulations tailored to local circumstances. The jurisdiction has to have a reasoned justification for departing from the best available science.

First, there is limited relevance to Ellensburg. Skagit County has land that qualifies both as agricultural and as critical areas. The County came up with the “no harm” standard.

Second, the court engaged in a lengthy discussion regarding the meaning of the word “protect”,
rejecting the tribe’s argument that a jurisdiction’s duty to “protect” critical areas extends to a duty to “enhance” critical areas. The court stated the obligation to “protect” means to prevent new harm, but does not extend to a duty to enhance or restore a critical area. The Court observed the GMA does not need to enhance. There is no requirement to enhance, but enhancement can be allowed.

Thirdly, and the most relevant to the current discussion with the City Council, in its discussion of the mandatory buffers the court provided guidance indicating that local jurisdictions have somewhat broader discretion than previously thought to develop critical area regulations tailored to local circumstances, as long as the jurisdiction has a reasoned jurisdiction for departing from the best available science.

Council discussed that the Critical Areas Committee needs to review the proposed ordinance. The Planning Commission is reviewing this ordinance at their meeting Thursday evening (November 2, 2007). The Council needs to know how it will affect present uses on developed property and future uses on developed property. There are streams under entire blocks in the downtown area. The Council needs to know what this ordinance will do to the people’s property and value of that property.

Council discussed what the Critical Areas Committee reviewed. At least five members from this committee thought the best available science would be more clear, that it would be more creative. Council discussed that they need to have a starting place and that was the point of this draft. It looks like the Council can veer away from the best available science if they have a good explanation.

The Council returned to answering and acknowledging the questions collected from last night’s meeting.

**Recommendations on the Critical Areas Ordinance:** Amend sections pertaining to buffer reductions, widths, setbacks from buffer, setback from buffers for structures, and restructure section for permit to be filed with City official. (Submitted by Environmental Committee). The City Council has this information.

**What size of buffer is recommended for a stream made up of groundwater and springs?** (Submitted by audience member). The City has up to five type 3-5 streams. They are not differentiated as spring or groundwater fed streams though both sources of water likely are part of their annual flow.

The new ordinance proposes to measure stream buffers from the center of the stream channel. This includes the active stream zone in the buffer to the stream. The intent of having a buffer is to protect the zone around a stream, so why not measure the buffer from the top of the stream bank? This is an easily identifiable location that meets the intent of a buffer on the stream and is very repeatable. (Discussed earlier in the meeting.) Community Development Director Witkowski said they could use the top of the stream bank. He personally would prefer that they measure from the middle of the stream, as this would be easier.
Are there consistencies and coordination between Ellensburg and Kittitas County so the City will not inherit a plat blind to the underlying critical area during annexation? One example is platting along a stream where multiple culverts are needed to access individual properties where one crossing could have served all parcels with well throughout parcel creation. Community Development Director said this is for the City of Ellensburg’s jurisdiction. They cannot impose regulations on the County. They hope to have an interlocal agreement with the County and that the County will consider the City’s requirements and the County wants to see what the City has come up with.

Please consider linear trail networks along streams as the land is developed. This could be used as an incentive. This was noted by the City Council and staff.

Are critical areas identified before a parcel is platted? (Short Plats), so lots are not created that fail to protect the underlying resource? Specifically, getting into the unbuildable lot situation needing variances, where prior recognition could have avoided the entire conflict. Is this happening, and if not, why not? Someone could privately hire someone to do a written analysis of his land. If someone reads the ordinances, he would know where the critical areas are, except for the wetlands. Four out of five of the critical areas could be available.

Measuring the buffer from the center of the stream channel is not necessarily clear and easy as the stream may be in different places at low flow vs. high flow. Why not measure from the top of the stream bank? Also measuring from the center of a stream gives a smaller buffer on a larger stream than it does on a smaller stream. A counter productive strategy for protecting our streams. Same as previous question. The streams are fairly consistent in size. The top of the stream bank would be acceptable.

One-hundred foot buffers on type III streams in the City of Ellensburg is not reasonable given the size of some properties and the minimal benefit to the riparian environment inside the City fish according to charges presented benefit from a twenty to fifty foot buffer. That seems more realistic inside a city that already paved most of its streams. This was discussed earlier. This is another method to look at.

Please consider waivers of impact fees for developments that create critical areas parcels that are created as a separate parcel within subdivisions next to streams and wetlands. The Critical Areas Advisory Committee had considerations that they wanted to see in the ordinance. What about fitting in parking? It would give people a certainty. There would be flexibility and we could add to this ordinance and have more specific information about variances. There are two approaches to variances. Guidance must be given to the Environmental Committee as to which hearings and thoughts along this line would make people more comfortable about this ordinance.

Please consider incorporating low impact development standards along streams and wetlands. This was discussed and recommended by the City Ad Hoc Committee. This was unsuccessfully
embraced. There will be mitigation for wetlands, but it will be very difficult. This can be part of the package that is up to the City Council.

Council asked if there was a penalty for not meeting the timeframe. Community Development Director Witkowski advised there is no provision for an extension; however, the penalty would be a sanction upon an organization that did not meet the requirements. The sanctions would come through the Governor’s office. If the Council is working on the ordinance, that would show they are trying and sanctions would be unlikely. Other people could take the City to court privately.

Regarding critical aquifer recharge areas, the consultant said that city wells are quite deep and essentially don’t need protection, however, our City is growing rapidly and many properties on the edge of town or in town have private wells that are closer to the surface - how do we protect these shallow aquifer/well areas? The ordinance is trying to address this issue right now. The main concern is the water supply.

Recommendation for critical areas ordinance for a type 3 stream buffer distance of 150 feet based on protecting various functions and values of the stream. (Submitted by William Meyer, Department of Fish and Wildlife). This recommendation was noted by the City Council.

The public began addressing the City Council regarding the proposed ordinance.

Fennelle Miller, 605 North Anderson Street, Ellensburg, spoke for herself as a concerned citizen and somewhat of an environmentalist. She stated the Critical Areas Ordinance is currently written almost exactly like the Department of Ecology’s ordinance. This is not appropriate for this community and is not appropriate for an urban city setting. There is a great deal of inherent absurdity in requiring property owners who live across a street, but within 100’ of a creek to not prune their trees. No trees in Ellensburg have a 100’ spread so there is no shading affect upon a creek or wetland. She showed the Council pictures where the properties within 100’ of the creek would apply to unwitting neighbors. She did not believe an ordinance which gives the City jurisdiction over a property owner’s actions within 200 feet of the creeks in Ellensburg and the wetlands should be adopted. The ordinance says it encourages property owners to enhance habitat, but why would they do this? There must be some incentive for property owners to enhance habitat and the State Supreme Court has found that you may not require enhancement. The logical solution is to provide bonuses for those property owners who agree to create habitat or habitat improvements.

Other municipalities who have adopted the Critical Areas ordinances have also acknowledged the burden to map critical areas and their buffers are the responsibilities of the municipalities not the property owners. This way a property owner would know if he is affected by the Critical Areas Ordinance. Both Bothell and Bellingham have detailed maps available to the public. The government should lead by example.

In discussing fencing, how does fencing encourage wildlife to use the buffer zone? How do deer get
through a fence. Historic properties are affected by this. Wilson Creek is underground. There is no mention of this in the ordinance.

David Whitwill, Central Washington Homeowners, 211 West Mt. Hood Court, stated the ordinance is going in the right direction. Some property owners will obey the laws and some will not. A fence keeping someone from their own property is not feasible. If someone is in violation of the ordinance, it would be a criminal misdemeanor, maybe giving the property owner one week to correct the violation or be subject to a fine. This would avoid someone saying they did not understand the ordinance. He agreed with the minimum widths.

Martin Kaatz, 309 North Poplar Street, said he has done an analysis of the situation and nowhere in the ordinance, is there any reference to irrigation. The role of irrigation is to deny and/or add water to our creeks. Sometimes irrigation is used for flood control. There needs to be a more detailed analysis regarding stream flow and the culverts in Ellensburg. The creek goes right under Lind Hall at Central Washington University. All of this needs to be considered in the ordinance. The affects of irrigation are important.

Larry Nickel, 317 ½ North Pearl Street, said he was critical of the process. The Council only budgeted $40,000 for their report from Golder and they got what they paid for. The report says the best available science was conducted within the limitations of available time and budget. Golder stated other jurisdictions have committed significantly more resources to the documentation of best available science as it applies to their Critical Areas Ordinances. New science is always going to be welcomed. Where do you get the best science? Regarding aquifer recharge, surface and groundwater are tied together. The Kittitas County Commissioners have not reviewed the best available science. All geologies are unique. Larry Nickel said he believed that Ellensburg is going to find itself in the same predicament as Roslyn regarding its water supply if they are not careful. What about shallow wells along the Yakima River? How much would it cost to get rid of these wells? The City has done nothing to try and protect its critical areas.

Doug Mitchell gave the Council a copy of his concerns of the Critical Areas Ordinance. He encouraged the Council to carefully examine three aspects of the current draft: (1) The role of Best Available Science as required by the Growth Management Act; (2) The application of Best Available Science to the buffer and jurisdictional area and (3) the compatibility of the Critical Area Ordinance with the community goals stated in the Comprehensive Plan.

Mr. Mitchell further stated the draft mistakenly uses summaries of studies of riparian buffers to justify setback distance. A buffer is a small eco system of plants which naturally occur along streams and which provide water filtration, bank stability, habitat, shade, sediment reduction and organic matter. There is no existing buffer and there are simply no studies out there.

David V. Taylor, Alliance Group, 1611 Bean Road, Moxee, submitted written comments and a disc. The Alliance Group and Lakeshore Development believe the City of Ellensburg Critical Areas
Ordinance Update fails to meet Planning Goal 1 related to urban growth. It says urban growth - encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. The regulations adopted for the protection of critical areas severely restricts development within the designated Urban Growth Areas by requiring large, overly burdensome buffers inconsistent with urban growth. Section 13.39.1180(B) requires a frequently flooded areas report for all development within floodplains. They believed this went overboard and should be removed.

Rick Cole, County resident, but owns property within the City of Ellensburg, stated he believed the Swinomish case says the mandatory buffer is not required. Best available science is included, but not followed. All of the best available science that Golder used is related to King County, not Kittitas County. He objected to the City being able to take someone’s property, or place restrictions on that property and not compensate the property owner. Since he lives in the county, but owns City land, he did not believe his voice would be heard. One hundred feet from the creek is a lot of property. He will be submitting his comments in writing to the City Council.

Jack Piper, Ellensburg resident, said he has read the court case numerous times and is hoping the City Council will read it. It says they do not have to use the best available science and do not have to require a buffer. This is the City Council’s choice. They will decide the destiny of Ellensburg and what will apply to the City as a whole. The 100 foot buffer zone would affect almost the entire Rodeo Grounds. He said the ordinance gives everyone a place to start. The burden this places on staff and developers is ridiculous. He liked using the center of the stream as a place to measure from.

Roger Weaver, 1217 Radio Road, discussed the issue of irrigation. In July there is very little irrigation water in the valley. Irrigation is a very well used tool in the valley and helps handle the surface water. He believed the proposed ordinance is vague and confusing. The process forces the property owners to ask for variances.

William Meyer, Fish and Wildlife, stated there needs to be a balance between public and private property. There are numerous concerns that cannot fit into the current code. Land owners need to use their property and the water runs through the Rodeo grounds. For the first time in decades there was salmon in the lower Reecer Creek. Development too close to the creek causes a negative impact. A balance needs to be found. This is a big challenge.

Robert Terrell stated the best available science is like the weather report and is incorrect 75% of the time. He has seen reports and they are all different and wondered how reliable they are. Timber harvest wiped out the spotted owl. Forests were closed and 1,500 - 2,000 people lost their jobs because of the ruling to save the spotted owl. Communities were devastated because of this decision. Then it was discovered the spotted owl was being killed by another owl. The City Council needs to look at more than one area of this. What are the ramifications going to be? The City Council must make decisions and how they will affect more than just property rights. There is a very big difference in Ellensburg than the west side.
Doug Mitchell said the local government does not have to follow the best available science. The court has not ruled how to deviate from the best available science. Justice Charles Johnson has not determined this. They are operating with very little science to back us up. When science is quoted, reports and studies need to be produced.

David V. Taylor, Alliance Group, Moxee, talked about title companies and the laws they are governed under regarding title insurance. He asked about third party lawsuits and said there are several unanswered questions. The Alliance Group has three questions. What is the content of the Growth Management Act? The Council has the responsibility of balancing all 13 goals of the GMA. They need to encourage urban growth. The Critical Areas Ordinance fails to meet this goal. They are supposed to reduce sprawl. The Ordinance fails to reduce sprawl. They need to encourage availability of affordable housing. They fail to do this. They are supposed to encourage economic development. The Critical Areas Ordinance fails to do this since economic development is not encouraged due to the regulations regarding the buffer zone. There are other areas which are not being met by the Critical Areas Ordinance. He did not believe the Community Development Director had the authority to approve/reject the SEPA checklist. He did not believe an update is necessary at this time.

Mark Tesker, Department of Wildlife, said that the delisting of steelhead referenced in the report was incorrect. It was still on the Federal list as well as the State species of concern. He wanted to know what the timeframe is and when more comments will be heard by the Council. Mayor O’Brien said the Council will listen to comments anytime. The Council will have another meeting like this one at a later date.

Rick Cole, County resident, said he hopes the Council will keep in perspective what they have to do. He is not convinced the current situation is not working. The Palace Café is over Wilson Creek. Can they not do any remodeling? He encouraged the City Council to read and study the Swinomish decision. It is related to Ellensburg, but is obviously not the same. He did not believe the City Council had to pass this by December. They need to do the right thing and listen to everyone and make their own decisions.

Motion that the Critical Areas Ordinance be referred back to the Critical Areas Ordinance Perrie Advisory Committee and the Planning Commission and the ordinance be polished before Affirmed it comes back to the City Council.

Council agreed to include the Environmental Commission in this review for their input before it comes back to the City Council.

The Critical Areas Advisory Committee needs to go back and look through the ordinance and discuss any points that need to be discussed and decide on what areas need further input. They need to write up a Pro/Con list and forward that to the City Council.
City Manager Barkley stated Carol Morris is reviewing the ordinance at this time. The City Attorney will also need to have his comments incorporated.

Council discussed that the committees, commissions and City Council need to take the time and deal with this issue. There is now a draft to work from. City Attorney Pidduck reminded the City Council about the December 31st deadline. Council said it does not look like the penalties are substantial. If they have to go beyond the State’s deadlines, then that is what needs to be done.

The Commissions and Committees that review the ordinance need to focus on reasonable use. They need to come up with a clear process. The Downtown Task Force should be included in this review.

Motion to add the Downtown Task Force to the list of commission and committees to Perrie review the Critical Areas Ordinance. Affirmed

Rick Cole stated as he read the requirements of the law, the City is required to review annually. A review is acceptable for now. The City Council does not have to make any decisions tonight. The ramifications are far reaching regarding the streams. He urged the City Council to amend the current ordinance and then do what is right. They should not rush into this. The court case should be reviewed carefully.

The Critical Areas Ordinance has been on the back burner for about six years. City Attorney Pidduck advised it needs to be completed by the December 31, 2007 deadline. They are not supposed to go past that deadline. They have to show a good faith update.

The meeting scheduled for November 7th may be cancelled.

**ADJOURN** Adjourn at 9:58 pm. Bassett

Affirmed

_________________________________
Mayor

ATTEST: __________________________________

City Clerk