

APPROVED

**CITY OF EDMONDS
ARCHITECTURAL DESIGN BOARD
Minutes of Regular Meeting
April 2, 2014**

Chair Gootee called the meeting of the Architectural Design Board to order at 7:00 p.m., at the City Council Chambers, 250 - 5th Avenue North, Edmonds, Washington.

Board Members Present

Bryan Gootee, Chair
Cary Guenther, Vice Chair
Brian Borofka
Bruce O'Neill
Rick Schaefer

Board Members Absent

Lois Broadway (excused)

Staff Present

Kernen Lien, Senior Planner
Mike Clugston, Senior Planner
Jen Machuga, Associate Planner
Jeff Taraday, City Attorney
Karin Noyes, Recorder

APPROVAL OF MINUTES

BOARD MEMBER SCHAEFER MOVED THAT THE MINUTES OF MARCH 19, 2014 BE APPROVED AS SUBMITTED. BOARD MEMBER BOROFKA SECONDED THE MOTION, WHICH CARRIED UNANIMOUSLY.

APPROVAL OF AGENDA

The agenda was approved as presented.

REQUESTS FROM THE AUDIENCE:

There was no one in the audience.

PRESENTATION BY THE CITY ATTORNEY REGARDING THE OPEN PUBLIC MEETINGS ACT AND RUNNING LAND USE HEARINGS

Mr. Lien explained that in the work session where the City Attorney will lead a discussion about the legalese of land use hearings and staff will lead a discussion about how the design review process currently works and what can be done to improve it.

Mr. Taraday observed that the Architectural Design Board (ADB) plays a valuable role in the City. The cases that come before them can end up before the City Council and then to the Superior Court, and the ADB is the only body in the chain that gets to conduct an open record public hearing. That means all of the evidence the City Council and Superior Court uses to make decisions must be submitted during the Board's hearing. In most circumstances, factual questions about projects, the surrounding area and other criteria related to the decision must be asked and answered at the ADB hearing through oral and written testimony and other documents that are submitted. Before closing a public hearing, it is important for the Board Members to collectively have a feeling that they have all of the facts and information needed to make their decision. If they feel there are not enough facts to support the proposal as presented or with conditions, they can either deny the application or continue the hearing. If they continue the hearing, they should specify exactly what

factual information they want brought back. Once the public hearing has been closed, no additional information can be added to the record.

Mr. Taraday explained that when sitting on the dais for a design reviewing hearing, ADB members must act as both the judge and the juror. In the capacity of juror, the Board Members must fulfill a fact finding role. In their capacity as judge, they must do their best to apply the City's adopted codes and policies. He explained that establishing codes and design standards are the purview of the City Council, but the Board can assist in this effort by identifying problematic areas and recommending potential changes to make the code better.

Mr. Taraday emphasized that all of the factual information needed for the Board to make a decision must be presented in an open record hearing. The City is not bound by the discussions that took place and/or the direction provided by staff during the pre-application conference. He cautioned that if the Board has concerns about the appearance of fairness when reviewing a particular application, they should direct their questions and requests for legal advice to him directly or through one of the City planners. He pointed out that, as long as the public record is still open, it is never too late to raise concerns or ask questions.

Board Member Borofka asked how much communication the Board Members are allowed to have with staff prior to a public hearing. Mr. Taraday explained that staff would not be considered a party of record for the purpose of the Appearance of Fairness Doctrine and ex parte communications. Therefore, Board Members can communicate with staff and the City Attorney as often as they need to prior to a hearing without having to disclose the communications at the hearing. The ex parte communication provision relates to proponents and opponents of the project. Any contact a Board Member has with either a proponent or an opponent must be disclosed at the start of a public hearing.

Chair Gootee pointed out that, most of the time, the Board approves projects with certain conditions and there are no significant concerns. However, on occasion, legal questions come up during a hearing, and he struggles with how to handle them without continuing the hearing and holding up the project until a future meeting. He asked if it would be possible to approve a project conditioned upon review by the City Attorney. Mr. Taraday pointed out that a good deal of the Board's questions, both factual and legal, can be unearthed through their preparation for the meeting and asking questions in advance. Questions that come up during the hearing should be answered before the Board makes a decision. He reminded the Board that they are not required to make a decision on the day of the hearing. They can continue the hearing to a future date to allow time for the questions and concerns to be addressed.

Chair Gootee referred to the Point Edwards Project, which recently came before the Board for review. The project that was presented to them was not only approved by a prior ADB, but the changes made to the plan were consistent with the Board's request. While there was a lot of public pressure to deny the project, the Board felt legally bound to grant approval because the project was consistent with the Design Guidelines and policies in the Comprehensive Plan and met the Development Code requirements. The City Council later overturned the Board's decision, and he questioned the legality of denying an application that is code compliant and consistent with the Comprehensive Plan.

Mr. Taraday explained that, in the case of Point Edwards, the applicant voluntarily withdrew the application after the Board had provided guidance at a public hearing about what they wanted to see. When the new application was submitted, the applicant had no right to rely on the guidance and direction provided by the Board pertaining to the application that was withdrawn.

Chair Gootee said Point Edwards is a good example of when it would have been helpful to have legal counsel present at the hearing to provide guidance.

Mr. Taraday said he had a discussion with staff about when it would be appropriate for him to attend ADB Meetings. He invited the Board Members to share their thoughts, as well. Mr. Lien pointed out that not every application that comes before the Board requires a public hearing, and there are only a few where the ADB is the sole decision maker.

He suggested it might be helpful to have the City Attorney attend the public hearings so the Board could seek timely legal advice if something unanticipated comes up.

Board Member O'Neill pointed out that, although they may add to the conditions of approval, the Board relies heavily on the staff's recommendation. Mr. Taraday commented that if the Board is not seeking to significantly modify the staff's recommendation, there should not be any major legal concerns. He added that staff is good about coming to him for clarification if they see legal issues or questions. Vice Chair Guenther suggested that if something comes up during a hearing, the Board could continue the hearing so that legal issues could be resolved. Other than Point Edwards, there have not been any legal issues, and it might not be a good use of the City Attorney's time to attend every public hearing.

Chair Gootee asked if Board Members can ask the City Attorney questions during a public hearing. Mr. Taraday answered affirmatively. He encouraged the Board Members to watch the video recording of the closed record hearings the City Council conducted for the Point Edwards Building 10 application to see how the City Council engaged with their legal counsel during the hearing to get their questions answered. The video would also help the Board Members better understand what happens to an application after the ADB makes its decision. Mr. Lien agreed to send the Board Members links to the video recordings.

Mr. Lien said staff can usually gauge how controversial an issue will be and how many people will show up at a hearing based on how many written comments are received regarding a project. This can give them a heads up that it might be a good idea for the City Attorney to attend. Mr. Taraday suggested it would be appropriate for the Chair of the Board to communicate with the lead planner for the project before the public hearing to determine if it would be helpful for the City Attorney to attend. If the answer is clearly no, he won't attend. If there is some concern, he could show up at the hearing. If it appears it will be a typical public hearing, he could leave. In some cases, it will be clear that his attendance will be helpful.

Board Member O'Neill reviewed that the first thing the Board considers when reviewing applications is whether or not they are code compliant. In 90% of the applications, the projects meet code and the Board moves to the next step of design review. For the most part, applicants are amenable to the changes put forward by the Board so their projects can move forward, and there has been very little resistance to the Board's additional conditions to the staff recommendations.

Mr. Taraday briefly reviewed excerpts from the court case, *Anderson v. City of Issaquah*, and invited the Board Members to share their thoughts. He explained that, in this particular case, a property owner filed a claim against the City of Issaquah because it denied his application after repeated revisions to make it consistent with the code. He argued that the building design requirements in the city's code were unconstitutionally vague. The court held that Issaquah's codes did not give effective or meaningful guidance to applicants, design professionals, or to public officials who are responsible for enforcing the code. Because the code requirements were vague, the design review board was left to make discretionary and arbitrary decisions regarding its interpretation of the law. The court granted judgment in favor of the property owner.

Mr. Taraday advised that it would be helpful for the City Attorney, staff and City Council, if the Board relies upon the adopted City standards and guidelines when making decisions. If they have concerns or questions about a particular standard or guideline, they should provide feedback to him via an attorney client privilege memorandum. It is important for the City Council to know about these concerns so they can be addressed. If the Board, staff, City Council and City Attorney are collectively mindful of the requirement to articulate the vision in clearly defined terms, they can make progress towards refining the standards to make them better. The clearer the standards are articulated, the easier the Board's job will become.

Board Member Schaefer said that issues repeatedly come up about the definition of some terms, such as "mass." Because the code does not provide a clear definition for this term, the Board is left to interpret its meaning. Designers have interpreted the term to mean that large facades must be broken up with different textures and articulation.

Vice Chair Guenther recalled that he served on the Planning Board when the Design Guidelines were adopted. Contractors expressed a desire to have clear cut, descriptive standards, and designers wanted more flexibility. He cautioned that while prescriptive codes are clearer, they can result in “cookie cutter” style development. Some vagueness is intended to allow flexibility, but it should not so vague that that it cannot be understood. Terms such as “mass” can be illustrated and defined better, but making the code too prescriptive can work against the intent of the Design Guidelines. Mr. Taraday agreed that a code that is too prescriptive does not leave a lot of room for the design process to take place. However, there must be measurable standards for the Board to use as a basis for their decisions. If the Board denies a project, it is particularly important for them to articulate the standards to justify the reasons for the denial.

Vice Chair Guenther noted that, in addition to either approving or denying an application, the Board can approve an application with conditions. He requested guidance from Mr. Taraday about the Board’s ability to condition project approval. Mr. Taraday explained that, when conditioning a land use permit, local governments must:

1. Identify the public problem that the condition is designed to address.
2. Show that the development for which the permit is sought will create or exacerbate the identified public problem.
3. Show that the proposed condition will solve or at least alleviate the identified public problem.
4. Demonstrate that the proposed solution is roughly proportionate to the part of the problem that is created or exacerbated by the proposal.

Vice Chair Guenther recalled that, just recently, the Board discussed placing an additional condition on Swedish Edmonds Hospital’s proposal that would have required them to paint the existing buildings a color that matches the new addition. They concluded that this condition would be outside of their purview. Mr. Taraday advised that the Board can add conditions of approval that recognize compatibility with the surrounding environment and surrounding development. For example, they can require an applicant to make changes to a proposed development so it is more compatible with existing development, but they cannot require the applicant to alter the existing development to be more compatible with the proposed development. An applicant can propose to paint adjacent buildings as a way out of a condition the Board has a right to impose on the new building. However, the condition must be voluntarily offered by the applicant and not imposed by the Board.

Mr. Taraday said the Board can help fill in the gaps where there is flexibility in the code by imposing conditions on their approval of a project. Mr. Lien cautioned that conditions should be clear so they get the intended results. The conditions should provide clear guidance so staff can determine if the application meets the conditions at the time of building permit. Chair Gootee said that, generally, the Board gives clear direction and clear conditions that are based on the City’s Design Guidelines.

Mr. Taraday commented that it is easy for the Board to be misled by an applicant who parades pretty pictures in front of them about what the buildings will look like. However, if these designs are not referenced in the Board’s actual decision, the designs that are submitted for a building permit might look different. Depending on how the condition is worded, staff may have to approve the building permit application even if it does not meet the Board’s intent.

Vice Chair Guenther pointed out that, generally, designs are not complete when they are presented to the Board for design review. The intent is that design review take place early enough that changes are not burdensome to developers. The process is designed to be friendlier to applicants. While he would expect some changes after design review, they should be minor and not major. He noted there have been problems in the past where what the Board recalled seeing in the presentation was not what was actually built. Mr. Taraday expressed his belief that the code should include a provision that addresses major and minor modifications to design so that staff has a clear understanding of when a change crosses the line from minor to major.

Board Member Borofka requested direction from the City Attorney about whether conditions imposed on an application by the Board must include references to specific design guidelines. Mr. Taraday answered that the conditions should contain a high level of specificity so that staff can determine whether or not the final designs are consistent with the Board's approval. If the Board's intent is not clearly articulated in the conditions, it may not show up when the building is developed. Board Member Schaefer agreed that it is important for the conditions to clearly capture the Board's intent, but it is also important to allow staff some flexibility when reviewing development permits. Ms. Machuga commented that the Board is good about referencing code sections they feel an application does not meet. They also do well connecting the conditions to code requirements. She summarized that they need to make sure the conditions are clear enough for both the staff and applicant to follow, yet leave some flexibility.

Mr. Taraday explained that, when considering findings and conclusions for the Point Edwards project, the City Council had the luxury of taking its time to review the findings and conclusions that were drafted by their legal counsel based on their guidance. Going forward, staff will prepare Staff Reports in the form of proposed findings and conclusions of law, which will make it unnecessary for the Board to have this type of back and forth conversation. If there is something of great significance to the Board that they want to see fully written out before taking action, they can postpone their decision.

Board Member O'Neill asked the City Attorney to explain the basis for City Council overturning ADB decisions that are based on the adopted Design Guidelines. Mr. Taraday pointed out that the City Council does not often reverse ADB decisions. If there is a question about interpretation of the Design Guidelines, the City Council's interpretation should trump the ADB's interpretation, because they are responsible for making the law. If this becomes a pattern, it would signal that the law needs to be clarified and the City Council needs to do a better job of articulating its vision in the Design Guidelines. Again, he said the Board could gain some insight as to how the City Council interprets the standards by either reviewing the resolution they adopted, watching the video, or both.

Mr. Taraday agreed to provide a script for the Board Chair to work from during public hearings to ensure that appearance of fairness and exparte communication issues are handled appropriately. Chair Gootee agreed that would be helpful.

Board Member Schaefer suggested that Board Members could forward questions to either the staff or the City Attorney prior to the public hearing via email. However, he cautioned them against having broad email discussions with numerous Board Members. Mr. Taraday advised that a quorum of Board Members participating in email discussions would constitute a violation of the Open Public Meetings Act. While two or three Board Members could theoretically have an email communication, he cautioned that it is easy to lose track of who is participating in the exchange. He recommended that when emailing, Board Members should use the bcc feature to prevent outside private meetings from occurring.

Board Member O'Neill asked if Board Members could discuss projects with each other outside of the public hearing. Mr. Taraday said it would not violate the Open Public Meetings Act to confer in groups that are less than a quorum. However, if a Board Member moved from a place of open mindedness to a place of pre-decision during the conversation, it would be a violation of the Appearance of Fairness Doctrine. The Board Members should be careful their conversations do not cross the line to the point of creating a pre-decision.

Mr. Lien pointed out that the Staff Reports have been changed to provide more details to help the Board make informed decisions. He asked the Board to share feedback about the new format and whether or not the reports provide sufficient information for them to make decisions. The Board Members indicated that the new format is helpful, and they appreciate the greater detail. They also appreciate that the reports evaluate each of the points called out in the Design Guidelines. The reports also clearly articulate each of the code requirements the Board must address, as well as those that will be dealt with later in the process.

Board Member Borofka recalled that one condition recommended by staff for the Swedish Edmonds Hospital's application was that the applicant be encouraged, where feasible, to incorporate pervious pavement. He asked the code basis for this condition. Mr. Lien answered that the condition was recommended by the Engineering Division. He explained that applications are routed to various City departments, and their comments are incorporated into the Staff Reports. He advised that, at this time, the City's stormwater code does not have a requirement for Low-Impact Development (LID), but provisions will be added in the next few years to require LID unless it is not feasible. While the City encourages applicants to incorporate LID techniques, there is no code basis for requiring them at this time.

Vice Chair Guenther asked if Board Members are allowed to ask questions of the people who testify during public hearings. Mr. Taraday answered that public comments are considered evidence in a quasi-judicial hearing, and the Board has every right to ask questions of those who testify. Vice Chair Guenther asked if it is appropriate to place a time limit on public testimony. Mr. Taraday said it is up to the Board to determine the appropriate amount of time to hear from both the public and the applicant. However, the Appearance of Fairness Doctrine requires a balanced opportunity for both the proponents and the opponents of a project.

Chair Gootee observed that sometimes the Board reviews safety concerns, and he gets nervous that this may be outside of their purview. He expressed his belief that the Board's job is to address design issues and not evaluate safety and access conditions. He voiced concern that this might open the Board to liability if an accident were to occur in the future. Mr. Taraday advised that it is very difficult for Board Members to be sued for negligent permitting, and the City is protected by the Public Duty Doctrine. He pointed out that there are elements of the Design Guidelines where safety is contemplated to be addressed by the Board, but most safety issues will be addressed by the Engineering Division as part of the building permit. If the Board is being asked to pay attention to something that seems outside of its purview, they could ask staff where the issue would get addressed if not by the Board. If the issue would be addressed by a City Department as part of the building permit, the Board would not need to address the issue as part of design review. He reminded the Board that in an open record public hearing, they are not limited to issues raised in the Staff Report or by the applicant or public. If the Board has a concern about a project, they can ask and get answers. Chair Gootee liked the solution of asking staff who would address a safety concern and when. If it is still a concern, the Board could add a condition that the issue be reviewed as part of the building permit.

Chair Gootee advised that the Board tries to be reasonable and pragmatic in the conditions they place upon applicants. They understand they can get in trouble by adding conditions that are based on opinion rather than Design Guidelines and code. Mr. Taraday said the Board should not be afraid to require good design just because it will cost a little more. However, they should avoid placing conditions on applicants that have no code basis. If this happens, the applicant could appeal the Board's decision to the City Council. At that point, he would become involved in the process. If he felt the Board had gone too far, there would be an opportunity to correct the problem at the City Council level.

Chair Gootee said he has presented projects in jurisdictions where the design review board has imposed such unreasonable conditions that developers have been discouraged from doing projects in that city. The Board Members try to be pragmatic, reasonable and consistent. Mr. Taraday pointed out that every project that comes before the Board for design review will be different. He does not worry so much about being consistent unless the Board is doing a complete reversal of its interpretation of the Design Guidelines. Rather than worrying about costs, the Board's primary consideration should be whether or not the application meets the code and design standards. If not, they should provide guidance on how the applicant can make the project code compliant. He agreed that it is good to have consistency in mind when considering additional conditions.

Chair Gootee asked if the Board should be concerned that a particular decision will set a precedent for other applicants who want to do the same thing. Mr. Taraday answered that the Board is in no way bound by precedent to allow a property owner to do something just because it was allowed on another property in the City. However, he cautioned against them making an interpretation that is 180% different.

Mr. Taraday explained that, in the context of government, the public interest is so significant that the public is seldom forced to waive its interest just because an earlier mistake was made. If a project was approved in a mistaken way, through a misunderstanding of the facts or misinterpretation of the law, the City, including the Board, is not bound by that earlier decision because they have the public interest to consider. It is more important to do what is right for the public interest than it is to be consistent with an earlier wrong decision. For example, if a project they approve expires and the applicant comes back in four years with the exact same project, the Board would not necessarily be required to take the exact same action, particularly if the earlier action was determined to be erroneous in some way. If an issue like that ever comes before the Board, they should involve him in the process.

Board Member Borofka pointed out that the Commission has been functioning without its seventh member for quite some time. He asked the status of the vacant position. Mr. Lien said the City advertised the vacant landscape architect position, but they have not received any applicants. Mr. Taraday said is not really acceptable to have a permanent condition of a six-member board, and the City should actively recruit to fill the vacant position. Mr. Lien agreed to discuss options with Mr. Chave for recruiting a new member.

ADMINISTRATIVE REPORTS/ITEMS FOR DISCUSSION:

There were no administrative reports.

ARCHITECTURAL DESIGN BOARD MEMBER COMMENTS:

None of the Board Members provided comments during this portion of the meeting.

ADJOURNMENT:

The meeting was adjourned at 9:15 p.m.