

PLANNING BOARD MINUTES June 11, 2003

Chair Crim called the regular meeting of the Planning Board to order at 7:00 p.m. at City Hall, Brackett Room, 121 – 5th Avenue North.

PRESENT

Jim Crim, Chair
James Young, Vice Chair
Cary Guenther
Janice Freeman
Ronald Hopkins
Judith Works

ABSENT

Virginia Cassutt
John Dewhirst

STAFF PRESENT

Rob Chave, Planning Division Manager
Karin Noyes, Recorder

Board Members Dewhirst and Cassutt were excused from the meeting.

READING/APPROVAL OF MINUTES

BOARD MEMBER YOUNG MOVED TO APPROVE THE MINUTES OF MAY 28, 2003 AS CORRECTED. BOARD MEMBER HOPKINS SECONDED THE MOTION. THE MOTION CARRIED UNANIMOUSLY.

ANNOUNCEMENT OF AGENDA

There were no changes made to the proposed agenda.

REQUESTS FROM THE AUDIENCE

There was no one in the audience who expressed a desire to address the Board during this portion of the agenda.

CONTINUED DELIBERATION ON AMENDMENTS TO THE EDMONDS COMMUNITY DEVELOPMENT CODE MAKING THE DECISION OF THE HEARING EXAMINER ON PERMIT APPLICATIONS FINAL, AND CLARIFYING THE RULES FOR RECONSIDERATION OF HEARING EXAMINER DECISIONS. (FILE NO. CDC-03-60)

Mr. Chave reminded the Commission that at a retreat in February, the City Council directed the Planning Board to review the issue of quasi-judicial final decisions and appeals. At this time, most Hearing examiner decisions can be appealed to the City Council for a final decision. The same is true for ADB decisions. The City Council asked the Board to forward a recommendation as to whether the current process should remain in place or if the code should be changed so that Hearing examiner and ADB decisions would be appealable to Superior Court rather than the City Council. He introduced Mike Walters, WCIA Attorney from Keating, Bucklin & McCormack, who was present to provide a workshop on the pros and cons of the Hearing examiner system.

Mike Walters, WCIA Attorney from Keating Bucklin & McCormack, said their Seattle-based firm exclusively handles land use litigation for cities that are part of the Washington Cities Insurance Agency (WCIA), which is an insurance risk pool that provides liability insurance for lawsuits and claims that come up in the scope of a city's activities. He said he is present, not as a person trying to push the Board into recommending the use of a Hearing examiner system, but to provide some advice and information about doing so. He referred the Board to the copies he provided of most of the overheads he would be using in his presentation.

Mr. Walters said he is not a hearing examiner, and has never done hearing examiner work. In addition, no one in his law firm does hearing examiner work, and they do not have any relationship with hearing examiners. He said he has made similar presentations before a lot of city and county government bodies across the State for the past ten to twelve years. Because of the type of work he does in representing cities and counties and elected officials in land use lawsuits, he would be put out of business if all cities and counties decided to use the hearing examiner system. But because a lot of jurisdictions do not follow this advice, he is able to work 75 hours per week defending them. He said the purpose of his presentation is to provide objective advice regarding the use of a hearing examiner as a final decision maker.

Mr. Walters said he believes that using a hearing examiner as the final decision maker is the best risk management advice he can give to counties and cities. He said he has been working as a land use attorney for cities and counties for the past 18 years and he does not do any work for plaintiffs. About 90 percent of his work is related to zoning, environmental and litigation issues. He said he has worked with the City of Edmonds on a number of cases. He has worked with Scott Snyder, the Edmonds City Attorney often, and has a lot of respect for him. He said he suspects that Mr. Snyder would probably concur with everything he tells the Board in his presentation.

Mr. Walters explained that everyone on the Board could possibly end up being a defendant in a land use issue. He suggested that by fully using a hearing examiner system, the elected officials and members of other appointed boards are taken out of the arena of lawsuits. All of the liability can be placed on the hearing examiner, instead.

Mr. Walters displayed a quote on the overhead stating, "The conduct of government should always be scrupulously just in dealing with its citizens." He said this quote is referenced in most lawsuits. He said it is his belief that the effective use of a hearing examiner could help the City achieve the goal of being scrupulously just.

Next, Mr. Walters referred to the following list of the potential legal claims over municipal land use decisions:

- Civil Rights Action under 42 U.S.C.
- "Inverse Condemnation" or "takings"
- Substantive Due Process
- Procedural Due Process
- State Permit Statute - RCW Chapter 64.40
- Intentional Interference with Business Expectancy
- Negligent Misrepresentation
- Negligent Administration of Regulations
- Nuisance
- Illegal Dedications, Fees or Conditions

Mr. Walters said that in the lawsuits he defends, most of these types of claims are asserted. He said there is a huge potential for a legal claim against a city decision-making body on land use issues and these claims can also be filed against the individual(s) making the final land use decision. He suggested that using a hearing examiner as the final decision maker could accomplish two goals. First, it would remove a jurisdiction and individual decisions makers out of the final decision making process on quasi-judicial applications. By transferring the decision-making authority, the hearing examiner would absorb the potential threat of claims. Second, the planning staff and those making recommendations to the hearing examiner could do a better job of identifying problems with applications so that the hearing examiner could do a better job.

Mr. Walters emphasized that any of the Board members, as final decision makers on rezone applications, face the potential of being sued personally for damages, in addition to the City. And any one of the claims identified above can be asserted against either the individual decision maker or the City as a whole.

Mr. Walters explained that there are three types of actions the City's governing bodies and staff must consider: quasi-judicial, legislative and ministerial. But he said the focus of his comments would be related to quasi-judicial actions, which are very high risk, in fact the highest risk of all the actions. Quasi-judicial actions involve individual projects and applicants and site specific permits such as a site plans, Planned Residential Developments, Conditional Uses, Special Uses, SEPA Appeals, variances, and site specific rezones. Legislative actions are approved by the City Council to adopt Comprehensive Plan amendments, and other policies. These actions are low risk. Ministerial actions are decisions made by staff on permit applications such as grading, tree cutting, right-of-way, etc. Ministerial actions are also considered low risk.

Mr. Walters noted that cities use the following types of decision makers: city council, design review board, planning commission, board of adjustment, hearing examiner and staff. They can use some or all of these decision makers, and each type of decision maker has a different level of risk associated with it. Using the City Council as the final decision maker is very high risk, and the bulk of the lawsuits he defends are a combination of quasi-judicial decisions arising out of city council final decisions. In fact, he said that between 75 and 80 percent of the lawsuits he defends arise out of city council decisions. Design review boards can also be high-risk decision makers if they are responsible for the final decision. Planning commissions pose a moderate risk, but the risk can increase if they are making the final decision or a decision on an appeal. A board of adjustment is also a moderate risk. Staff decisions are low risk. In fact, when staff makes a ministerial type of decision, there are very few cases in which a lawsuit will result. However, having the hearing examiner make the final decision is the lowest risk of all. He said he can count on both hands the number of lawsuits that have arisen from hearing examiner decisions in the past eighteen years he has been practicing law and of the several hundred cases he has handled. He said that is the best kind of evidence he can think of for using a hearing examiner for final decisions. Statistically, hearing examiners are very low risk decision makers.

Mr. Walters advised that there are two types of decisions that the above mentioned decision makers can be responsible for: recommendations and final decisions or appeals. A recommendation decision would involve one city body or individual making a recommendation to another body, who would then make the final decision, such as a hearing examiner making a recommendation to the city council. If a decision is in the form of a recommendation, the body or person making the recommendation establishes very low liability. These recommendations rarely, if ever, lead to lawsuits. What triggers the lawsuits are the final decisions or decisions of appeal. If a person or entity, such as a city council or a hearing examiner, is acting in a appeals capacity to hear appeals of some other individual or body's work, the appeal would become the final decision before the lawsuit is filed. Final or appeal decisions are the highest risk. Mr. Walters said the recipe for the highest risk land use decision that would most likely lead to a lawsuit would be a final quasi-judicial decision made by a city council or some other city entity.

Mr. Walters identified the following risk inducing actions for which the bulk of the lawsuits are based:

- **Playing politics with quasi-judicial applications** is one of the most typical risk inducing actions that can lead to lawsuits.
- **Meddling in the province of staff** is a common risk inducing action, but is rarely a problem with hearing examiner decisions.
- **Arbitrary and capricious decision making** is another common risk inducing action. He said there is a standard set forth by the courts for quasi-judicial decision making. Going against this standard is one of the most frequent actions by city councils, planning boards, design review boards, etc. He has yet to handle a lawsuit related to a hearing examiner acting in an arbitrary and capricious manner.
- **Misapplying the law** can also lead to a lawsuit. While this happens frequently when city councils or other city bodies make final decisions, it rarely happens with hearing examiner decisions.
- **Ignoring the law** is another risk inducing action that is rarely encountered when a hearing examiner makes the final decision.

Mr. Walters advised that the potential for making a mistake in a land use action has significant consequences. He reviewed the following consequences with the Board:

- **Exposure to the City.** The courts will often invalidate a city council land use decision. In many cases, the court may also substitute its own decision. There can be claims for money damage filed against the City, and the City could end up paying attorney fees and costs for the appellant if the City loses the lawsuit. This could end up being a significant cost and might not all be covered by the City's liability insurance coverage. In addition, the court could bind and invalidate portions of their code, which could have an impact on the City's decision making ability in the future.
- **Personal Exposure.** Final land use decision makers for cities can end up being named as defendants in lawsuits. In fact, this is the case in about 40 percent of the lawsuits he is involved with. This means that the Planning Board members can be named as defendants in lawsuits associated with rezone decisions they make. They can also be named as a key witness at trial, and possibly end up having to testify against the City. There is also the possibility that personal claims would be uninsured if it was found that a decision-making body or individual willfully disregarded the law, etc.
- **Expensive.** Land use lawsuits can be very expensive. Some of the cases he is working on have been going on for more than seven years.
- **Politically Damaging.** Land use decisions can become emotional, personalized, and politically motivated. As a result, they can create bad public relations for a city. Using the hearing examiner as the final decision maker can help eliminate these situations.
- **Undermines Public Confidence in Government.**

Mr. Walters displayed a chart identifying the different roles city councils can play in land use decision making. He explained that State law authorizes city councils to make both legislative and quasi-judicial decisions. These two functions are radically distinct and different and have radically different risk levels associated with them. He said the goal, from a risk management perspective, is to clearly segregate the two decision-making roles so that the city council is not involved in both. He suggested that the city council should be removed from the quasi-judicial decision-making process. Instead, the final decision should be made by a hearing examiner.

Mr. Walters explained that legislative decision making is the prototypical law making activity that governments do. This includes comprehensive planning, capital improvement planning, zoning maps, establishing development standards, etc. Legislative decision making is considered to be low risk, and the elected officials are the only ones who are empowered to make policy decisions. However, because the State law authorizes city councils to act in a quasi-judicial capacity, those who choose to do so will be held to the same standard that a superior court or district court judges are held to. Rules such as appearance of fairness apply, and they have to follow the same laws and policies. Many city councils and other city decision makers do not realize this. They cannot make decisions based on political situations, etc. Yet, these types of mistakes are what he sees frequently with quasi-judicial decision makers like planning commissions and city councils, etc. because they do not understand their role and function.

Mr. Walters reviewed that legislative actions include: capital improvements, comprehensive plans, area-wide planning, zoning maps, establishing development standards, adoption of general application ordinances, long-term planning, general infrastructure planning, planning and financing extensions, annexations and contracts. Quasi-judicial actions include subdivision/short plat approvals, conditional/special use permits, site plan approvals, planned residential development applications, property specific approvals, appeal of administrative decisions, variances, shoreline permits, boundary line adjustments and site specific rezones. He noted that State law authorizes a hearing examiner to make decision on these actions. However, hearing examiners are not authorized to make decisions on legislative actions. Legislative actions are the responsibility of the elected officials. Because it is important that quasi-judicial decisions be qualified and neutral and that no mistakes are made, he said he would recommend that the hearing examiner be the final decision maker.

Mr. Walters advised that the concept of using a hearing examiner for land use decision making started in the mid to late 1960s in Maryland, and was modeled after the hearing examiner system used by the Federal Government. Since 1967 there has been a huge growing trend for using a hearing examiner in land use cases. King County was the first, starting in 1969, and now they use a hearing examiner as the final decision maker for almost all quasi-judicial actions. Since King County

started using a hearing examiner, at least 73 cities and 17 counties in the State have followed. Many of Edmonds' neighboring jurisdictions use a hearing examiner system. He said that Everett uses a hearing examiner almost exclusively for quasi-judicial decision making. Most newly incorporated cities set up a hearing examiner system right from their inception.

Mr. Walters further advised that in 1977, the State Legislature amended the planning enabling act to specifically allow for the use of a hearing examiner at the local government's discretion to handle local land use decisions. He cited the following four sources for hearing examiner authority:

- **RCW 35A.634.170** gives discretion to a legislative body to use a hearing examiner as the decision-making authority. In virtually every quasi-judicial action except final plat decisions, the hearing examiner can be the final decision maker.
- **RCW 36.70B.120(3)** is regarding the regulatory reform act, and authorizes and encourages local governments to use a hearing examiner. The State Legislature has given broader discretion to local governments to use a hearing examiner for land use decisions.

Next, Mr. Walters reviewed the scope of authority given to a hearing examiner by the State Legislature as follows:

- A hearing examiner has the power to authorize, deny or recommend for or against variances, non-conforming uses and permits.
- A hearing examiner has the authority to review actions of administrative officers and either grant approval, condition or deny an application.
- A hearing examiner has broad procedural powers. Once a hearing examiner system is set up in a city, the city council, through the code, can give broad powers to a hearing examiner to hold hearings on quasi-judicial actions, deliberate and make a decision based on the record before him.

Mr. Walters suggested that once a city makes the policy decision to use a hearing examiner system, their goal should be to use the hearing examiner to the fullest extent possible so that the elected officials can step out and deal with policy issues and long-term planning. He said hearing examiners can be used to make decisions on the following:

- Proposals to amend zoning ordinances on site specific rezones.
- Applications for conditional or special use permits.
- Full subdivision applications.
- Applications for variances.
- Short subdivision/short plat applications.
- Shoreline permits.
- Planned residential developments.
- Commercial site plan applications.
- Requests for lot line or boundary line adjustments.
- Any other classification of application for or pertaining to land use.
- SEPA appeals.
- Appeals of administrative decisions or administrative determinations.
- Appeals of permit fees, development fees or regulatory fees imposed by the local government.
- Interpretation of development regulations. (While many jurisdictions do not realize it, they have the ability to authorize their hearing examiner to make code interpretations. Someone can actually submit a one-page application for a code interpretation, and the hearing examiner can be charged with the responsibility of making a decision. He said hearing examiners are educated in land use and are good at interpreting codes. Allowing hearing examiners to make code interpretations can give certainty, up front, as to how land use regulations should be applied.

Mr. Walter emphasized that hearing examiners are not authorized to do the following:

APPROVED

- Hearing examiners have no legal authority to pass judgment on the constitutionality of an ordinance, statute or regulation.
- Hearing examiners cannot impose conditions on an action not expressly or impliedly authorized by the land use ordinance.
- Hearing examiners cannot enact legislation or make legislative resolutions.
- Hearing examiners cannot allow structures or land uses that are incompatible with the land use regulations and comprehensive plan.
- Hearing examiners cannot enact area-wide zoning or otherwise change area wide boundaries.

Mr. Walters explained that while the City already has a hearing examiner system in place, the City Council has the ability to modify the system through resolution or adoption of an ordinance. He said he would recommend that Edmonds set up a hearing examiner system that would authorize the hearing examiner to make the final decision on all quasi-judicial actions, which is contrary to the way it is currently set up. At this time, the hearing examiner is responsible for making a decision, but in most cases, his decision is appealable to the City Council. He said that, in his opinion, that is not the best way to do it. He advised that the City could structure their hearing examiner system using the following options:

1. The hearing examiner could make a recommendation to the legislative body, but he does not recommend doing this.
2. The hearing examiner could make the final decision for appeals and other quasi-judicial actions within the specified limits. This is the system the City has been and is currently using.
3. The hearing examiner could be authorized to make the final decision, appealable within a specified time limit, to the State Superior Court for judicial review.
4. The final decision of a legislative body could go to the hearing examiner for review.

Mr. Walters said he would recommend the City use Option 3, which would authorize the hearing examiner to make the final decision. This would allow for the broadest use of the hearing examiners authority, and most cities use the hearing examiner in this manner.

Mr. Walters pointed out that the decision of a hearing examiner must be in writing, and the same would be true for other decision makers such as the planning board, the ADB and the City Council. The decision has to include findings of fact and conclusions of law based on the record to support the decision. He said one of the reasons he recommends the City use the hearing examiner as the final decision maker is that about 1/3 of the lawsuits he deals with claim that there has been a defect in the findings of fact or conclusions of law. In many cases, this is done by a decision maker who does not know how to craft findings of fact and conclusions of law or the documents they draft are incomplete to support their decision.

Mr. Walters advised that a decision must be issued within ten days following the conclusion of testimony unless a longer period of time is mutually agreed upon in writing. Non-hearing examiner decision makers frequently forget about this timeline or they delay making a decision and the courts find unlawful delay. Mr. Walters said it is important to remember that the hearing examiner's decision must be exercised within the guidelines and limitations set forth in the State Enabling Act and the ordinances set forth by the City Council.

Mr. Walters reviewed a list of what he believes are the advantages of using the hearing examiner as the final decision maker. He reviewed each as follows:

- **No political influence or pressure.** Most of the lawsuits he sees in land use decisions arise out of political decisions that interfere with the quasi-judicial process. These typically arise out of city council decisions that are made to help them get elected or by legal officials who make decisions in an attempt to make their citizens happy or their city better. A hearing examiner is not an elected official, and does not have to succumb to political pressure or influence. He said he does not know of any cases where a hearing examiner has been challenged for making a decision that was based on political pressure.

If used to their potential, hearing examiners can substantially reduce the potential for legal claims against a city. About 75 percent of the cases that go before the State Supreme Court and the Appellant Court arise out of non-

hearing examiner decisions. Using a hearing examiner as the final decision maker on quasi-judicial matters is great risk management and substantially reduces the risk of law suits. The cities that generate most of his lawsuits are those that either do not use a hearing examiner for quasi-judicial decisions or do not allow the hearing examiner to make the final decision. Again, he said that in the 18 years he has been a land use attorney, he could count on his fingers the number of quasi-judicial law suits that arise from a hearing examiner decision.

- **Hearing examiners are specially trained and professional.** Hearing examiners do not have to be lawyers or have a law degree. They are trained in conducting hearings. They know the process and rules and have knowledge of land development land use claims.
- **Hearing examiners have experience with many different jurisdictions and regulations.** This is a great benefit the City can receive from a hearing examiner that they would not get from a city council or a planning or design review board. Typically, a hearing examiner works for numerous other jurisdictions. This gives them a unique perspective to understand how other cities set up their processes, and they have had experience with variance applications. They are also in depth in understanding how codes are supposed to work, and are in a unique position to make recommendations to the city. If requested, they can provide recommendations to cities on how to improve their code or the process or can identify vague code language that needs to be clarified.
- **Hearing examiners are technically adept and have knowledge of physical land development and technical feasibility.** Hearing examiners are more technically adept and have knowledge of land use, design, feasibility, and development. Most hearing examiners, if they are not planners by trade or background, have dealt with planners for many years. They have an outstanding working knowledge of what it takes to develop land and what is appropriate for view protection, drainage, etc.
- **Hearing examiners are more cost efficient.** Using a hearing examiner as the final decision maker can reduce appeals and judicial challenges. What a city pays for a hearing examiner is a fraction of what they would pay for just one lawsuit. If they eliminate the potential for just one lawsuit per year, they could pay for a hearing examiner for at least one year and in many cases much more. He said that there are some situations where attorney fees alone have reached \$200,000 to \$300,000.
- **Hearing examiners provide a more efficient process.** Hearing examiners know how to conduct public hearings, and they do not get distracted with extraneous comments and issues. They are far more efficient with their time because they are more specialized and have the expertise to deal with the issues.
- **By using a hearing examiner, a city can substantially reduce judicial reversals of decision.** Even those cases where there is legal challenge to a hearing examiner decision, it is rare that the court will reverse the hearing examiner decision. He said that in the 9 or 10 cases of hearing examiner appeals that he can think of, only two resulted in the court not upholding the hearing examiner's decision. In both cases, rather than reversing the hearing examiner's decision, the court remanded the issue back to the hearing examiner for further review. In all other cases, the hearing examiner's decision was confirmed. However, this is not the case when elected officials make the final decision.
- **If the hearing examiner makes the final decision, a city could substantially reduce their potential legal damages claims.** Allowing the hearing examiner to make the final decision would remove the potential for individual lawsuits against final decision makers. The current process does not shield the City Council from the liability of final decisions. If they make a decision that is found to be arbitrary or capricious, they can end up being named as an individual defendant in a lawsuit.
- **Using a hearing examiner as the final decision maker would help a city avoid potential legal claims against citizen decision makers personally.** If the City wants to eliminate this risk, they should use the hearing examiner as the final decision maker, and he can assume the personal liability risk.

- **Using a hearing examiner as the final decision maker instills public confidence in the decision-making process.** He said he frequently hears the comment that hearing examiners are outsiders and the elected officials should make the decisions. But using a hearing examiner would provide an independent decision maker and the bias and political agendas would no longer be an issue of concern.
- **Using a hearing examiner as the final decision maker helps insure constitutional protection of Due Process of Law and Equal Protection.** He said that quasi-judicial hearings have all the hallmarks of a trial. All of the Due Process and Equal Protection Laws apply. The hearing examiner is better suited to limit these claims because they are experienced and trained and they know the legal system and laws and rules. They are specifically trained in how to set up and notice a public hearing properly so that Due Process is ensured.
- **Using a hearing examiner as the final decision maker helps ensure predictability and consistency.** Hearing examiners only deal with land use decisions and they know the rules and regulations. Because of that, they will be able to produce a predictable and consistent decision that is based on findings of fact and conclusions of law.
- **Hearing examiners are skilled in understanding, interpreting and applying nuances of municipal code and general legal principals.** They probably know a jurisdiction's code better than anyone else because they work with it every day. Hearing examiners have even provided input on revising the code. The law presumes that quasi-judicial decision makers know the law, but he has found that is not the case, unless the final decision maker is the hearing examiner.
- **Using a hearing examiner as the final decision maker can help satisfy new state law requirements for streamlining the regulatory process and administrative review and appeals.** In 1995 the State Legislature enacted the regulatory reform act. Some parts have been repealed, but many parts are still in effect. One of the main components of the 95 Act was to help streamline the process of local government land use decision making. One element was to encourage the local jurisdictions to use a hearing examiner as the final decision maker.
- **Using a hearing examiner as the final decision maker allows a city to segregate and clearly delineate quasi-judicial decision-making functions from legislative and long-term planning functions.** Using a hearing examiner creates a bright line between the two roles because it creates two different entities to deal with the separate issues. The City Council would be the legislative body and quasi-judicial actions would go before the hearing examiner, independent of the legislative body. He said a lot of the problem he sees involve elected officials who try to impose policy making and planning functions on a quasi-judicial application.
- **Using a hearing examiner as the final decision maker frees up city council and/or planning commission time for other important law-making functions.** He said the Planning Board and City Council should focus their land use efforts on planning functions, policy functions and law making functions, rather than quasi-judicial functions. If the quasi-judicial role were delegated to a hearing examiner, the City Council and Planning Board would have more time to take care of other things that are important to the City, as well. The overall planning policy and development of the City are more important than dealing with individual applications.
- **Using a hearing examiner as the final decision maker allows a city to provide good customer service.** He advised that using a hearing examiner is excellent customer service. It provides neutrality, partiality, expertise, a reduction in risk management costs, and helps the City serve the constituents better.

Mr. Walters said that he has only heard two potential complaints about using a hearing examiner as the final decision maker. The first is that hearing examiners are too expensive. The second is that using a hearing examiner can take away a city council's control over the land use process, which is why the constituents elected them in the first place.

Mr. Walters pointed out that there are numerous ways to save money using a hearing examiner system. While there is an initial cost in paying for the hearing examiner, there are ways to pass on the cost to the individual applicants who apply for permits or appeals. Another option is for jurisdictions to share a hearing examiner that rotates around the community, or to consolidate the quasi-judicial hearings of several jurisdictions into one hearing in a central location. All of the municipalities could then share the cost of the hearing examiner. In addition, there is an overall cost savings in using a hearing examiner. If just one lawsuit is prevented, a city would be able to pay a hearing examiner for one to three years.

Regarding the issue of taking control away from a city council, Mr. Walters said that is exactly why a hearing examiner should be the final decision maker for quasi-judicial actions. Elected officials often feel the need to deal with quasi-judicial matters because the citizens elected them to control land use issues. But that is exactly the wrong reason for having a city council make the final decision. The elected officials should not be involved in that level of detail because they could end up setting their city up for a lawsuit.

Board Member Young said it appears to him that the City has struck a balance between having the hearing examiner make the final decision on some quasi-judicial decisions while allowing their elected officials to make the final decision on others. He asked how much risk the City's current system creates as opposed to having the hearing examiner make the final decision on all land use decisions with an appeal to Superior Court. Mr. Walters said he cannot give specific statistics for the amount of risk reduction that would occur if the City were to allow the hearing examiner to make the final decision on all quasi-judicial matters. But from his experience, there is much less risk of a lawsuit to the City and the decision makers personally if a hearing examiner is used for the final decision. The City would still engender some risk of a lawsuit by having the City Council overrule the expert's (hearing examiner's) opinion. Eliminating the appeal to the City Council and making the hearing examiner the final decision maker would reduce the risk, but he cannot tell them exactly how much. He can say that there will continue to be greater risk when the City Council gets involved in reviewing appeals of a hearing examiner decision. Some of these situations will result in lawsuits, especially if the City Council reverses the recommendation of the hearing examiner.

Mr. Walters compared the City's current system for reviewing quasi-judicial applications with the system used by the appellate courts to review appeals of decisions made by trial courts. When an appellate court reviews a trial court decision, they should reach the same decision because they are both using the same laws and record to make their decision. That is the same result that should occur if the City Council is reviewing the recommendation of the hearing examiner. The appellate courts either uphold or affirm about 80 to 90 percent of the situations that come before them. If this percentage were less, the message would be that the trial court judges are making serious mistakes. He suggested that one thing the City could do to gauge the efficiency of the current system is to have someone look at the number of appeals that are made to the City Council on hearing examiner decisions and how many of them were reversed. If the City Council is reversing or disagreeing with the hearing examiner on more than 25 percent of the appeals, there would be some cause for concern because they should be operating from the same rules, regulations, process and record. He said that, overall, hearing examiners are more experienced and skilled at making these decisions and they do not have politic influence issues, either.

Mr. Walters said it would also be important for the Board to consider how many times lawsuits have been filed against the City as a result of a decision being made by the City Council that is different than the decision made by the hearing examiner. There is significantly less risk in allowing the hearing examiner to make the final decision, and that is what the majority of the cities and counties he works with do.

Mr. Walters inquired regarding the City's rationale for allowing the City Council the right to overturn the hearing examiner's decision. Board Member Crim said that right now, the feeling of the constituents is that the City Council should be responsive to the wishes of the populous. However, he suggested that a lot of people do not understand that there are limits placed on quasi-judicial hearings. He said that as he understands the Regulatory Reform Act, the initial record must be created at a public hearing before the hearing examiner. Therefore, he is not only hearing all of the facts for the first time, but he is absorbing them and making a decision, as well. There should be some kind of review or opportunity for appeal to send applications back to the hearing examiner for a rehearing based on specific findings of fact or applications of law. This would eliminate their being only one hearing with the next step being Superior Court.

Board Member Crim inquired if the City's current code allows for the reconsideration of the hearing examiner's decision. Mr. Chave answered that parties to the hearing can ask for reconsideration of the hearing examiner's decision, but no new hearing would be held. A reconsideration could be requested based on the findings of fact that are salient to the decision the hearing examiner made. The current regulations already allow this to occur. However, he agreed that perhaps they need to be reviewed and updated, as well.

Mr. Walter said that a provision that allows a request for reconsideration of a hearing examiner decision is a great idea, and most of his clients have this in their code. If the City's current provision needs to be "beefed up," he encouraged them to do so. He explained that most jurisdictions allow for a reconsideration request within 10 to 14 days of the hearing examiner decision. He cautioned that a reconsideration is not a time to submit new information, but an opportunity for the hearing examiner to reconsider the testimony and information that was provided at the hearing. He emphasized that reconsideration is different than supplementing the record with new questions. If the City were to set up a system that allows the hearing examiner to make the final decision on quasi-judicial applications, interested parties should be allowed to request a reconsideration and still retain their ability to take the issue to court. However, when the decision is considered by the courts, the judge would use the exact same record that was used by the hearing examiner to make his/her decision. If it is found that a hearing examiner made an error of law or failed to consider evidence, etc. the judge would have the authority to uphold or affirm the decision, reverse the decision or remand the decision back to the hearing examiner for additional fact finding or reconsideration of testimony in the record. This same process would be followed whether the final decision is made by the hearing examiner or the City Council, etc.

Board Member Young said his understanding is that the hearing examiner would be the final decision maker unless someone party to the application chooses to appeal. If an appeal were filed, the application would automatically go to the City Council for a final decision according to the existing code. Mr. Chave agreed, but said that if an appeal were filed for a hearing examiner decision, the hearing examiner would no longer be considered the final decision maker. Board Member Young clarified that any appeal of a hearing examiner's decision to the City Council would be conducted as a closed-record review, and the City Council's decision must be supported by findings of fact and conclusions of law. If the City Council decides to uphold the hearing examiner's decision, they could simply make a motion adopting the hearing examiner's findings of fact and conclusions of law. Mr. Chave answered affirmatively.

Board Member Young asked how many appeals of hearing examiner decisions the City receives each year. Mr. Chave answered that in the last five years, they have had a total of 60 appeals, but most of these were appeals of staff decisions to the hearing examiner. Only ten of the 60 appeals were successful.

Board Member Young said that while the information provided by Mr. Walters is outstanding, the Board needs to review the Edmonds Community Development Code carefully before they can make a decision as to whether or not changes should be made to the process. Right now, he said it appears the Board is being asked to change something that has been going on for a long time and is important to the public, yet the risk of liability appears to be fairly low. He concluded that the current system seems to be working. Therefore, he is not persuaded, at this time, to make any significant changes.

Board Member Crim reminded the Commission that it is important to remember that the reason they are considering the issue is that the City Council asked them to. The City Council has indicated that they feel that perhaps a change is warranted to get the City Council out of the business of hearing appeals. Mr. Chave clarified that the City Council asked to the Board to take a serious look at getting the City Council out of the business of hearing appeals, but the Board is not obligated to make that recommendation. He suggested that perhaps some of the applications could be decided by the hearing examiner and other by the City Council.

Mr. Walters agreed that there are a lot of ways to structure the City's review process. He suggested that the Board review the past appeals. If there were not very many over the past several years, perhaps they do not need to change their system. But if they find a significant number of appeals in which the City Council reversed the hearing examiner's decision and lawsuits resulted, maybe they should consider some changes. The Board has a lot of flexibility in their recommendation. The City could take three or four of the big land use decisions and designate the hearing examiner as the final decision maker. The City Council could remain as the final decision maker for the rest. He also encouraged the Board and staff to contact other cities and counties in the area to find out what their experience has been.

Board Member Hopkins clarified that a final decision is one that can only be appealed to the court. Mr. Walters answered affirmatively. He further explained that using the City's current system, if the City Council reverses the decision of the hearing examiner, the City Council would then become the final decision maker. Any appeals to the court would be based on the City Council's decision. He said he supports the hearing examiner being the final decision maker because it removes the City Council from the potential risk of a lawsuit. The City hasn't fully eliminated their risk because as long as there is a potential for appeal to the City Council, their decision will be the final decision for any judicial appeal and for damages and liability. If the City Council upholds a hearing examiner decision but the courts later reverse that decision, the City Council could be held liable, but a hearing examiner could not. The City Council would not be shielded from lawsuits if the City were to continue to use their current system.

Board Member Freeman inquired if the entire City Council would be held personally liable if a final decision they make is appealed to the court. Mr. Walters answered that just those that voted in the way that triggered the lawsuit would be liable. He said that cases where individuals get named in lawsuits are usually controversial projects with some kind of animosity exhibited by the decision maker that upset someone else.

Board Member Crim asked that each of the Board Members be provided with a copy of all of the documents Mr. Walters displayed on the overhead projector.

Board Member Guenther inquired if the way the City's current review system is set up (a decision by the hearing examiner with an appeal to the City Council) also results in redundancy. Mr. Walters answered affirmatively, and suggested that this could be changed by eliminating the right to appeal to the City Council. Instead, any appeal of a hearing examiner's decision would be sent to the Snohomish County Superior Court. He also suggested that the staff and Board contact neighboring jurisdictions to see how they handle their review process and how their citizens feel about their present system. He clarified that if the City were to implement a system by which the hearing examiner would make the final decision with appeals going directly to the Superior Court, the City Council would still have unrestricted control over the policy making process, but the individual development proposals would be removed from their purview.

Board Member Hopkins suggested that the Board would really benefit from having some statistical information about the outcome of land use applications over the past five years. It would be helpful to know how many appeals of hearing examiner decisions have been considered by the City Council and what the City Council's final action was for each. Mr. Chave said staff could provide the Board with this information. Board Member Works suggested that it would also be helpful to have some background information related to each of the appeals. Board Member Crim asked that staff provide more feedback from the City Council regarding the direction they would prefer the Board to go.

Board Member Hopkins said it would also be helpful to have some sense of what the personal liability threat really means to a City Council Member if they are fulfilling their normal duties. Would the City's insurance coverage back them? Mr. Walters referred the Board to the information he provided related to the lawsuit Mission Springs vs. City of Spokane. He said this lawsuit clearly illustrates what it would take for an elected official to end up being named personally in a lawsuit. This situation provides an example in which elected officials willfully ignored codes and the City Attorney's advise.

In addition, Mr. Walters encouraged the Board and staff to contact the WCIA staff for specific advice on the coverage limits for individuals and what types of City actions by individuals would take them outside of the coverage. Board Member Freeman asked that staff contact the WCIA to obtain this information. Board Member Hopkins said he is interested in distinguishing between being named personally in a lawsuit and being threatened with personal damage liability in a lawsuit. Mr. Walters answered that it does not take much to be named in a lawsuit, but in order to be identified for personal damage liability, a person must be the final decision maker and show that they acted arbitrarily or capriciously in the land use decision that they made. Political influence, ignoring law, disregarding city attorney advice, etc. are all examples of this type of situation. If an appellent court judge finds that someone acted arbitrarily or capriciously, they could be held liable for the damages proven by the plaintiff.

Mr. Walters explained that if a person is found to be liable, the WCIA provides insurance coverage. Generally, the WCIA offers broad insurance coverage to a city, its agents and its employees. They will provide a defense for anyone named in a

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lawsuit, as well as pay the judgment or settlement against that person. However, if it is established that a person intended to violate someone's constitutional right, disregard the code or the city attorney's advice or ignore the statutes, the WCIA could potentially deny insurance coverage. Again, he suggested that the City staff contact the WCIA for further information related to this topic.

REVIEW OF EXTENDED AGENDA

Mr. Chave reviewed that the agenda for the next meeting would include a public hearing on a rezone application. It would also include a continued discussion regarding the permit application review process. Board Member Crim suggested that the Board also review the reconsideration section of the Code. He recalled previous public testimony that the timeline for reconsideration runs concurrently with the appeal timeline. Mr. Chave said that the timeline for reconsideration is ten working days, which is the same as for an appeal. Therefore, if someone files a request for reconsideration at the end of the time period they could end up missing their opportunity to appeal. However, the City typically extends the time period for appeals by about three days to allow individuals to decide whether or not to appeal after the hearing examiner has completed his reconsideration.

Mr. Chave advised that a quarterly report regarding wireless facilities is scheduled for the next meeting, as well.

PLANNING BOARD CHAIR COMMENTS

Board Member Crim provided no comments during this portion of the meeting.

PLANNING BOARD MEMBER COMMENTS

None of the Board Members provided additional comments.