

~~Councilmember Buckshnis advised she grew up in Portland where light rail is king and she is looking forward to light rail in this area. She anticipated once it is built, ridership will increase.~~

~~Mayor Earling explained the Sound Transit Board is beginning to look at ST3 which would extend light rail from Lynnwood to Everett. The planning process is just beginning; ST3 would be part of a ballot measure in 2016-2020.~~

7. **CLOSED RECORD REVIEW OF THE ARCHITECTURAL DESIGN BOARD'S DESIGN APPROVAL OF POINT EDWARDS' BUILDING 10 TO BE LOCATED AT 50 PINE STREET UNDER FILE PLN20130022. APPEAL NUMBERS APL20130002 - APL20130004.**

Mayor Earling explained this is a closed record review; the purpose of the closed record review is for the City Council to address three appeals of the Architectural Design Board's (ADB) decision to conditionally approve revisions to Building 10 of the Pt. Edwards Development which includes a multi-family residential building and associated parking located at 50 Pine Street in Edmonds. He opened the closed record hearing.

Mayor Earling described the procedures, explaining the City Clerk will make a recording of the proceedings. This is a hearing on the appeals of Christy Cufley, Town of Woodway, and David Inadomi. It is not an open record hearing and there will be no opportunity during the closed record appeal hearing for public testimony. Oral argument will be allowed from the appellants and parties of record. The parties of record include the applicant, any person who testified at the open record public hearing on the application and any person who individually submitted written comments concerning the application at the open record public hearing. The City Clerk has a list of people who meet the definition of a party of record.

Mayor Earling explained the Appearance of Fairness Doctrine requires this hearing be fair in form, substance and appearance. The hearing must not only be fair, it must also appear to be fair. He asked whether any member of the decision-making body has engaged in communication with opponents or proponents regarding the issues in the appeal outside of the public hearing process. Councilmembers Bloom, Yamamoto, and Buckshnis said they had not. Council President Petso said she had not had communication with proponents or opponents but had some other contacts. Ms. Morris advised the disclosures that needed to be made were with proponents or opponents of the project; staff members were not proponents or opponents. Council President Petso said she had not had communication with proponents or opponents. Councilmember Peterson stated he had not had any communication.

Councilmember Fraley-Monillas disclosed she has received a number of emails during the past six months that are stored on her computer. She has not spoken to anyone connected with the project.

Councilmember Johnson disclosed that she has received email petitions regarding the Pt. Edwards land use appeal. She has received 197 separate emails to her City Council email account that contained the 682 individuals who signed the petition. The emails were sent via an online petition at change.org. Some of the messages were sent one at a time; other messages were sent in batches of 25. Most of the batches were captured in the email quarantine and deleted from there without identifying the names of the senders. At first she opened and read the messages. She was then advised to delete the messages without reading them, which she did. However, she did recognize the names of some of the senders. She did not recall responding to any of the emails. She explained Ms. Morris advised her to make this disclosure and notify the Planning Department, which she did.

Mayor Earling disclosed he received 1900-2000 petitions; in each case he quickly forwarded them to the City Clerk and did not read, study or react to any of them.

Council President Petso stated she also received written correspondence and emails on this topic. She provided the City Clerk the written correspondence and the emails are in a file on her iPad titled "Do Not Read."

Mayor Earling asked if any member of the Council has a conflict of interest or believes he/she cannot consider and hear the application in a fair and objective manner. Councilmembers Bloom and Yamamoto answered no. Councilmember Buckshnis answered no, noting she knows the attorney for the appellant, Christy Cufley, who is a fellow Rotarian and she knows Doug Purcell. Council President Petso stated she had no conflict but was acquainted with Mr. Purcell. Councilmember Peterson had no conflicts but was acquainted with Mr. Purcell. Councilmember Fraley-Monillas had no conflict but was acquainted with Mr. Purcell. Councilmember Johnson stated she had no conflict but was acquainted with Mr. Purcell. Mayor Earling stated he had no conflicts and also knew Mr. Purcell but has not talked to him about this matter.

Mayor Earling asked whether any audience member objected to the Council's or his participation as a decision-maker in the hearing. There were no objections voiced.

Special Land Use Attorney Carol Morris pointed out at least two appeals have raised the issue about whether the ADB should have entered Findings of Fact and Conclusions. There are no Findings of Fact and Conclusions in the record. The City Council is required by the code to make a decision in a closed record appeal as to whether or not those Findings of Fact and Conclusions are clearly erroneous. Without Findings of Fact and Conclusions, the Council has an impossible task. There are also legal requirements for the entry of Findings of Fact and Conclusions by a decision-maker after an open record hearing. She recommended the Council vote to remand this back to the ADB for the entry of Findings of Fact and Conclusions, consistent with their vote. She recommended the Council take this step before they hear any testimony because the Council cannot give the ADB direction as far as what the Findings of Fact and Conclusions should say. This is basically trying to bring the City back to the point in time where it would have been after the open record hearing and the ADB vote so the ADB can enter Findings of Fact and Conclusions. All the members of the public can attend that hearing, and the appellants and parties of record can submit draft Findings of Fact and Conclusions to the ADB for their consideration. Appeals can then be filed of the Findings of Fact and Conclusions entered by the ADB.

Ms. Morris explained if there is an appeal, the Council would then schedule another closed record hearing, bringing the Council to the same position it is in today. If the Council agrees with the procedure, the Council needs to ask the applicant if they will agree to this procedure. The applicant must be willing to sign a written statement stating they waive the deadline for issuance of a final decision in the code which is 120 days after a complete application is submitted. The applicant must also sign a written waiver of the one open record hearing and one closed record appeal proceeding.

Mayor Earling asked whether the applicant would be willing to do that. **Rick Gifford, attorney for the applicant, Edmonds Pine Street LLC**, asked clarifying questions. He referred to Ms. Morris' statement that if the Council made a determination to remand this matter to the ADB for entry of Findings of Fact and Conclusions in support of their decision, anyone can present proposed findings at that hearing. It was his understanding the remand would not be to a public hearing but a meeting at which the ADB would consider and enter Findings of Fact and Conclusions. Ms. Morris answered that is correct; there would not be an opportunity for any additional public testimony, only for entry of Findings of Fact and Conclusions. The ADB has voted and the open record hearing is closed. Mr. Gifford stated with that clarification, the applicant would not oppose Ms. Morris' recommendation and would be willing to execute the necessary agreement regarding waiver of the timeline and multiple open and closed record hearings. He hoped the remand could proceed at the earliest possible time, recognizing that was subject to the ADB's availability. He was hopeful the ADB could proceed by early August and that the Council would issue clear direction to the ADB so that the ADB understands what it is being asked to do.

Council President Petso explained she has had extensive discussion with Ms. Morris about this suggestion and she urged the Council not to do it. She felt she was being asked to make a decision on one issue in the appeal prior to having heard from the appellants which she considered it a violation of due process. The code states this hearing review shall commence with the resolution of Appearance of Fairness issues, if any, followed by the opportunity for oral presentations by the director and other parties of record including the appellants. She pointed out the Council has not yet heard from the appellants or parties of record but is already being asked to remand, merely on the consent of one party. She did not find this appropriate or a good process for the City on a due process basis.

Council President Petso pointed out one of the appeal items is whether the Findings and Conclusions are adequate. The applicant has consistently argued that the Findings and Conclusions, while not in a detailed and formula-like outline, do exist and can be determined from the record. The attorney has advised they are not in a sufficient legal form and although the Council has not yet heard from the appellants, they argue the Findings and Conclusions are not adequate. The Council is supposed to make this decision without prejudgment and based on what they hear at the hearing, not just make a decision before the hearing has commenced. The code states the appellant shall bear the burden to demonstrate the decision is clearly erroneous given the record, not the Findings and Conclusions.

Council President Petso recalled a comment in one brief that the purpose of Findings of Fact is to ensure the decision-maker has dealt fully and properly with all the issues in the case before it decides the case. However, she is being asked tonight to remand this for Findings of Fact that support a decision that has already been made. She was not comfortable with that because it defeats the purpose. If the matter is remanded and an ADB member agrees the ADB should have considered massing, she questioned how the ADB could enter that finding of fact now. She noted the ADB could not enter a finding that it was too massive because that would not be consistent with the ADB's prior vote. She concluded the process Ms. Morris suggested makes no sense and she encouraged the Council to proceed with the hearing.

Ms. Morris responded at least two appellants have raised this as an issue in their appeal, that the ADB did not enter Findings of Fact and Conclusions. Therefore, they cannot complain if the Council remands for entry of Findings of Fact and Conclusions and correction of that error. This is a legal issue, not a factual issue. The Council does not need to take oral argument regarding whether Findings of Fact and Conclusions are required because as a matter of law, they are. In her experience working with cities on land use appeals for the past 20 years and working for an insurance pool doing nothing but land use damage actions, the Council needs to remand this to the ADB so they can enter Findings of Fact so the Council can proceed with the closed record hearing. Once those Findings of Fact and Conclusions have been entered, the Council can review them and determine whether they are clearly erroneous.

Councilmember Peterson commented it pained him to go through this process again and send it back to the ADB but did not see any other choice. If the Council were to proceed with the closed record review and hear oral testimony tonight without the opportunity to compare it to Findings of Fact and Conclusions would create a bias for any Councilmember. He summarized the issue was the process had not been completed from the previous level, the ADB, and that must be fixed before the Council can proceed. He understood the frustration visible on the faces of the audience and implored the audience members not to contact the Council to talk about this issue because the Council cannot talk about it. He supported Ms. Morris' advice; she is one of the top land use attorneys in the state and ignoring her advice puts the City, the City Council and the entire process at risk.

Councilmember Buckshnis echoed Councilmember Peterson's comments. She asked Ms. Morris if the City was vulnerable if the Council proceeded as Council President Petso proposed. Ms. Morris answered yes; there is a legal requirement that there be Findings of Fact and Conclusions from the decision-maker after an open record hearing. If the Council proceeded, it would be trying to make sense of a record that

does not have entry of Findings and Conclusions. Councilmember Buckshnis said staff suggested the Council could review the ADB minutes. Ms. Morris recalled the draft Findings of Fact she prepared on the Hillman matter quoted a case, *Weyerhaeuser v. King County*, that described the court's description of what Findings of Fact and Conclusions need to include. The courts have stated Findings of Fact and Conclusions drawn up by an administrative body after the open record public hearing have to meet the same requirements as a trial court and it cannot be entry of minutes; it must be actual Findings of Fact that reveal the decision-maker's thought process and why the final decision was arrived at.

Councilmember Bloom asked whether Findings of Fact and Conclusions would be based on the specifics of the ADB's decision or could it include issues such as mass and bulk that have been raised by the appellants. Ms. Morris answered the ADB needed to enter Findings of Fact and Conclusions that are consistent with their decision. This is the only direction the Council can give the ADB. If those issues were considered by the ADB, they could be included in the Findings of Fact and Conclusions.

Councilmember Bloom relayed in her reading of the May 15, 2013 minutes, at least one member of the ADB felt the ADB was not to address the height and bulk/mass issue, as that had already been settled. She asked if that would be left out of the Findings of Fact and Conclusions. Ms. Morris suggested the Council not be concerned with that because whatever the ADB develops as their Findings of Fact and Conclusions, anyone with standing has an opportunity to raise that issue in an appeal. No one is prejudice at all by this procedure. She referred to the Invited Error Doctrine that would prevent any of the appellants who have alleged there was an error in not having Findings of Fact and Conclusions from claiming their due process rights were violated because this is an error they have claimed has occurred and the City is going back and correcting that error. Once the Findings of Fact and Conclusions are drafted and signed by the ADB, everyone can read them and decide what to base their appeals on; it may be different than the current appeals.

Councilmember Bloom asked if there would then be new appeals filed. Ms. Morris answered there could be new appeals because they are currently appealing the basis for the ADB's vote which is unknown because the only thing in the record is the ADB's vote and the minutes. Councilmember Bloom asked whether that would give the Council a broader view rather than a narrower view. Ms. Morris responded it may also provide additional detail and explain the ADB's vote which may make it easier to resolve appeals at the closed record review. She assured this procedure does not prejudice anyone; the only party that it could possibly be prejudiced is the applicant and they have agreed to waive the codes and state laws that provide an impediment to the procedure. She relayed Council President Petso's indication today that perhaps the appellant would be prejudice in that they would have to pay an additional appeal fee. She suggested the Council could state anyone who has filed an appeal does not have to pay another appeal fee.

Councilmember Bloom asked when the Council would state that. Ms. Morris answered that could be done tonight; the Council could state that after the ADB enters its Findings of Fact and Conclusions if any of the three appellants choose to file an additional appeal, they do not have to pay another appeal fee.

Councilmember Bloom asked whether the current appellants would have to re-appeal if the Council remanded to the ADB. Ms. Morris answered yes.

Council President Petso asked whether the appeal fees that have been paid could be refunded. Ms. Morris answered she did not see a problem with that. City Attorney Jeff Taraday explained the remand effectively grants relief to the appellants by providing for findings that previously were lacking. He was uncertain it made sense to refund the appeal fee but certainly it would be fair to waive a second appeal fee. Mayor Earling commented he had no problem with waiving a second appeal fee but he was not interested in refunding fees for appeals that staff has already been working on.

Council President Petso commented no relief whatsoever had been provided to the appellants; the Council has refused to hear their appeal. That was the basis for her suggestion to refund the appeal fees.

Councilmember Yamamoto commented it is a fairly simple process; the applicant and appellant have both agreed to sign the necessary waivers to remand to the ADB. He expressed support for remanding to the ADB for entry of Findings of Fact and Conclusions.

COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO REMAND TO THE ARCHITECTURAL DESIGN BOARD FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS CONSISTENT WITH THEIR VOTE AND TO WAIVE THE APPEAL FEE FOR CURRENT APPELLANTS.

Councilmember Fraley-Monillas expressed concern that neither Councilmember Johnson nor she was allowed to comment before the motion was made.

COUNCILMEMBER BUCKSHNIS WITHDREW THE MOTION WITH THE AGREEMENT OF THE SECOND.

Councilmember Fraley-Monillas expressed support for remanding to the ADB for preparation of Findings of Fact and Conclusions. She wanted to be cautious with proceeding, noting many lives are being affected as evidenced by the stress in the audience members' faces. She wanted to proceed in a proper manner and according to the attorney, the best legal way.

Council President Petso explained her concern with engaging in this process was it was not conveyed in writing until the last set of paperwork submitted by the applicant, not the appellants. She heard of it on Sunday afternoon in a telephone conversation with the lawyer. She was not allowed to contact the appellants to ask if this was acceptable to them; the appellants have not been allowed to speak and in fact have not had an opportunity to reply and none of them requested a limited remand in their appeal documents. The appellants requested relief via many solutions such as adopting the staff findings, deny, etc., but remand was not one of them.

COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO REMAND THIS BACK TO THE ARCHITECTURAL DESIGN BOARD FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS CONSISTENT WITH THE ARCHITECTURAL DESIGN BOARD'S PREVIOUS VOTE AND THAT IF AN APPELLANT NEEDS TO RE-APPEAL, THEY WILL NOT HAVE TO PAY AN APPEAL FEE.

Councilmember Bloom wanted to ensure this action would not limit what could be brought up in an appeal to whatever the Findings of Fact and Conclusions include. Ms. Morris answered this action would not limit anything. There is no prejudice to the appellants by this action. All that will occur is this matter will go back to the ADB, the ADB will enter Findings of Fact and Conclusions consistent with the decision they have already reached and everyone with standing to file an appeal, can file an appeal. Those appeals will come back to the Council.

Councilmember Johnson stated her belief that this is a procedural issue and the correct action for the Council to take would be to remand it back to the ADB. She hoped the Council had learned from this experience and would not have the same problem in the future.

Mr. Taraday suggested the Council give clear direction to the ADB regarding the schedule for the hearing and the submission of proposed Findings of Fact and Conclusions. He relayed staff's proposed schedule:

- City staff prepare the first draft of Findings of Fact and Conclusions and submit them to the applicant and all parties of record on July 23.

- The applicant and all parties of record have an opportunity to make red-line revisions to the proposed Findings of Fact and Conclusions. Red-line revisions would be submitted by July 30.
- All the red-line revisions would be provided to the ADB in a packet on July 31.
- The ADB would review red-line revisions and make a decision on August 7.

Mr. Taraday explained the reason he proposed the above process was beginning with proposed Findings of Fact and Conclusions and red-line revisions would make it easier for the ADB to review and make a decision rather than attempt to synthesize several draft Findings of Fact and Conclusions. Mayor Earling suggested posting the above schedule on the City's website.

Council President Petso relayed her understanding of Mr. Taraday's proposal was instead of asking the ADB the basis of their decision, everyone would submit to the ADB what they thought the basis of their decision might have been and the ADB will select one. Mr. Taraday answered that was his proposal, noting that was what was done in court when there was a trial to the bench. Council President Petso disagreed, commenting in court the judge gets to decide which way to rule. In this case the Council is telling the ADB to prepare Findings of Fact and Conclusions but to rule the same way they did before.

Mr. Taraday disagreed with Council President Petso, explaining in his experience, when a trial is tried by the bench and the judge has rendered his decision, he will tell counsel for the parties to draft proposed Findings and Conclusions; typically the prevailing party will draft the first set of Findings and Conclusions, which are then reviewed and potentially revised by the non-prevailing party. The judge will then typically adopt some combination of the two based on his determination about which findings are the most reasonable and the most in tune with the judge's oral decision. He explained that was consistent with this situation; the ADB made an oral decision and the Council is now requesting they memorialize their oral decision in writing after giving everyone who participated in the hearing an opportunity to draft proposed Findings and Conclusions that are consistent with the vote that was already taken.

Council President Petso commented if a judge is dissatisfied with what the parties submit, the judge simply red-lines and revises the order to state what he wants it to say regardless of what the parties submit. She asked whether the ADB would be given that opportunity. Mr. Taraday answered of course; this is only a starting point.

Councilmember Buckshnis asked Ms. Morris to comment on Mr. Taraday's suggestion, noting she also found it unusual for staff to prepare draft Findings and Conclusions when it was remanded to the ADB. Ms. Morris responded she was 100% supportive of what Mr. Taraday described including his description of what courts do. It may be more difficult for the ADB to synthesize a bunch of different Findings of Fact and Conclusions; starting with one draft that everyone suggests revisions to would be easier.

Councilmember Bloom asked whether in other cities that have ADBs staff typically drafts Findings of Fact and Conclusions. She recognized the ADB is a volunteer board. Ms. Morris responded in her experience, planning staff drafts Findings of Fact and Conclusions. Sometimes when a matter is complicated, staff will ask that it be done by the City Attorney.

THE VOTE ON THE MOTION CARRIED (6-1), COUNCIL PRESIDENT PETSO VOTING NO.

Mayor Earling declared a brief recess.

Council President Petso asked whether the Council's action ended the appeal and the Council was free to discuss the matter with the public or should the Council still refrain from conversation with proponents or opponents. Mr. Taraday answered there is still an application pending; there is still a proposed project and potentially proponents and opponents of the project. He recommended the Council continue not to have

contact with proponents or opponents of the project to ensure they could participate in the event the matter returned to the Council on a subsequent appeal.

8. ADOPTING AN INTERIM ZONING ORDINANCE TO AMEND THE CRITICAL AREAS ORDINANCE, SPECIFICALLY SECTIONS ECDC 23.40.210 AND 23.40.320, TO REPEAL THE DEFINITION OF REASONABLE ECONOMIC USE AND REFERENCES THERETO.

City Attorney Jeff Taraday explained he was asked to prepare this ordinance. There are two versions of the ordinance, one in the packet and a version that was emailed to Councilmembers late this afternoon. The difference between the two is the version that was emailed is an emergency ordinance and takes effect immediately; the version in the packet is not an emergency ordinance although both are interim zoning ordinances. If the Council adopts the emergency version of the ordinance, it goes into effect tonight and prevents an application from being submitted tomorrow and thereafter that can utilize the current reasonable use exception, in particular the definition that has been determined to be outside the norm. If the Council wanted to allow for a small window of opportunity to allow property owners and applicants to submit applications under the current reasonable use exception, the Council would adopt the version of the ordinance in the packet.

Council President Petso stated once discussion is finished, she is ready to move to adopt the emergency ordinance.

At Councilmember Buckshnis' request, Mr. Taraday described how the emergency ordinance differs from the ordinance in the packet:

- The title adds the language, "and declaring an emergency necessitating immediate adoption of this interim zoning ordinance."
- In the third whereas clause, the word "urgent" is changed to "immediate."
- A fourth whereas clause was added that reads, "WHEREAS, the city council has determined that the "reasonable economic use" regulations should be addressed and considered while the interim critical areas regulations below are in place, to prevent any property owners from submitting applications for development or re-development under the existing codes, which may not provide adequate protection to critical areas; and"
- Section 4, Emergency Declaration was added.
- Section 6, Effective Date, has been revised to state the ordinance takes effect immediately and to state approval requires a vote of a majority plus one.

Councilmember Peterson expressed support for the interim zoning ordinance but was very uncomfortable with the emergency zoning ordinance, primarily because there was no mention of an emergency ordinance on the agenda. In fact, the Council did not receive the ordinance until late this afternoon. In the past the Council has been interested in properly notifying the public before taking certain votes. He recognized there were some emergency ordinances where notification would not be possible but did not think this ordinance was one of those.

Councilmember Fraley-Monillas asked what the emergency was. Mr. Taraday assured he was not placing a judgment on the Council's decision to adopt the ordinance in one form or the other. The reason he did not include the emergency ordinance in the packet was that would have defeated the purpose. The purpose of an emergency ordinance is to ensure applications do not vest prior to adoption of the new regulations. If the public is informed the Council is planning to adopt an emergency ordinance, it does not work. While he was not prejudging or placing a value judgment on the Council whether they should or should not adopt the emergency ordinance, it was done that way purposefully to give the Council the option of adopting the regulation without public notice. This is an exception to the general rule of having public notice; interim zoning ordinances and moratoriums are the two exceptions to the GMA where the Council can take immediate action. The reason that immediate action would be taken was to prevent