



EAST BELLEVUE COMMUNITY COUNCIL (EBCC) 2019 RETREAT REPORT

July 16, 2019

6:30 | Bellevue City Hall Room 1E-120



East Bellevue Community Council (EBCC) Retreat Report

July 16, 2019 - 6:30 P.M.

Bellevue City Hall, 1E-120

Present: Chair Hummer, Vice Chair Walter, Alternate Vice Chair Gooding, and Councilmembers Dhananjaya and Kasner

Absent: None

Staff: Catherine Drews, Assistant City Attorney
Kyle Stannert, Assistant City Manager

Chair Hummer called the 2019 Retreat of the East Bellevue Community Council to order at 6:31 p.m. Acting Clerk Stannert called the roll and all members were present.

Chair Hummer introduced the retreat, noting an objective of further clarification of goals in order to improve relationships with the city, City Council and staff. Following a review of the night's agenda, the Chair noted that Assistant City Manager Stannert would be serving as the facilitator for the retreat, and she would be turning over meeting management to him.

Mr. Stannert noted that for the purposes of the retreat, he would be serving as both the meeting's Clerk and facilitator and thanked the Council for the opportunity to serve in both roles for the evening. He explained that in preparation for the night's retreat, staff had met with Chair Hummer and Councilmember Dhananjaya to review proposed topics for the retreat based on feedback from members of the Community Council over the past year. Overall objectives for the retreat include:

- Review of EBCC accomplishments from the past year, and establish a draft work plan for the next 12 months
- Reaffirm updated EBCC Rules of Procedure
- Discussion of what success looks like over the next year, including what the EBCC hopes to achieve together as a body

Mr. Stannert stated that the Council requested training on the quasi-judicial process as it pertains to the work of EBCC. Because of pending quasi-judicial matters coming before the EBCC, the agenda includes this training as the first item of focus for the retreat. Providing the training was Catherine Drews, Assistant City Attorney.

Understanding the Quasi-Judicial Process and Decision Criteria

Assistant City Attorney Drews reviewed the items being covered by the training, including the authority given to Community Council's under Washington State Law, an overview of the quasi-judicial process and Appearance of Fairness Doctrine, and decision criteria the EBCC may use when acting on quasi-judicial matters.

Ms. Drews reminded the Council that their authority is established by Revised Code of Washington (RCW) Chapter 35.14, and highlighted section 040, which focuses on the land use functions of Community Councils, and 050, which establishes an advisory role. In response to a request for clarification related to the first criteria listed for Community Council's advisory role, staff committed to providing examples of what qualifies as having an indirect affect of the use of property or land within the service area, as noted in RCW 35.14.050.

After completing the overview of authority of roles and applicability of Washington State laws, Ms. Drews reviewed the quasi-judicial process. Within the training, EBCC members were provided three recommendations for quasi-judicial proceedings:

- 1) Do not play politics nor favorites with quasi-judicial land decisions. Included with this item was the reminder that decisions must be based on decision criteria, which cannot be based on personal perception.
- 2) You must think like a judge, act like a judge, and decide like a judge. In order to do so it is important for members to remember that while as elected officials they serve a role as a legislative authority, when in the quasi-judicial role they serve a judicial role which requires evidence-based decisions and remaining fair, impartial and unbiased.
- 3) The record is the vehicle that supports your decision. All decisions must be made based on a consideration of all evidence and information in the record. Substantial evidence must be deemed competent, material and relevant.

Ms. Drews continued with the training and reviewed elements of the Appearance of Fairness Doctrine, and Bellevue City Ethics Code (3.92 B.C.C.). Key factors within the Appearance of Fairness Doctrine include the requirement that members conduct fair and impartial fact-finding hearings by remaining open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. The City's Code of Ethics, which applies to elected and appointed officials, requires compliance with laws, impartiality of actions, for public office to be used for public good and not personal gain, and that processes are conducted openly. In relationship to quasi-judicial decisions, section 040 of the Ethics Code requires officials to publicly disclose substantive information that is relevant to a matter under

consideration when they may have received that information from sources outside of the public decision-making process.”

Next, Ms. Drews connected rules and processes to the role of EBCC members, and the importance of proactively avoiding potential conflicts. Members are encouraged to seek guidance from their assigned attorney if there are any instances where boundaries are unclear. In the event an ex-parte communication on a quasi-judicial matter occurs, Ms. Drews reviewed the requirement for each communication to be disclosed and any written materials to be provided to the Deputy City Clerk. This information then becomes included in the official record of a quasi-judicial matter.

Following a review of the various roles in the quasi-judicial process, the training concluded with a review of the decision criteria that is used in such matters. Based on information within the official record, the EBCC decision criteria should:

- adhere to the Appearance of Fairness Doctrine
- follow the regulations and statutes of state law
- be made after careful review of the Hearing Examiner’s recommendation
- be based on substantial evidence in the record
- be supported by a written record (resolution) that establishes a factual basis and findings that support conclusions and the ultimate decision
- treat all applicants equally and consistently

Community Council Year in Review & Year Ahead

Due the time remaining in the retreat, EBCC members agreed to continue the discussion of the East Bellevue Community Council’s Review of the Year Ahead and Working Relationships to their next meeting, scheduled for August 6, 2019.

In preparation, Councilmembers were asked to reflect on what each individual member saw as topics relevant to EBCC to discuss within their advisory role as well as what types of topics that advance information would be a priority. The focus of the next meeting would then be on coming to a common agreement among members on both areas. This information would then be reviewed by staff and used to help prioritize agenda items.

For the August meeting, staff was asked to pursue an alternate location to hold the meeting, preferably within the East Bellevue jurisdictional boundaries. Mr. Stannert agreed to research alternate locations, including the Lake Hills Library, and confirmed he would be available to continue facilitating the discussion.

The meeting was adjourned at 8:47 p.m.

Follow Up Items

The following items were requested for follow-up by staff and reviewed prior to adjournment. Staff will review each request and provide an update on status as part of future meeting planning conversations.

- 1) Staff will provide EBCC with examples of what an indirect affect may be in context of the advisory role of Community Council's as noted in RCW 35.14.050.
- 2) Deputy City develop a procedure for collecting and transmitting comments from EBCC courtesy hearings to be included in the official record.
- 3) Staff will develop a script for the EBCC Chair to use to educate the public on the Council's quasi-judicial role in the event comments cannot be received at a meeting.
- 4) Assistant City Attorney to research the appeal process for Determination of Nonsignificance (DNS) within the State Environmental Policy Act (SEPA) in a quasi-judicial process when the item is moving forward.
- 5) Staff will examine the possibility of an expedited process for requesting funding for outside counsel upon an identified need.
- 6) Assistant City Manager will ask the city's Communications team if it is within NextDoor's usage policy to post information to clarify and educate the public on EBCC's quasi-judicial role related to Puesta del Sol Elementary School.
- 7) Staff propose a revision to the EBCC rules of procedure (Resolution 570), Section 7 (A)7 to read:

Oral testimony shall not be taken on quasi-judicial matters outside of a public hearing meeting except on matters of procedure...
- 8) Staff to research feasibility of adding audio recordings of EBCC meetings to the City's website.
- 9) Correct typo on Slide 31 for training outline (2nd to last bullet) and Slide 37 to replace the word "Remainder" with "Reminder".
- 10) Assistant City Attorney to research and provide a legal opinion on legislation related to development agreements, Land Use Code Process I decisions, and Land Use Code Process III decisions.
- 11) Assistant City Attorney to research and provide a legal opinion on possibility of EBCC members working in pairs to research and discuss findings of fact on quasi-judicial matters prior to reaching a decision as a body.
- 12) Assistant City Manager to develop process flow chart of Process III decisions that come before the East Bellevue Community Council as a quasi-judicial matter.

Understanding the Quasi-Judicial Process and Decision Criteria

East Bellevue Community Council Retreat

July 16, 2019

Understanding the Quasi-Judicial Process and Decision Criteria

1) What We'll Cover Today:

- a) Authority Review
- b) Land Use Basics
- c) Quasi Judicial Process
- d) Appearance of Fairness Doctrine
- e) Decision Criteria
- f) Questions

2) EBCC Authority — Where Does it Come From

3) Land Use RCW 35.14.040

May approve or fail to approve the adoption, approval, enactment, amendment, granting or authorization by the City Council of any ordinance or resolution applying to land, buildings or structures within the service area regarding:

- Comprehensive plan;
- Zoning ordinance;
- Conditional use permits;
- Subdivision ordinance;
- Subdivision plat;
- Planned unit development.

Disapproval by the Community Council does not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation.

4) RCW 35.14.050 Advisory Role

- i) Make recommendations concerning any proposed comprehensive plan or other proposal which directly or indirectly affects the use of property or land within the service area;
- ii) Provide a forum for consideration of the conservation, improvement or development of property or land within the service area; and
- iii) Advise, consult, and cooperate with the legislative authority of the city on any local matters directly or indirectly affecting the service area.

5) Reminder.... Washington State Law Applies

As a public body, Washington law applies to EBCC Council actions, including but not limited to:

- a) The Appearance of Fairness Doctrine, chapter 42.36 RCW;
- b) The Open Public Meetings Act, chapter 42.30 RCW; and
- c) The Public Records Act, chapter 42.56 RCW, and associated regulations. *See also* Resolution No. 538.

If EBCC Council rules or procedures conflict with municipal or state law, municipal and state law controls. *See generally* chapter 35A.13 RCW (powers of city council subject to state law).

The Quasi Judicial Process

6) The Quasi Judicial process

I. OVERVIEW

- a) Recommendations for QJ Proceedings
- b) The Appearance of Fairness of Doctrine
- c) What to Do When Faced with Ex Parte Communications from Constituents or Project Proponents
- d) Decision Makers' Roles in the QJ Process

7) Recommendations for QJ Proceedings #1

Do not play politics nor favorites with quasi-judicial land use decisions:

- Decision making is no place for politics.
- Stick to decision criteria - don't base decisions on your perception of "what's in the best interest for the EBCC".
- Be careful in what you do, what you say, and how you act.
- Always be fair, independent, cordial and respectful of those to whom you owe a fiduciary duty — the applicant, opponents, and the public.

8) Recommendations for QJ Proceedings #2

You must think like a judge, act like a judge, and decide like a judge

- If you are the decision-maker remember that *you are the judge*.
- Your obligation is to think like a judge, act like a judge, provide a process like a judge, and decide the application like a judge.
- Judges have an obligation to follow the law (the standards provided).
- The law requires a judge to be fair, impartial and unbiased, and the same requirements apply to you.
- Judges must consider all of the evidence presented before making a decision.
- Judges must rely on competent, substantial evidence to support their decision

9) Recommendations for QJ Proceedings #3

The record is the vehicle that supports your decision

- Your legal obligation is to consider *all* of the evidence and information in the record.
- The record must contain sufficient evidence to support any decision.
- "Substantial evidence": must be competent, material and relevant to the issues before you.
- Studies, tests, surveys, reports, planning documents, correspondence, or testimony
- Inadequate Evidence: Statements parties' positions, general conclusions.
- Evidence cannot be "speculative!" (Assuming an event will happen in the future without further proof).

10) The Record

- *Weekly Permit Bulletin:*
 - o Notice of Application
 - o Director's Recommendation
 - o Public Hearing information before Hearing Examiner
 - o Hearing Examiner's Recommendation

- Appeals to the Council — Seattle Times
- Hearing Examiner's Recommendation available on City's website:
<https://bellevuewa.gov/city-government/departments/city-clerks-office/hearing-examiners-office>.

If not available ask Deputy City Clerk for assistance

- Record is complete after appeal heard and Council issues its decision.

11) The Record

Coordinate with the Deputy City Clerk to review the complete record after the Hearing Examiner indexes and transmits to Council.

NOTE: Council allows additional written comments only if the Recommendation is appealed.

12) Appearance of Fairness Doctrine

Protecting the public's interest in the Quasi-Judicial process

13) Appearance of Fairness Doctrine

- Quasi-judicial decisions determine the legal rights, duties, or privileges of specific parties in hearing or other contested case proceeding.
- Quasi-judicial actions do not include legislative actions. - RCW 42.36.010

14) Appearance of Fairness Doctrine - Key Points

- Under the appearance of fairness doctrine, "[m]embers of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. *"City of Mill Creek v. Washington State Boundary Review Bd. for Snohomish Cty*, 165 Wn. App. 1003 (2011) (citations omitted).
- "Prejudgment of facts, personal bias, or personal prejudice for or against a party support appearance of fairness claims." *Largent v. Klickitat Cty.*, 101 Wn. App. 1033 (2000) (citations omitted) (Unpublished).

15) Bellevue City Ethics Code

Key principles of the Code of Ethics are:

- Public officials, elected and appointed, must comply with the laws and policies affecting government operations;
- Public officials must be independent, impartial, and fair in their actions;
- Public office must be used for the public good, not for personal gain; and
- Public deliberations and processes must be conducted openly, unless legally confidential, in an atmosphere of respect and civility.
- Bellevue City Code 3.92.010(B).
- RCW 42.36.060 prohibits ex parte communications in quasi-judicial proceedings
- Cannot engage in ex parte communications regarding the subject of the proceeding unless the official:
 - 1) Places on the record the substance of the ex parte communications concerning the decision of action; and
 - 2) Provides that a public announcement of (1) the content of the communication and (2) of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related.

16) City Ethics Code Addresses QJ Decisions

- The Code of Ethics establishes specific conflict of interest restrictions for property
 - (1) acquisition and site-specific and quasi-judicial land use decisions.

(2) Bellevue City Code 3.92.030(A).

- For quasi-judicial matters, "officials shall publicly disclose substantive information that is relevant to a matter under consideration by the council or boards and commissions, which they may have received from sources outside of the public decision-making process." Bellevue City Code 3.92.040(6)(7).

17) EBCC Adopted the Appearance of Fairness Doctrine

- Washington state statutes, ch. 42.36 RCW, also ensure the Appearance of Fairness. The EBCC has adopted this statute in Resolution No. 538.
- The Appearance of Fairness doctrine applies to the EBCC's quasi-judicial decisions.
 - i) Quasi-judicial decisions determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.
 - ii) Quasi-judicial actions do not include legislative actions. - RCW 42.36.010

18) When is a Matter Considered Quasi-Judicial?

- A matter doesn't become quasi-judicial until appeal is filed before the Council. *West Main Assoc. v. City of Bellevue*. (For City Council)
- Best practice: a matter becomes QJ when a Process III application is filed
 - Filing of a Process III land use decision within the EBCC's jurisdiction
 - At this point, treat the matter as QJ — no ex parte communications.
- Per its rules, EBCC cannot take oral testimony on quasi-judicial matters outside of a public hearing, except on matters of procedure, provided that written comments may be submitted to the EBCC prior to the hearing and may be filed with the City Clerk's Office. Res. No. 570, §7.A(7); C(3).

What Does this Mean to EBCC Councilmembers?

19) Be Aware of Conflicts

- Be vigilant against developing any potential conflicts.
 - Guard against ex parte communications, taking an advocacy position, or other potential conflict of interest or appearance of fairness issues even under the following circumstances:
 - When an issue is not a currently pending quasi-judicial matter but is likely to or could turn into a quasi-judicial matter.
 - When a quasi-judicial matter is pending in another related matter, but not the current matter
 - Consider the appearance of fairness at all times.
 - Treat all applicants fairly and equally.

20) Be Proactive About Potential Conflicts

- Follow proper procedures for addressing potential conflicts:
 - i) Discuss any potential conflicts of interest with assigned Assistant City Attorney as needed.
 - ii) Disclose any ex parte communications as provided by law.
 - iii) Recuse from EBCC decisions, if necessary.
- Remember, you cannot carry out the functions of your position if you have to recuse, so it is best to avoid conflict of interest and appearance of fairness issues.
- Avoid all ex parte communications in quasi-judicial proceedings because they may violate the appearance of fairness doctrine.

- To the extent ex parte communications occur, they must be disclosed pursuant to state and local law. (You must log all ex parte communications for disclosure)
- Log, then forward any emails, voicemails, or written communications to Deputy City Clerk, who may then track and forward to appropriate staff person for inclusion in the record.

21) Why Does This Matter?

- Potential invalidation of the decision or regulation
- Money damages against city or entity
- Money damages against individual decision-maker Attorneys' fees to the party suing if they prevail Attorneys' fees and costs incurred by the city or entity in defending a claim or lawsuit
- Drain on staff time, and increased workload
- Adverse publicity, embarrassment, and loss of public confidence

22) Decision Maker's Role in the QJ Process

Process III Decisions (LUC 20.35.300 et. seq)

- Land Use Director — receives and reviews application, requests additional information from applicant when necessary, receives information and comments, issues a staff report and recommendation to the Hearing Examiner
- Hearing Examiner — issues a recommendation on Process III Land Use applications after consideration of public hearing, DSD's recommendation, and the entire record.
- City Council — hears appeals of the Hearing Examiner's Recommendation, if appeal filed. Final decision maker for Process III decisions, unless within the EBCC jurisdiction.
- EBCC approves or disapproves the City Council's ordinance in the QJ action using the applicable decision criteria.

23) City Staff Responsibilities in a Nutshell Process III (LUC 20.35.300 et. seq)

- Review application and SEPA materials
- Determine if a public meeting is necessary and if so, schedule, and conduct meetings
- Requests or requires additional information or materials from an applicant as necessary to complete application review consistent with City's Comprehensive Plan, Land Use Code, SEPA, and other applicable development regulations
- Receives and considers public and project applicant comments as part of the permit review process
- Drafts for LU Director's/Env. Coordinator's review, consideration, and signature and issues both DSD recommendation and SEPA Decision

24) The Hearing Examiner

- Typically land use practitioners who are impartial and objective decision-makers.
- Role is to conduct a fair and impartial public hearing, consider all of the evidence in the record, and then adopt findings of fact and conclusions of law by applying the controlling law to the evidence.
- As non-elected officials, Hearing Examiners are not susceptible to political pressure or threats from parties to the land use action.
- Hearing Examiners are trained to think like a judge, act like a judge, and issue land use decisions that comply with the requisite legal standards

25) Hearing Examiner's Role — QJ

- Holds a public hearing on the application
- Creates and transmits a complete record to the City Council

- (1) All exhibits
- (2) Electronic recording of the hearing
- Recommends approval or approval with modifications if applicant demonstrates project complies with applicable decision criteria.
 - Applicant must prove by a preponderance of the evidence (more likely than not).
 - Otherwise, Examiner must recommend denial
- Provides written Recommendation and complete record to the City Council for its consideration

26) The City Council's Role — QJ

- Final decision maker on Process I and III decisions (LUC 20.35.300 et. seq)
- Hears appeals of the Hearing Examiner's Recommendation
 - Council considers and makes its decision on the Examiner's Complete record
 - Hearing Examiner's Recommendation
 - City recommendation at a public meeting considering;
 - Council decision on any appeal of the Hearing Examiner's Recommendation
- Decision on the Recommendation:
 - Approve, approve with modifications, remand to Hearing Examiner and DSD for additional hearings on limited issues, or deny the applications
- Ordinance:
 - May impose conditions
 - Must include Findings of Fact and Conclusions of Law, supporting decision. May adopt some or all of Hearing Examiner's FF&CL by reference
 - Majority vote required
 - Final decision of City — (Final upon EBCC action or inaction (60-day rule))
 - Applicant may begin/apply for other approvals before expiration of appeal period at own risk.

27) The EBCC's Role in the Quasi Judicial Process

- Submit any comments received from the public, via the Deputy City Clerk, to either the staff person processing the application or the Hearing Examiner before or the day of the public hearing. Generally, the record will be closed after the public hearing, and no additional comments or testimony will be allowed.
- Keep track (date, who, substance) of any ex parte communications and be prepared to disclose on the record prior to your public meeting.
- City council's decision is not effective within the EBCC until the EBCC votes to approve the ordinance. - RCW 35.14.040
- EBCC follows decision criteria in its Rules of Procedure
- Disapproval or approval subject to appeal to superior court under the Land Use Petition Act and other legal theories

28) Decision Criteria

How does it apply to the EBCC's decision-making process?

29) Decision Criteria Overview

- Purpose
- EBCC Decision Criteria
- Conditional Use Permits

- Analyzing

30) Decision Criteria

- Applicants and public need to know what standards projects are measured against:
- [A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, (1993).
- Provide objective guidelines to follow — can contain subjective measures provided there is an appeal process.
- Reduces potential for arbitrary enforcement of codes.

31) EBCC Decision Criteria

- Land Use Code Amendments
- Comprehensive Plan Amendments
- Rezones
- *Conditional Use Permits*

Reminder: Planned Unit Developments and Preliminary Plats will address if and when an application is scheduled for EBCC consideration

32) Conditional Use Permit

May approve if:

- Consistent with the Comprehensive Plan (note, *not* comply with);
- Design is *compatible with* and responds to the existing, or intended character, appearance, quality or development and physical characteristics of the subject property and immediate will be served by adequate public facilities including streets, fire protection, and utilities; and
- Will not be *materially detrimental* to uses or property in the *immediate vicinity* of the subject property; and [material-being both relevant and consequential; detrimental causing damage or harm; injurious] *Puget Sound Energy*, 197 Wn. App. 1055.
- Complies with applicable requirements of the Land Use Code.

33) Analyzing the Decision Criteria

- Review the City Council's ordinance including the recitals and Findings of Fact and Conclusions of Law and compare to EBCC's decision criteria.
- Review the complete record, including audio recordings.
- Assigned Assistant City Attorney cannot do this for you, you must do the work to reach your decision for when it's time to vote.

34) Tips for Decision Making

- When Making Decisions:
 - o Adhere to the Appearance of Fairness Doctrine.
 - o Follow decision criteria in EBCC Rules and Regulations and state law (Ch. 35.14 RCW) as part of discussion and debate and decision.
 - o Carefully review the Hearing Examiner's Recommendation.
 - o Base decisions on substantial evidence in the record.
 - o Ensure that your decisions are supported by a written record (resolution) that establishes a factual basis and findings that support your conclusions and the ultimate decision (Your

decision could be appealed, and a judge will be relying on it and the complete record).

- o Treat all applicants equally and consistently; NOTE, HOWEVER, this does not mean the same result on the same permit applications — only equal and consistent process and treatment (not necessarily the same outcome).
- Don't Make Decisions:
 - o For political reasons.
 - o Based on community demands, desires, or displeasure.
 - o By ignoring applicable law or facts or applying wrong facts or facts not in the record.
 - o Based on criteria unrelated to the decision criteria, such as economic viability of the project or other.

Process III decisions that come before the East Bellevue Community Council as a quasi-judicial matter

