From: Ken Reidy <kenreidy@hotmail.com>
Sent: Wednesday, May 8, 2024 6:45 AM
To: Diane Buckshnis <d.buckshnis@comcast.net>; Olson, Vivian <Vivian.Olson@edmondswa.gov>
Cc: joe scordino <joe.scordino@yahoo.com>; Taraday, Jeff <jeff@lighthouselawgroup.com>; Rosen, Mike <Mike.Rosen@edmondswa.gov>; Bob Danson <BobD@ovwater.com>; Dotsch, Michelle <michelle.dotsch@edmondswa.gov>; Chen, Will <will.chen@edmondswa.gov>; Mitchell, Jeremy (Planning Board) <jeremy.mitchell@edmondswa.gov>; Theresa Hollis <theresahollis218@gmail.com>
Subject: Planning Board Executive Session

There are no Special Meeting Minutes so there is no way to know if the City Attorney attended the so-called Executive Session on February 28, 2024.

If the City Attorney did attend the February 28, 2024 Planning Board Meeting, who invited such attendance?

Short on time and will have more to say on this topic later. I am researching whether Planning

Board can have their own Executive Session.

In the meantime, the following may be helpful:
Edmonds Planning Board is a public agency charged with the statutory duty of conducting public hearings and providing advisory opinions to the governing body, the City Council. ***Fasano v. Board of County Com'rs of Washington Cty.***, **507 P.2d 23 (1973)**

One of the primary duties of public officers impressed with the duty of conducting a fair and impartial fact-finding hearing upon issues significantly affecting individual property rights as well as community interests, is to ensure that such hearings are "open minded, objective, impartial and free of entangling influences or the taint thereof."
- in Anderson v. Island County 1972

In support of this argument Johnston essentially contends that the cumulative effect of the **Board's** conduct was to "inescapably cast an aura of improper influence, partiality and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness..." Medical Disciplinary Board v. Johnston, 663 P.22d 457, 1983.

This tenet of the law known as the "appearance of fairness doctrine" has been enunciated in a number of Washington decisions.
- in Fleck v. King County, 1977, 502 P.2d 327m 1972

Also:
Source: https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3:

(i) Litigation, Potential Litigation, or Enforcement Actions
An agency must meet three basic requirements before it can invoke this provision to meet in closed session. First, "legal counsel representing the agency" must attend the executive session to discuss the enforcement action, or the litigation or potential litigation. This is the only executive session provision that requires the attendance of someone other than the members of the governing body. The legal counsel may be the "regular" legal counsel for the agency, such as a city attorney or the county prosecutor, or it may be legal counsel hired specifically to represent the agency in particular litigation.

Second, the discussion with the legal counsel either must concern an agency enforcement action or it must concern litigation or "potential litigation" to which the agency, the governing body, or one of its members acting in an official capacity is or is likely to become a party. Discussions concerning enforcement actions or existing litigation could, for example, involve matters such as strategy or settlement.

This provision for an executive session defines "potential litigation" as matters that are protected by attorney-client privilege concerning:
Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or
Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency.
This definition permits discussions by an agency governing body of actions that involve a genuine legal risk to the agency. This allows a governing body to freely consider the legal implications of a proposed decision without the concern that it might be jeopardizing some future litigation position.

The third requirement for meeting in closed session under this subsection is that public knowledge of the discussion would likely result in adverse legal or financial consequence to the agency. In *Port of Seattle v. Rio* (1977), the Court of Appeals stated that a closed executive session with legal counsel to discuss settlement or avoidance of litigation is proper because "A public agency should neither be given an advantage, nor placed at a disadvantage in litigation." The Washington Supreme Court, in *Recall of Lakewood City Council* (2001), held that a governing body is not required to determine beforehand whether disclosure of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and will likely result in adverse consequences.

Since the purpose of this executive session provision is only to allow the governing body to *discuss* litigation or enforcement matters with legal counsel, the governing body is not authorized to take final action regarding such matters in an executive session. Case law

suggests that a governing body may do no more than discuss litigation or enforcement matters and may therefore be precluded from decisions in the context of such a discussion in order to advance the litigation or enforcement action. In *Feature Realty, Inc. v. City of Spokane* (2003), the federal Ninth Circuit Court of Appeals invalidated a "collective positive decision" of a governing body in executive session to approve a settlement agreement. The *Feature Realty* court relied on the Washington Supreme Court's holding in *Miller v. City of Tacoma* (1999) that a governing body can only take an action in executive session "explicitly specified" in an exemption to the OPMA.

This provision is, in practice, often used as a justification for executive sessions, particularly because "potential litigation" is susceptible to a broad reading. Indeed, many things a public agency does will subject it to the possibility of a lawsuit. However, a court will construe "potential litigation" or any other grounds for an executive session narrowly and in favor of requiring open meetings. *Miller v. City of Tacoma* (1999). To avoid a reading of this subsection that may be broader than that intended by the Legislature — and to avoid a suit alleging a violation of the OPMA — it is important for a governing body to look at the facts of each situation in the context of all the requirements of this subsection.

Case Example: *A board of county commissioners is considering adopting a stringent adult entertainment ordinance, and a company that had announced its intention to locate a nude dancing establishment in the county states that it will sue the county if it passes this ordinance. The commissioners call an executive session to discuss with the prosecuting attorney this "potential litigation." Specifically, they intend to discuss with the prosecuting attorney his opinion as to the proposed ordinance's constitutionality. May the commissioners meet in executive session to discuss this?*

Resolution: *The county commissioners may discuss with their legal counsel in executive session the constitutionality of the proposed ordinance, particularly in light of the threatened legal challenge. They want to have a strong position coming into the litigation. The company's knowledge of their discussion would give it an unfair advantage in framing the constitutional theories in support of its threatened suit against the county. Also, the prosecuting attorney may not feel he can be totally candid with the commissioners in open session.*

The company, on the other hand, may argue that the commissioners are not discussing the potential litigation, but rather are only discussing the ordinance. The commissioners should always be aware of the constitutionality of the actions they take. But, that does not mean the commissioners have the authority to meet in executive session any time they are proposing legislation that may implicate constitutional issues. However, given the circumstances here – specifically that the company threatened to sue - the commissioners' position should prevail. Consistent with the definition of "potential litigation" added by the Legislature in 2001, the county commissioners may discuss the "legal risks of a proposed action," in this case, the legal risks of adopting a stringent adult entertainment ordinance, particularly when the company has threatened litigation if the county adopts the ordinance.

From: Ken Reidy <kenreidy@hotmail.com>
Sent: Tuesday, May 7, 2024 1:11 PM
To: Diane Buckshnis <d.buckshnis@comcast.net>; Olson, Vivian

<Vivian.Olson@edmondswa.gov>
Cc: joe scordino <joe.scordino@yahoo.com>; Jeff Taraday <jeff@lighthouselawgroup.com>; Mike Rosen <Mike.Rosen@edmondswa.gov>; Bob Danson <BobD@ovwater.com>; michelle dotsch <michelle.dotsch@edmondswa.gov>; Will Chen <will.chen@edmondswa.gov>; Jeremy Mitchell <jeremy.mitchell@edmondswa.gov>; Theresa Hollis <theresahollis218@gmail.com>
Subject: Re: Heads up about Agenda changes for tonight and why

We all deserve to know how this so-called executive session took place and who advised the Planning Board that they could go into Executive Session. Also, there are no Special Meeting Minutes for the related Special Meeting.
Unreal.
Ken

From: Diane Buckshnis <d.buckshnis@comcast.net>
Sent: Tuesday, May 7, 2024 12:18 PM
To: Olson, Vivian <Vivian.Olson@edmondswa.gov>
Cc: joe scordino <joe.scordino@yahoo.com>; Ken Reidy <kenreidy@hotmail.com>; Jeff Taraday <jeff@lighthouselawgroup.com>; Mike Rosen <Mike.Rosen@edmondswa.gov>; Bob Danson <BobD@ovwater.com>; michelle dotsch <michelle.dotsch@edmondswa.gov>; Will Chen <will.chen@edmondswa.gov>; Jeremy Mitchell <jeremy.mitchell@edmondswa.gov>; Theresa Hollis <theresahollis218@gmail.com>
Subject: Re: Heads up about Agenda changes for tonight and why

Good Morning Vivian,
This email is confusing to some of us that were bcc'd and thank you for including me as the Storm's opener is tonight and I may not have a chance to comment tonight.

Are you now removing it from the table and putting it on the agenda to discuss? Or is this packet now moved to receipt for filing and will not be council business?

Also, Joe brought it to my attention that the planning board went into executive session to discuss litigation? What!?! I have NEVER heard of this happening before as the planning board are citizen volunteers. They are not bound by executive session privileges as they have no authority to approve code or policy. I could sue a planning board member over this "potential litigation secret" and the City would have no legal authority to represent that planning board member. So, I suggest the public be made aware of this pending litigation or if it's a mere "threat" that many developers will use as scare tactics.

We are all aware the Lighthouse has been involved in two personnel lawsuits of which executive privileges were lax at best; but it's one thing to speculate and another to have a case filed in court.

Thank you in advance,
Diane

On May 7, 2024, at 11:41 AM, Olson, Vivian <Vivian.Olson@edmondswa.gov> wrote:

Hi Director McLaughlin,

Thank you and Mike Clugston for providing additional info regarding the SEPA review (and timing of it) at council's request.

I should have put it in memo form in received for filing (support for the tabled item for council and the public to refer to) instead of council business, and will be remedying that by motioning the removal of the CARA agenda item during approval of the agenda.

The below is the process to move discussion of the tabled item by taking it from the table:

a motion to un-table can happen at any point in the meeting by any councilmember?
Yes, motion to "take the CARA Code from the table"

Is that motion debatable? No, just like the motion to table.

Simple majority or supermajority to pass the un-tabling motion? Simple majority

I am likely to make a motion to take from the table (if no one else does) as the "do nothing option" is not preferred by Mr Danson at Olympic View Water per my forwarded email from him a few days ago. My takeaway from conversations with MRSC Danson is that If you can't yet justify amending it to remove the allowance for the shallow injection wells, you should vote to pass it as is.
Mr Danson is cc'd on this email so anyone who wants to reach out to him is able, and so he can reply all to correct if I inadvertently mischaracterized what he said.
Any questions, let me know.
Enjoy the blue sky's until we are together!!!
Vivian Olson/ Council President
City of Edmonds
(425) 361-8176