

EDMONDS CITY COUNCIL APPROVED MINUTES

August 23, 2011

The Edmonds City Council meeting was called to order at 7:00 p.m. by Mayor Cooper in the Council Chambers, 250 5th Avenue North, Edmonds. The meeting was opened with the flag salute.

ELECTED OFFICIALS PRESENT

Mike Cooper, Mayor
Strom Peterson, Council President
Steve Bernheim, Councilmember
Michael Plunkett, Councilmember
Lora Petso, Councilmember
Adrienne Fraley-Monillas, Councilmember
D. J. Wilson, Councilmember (participated by telephone in Item 5; 8:04 – 9:19 p.m.)

ELECTED OFFICIALS ABSENT

Diane Buckshnis, Councilmember

ALSO PRESENT

Peter Gibson, Student Representative

STAFF PRESENT

Stephen Clifton, Community Services/Economic Development Director
Phil Williams, Public Works Director
Carrie Hite, Parks & Recreation Director
Rob Chave, Planning Manager
Carl Nelson, CIO
Rob English, City Engineer
Jeff Taraday, City Attorney
Sandy Chase, City Clerk
Jana Spellman, Senior Executive Council Asst.
Jeannie Dines, Recorder

1. APPROVAL OF AGENDA

COUNCILMEMBER PLUNKETT MOVED, SECONDED BY COUNCILMEMBER PETSO, TO MOVE ITEM 6, AUDIENCE COMMENTS, UP TO ITEM 3B. MOTION CARRIED UNANIMOUSLY.

COUNCIL PRESIDENT PETERSON MOVED, SECONDED BY COUNCILMEMBER BERNHEIM, TO APPROVE THE AGENDA AS AMENDED. MOTION CARRIED UNANIMOUSLY.

2. CONSENT AGENDA ITEMS

COUNCIL PRESIDENT PETERSON MOVED, SECONDED BY COUNCILMEMBER BERNHEIM, TO APPROVE THE CONSENT AGENDA. MOTION CARRIED UNANIMOUSLY. The agenda items approved are as follows:

A. ROLL CALL

B. APPROVAL OF CITY COUNCIL MEETING MINUTES OF AUGUST 15, 2011.

C. APPROVAL OF CLAIM CHECKS #127228 THROUGH #127359 DATED AUGUST 18, 2011 FOR \$317,051.73. APPROVAL OF PAYROLL DIRECT DEPOSIT AND CHECKS #50709 THROUGH #50759 FOR THE PERIOD AUGUST 1, 2011 THROUGH AUGUST 15, 2011 IN THE AMOUNT OF \$673,171.85.

- D. APPROVAL OF MINOR CHANGES BY SNOCOM LEGAL TO THE "INTERLOCAL AGREEMENT FOR SNOCOM INTERNET ACCESS" THAT WAS APPROVED FOR MAYOR'S SIGNATURE ON 11-16-2010.
- E. ORDINANCE NO. 3852 – PARK TRUST FUND ORDINANCE AMENDING CITY CODE 3.16.020.
- F. RESOLUTION NO. 1255 – CALLING FOR A REPORT RELATED TO THE CREATION AND DISPLAY OF WALL GRAPHICS WITHIN THE CITY OF EDMONDS.
- G. RESOLUTION NO. 1256 – THANKING PETER GIBSON FOR HIS SERVICE AS A STUDENT REPRESENTATIVE.

3A. PRESENTATION OF RESOLUTION TO STUDENT REPRESENTATIVE PETER GIBSON.

Council President Peterson read a resolution commending Student Representative Gibson for his service from October 2010 through August 2011.

Student Representative Gibson thanked the Council for a fun 10 months.

3B. AUDIENCE COMMENTS

Ron Wambolt, Edmonds, commented a number of people planned to attend tonight's meeting for Agenda Item 7 and he hoped moving Audience Comments up on the agenda would not prevent them from speaking regarding that item. With regard to Item 7, there is concern by some citizens that if development agreements are approved as recommended by the Planning Board, taller buildings could spring up around the City. He proposed the criteria for allowing a development agreement be amended so that incorporating one or more uses designed to further the City's economic development goals (such as a hotel, post office, farmers market or space for artist) is mandated. With that as a mandatory criteria, it is unlikely there will be more than one post office, hotel or farmers market developed. He urged the Council to consider that change.

Neil Tibbott, Edmonds, advised he did not own any property downtown that he intended to develop and therefore was free of bias. With regard to development agreements, he explained when the people have an opportunity to participate in what they want to see downtown, the people win. Development agreements are a way for people to participate with regard to amenities they would like downtown. With regard to concern with 35-foot buildings, he envisioned development agreements would result in a range of heights. Development agreements also provide an opportunity for creativity and for citizens to be collaborative with developers. He urged the Council to provide an opportunity via development agreements as has been done in surrounding cities to facilitate greater and more expanded economic development. He referred to Seattle's decision to allow the use of development agreements in the area around Northgate to facilitate more rapid development. He summarized the City and its citizens could benefit from the use of development agreements.

Al Rutledge, Edmonds, commented on the need for more public involvement at Hearing Examiner meetings, noting the last two have been in regard to very important issues. He suggested the current 3:00 p.m. Hearing Examiner meeting time be changed. Next, he suggested updating the public on the meetings being held with regard to Fire Department consolidation.

Roger Hertrich, Edmonds, questioned what the proposed changes in the BD zones allowed and what was required. His understanding is that the current building height is 25 feet and 30 feet can be achieved if certain requirements are met. Because those items are required, he viewed the height limit as 30 feet. A development agreement is quite liberal as it only requires meeting two of three criteria. By achieving

LEED or green building certification or complying with an arbitrary number of uses as determined by the City's economic development goal, a developer can do almost anything and will be allowed a 35 foot height limit. He summarized the proposed changes do not satisfy the citizens, and development agreements are too liberal and promote higher building heights.

Natalie Shippen, Edmonds, commented residents value Edmonds' small scale, low profile image of an older, small town. Residents remain in place, unlike businesses that may come and go. She quoted from the Comprehensive Plan, "Increased growth in the Puget Sound region led to a gradual change in the character of Edmonds with more emphasis on residential development and a decline in the retail importance of downtown Edmonds. The City is now primarily a residential community." Consequently, the following Growth Management policy was adopted, "the role of commercial and industrial enterprises, the intended tax base and provision for consumer needs should be considered as a supporting part of the residential nature of the area rather than as the dominant activity of the community." Thirty years ago residents supported lowering height limits because they disliked the size of buildings being constructed in the bowl. Since then no public interest group has ever asked that the bowl height limit be changed. Residents have used the ballot box to resist those who advocate for taller building. The height issue was kept alive by a stubborn, self-serving segment of businesses that will not accept its secondary role in the community. Development agreements are special interest legislation designed to profit developers, not residents. She suggested Council establish a Beautification Commission to study and recommend projects that will benefit the entire town and capitalize on Edmonds' esthetic assets rather than attempting to bail out businesses that say increased heights are needed to prosper. She recommended Council not allow development agreements.

4. UPDATE ON OLD MILLTOWN COURTYARD DESIGN.

Parks & Recreation Director Carrie Hite recalled when the design was presented to the Council on July 19 concerns were expressed with regard to some of the design elements and there was a request to gather feedback from the design committee. She explained Old Milltown courtyard is considered one of the main gateways into the downtown area and is one of the first public spaces people see. It lends itself to being an attractive gathering area, to encourage people to come, stay and shop downtown and to improve the economic vitality of downtown. She described the existing courtyard that has a number of drainage problems, diseased trees, plants bound by bamboo root and it abuts a number of businesses and empty storefronts. A good courtyard design that establishes an attractive gathering place has the potential to boost development and businesses in Old Milltown.

Ms. Hite explained a design committee was formed to consider the courtyard. Most committee members viewed it as a central gathering place, a "meet me place" downtown where people would choose to gather. She reviewed the three design options provided to the design committee.

- Option 1: Contains hardscape, softscape, and artistic elements
- Option 2: More formal; design committee did not like
- Option 3: Artistic hardscape, seating areas. The committee liked the design but did not like sandbox and wanted more raised bed gardens and seating areas.
- Preferred Option: Raised bed gardens, natural gathering/seating areas, fountain, stage on the south end for performances, visibility to current businesses. Child friendly elements include strategically placed large boulders for children to climb on, a touch/smell/feel educational garden, and stage.

Ms. Hite reviewed inspirational and artistic themes for the space, noting the basic concept has been determined but specific items have not been selected. She displayed artistic child elements, explaining after the July 19 Council meeting, she met with Councilmember Wilson at Old Milltown to discuss

attributes that would not take away from the gathering area but could be more exploratory for children. These could include small artistic elements for children to discover and a more playful water feature.

Ms. Hite explained the committee's focus was on native plants as well as plants to create a backyard habitat certification. She reiterated the child-friendly elements included in the current design include a look/smell/feel educational garden, climbable boulders, water fountain, small stage area, stairs to the stage to climb, and artistic elements incorporated into the hardscape for children to discover and explore.

Ms. Hite explained the budget for the proposed design is \$120,000-\$125,000. The original budget approved by the Council was \$40,000. She commented \$40,000 was an unrealistic budget given the drainage issues, unavailability of utilities, necessary grading, etc. The proposed budget includes:

\$40,000	City
\$10,000	Floretum Garden Club
\$ 4,000	Edmonds in Bloom
????	(pending) Grant applications to Hubbard Foundation, Hazel Miller Foundation, Arts Festival Foundation and private donors

Ms. Hite stated staff did not submit for Hubbard Foundation and Hazel Miller Foundation grants because both foundations preferred to have a Council-approved design before the City submitted an application. The next deadline for both foundations is September 2011 with decisions announced in October. Construction of the project is anticipated to take 2-2½ months; November weather will slow construction. The dilemma of a fall construction schedule and lack of confirmed funding from private foundations was presented to the Finance Committee at their August meeting.

Ms. Hite reviewed options for Council consideration:

1. Do nothing.
2. Wait until the grant and private funds have been secured to start construction (likely spring 2012).
3. Authorize additional REET funds to begin construction this fall. When private funds are secured (no guarantee), they would be used to replenish REET.

Ms. Hite explained the ending REET fund balance in 2010 was approximately \$400,000. Council authorized an additional \$294,000 for the Interurban Trail from that balance, leaving approximately \$100,000 that has not been allocated. If the Council approved Option 3, staff will return with a financing plan for Council approval.

Mayor Cooper opened the opportunity for public comment.

Ron Wambolt, Edmonds, commented the Old Milltown Park had turned into a fiasco. When the property was purchased in 2008, the goal was to prevent the developer/owner from redeveloping the area out to the street and to retain the area as is. Now three years later there is a grandiose plan that would be fitting if the City had an overabundance of funds. The plan calls for spending \$120,000-\$125,000 with a possible \$100,000 provided by the City if the Council chooses to proceed immediately. He proposed staff tidy up the area and maintain it until the City has discretionary funds for a more elaborate park. If the City has \$100,000 in REET funds, he preferred the Council change the policy for the use of REET funds and spend it on badly needed street overlays. He recommended the Council select Option 1.

Joan Bloom, Edmonds, commended Ms. Hite and the design committee for designing a wonderful space for the community. She recalled bringing her children to that space when they were small and there were many community gatherings there. She pointed out children are endlessly creative; they will entertain themselves with large rocks to play on, paths to skip down and flowers to smell, and birds, bees and bugs to observe. A stage and music will allow them to entertain others. She summarized all the elements have

been provided for a very nice community project that will provide economic development and encourage tenants. Although it is unfortunate the project will be delayed, she felt it fiscally wise to wait until funding is in hand.

Barbara Chase, Edmonds, explained she has been involved with the Old Milltown courtyard as a member of the Garden Club and a member of the design committee. As a fiscal conservative, she would not support the project if it were a bad decision. The Old Milltown courtyard is a very important part of Edmonds and leaving it as is makes it a depressing part of the City. She supported the decision to eliminate the sandbox, noting there is a great deal of sand at nearby beaches. Many of the proposed elements are friendly to children as well as adults. She acknowledged it was the Council's responsibility to determine the funding details and envisioned the public would also provide financial support.

Al Rutledge, Edmonds, recommended the Council establish a percentage of funding for the project that would be provided via donations from residents.

Natalie Shippen, Edmonds, commented on a recent visit to Leavenworth where the main streets were crowded with people and cars. She drove on some of the streets behind the city, many of which were quite rough with potholes and patches, comparing them with the beautiful Leavenworth façade and landscaping. If a city aspires to be a tourist town, it needs to be an attractive town that draws people. If there is a choice between a beautification and a purely utilitarian project, she recommended the City delay the utilitarian project and go with beauty.

Hearing no further comment, Mayor Cooper closed the opportunity for public comment.

Councilmember Fraley-Monillas supported proceeding with funding Option 2. She preferred to approve the plan but wait to secure the grant and private funds before constructing the courtyard. She did not want to allocate REET funds for the project. Mayor Cooper clarified the result would be construction in spring 2012. Ms. Hite clarified the action requested of Council was, 1) approve the plan, and 2) approve one of the funding options.

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER BERNHEIM, TO APPROVE THE PLAN.

Councilmember Plunkett spoke in favor of the plan, commenting this is the type of economic development that citizens will support; improving parks, walkways, art and public amenities. This courtyard will bring people to the city and generate more sales tax revenue. The courtyard is a wonderful attribute but it is also economic development.

Student Representative Gibson asked when the project would be completed if the City received grant funding and began the project in spring 2012. Ms. Hite advised the construction cycle is 2-2½ months. If private donations need to be sought to bridge a gap in funding provided by the foundations, the start date may be delayed.

MOTION CARRIED UNANIMOUSLY.

Councilmember Petso recalled in the past the City has often received 50% of projects funds from State grant programs. She asked whether this project would be eligible for State grants. Ms. Hite answered this project would be eligible; the open cycle is February 2012 with decisions made in July/August and funds released in 2013.

Councilmember Petso asked if a letter of retroactivity could be submitted for reimbursement if the City proceeded with construction of the project. Ms. Hite answered a letter of retroactivity only applied to land acquisition, not a development project. The only option is to apply and compete with other projects.

Councilmember Petso asked whether the available REET funds had previously been appropriated to other projects. Ms. Hite answered when the final budget was completed for 2010, the yearend cash in the REET fund was significantly higher than anticipated.

Councilmember Petso advised the Finance Committee expressed its support for the Council authorizing up to \$100,000 in REET funds for Option 3.

Councilmember Plunkett pointed out the three financing options Ms. Hite presented were not in the agenda memo. Ms. Hite explained the last paragraph identifies the budget and the presentation to the Finance Committee regarding allocation of additional funds pending foundation grants.

Mayor Cooper clarified the Finance Committee recommended Option 3 with a presentation to the full Council. Councilmember Petso relayed the Finance Committee felt moving ahead with the project was preferable to continued delay. She has received a number of complaints regarding the City's failure to do something with the Old Milltown courtyard. She also viewed it as economic development. It was easier for her to support allocating \$100,000 to construct this economic development project than to support funding for a study that may simply be shelved. She supported proceeding with the courtyard to create a gathering space that will provide quality of life for Edmonds citizens and also draw businesses into the Old Milltown area.

Councilmember Bernheim asked the cost difference between proceeding as soon as possible and waiting until funds are available. Ms. Hite explained proceeding immediately without securing private funds requires the Council allocate an additional \$70,000 in REET funds to the project. If the Council chooses Option 2, staff will endeavor to obtain \$70,000 from foundations and private donors. If the Council chooses Option 2, staff will continue its efforts to obtain funding from foundations and private donors to replenish the REET. There is no difference in the actual project cost.

Councilmember Fraley-Monillas asked whether the project would be completed this year if the Council chose Option 3. Ms. Hite answered yes, that was the target date. If the Council chooses Option 2, construction will not begin until all funds are secured.

Council President Peterson commented with regard to funding, he was torn because the project is a great economic development opportunity, an opportunity for beautification and it creates a space for people to gather and shop downtown. However, he was concerned with spending money before it was obtained. He leaned toward Option 2 although it pained him to go through the holiday season with a space that was not ideal. He summarized it was not the right time to spend REET money even though it was available.

COUNCILMEMBER BERNHEIM MOVED, SECONDED BY COUNCILMEMBER PETSO, TO APPROVE OPTION #3, WITH A FINANCING PLAN PRESENTED FOR FINAL APPROVAL BY THE COUNCIL.

Councilmember Bernheim commented creating parks is a government responsibility. He did not expect private citizens to pay for parks, comparing that to citizens paying for street overlays. He supported applying for grants but did not want to delay public projects to raise more private funds. Old Milltown courtyard is the type of economic development he prefers over constructing new building and filling them with new businesses which has not occurred in Old Milltown. He noted the 15-foot first floor in Old Milltown has been empty ever since the BD zones were amended to require that ceiling height. He commented on the importance of the Old Milltown courtyard due to its location in the center of downtown. He summarized it would be depressing to leave the space as is and it should be completed as quickly as possible because it promotes economic development.

Councilmember Fraley-Monillas clarified staff will still seek grant funds to replenish the REET fund if the Council authorizes proceeding with the project this year using REET funds. Ms. Hite answered yes. There is no guarantee regarding their receipt but staff will apply for grants for the project. Councilmember Fraley-Monillas expressed her support for Option 3, knowing staff will still apply for grant funds.

Councilmember Plunkett asked if the City's chances of receiving grant funds were improved if the project was underway. Ms. Hite answered it could be improved. She noted it would not be desirable to break ground until a funding mechanism is agreed upon. Option 3 allows staff to break ground this fall and apply for grants this fall. Councilmember Plunkett expressed his support for Option 3 and looked forward to having the project complete for the Christmas season.

Council President Peterson agreed with the importance of the project but was hesitant to allocate funds before the grants have been received. He was confident the foundations and citizens will provide funds but he had no idea to what extent.

MOTION CARRIED (4-1), COUNCIL PRESIDENT PETERSON VOTING NO.

5. DISCUSSION OF PREVIOUSLY APPROVED CHANGE ORDERS FOR THE 162ND AVE PARK (HAINES WHARF PARK) AND 75TH/76TH WALKWAY PROJECT.

(Councilmember Wilson participated in this item via telephone.)

Public Works Director Phil Williams advised also present tonight are City Engineer Rob English who administered both the design and construction contracts for this project and Parks & Recreation Director Carrie Hite representing the Parks Department who was the client on this project. He described what issues will be discussed and will not be discussed. The focus will be the change orders already executed on the project. The Council has discussed in Executive Session a request for equitable adjustment by the contractor. He noted that the contractor for this project, Jerry Bergeman, Precision Earthworks, is in the audience. The claim for equitable adjustment is under review by the City and the City is working with the contractor to determine the next steps. There may eventually be a claim filed against the City for additional costs for the project. That will not be discussed during this item.

Mr. Williams explained although the project is entitled 162nd Avenue Park and 75th/76th Walkway Project in the CIP and Parks Comprehensive Plan, it is most often referred to as the Haines Wharf Park project. He pointed out this project had two major components, the park as well as a very significant and rather expensive structural sidewalk that leads to the park. Most of the problems have been on the park phase although the walkway project was not immune from change orders, for many of the same reasons: poor site conditions, unsuitable soils and structural issues. Comparing the two, the park was the biggest source of difficulty.

Mr. Williams displayed two photographs of the park, commenting it is a wonderful addition and amenity to the City. He displayed and reviewed a chronology of the project for the planning and design phase, public involvement, permitting, and right-of-way acquisition with regard to the date, action, Council action, amount and description.

Mr. Williams described the bidding process, advising the project was bid three times. The first time the low bid was \$2.3 million, well in excess of the Engineer's estimate and the available budget; the Council rejected all bids. The project was rebid at what was thought to be a better time and the bids were significantly lower. The only change in scope made to the project between the first and second bid was to remove the irrigation system. The low bid at that time was \$1.708 million by Precision Earthworks which could have been awarded but there were defects in several of the bids. A decision was made to again

reject all bids, clean up the bidding documents and rebid the project a third time. Precision Earthworks was the low bidder in the third bid with a bid of \$1.634 million. That bid was brought to the Council for award along with costs for testing during the project, internal project management and a 10% contingency bringing the total estimated construction budget to slightly over \$1.9 million.

Mr. Williams reviewed a chronology of the construction phase with regard to date, action, Council action, amount and description. He explained on site, almost nothing was as it was thought to be entirely when the project began. The soil conditions were very poor. Although bad soils were anticipated in certain places, the extent was not discovered or discoverable prior to opening the ground for construction of the park. That led to many of the financial problems. He referred to a chronology of the ten change orders executed on the project to date that total \$725,802 in addition to the original construction contract at award. That summary categorizes change orders due to errors or deficiencies/insufficiencies in the design documents, changes in site conditions, owner requests (City requested changes), and safety related changes. Changes are also categorized as they relate to the park and the walkway.

Mr. Williams noted the change orders began in December 2009. The project began with a \$1.63 million contract and a 10% or \$163,000 contingency. The contingency is intended to provide some flexibility to approve change orders that almost always happen on projects and provide management authority to address changes quickly and in a timely manner to avoid delaying the contractor by seeking approval of individual changes to the contract. By approximately March 2010, that contingency was exhausted and several additional change orders followed including a \$131,000 change order in March 2010, a \$245,000 change order in April 2010 and \$167,000 change order in June 2010.

Staff came to the Council in Executive Session in July 2010 and provided information regarding the change orders and potential additional costs. Two smaller change orders occurred in August and September 2010. Substantial completion of the project was achieved in September 2010 and physical completion summer 2011. Since then there has been an effort to resolve a number of issues related to the project with the contractor. He advised the contractor's request for equitable adjustment, in addition to the project costs and change orders, is a request for an additional \$701,964. He clarified that is not yet a claim but he expected it ultimately will be.

Mr. Williams explained he came into the project late but has drawn the following conclusions:

- This project is not an example of the way the Public Works and Parks Department management teams want to work with the Council or the public on future projects.
- Accurate and timely communication, especially when things are not going well, is what the Council has a right to expect.
- We need to achieve transparency in our management of projects to maintain our credibility in managing public funds.
- Not all projects go well. Haines Wharf Park did not go well.
- A policy on processing change orders is necessary

Mr. Williams explained the City does not have a policy regarding the processing of change orders for construction contracts. He reviewed a potential change order policy:

Change Order Approvals and Processing

It shall be the practice of the City to award construction contracts to the lowest responsible bidder at the amount set forth in their bid plus any allowance for alternative scope items included in the bid and approved by City Council. In addition to this contract award amount the construction budget for the project includes the costs of inspection, project management, design services during construction (RFIs, etc.), and a management reserve for necessary change orders during the course of the project. This management reserve will be set by City Council at the time of contract award. The following guidelines will be considered in setting the management reserve:

For construction budgets up to \$100,000 change orders up to 20%, or the full amount of the management reserve set by City Council, whichever is higher, are to be approved (signed) by the City Engineer (if the project is being managed by the Engineering Division), the client department director, the Public Works Director, and the Mayor

For construction budgets between \$100,000 and \$500,000 change orders up to 15%, or the full amount of the management reserve set by City Council, whichever is higher will be approved (signed) by the same named individuals as in paragraph (1) above.

For construction budgets over \$500,000 change orders up to 10%, or the full amount of the management reserve set by City Council, whichever is higher, will be approved (signed) by the same named individuals as in paragraph (1) above.

For necessary change orders that will exceed the change order authority in paragraphs 1 through 4 above or the current budget authority granted by city Council for the City Fund(s) financing the project the City Council must authorize the Mayor to execute the change order(s).

If a necessary change order requires City Council approval but getting that approval will add significant additional expense or risk to the project the Mayor is authorized to approve the required work and bring the necessary change order to the next scheduled City Council meeting for review and approval.

Mr. Williams advised the Council was not being asked to approve the change order policy tonight but he recommended a change order policy be developed in the future.

Mayor Cooper relayed he asked City Attorney Jeff Taraday to research concerns raised about the authority of the Mayor with regard to change orders and contracts. Mr. Taraday provided the Council a memo earlier today and he asked Mr. Taraday to describe his research and provide his legal opinion. With regard to contracting authority and change orders in particular, Mr. Taraday reviewed State law authorization with regard to the Council and Mayor for contracts. RCW 35A.11.010 addresses the City Council's powers and states in part each city governed under this optional municipal code, by and through its legislative body, may contract and be contracted with... This RCW states the Council is the city's contracting authority. In the absence of any delegation of that authority to the mayor or administration, the City Council is the contracting authority of the city. There is no default mayoral contracting authority under State law.

One of the reasons a policy such as Mr. Williams suggested is needed is because it is not feasible for a city the size of Edmonds to bring every contract and every contract amendment before the City Council for action. The City has purchasing policies and procedures that authorize the mayor to enter into contracts up to \$100,000 which also applies to Public Works projects. In his memo he provided excerpts from the purchasing policies including that the City Council must authorize the call for bids for a project estimated at \$100,000 or more and the City Council must award bids that exceed \$100,000. The purchasing policies do not expressly address change orders. A change order is essentially an amendment to a contract and in his opinion the Mayor's contract authority would not expand on a contract amendment any more than a new contract.

Mr. Taraday explained what is less clear under the current purchasing policies and may have caused some confusion for the administration in processing some of the change orders is that it is not clear whether a small change order such as \$10,000 in a contract over \$100,000 falls within the Mayor's \$100,000 contract authority. His legal opinion is that once the \$100,000 threshold has been exceeded on any contract, any change order or amendment to that contract needs to come to the City Council. Otherwise it would be too easy to piecemeal contracts and avoid what clearly appeared to be the legislative intent of the City Council to ensure it was kept informed of expenditures over \$100,000. The City Council has the discretion to delegate to the administration whatever authority it wants with regard to contracting. In the

future it is important to discuss how to effectively manage construction projects and keep the City Council in the loop with regard to the amount that is being spent on construction projects.

With regard to management reserve, Mr. Taraday explained in the agenda bill provided to the Council on May 5, 2009 there was reference to a 10% contingency in the amount of \$163,460. The agenda bill could have been more clearly drafted in terms of expressly seeking City Council authorization to spend that management reserve. One can logically infer from the agenda bill that it was staff intent to seek that permission and City Council by approving the agenda bill probably intended to authorize that management reserve. In the future he recommended clear action be taken with regard to authorization of any management reserve to avoid confusion about whether the City Council authorized the additional expenditure above the contract price. Mr. Taraday recommended some type of purchasing policy that specifically addressed change orders be developed to effectively manage construction projects in the future.

Mayor Cooper commented about the time that key things occurred: the Public Works Director retired, Mr. Williams was hired in June/July 2010, then-Mayor Haakenson left to accept another position on July 1, 2010, he was appointed Mayor on June 23, 2010, the Parks Director retired in fall 2010 and Ms. Hite was hired in January 2011.

Mayor Cooper relayed his deep disappointment upon learning that change orders had been brought forward that were outside the scope of the \$100,000 threshold with regard to the total value of the project. If one accepts that each change order is a separate contract, three were outside \$100,000 threshold and by about Change Order 5 the contingency was exhausted.

Mayor Cooper distributed a memo dated August 22, 2011 that City Engineer Rob English prepared at his request outlining his efforts to keep his supervisor, the Public Works Director, and the Parks Director informed. He read key paragraphs from the memo:

By April 2010, negotiations concluded with Precision on several larger construction issues that resulted in the processing of two of the larger change orders (Change Order Nos. 6 & 7).

On May 3, 2010, the Parks Director scheduled a meeting to brief the Mayor on the status of the project. The staff present at the meeting included the Parks Director, Public Works Director, City Engineer and Mayor. The Parks Director led the meeting and discussion with the Mayor. The items covered during the meeting were the change order costs, construction problems and remaining work to be completed. The decision made during the meeting was to finish the project as quickly as possible to minimize additional costs. There was no direction given to prepare an agenda item for updating the City Council on the project at that time.

Mayor Cooper assured that based on the City Attorney's recommendation, effective immediately his administrative policy will be to bring change orders to the Council until this issue is resolved. During a time the public is being asked to raise taxes, the City administration and City Council owe it to the public to be as open, upfront and transparent as possible even when projects go wrong.

Mayor Cooper advised he met with Interim Finance Director Jim Tarte today to inquire whether the State Auditor has completed their work. He planned to ask the State Auditor to review this project, the processes and decisions made with regard to the project as well as to discuss with the City Attorney whether any further review was needed to be done on the project.

Councilmember Plunkett observed a reasonable interpretation of City policy would be the authority of the administrator i.e. the Mayor goes up to an accumulative \$100,000. Mr. Taraday responded that was correct. For example, if an \$80,000 original contract needed to be amended to add \$21,000, bringing the total contract value to \$101,000; his advice would be the amendment needed to come to the City Council.

Councilmember Plunkett recognized that a different interpretation of the policy could draw a different conclusion. Mr. Taraday agreed.

For Councilmember Plunkett, Mr. Taraday explained at the time of the bid award, there was reference in the agenda bill to the contract price as well as a 10% contingency. It was unfortunate that there was not express authorization in the agenda bill for the bid award as well as to authorize the administration to spend up to the 10% contingency. He acknowledged that authority was implied but could have been stated more expressly.

Councilmember Plunkett asked if the City Council was adequately notified that the amount was moving above \$100,000. Mr. Taraday answered no; the May 5, 2009 agenda bill preceded any of the 10 change orders. Even if the agenda bill is read that the Council expressly authorized the 10% contingency, that only covers the first 5 change orders. Change Orders 6-10, even with the contingency, should have come to the City Council for approval.

Councilmember Plunkett expressed concern with the length of time that elapsed between contract award and when the Council was informed of the significant number and amounts of the change orders. Mayor Cooper explained this item was included in the City Attorney's regular report to the Council on items of potential litigation in an Executive Session held in July 2010. The Council had a more complete briefing during an Executive Session on March 2011.

Councilmember Plunkett referred to July 6, 2010 in the chronology that states Council briefed on potential litigation per OMW's annual report to Auditor, potential claim estimated at \$500,000. Mr. Taraday explained he was not the City Attorney at that time and was uncertain the purpose of that Executive Session or the extent of the discussion. He agreed it was not appropriate to keep the City Council in the dark about the change orders for as long as had occurred.

Councilmember Petso commented she started on Council on July 7, 2010. She asked if there were two approximately \$700,000 amounts. Mr. Williams answered \$725,802 represents the total of the 10 change orders executed to date on the project. The \$701,964 figure is the request for equitable adjustment from the contractor that still needs to be processed.

Councilmember Petso asked when the Council was first advised of the \$725,000 in change orders. Mr. Williams recalled raising that issue during preliminary budget discussions in August 2010. He arrived the last day of July 2010 and as soon as Mayor Cooper was available, he was briefed on the issue. A presentation was then made to the Council in August. Councilmember Petso commented the Quarterly Project Report for Public Works was instituted shortly thereafter to improve communications.

Councilmember Petso suggested development of a policy be discussed in committee as soon as possible. She noted the payments to the contractor are not labeled in the vouchers as Haines Wharf Park, they are labeled something like Payment #13 on project EW-86.B5. As part of the effort to improve communications, she requested Mr. Williams work with Mr. Tarte regarding identification of payments. Mr. Williams responded he was happy to talk with Mr. Tarte but as policy makers, the Council should not be required to mine weekly payments; staff needs to come to the Council in advance.

Mayor Cooper recalled it was the August budget workshop when Mr. Williams may have mentioned concerns with this project. At the Council's surprise, an update to the Council was scheduled soon after. This project was then the subject of a controversial budget amendment that was presented to the Council and not adopted until October, largely due to confusion in communications and the way it was woven into other REET expenditures.

Councilmember Wilson clarified Edmonds is a code city. State law clearly delegates all contracting authority to the Council except for when the Council delegates that to the executive. Mr. Taraday agreed. Councilmember Wilson observed Edmonds' purchasing policy states the Mayor may sign contracts without Council review for contracts up to \$100,000. Mr. Taraday agreed, advising that is clearly the case for Public Works projects. It was his belief that the Mayor's authority was \$100,000 for all contracts but he did not review the entire purchasing policy.

Councilmember Wilson observed it was Mr. Taraday's interpretation that once contracts have exceeded \$100,000, any change order must come back to the Council. Mr. Taraday responded that was correct according to his reading of the current policy. Councilmember Wilson asked the difference between not following the law and breaking the law. Mr. Taraday answered that was a broad question and he was uncertain how to answer. These change orders in his opinion were not processed the way they should have been under State and City law. He was unable to comment on the ramifications. Councilmember Wilson commented the Council should not be the arbiter of what is legal or not; therefore Mr. Taraday's opinion held great weight for him.

Councilmember Bernheim posed the following questions/observations, advising he did not expect answers now but would like a response within the next couple weeks:

1. *Has the State Auditor evaluated the change orders and the process used to implement them?* He commented the Auditor is often referred to as the "great decider" and if he provides his stamp of approval, the matter is acceptable and award winning. He recalled a minor issue where the Senior Center had not paid the City the nominal rent required by the Senior Center contract which was never caught by the Auditor.
2. *What was the Mayor's authority to sign the 2 change orders for \$131,000 and \$245,000?* His understanding was that there was no legal authority for the Mayor to sign those two change orders.
3. *Did the payments of \$131,000 and \$245,000 appear in the list of vouchers?* He recalled asking the Finance Director to sort the vouchers by amount rather than alphabetically and was told that was not possible.
4. *He requested a copy of the July 10, 2010 Executive Session minutes where the disclosure was made and any documents that were distributed.*
5. *On pages 14-15 of the August 24, 2010 Council minutes Councilmember Petso asked Finance Director Hines to explain in REET 125 how \$1.3 million has been spent when only \$1.1 million was appropriated. She inquired how those funds were spent and why it was not presented to the Council. Mr. Hines explained these were costs from a parks construction project that was originally to have occurred in 2009. The expenditure did not occur in 2009 and was moved into 2010. This issue has been brought to the Parks & Recreation Director's attention. An amendment will be made in the next mid-year amendment. He offered to forward the Council an email describing the project. Councilmember Bernheim commented that was not a forthcoming response. He has searched all the Council minutes and cannot find Haines Wharf mentioned. He apologized if anything related to this project occurred when he served as the Interim Mayor, from July 1, 2010 to when Mayor Cooper took office. No one ever mentioned this project to him during that time and he did not recall signing anything.*

Councilmember Bernheim commented at some point it would be interesting to discuss whether it would have made any difference if there was any alternative to approving the change orders. He was concerned with the Mayor signing change orders without informing the Council.

Mayor Cooper relayed it was his understanding the State Auditor does not sample every project during every audit unless they are specifically asked. They often randomly review projects and it is unknown whether the Auditor reviewed this project. If they did not, he will ask them tomorrow to return and

specifically audit this project. Mayor Cooper advised Mr. Taraday, the City Clerk and he will provide responses to Councilmember Bernheim's questions.

Councilmember Fraley-Monillas commented she was speechless. She believes this will be looked at in a thorough manner. She looked forward to determining how to proceed in the future and appreciated Mr. Williams' input regarding a policy to avoid this in the future. She wondered if the Council would have stopped the project if they knew the overruns were this high; remarking the Council should have been given the opportunity to make that decision.

Councilmember Wilson commented the Auditor is not the appropriate arbiter of whether something is legal or illegal. Before the next Council meeting he suggested a definitive answer be provided by someone outside the City, whether that was an investigation by the Office of the Attorney General or the King County Prosecuting Attorney's Office or some other entity. He summarized it was not appropriate for the Council or Mayor to pass judgment regarding what was legal or illegal.

Councilmember Plunkett suggested scheduling an Executive Session with regard to what is legal and illegal, whether to pursue an investigation, etc. Mr. Taraday answered if the Council was contemplating whether the City has a cause of action that would be appropriately discussed in Executive Session as would be the defense regarding the request for equitable adjustment. Councilmember Plunkett commented Mr. Williams, Mr. Taraday and Mayor Cooper made every effort to make the information public as soon as they received it. The Council now needs to discuss how to proceed in Executive Session.

Council President Peterson scheduled an Executive Session on September 6, 2011 at 6:00 p.m.

Mayor Cooper advised staff will answer the questions asked by the Council and schedule review of a purchasing policy on a future agenda.

(Councilmember Wilson did not participate in the following items.)

7. POTENTIAL AMENDMENTS TO DOWNTOWN BD ZONES.

Planning Manager Rob Chave advised the Community Services/Development Service Committee discussed this at their recent meeting and forwarded three of the Planning Board recommendations to the Council for further consideration. Development agreements are not part of this agenda item and will be scheduled for a future Council work session.

Council President Peterson clarified tonight's discussion did not include development agreements. The City Attorney will review the issue of development agreements and make further recommendations. Mr. Chave advised the City Attorney will provide background on development agreements at a future work session. Council President Peterson advised he has been working with Mr. Taraday to schedule a work session on land use issues.

Councilmember Bernheim provided a PowerPoint presentation. He expressed support for the 45-foot depth for the storefronts and not allowing offices on the ground floor in the retail core. He did not support removing the step backs in the BD zone, at least at this point; and did not support allowing buildings as tall as 35 feet along the main retail corridors, Fifth Avenue and Main Street, noting he had seen no research or evidence proving these are good ideas. He provided photographs supporting his research that step backs are highly desirable and are necessary to preserve human scale, noting step backs are required in Kirkland and Friday Harbor. As support for his opposition to 35-foot buildings, he provided photographs of 1-2 story buildings along main shopping streets in Kirkland and Edmonds. He provided several photographs of buildings he liked.

Councilmember Bernheim said he would not approve an increase in height limits on the main retail shopping streets just to keep a post office or build a boutique hotel. He envisioned the sky, the air above, the view, the pedestrian scale, trees taller than buildings as the City's "seed corn," the City's heritage and the tourism golden egg and he would not sell it for the promise that residents could "save a buck on property taxes." He suggested the following ideas be considered before approving a permanent height increase:

- Limit the width of buildings on the street front (to break up buildings into smaller pieces)
- Measure height from the main street instead of the center of the lot (so the height of the building slopes with the street)
- Develop the alleys (to provide more storefront)
- Limit the volume of the building to, e.g., 250% of the lot size (to give builder flexibility, but control maximum building mass)
- Underground utility wires
- Replace some on-street parking with a pedestrian pathway

Councilmember Bernheim proposed the following:

1. Anywhere downtown, amend the Code to allow an extra 3 feet for solar panels (the City already allows unlimited extra height for church steeples, 3 feet for elevator penthouses and chimneys, 18" for vent pipes, and 30" for stand pipes. ECDC 21.40.030).
2. Maximum building height for lots in any BD zone should be between two and four stories
 - Stories above the second story should be set back 45 feet along Main Street and Fifth Avenue to match the recommended depth of the retail space.
 - All development in the BD zone above two stories requires ADB review after new guidelines are adopted.
 - Two stories along the main retail streets will protect human scale and pedestrian orientation.
 - Four stories everywhere in the BD zone with ADB approval except the valuable shopping streets.
3. Eliminate three-hour free parking
 - In BD-1 zone, 2 hours free, pay for anything over that, up to 4 hours.
 - In other downtown zones, to create commuter, transit-oriented parking, 2 hours free, pay for anything over that, up to 14 hours.

Councilmember Bernheim suggested holding a town hall meeting where residents can be heard, and can work together to find common ground. He summarized economic development does not require changing the zoning code to allow taller buildings. Building heights can be raised but only if residents support that change in the community character. To promote economic development, zoning codes should be predictable and fair; there are many more solutions than raising building heights along main historical town streets.

Councilmember Petso commented earlier this week she sent an email to some Councilmembers, Mr. Chave, Mr. Taraday, Mr. Clifton and Mayor Cooper conveying her analysis that the building height limit was 25 feet but the proposed amendments to Section C2 and C3 would change the height limit to 30 feet. Previously those sections allowed 30 feet with step backs for pitched roofs and the amendments appeared to allow 30 foot boxes. Mr. Chave answered 25 feet is the basic height limit in the BD zones and there are different ways to achieve 30 feet. For example in the BD1 zone, a 30-foot height can be achieved if the building has a 15-foot ground floor. In other BD zones a 30-foot height can be achieved with a step back and a 12-foot ground floor. The Planning Board recommendation eliminates the step back requirement but retains the 12-foot ground floor requirement.

COUNCILMEMBER BERNHEIM MOVED, SECONDED BY COUNCILMEMBER FRALEY-MONILLAS, TO ADOPT THE PLANNING BOARD RECOMMENDATION TO CHANGE THE 60-FOOT AND 30-FOOT DEPTH TO A 45 FOOT COMMERCIAL DEPTH IN THE BD ZONES. MOTION CARRIED UNANIMOUSLY.

COUNCILMEMBER BERNHEIM MOVED, SECONDED BY COUNCIL PRESIDENT PETERSON, TO ADOPT THE PLANNING BOARD RECOMMENDATION TO EXCLUDE OFFICE USES FROM THE STORE FRONTS IN THE BD1 ZONE.

Councilmember Plunkett relayed he would be unable to support this amendment, envisioning a property owner may not have a tenant without an office use. He preferred to allow the marketplace to determine whether an office such as a tax accountant locates in the BD1 zone based on their success.

Councilmember Fraley-Monillas was also concerned that a space would remain vacant if a building owner was unable to rent to a retail use. She did not support the motion.

Council President Peterson commented service businesses currently located in the BD1 zone would be grandfathered. He pointed out this is not radical thinking; there are retail districts around the world and they exist for a reason. As a retailer he understood that although some service businesses attract customers, a consistent retail base is needed in the retail core. Shoppers in a retail area encountering spaces where curtains are drawn because it is a dental office will often turn around and proceed no further. He emphasized this is proposed for a very limited area of downtown, it is the right thing to do for the greater good of the retail core and it is endorsed by business leaders in the community.

Councilmember Fraley-Monillas commented a dental office cannot be visible to the street due to HIPPA requirements. She envisioned uses such as interior designers, insurance, etc. who bring money to Edmonds. She was not convinced that Edmonds should not allow those businesses as prominently as retail stores. She favored a mixture of businesses in the City. She observed grandfathering meant that existing businesses could remain and asked whether the grandfather clause would allow another office after an office tenant moved out. Mr. Chave answered a similar use could locate in the space within 6 months. He relayed there have been instances where the building owners do not always seek a retail use first and rent to whomever shows up which over time can erode the retail core. The Planning Board's recommendation was only for the BD1, a very small area and only in the first 45 feet of the ground floor. In the BD1 zone offices can locate above or behind a retail uses.

UPON ROLL CALL, MOTION FAILED (2-3); COUNCILMEMBER BERNHEIM AND COUNCIL PRESIDENT PETERSON VOTING YES; AND COUNCILMEMBERS PETSO, FRALEY-MONILLAS AND PLUNKETT VOTING NO.

8. COUNCIL REPORTS ON OUTSIDE COMMITTEE/BOARD MEETINGS

Councilmember Petso reported on the Public Facilities District Board meeting; these are generally good and exciting times for the PFD. Although items are not usually presented to the Council without review by a Council committee, Councilmember Petso explained the PFD is working on term limits for their boards and they plan to present their proposal to Council on a Consent Agenda.

Councilmember Petso reported the Regional Fire Authority (RFA) Finance Committee is nearly to the point where policy decisions can begin to be made on individual items, from staffing levels to hydrant maintenance, within the RFA. As it will be difficult to get Council enough information in advance to seek policy direction, she planned to tentatively agree to policies to get a preliminary model in place. She will avoid agreeing on more than a tentative basis until there is an opportunity for Council discussion.

Councilmember Bernheim reported he was invited by the Muslim Association of Puget Sound to their beautiful new mosque in Redmond to break the fast.

9. MAYOR'S COMMENTS

Mayor Cooper reported the RFA Planning Committee meets the first Wednesday of the month. The next meeting is September 7 at the Ballinger Golf Course meeting room.

Mayor Cooper reported any decisions made in RFA subcommittees by Councilmember Petso, Wilson or himself are recommendations to the full Planning Committee and any actions of the Planning Committee are subject to passage by resolution by each individual jurisdiction. He anticipated in late 2011 or early 2012 there will be a couple large agenda items for Council discussion related to the RFA.

Mayor Cooper reported the City received 18 applications for the Finance Director position and 4 were interviewed. He was prepared to bring two highly qualified candidates to the Council for interviews but one candidate withdrew yesterday. A decision was made to interview another applicant. The City's code states the Council shall interview the top three candidates for the position prior to confirmation of the Mayor's final selection. In the last two Director appointments, Parks and Public Works, the Mayor only presented two applicants to the Council for interview prior to the Mayor's appointment. In the absence of two or three qualified candidates, he asked the Council to consider whether they wanted to interview the one candidate who was his top choice even before the other candidate withdrew and consider confirming his appointment without interviewing multiple candidates. The reason he asked the Council to consider that option is there are 2-3 other cities interviewing for Finance Directors including Shoreline and he did not want to delay action to find other applicants when he did not intend to appoint them.

10. COUNCIL COMMENTS

Councilmember Fraley-Monillas reported she missed the Snohomish County Cities dinner to attend the Edmonds-Mountlake Terrace annual softball game which Mountlake Terrace won.

Councilmember Fraley-Monillas thanked Student Representative Gibson for his service. He is smart with great questions and comments and his attendance has been better than any Councilmember. She summarized he has been an asset to the Council and she wished him the best of luck in the future.

Councilmember Bernheim thanked Student Representative Gibson for his service. He reminded the Interurban Trail is progressing and scheduled for completion in the next few months.

Councilmember Plunkett congratulated Student Representative Gibson and wished him good luck.

Student Representative Gibson commented serving as Student Representative had been a lot of fun and he was glad he was able to serve.

Council President Peterson announced next week is the fifth Tuesday of the month and the Council will not meet. He congratulated Student Representative Gibson and wished him good luck at Everett Community College.

11. ADJOURN

With no further business, the Council meeting was adjourned at 10:05 p.m.