suggested the use of performance-oriented zoning rather than prescriptive or proscriptive zoning. Some jurisdictions have replaced their conventional zoning ordinance with one that uses measures of performance. Design review is an outgrowth of this direction, as it is an approach that rewards both creativity and quality.

Some local codes make use of "overlays." This involves a two-tiered regulatory approach. Basic standards are set forth for the underlying zoning. Then, for a certain geographic area, an overlay district is established. For the overlay area, a host of subjects are addressed to ensure things such as pedestrian connections, building orientation, roof form, and architectural continuity. Overlay districts can also trigger a design review process. They highlight a particular area as being of special concern to the community and set forth a process to ensure that particular attention is given to new development or renovation. Design standards can be tailored to the specific context.

LEGAL FOUNDATIONS

Over the past several decades, there have been a number of judicial decisions regarding issues associated with design. Cases concerning aesthetic control, historic designation and review, sign codes, facade controls, and so forth have appeared, sometimes with widely varying results or results that have been unclear.

Aesthetics and Land Use Controls (PAS Report No. 399) discussed case law regarding aesthetics at the state and

federal level. Here, we will summarize some of the cases that bear directly upon the subject of design review.

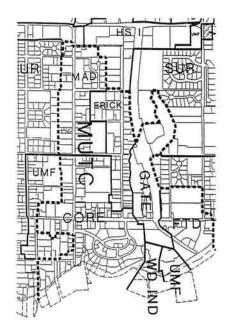
In one of the earliest cases concerning design review authority, the Florida Supreme Court, in *City of West Palm Beach v. State* (30 So. 2d 491 (Fla. 1947)), found that a zoning ordinance which required buildings to be substantially equal in height and appearance to be void, given that the ordinance did not contain adequate standards to make such a determination.

In a case a decade later in New Jersey, *Hankins v. Rockleigh* (55 N.J. Super. 132. 150 A. 2d 63 (1959)), the court struck down a requirement that specified buildings be "early American" in style, since such a wide range of styles could be associated with this general term. Further, the court did not find a consistent character within the geographic vicinity of the subject site to make such a limitation reasonable.

Another decade later, in *Pacesetter Homes, Inc. v. Village of Olympia* (104 III. App.2d 218, 244 N.E. 2d 369 (1968)), the Illinois court struck down an ordinance that gave excessive discretion to an architectural advisory committee in a city that had been attempting to prevent repetitive designs in single-family areas.

In these early cases, it is evident that courts had little tolerance for efforts by local governments to regulate design, particularly if criteria for making decisions had not been established.

In 1978, the New Jersey court, in *Morristown Road Associates v. Borough of Bernardsville* (163 N.J. Super. 58, 394 A.



Overlay districts can trigger design review. They can be used to highlight areas of special concern to the community so that new development or renovation in those areas is given special attention.

City of Bainbridge Island, Washington

MUTC Mixed Use Town Center District

GATE Gateway Overlay District

CORE Central Core Overlay District

ERICK Ericksen Avenue Overlay District

MAD Madison Avenue Overlay District

FTD Ferry Terminal Overlay District

2d 157 (1978)), handed down a decision that is important to consider today when communities adopt and administer a design review process. By 1978, many communities were becoming aware of the use of design controls and review procedures, which were given a boost in the growing support for historic districts and landmark designations.

However, the state of the art was in such a crude form as to generate a litigious reaction. The Borough of Bernardsville had, for example, adopted an objective of "fostering good quality design and attractive appearance" and required all proposed development to be reviewed by a citizens advisory committee to ensure that the objective was achieved. Some

proposed development to be reviewed by a citizens advisor committee to ensure that the objective was achieved. Some very general review criteria were adopted. However, the

Excerpts from Washington State Court of Appeals, *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744. Finding the City's Code "Unconstitutionally Vague"

Looking first at the face of the building design sections..., we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves, and parapets should be of "appropriate proportions," its colors should be "harmonious" and seldom "bright" or brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting."... If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive...transition" to adjoining properties....

As is stated in the brief of amicus curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code.... Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earthtones or pastels located with the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "[h]armony in texture, lines, and masses" is certainly encouraged....

In attempting to interpret and apply this code, the commissioners charged with that task were left with only

their own individual, subjective "feeling" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting." The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done with flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code....

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face....

As well illustrated by the appendices to the brief of amicus curiae, aesthetic considerations are not impossible to define in a code or ordinance....

Clearly,...aesthetic standards are an appropriate component of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street." It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board such as the Issaquah Development Commission to create standards on an ad hoc basis, during the design review process.

court found that the standards did not provide adequate guidance. The Borough's ordinance used terms such as "harmonious," "displeasing," and "appropriate," and none of these were defined. The court stated:

The basic criterion for design review under the ordinance is harmony with existing structures and terrain. This standard does not adequately circumscribe the process of administrative decision nor does it provide an understandable criterion for judicial review. It vests the design review committee, as well as the planning board, with too broad a discretion, and permits determinations based upon whim, caprice or subjective considerations.

Court of Appeals of Washington, Division 1.

M. Bruce ANDERSON; Gary D. LaChance; and M. Bruce Anderson, Inc., a Washington corporation, Appellants,

٧.

CITY OF ISSAQUAH, a Washington municipal corporation, Respondent. No. 29148-3-I. May 24, 1993.

Applicant for land use certification brought action challenging denial of application, and city interposed affirmative defenses. The Superior Court, King County, Norman Quinn, J., struck affirmative defenses and dismissed complaint. On cross appeals, the Court of Appeals,

Kennedyhttp://web2.westlaw.com/Find/Default.wl?DB=WLD%2DPEOPLECITE&DocName =0312984001&FindType=h&AP=&mlac=FY&fn=_top&rs=WLW6.06&mt=Westlaw&vr=2.0 &sv=Split" \t "_top, J., held that: (1) applicant's failure to promptly serve Attorney General was not fatal to claim in light of Attorney General's pretrial waiver of statutory opportunity to intervene, and (2) building design provisions of municipal code were unconstitutionally vague both on their face and as applied. Reversed and ordered accordingly.

West Headnotes



≈414 Zoning and Planning

414X Judicial Review or Relief

414X(B) Proceedings

414k584 Time for Proceedings

414k586 k. Commencement of Limitation Period. Most Cited Cases

City waived right to argue that date of "decision" denying application for land use certification for timely appeal purposes was date on which city council verbally adopted its action, rather than date on which final findings and conclusions were signed, by sending applicant notice stating that applicant had 14 days from date of that notice to file appeal.



414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k582 Parties

€ 414k582.1 k. In General. Most Cited Cases

City's claim that corporation should have been named as party plaintiff in action challenging denial of application for land use certification at time before corporation purchased property at issue was wholly frivolous; corporation did not become indispensable party until it purchased property, by which time it had been joined. \underline{CR} $\underline{15(c)}$.



414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings

414k582 Parties

<u> 414k582.1</u> k. In General. <u>Most Cited Cases</u>

Property owner in action challenging denial of application for land use certification is necessary and indispensable party. CR 15(c).



414 Zoning and Planning

414X Judicial Review or Relief

<u>414X(B)</u> Proceedings

414k588 k. Process or Notice and Appearance. Most Cited Cases

Land use certification applicant's failure to promptly serve Attorney General in action challenging denial of application on ground that building design requirements in city municipal code were unconstitutionally vague was not fatal to claim in light of Attorney General's pretrial waiver of statutory opportunity to intervene. West's RCWA 7.24.110.



≈361 Statutes

361I Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

\$\infty\$ 361k47 k. Certainty and Definiteness. Most Cited Cases

In field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within industry, or which employ words with well-settled common-law meaning, generally will be sustained against charge of unconstitutional vagueness.



361I Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness. Most Cited Cases

Test for vagueness does not require statute to meet impossible standards of specificity.



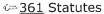
414 Zoning and Planning

€ 414II(A) In General

414k28 k. Certainty and Definiteness. Most Cited Cases

In area of land use, court looks not only at face of ordinance challenged as unconstitutionally vague but also at its application to person who has sought to comply with ordinance and/or who has alleged to have failed to comply. <u>U.S.C.A. Const.Amend. 14</u>.





361I Enactment, Requisites, and Validity in General

361k47 k. Certainty and Definiteness. Most Cited Cases

Purpose of void for vagueness doctrine is to limit arbitrary and discretionary enforcements of law.



414II Validity of Zoning Regulations

€ 414II(A) In General

414k28 k. Certainty and Definiteness. Most Cited Cases

Building design sections of city's municipal code did not give effective or meaningful guidance to land use certification applicants, design professionals or public officials responsible for enforcing code, and were unconstitutionally vague on their face; there was nothing in code from which applicant could determine whether project would be seen as "interesting" versus "monotonous" and as "harmonious" with valley and mountains, nor was it clear what else project was supposed to be harmonious with, though "[h]armony in texture, lines, and masses" was encouraged. U.S.C.A. Const.Amend. 14.



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€ 414 Zoning and Planning

<u>₹ 414II</u> Validity of Zoning Regulations

<u>414II(A)</u> In General

414k28 k. Certainty and Definiteness. Most Cited Cases

Building design sections of city municipal code were unconstitutionally vague as applied to applicant for land use certification; commissioners of city's development commission, having no objective guidelines to follow, necessarily had to rely on their own subjective "feelings" as to "statement" city was trying to make on its "signature street," and commissioners' individual concepts were as vague and undefined as those written in code. <u>U.S.C.A. Const.Amend. 14</u>.



414 Zoning and Planning

414II Validity of Zoning Regulations

™ 414II(A) In General

414k28 k. Certainty and Definiteness. Most Cited Cases

City's comprehensive plan and its subarea amendment were insufficient to fill in constitutional gap in unconstitutionally vague building design sections of municipal ordinance; comprehensive plan contained only very general statements of policy, criteria and goals. <u>U.S.C.A. Const.Amend. 14</u>.



[12] KeyCite Notes

414 Zoning and Planning

414II Validity of Zoning Regulations

414II(A) In General

414k28 k. Certainty and Definiteness. Most Cited Cases

Procedural safeguards contained in city municipal code providing for appeal from denial of land use certification to city council and to courts did not cure constitutional defects of vague building design sections; code provided no ascertainable criteria by which court could review decision at issue, regardless of whether arbitrary and capricious or clearly erroneous standard was applicable. <u>U.S.C.A. Const.Amend. 14</u>.



№ 414 Zoning and Planning

414II Validity of Zoning Regulations

414II(A) In General

414k28 k. Certainty and Definiteness. Most Cited Cases

Building design review ordinance must contain workable guidelines in order to satisfy constitutional vagueness concerns; discretion which is too broad permits determinations based upon whim, caprice or subjective considerations. <u>U.S.C.A. Const.Amend. 14</u>.



[14] KeyCite Notes

414 Zoning and Planning

<u>414II</u> Validity of Zoning Regulations

◆ 414II(A) In General

414k36 k. Aesthetic Considerations. Most Cited Cases

Regardless of whether community can exert control over building design issues based solely on accepted community aesthetic values, aesthetic standards are at least appropriate component of land use governance.

[15] KeyCite Notes

<u>414</u> Zoning and Planning

<u>414II</u> Validity of Zoning Regulations

<u>414II(A)</u> In General

414k28 k. Certainty and Definiteness. Most Cited Cases

<u>414</u> Zoning and Planning <u>KeyCite Notes</u>

<u>414II</u> Validity of Zoning Regulations

<u>414II(A)</u> In General

414k36 k. Aesthetic Considerations. Most Cited Cases

Whenever community adopts aesthetic standards as component of land use governance, they can and must be drafted to give clear guidance to all parties concerned; land use certification applicants must have understandable statement of what is expected from new construction, and design professionals need to known in advance what standards will be acceptable in given community. <u>U.S.C.A. Const.Amend. 14</u>.

**746 *65 Rebekah Ross and Dennis D.

Reynoldshttp://web2.westlaw.com/Find/Default.wl?DB=WLD%2DPEOPLECITE&DocName =0198104201&FindType=h&AP=&mlac=FY&fn=_top&rs=WLW6.06&mt=Westlaw&vr=2.0 &sv=Split" \t "_top, Williams, Kastner & Gibbs, Seattle, for appellants. Wayne D.

Tanakahttp://web2.westlaw.com/Find/Default.wl?DB=WLD%2DPEOPLECITE&DocName=0 204355701&FindType=h&AP=&mlac=FY&fn=_top&rs=WLW6.06&mt=Westlaw&vr=2.0&s v=Split" \t "_top, Ogden Murphy Wallace, Seattle, for respondent. Linda M.

 $\label{localize} $$\frac{Youngs}{t} : //web2.westlaw.com/Find/Default.wl?DB=WLD%2DPEOPLECITE&DocName=0 $$153908901\&FindType=h\&AP=\&mlac=FY\&fn=_top\&rs=WLW6.06\&mt=Westlaw\&vr=2.0\&s v=Split" \ t "_top, on behalf of American Institute of Architects, amicus curiae.$

Appellants M. Bruce Anderson, Gary D. LaChance, and M. Bruce Anderson, Inc. (hereinafter referred to as "Anderson"), challenge the denial of their application for a land use certification, arguing, *inter alia*, that the building *66 design requirements contained in Issaquah Municipal Code (IMC) 16.16.060 are unconstitutionally vague. The superior court rejected this constitutional challenge. We reverse and direct that Anderson's land use certification be issued. [FN1]

<u>FN1.</u> Anderson raises additional issues which we need not address in view of our determination that the land use certification was denied based on an unconstitutionally vague ordinance which was applied in an *ad hoc* manner.

The City of Issaquah cross-appeals, contending the trial court erroneously granted summary dismissal of its affirmative defenses. Anderson contends the cross appeal is wholly frivolous and seeks an award of reasonable attorney fees incurred in responding thereto. We affirm the trial court's summary dismissal of the affirmative defenses. We resolve our considerable doubts with respect to sanctions in favor of the City of Issaquah and deny Anderson's request for attorney fees.

FACTS

Anderson owns property located at 145 N.W. Gilman Boulevard in the City of Issaquah (City). In 1988, Anderson applied to the City for a land use certification to develop the property. The property is zoned for general commercial use. Anderson desired to build a 6800 square foot commercial building for several retail tenants.

After obtaining architectural plans, Anderson submitted the project to various City departments for the necessary approvals. The process went smoothly until the approval of the Issaquah Development Commission (Development Commission) was sought. This commission was created to administer and enforce the City's land use regulations. It has the authority to approve or deny applications for land use certification.

Chapter 16.16.060 of the IMC enumerates various building design objectives which the Development Commission is required to administer and enforce. Insofar as is relevant to this appeal, the Development Commission is to be guided by the following criteria:

*67 IMC 16.16.060(B). Relationship of Building and Site to Adjoining Area.

- 1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
- 2. Harmony in texture, lines, and masses shall be encouraged.

IMC 16.16.060(D). Building Design.

- 1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.
- 2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.
- 3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.
- 4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings. **747 5. Exterior lighting shall be part of the architectural concept. Fixtures, standards
- ****747** 5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.
- 6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

As initially designed, Anderson's proposed structure was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a "modern" style with an unbroken "warehouse" appearance in the rear, and large retail style windows in the front. The City moved a Victorian era residence, the "Alexander House," onto the neighboring property to serve as a visitors' center. Across the street from the Anderson site is a gasoline station that looks like a gasoline station. Located nearby and within view from the proposed building site are two more gasoline stations, the First Mutual Bank Building built in the "Issaquah territorial style," an *68 Elk's hall which is described in the record by the Mayor of Issaquah as a "box building", an auto repair shop, and a veterinary clinic with a cyclone fenced dog run. The area is described in the record as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman [Boulevard]."

The Development Commission reviewed Anderson's application for the first time at a public hearing on December 21, 1988. Commissioner Nash commented that "the facade did not fit with the concept of the surrounding area." Commissioner McGinnis agreed. Commissioner Nash expressed concern about the building color and stated that he did not think the building was compatible with the image of Issaquah. Commissioner Larson said that he would like to see more depth to the building facade. Commissioner Nash said

there should be some interest created along the blank back wall. Commissioner Garrison suggested that the rear facade needed to be redesigned. <a>[FN2]

<u>FN2.</u> The minutes of this and the other commission hearings for this project reflect that parking, signs, building security, and landscaping were also discussed. We include here only those comments contained in the various minutes which relate to building design.

At the conclusion of the meeting, the Development Commission voted to continue the hearing to give Anderson an opportunity to modify the building design. On January 18, 1989, Anderson came back before the Development Commission with modified plans which included changing the roofing from metal to tile, changing the color of the structure from off-white to "Cape Cod" gray with "Tahoe" blue trim, and adding brick to the front facade. During the ensuing discussion among the commissioners, Commissioner Larson stated that the revisions to the front facade had not satisfied his concerns from the last meeting. In response to Anderson's request for more specific design guidelines, Commissioner McGinnis stated that the Development Commission had "been giving direction; it is the applicant's responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes." Commissioner Larson then suggested *69 that "[t]he facade can be broken up with sculptures, benches, fountains, etc." Commissioner Nash suggested that Anderson "drive up and down Gilman and look at both good and bad examples of what has been done with flat facades." As the discussion continued, Commissioner Larson stated that Anderson "should present a [plan] that achieves what the Commission is trying to achieve through its comments/suggestions at these meetings" and stated that "architectural screens, fountains, paving of brick, wood or other similar method[s] of screening in lieu of vegetative landscaping are examples of design suggestions that can be used to break up the front facade." Commissioner Davis objected to the front facade, stating that he **748 could not see putting an expanse of glass facing Gilman Boulevard. "The building is not compatible with Gilman." Commissioner O'Shea agreed. Commissioner Nash stated that "the application needs major changes to be acceptable." Commissioner O'Shea agreed. Commissioner Nash stated that "this facade does not create the same feeling as the building/environment around this site."

Commissioner Nash continued, stating that he "personally like[d] the introduction of brick and the use of tiles rather than metal on the roof." Commissioner Larson stated that he would like to see a review of the blue to be used: "Tahoe blue may be too dark." Commissioner Steinwachs agreed. Commissioner Larson noted that "the front of the building could be modulated [to] have other design techniques employed to make the front facade more interesting."

With this, the Development Commission voted to continue the discussion to a future hearing.

On February 15, 1989, Anderson came back before the Development Commission. In the meantime, Anderson's architects had added a 5-foot overhang and a 7-foot accent overhang to the plans for the front of the building. More brick had been added to the front of the building. Wood trim and accent colors had been added to the back of the building and trees were added to the landscaping to further break up the rear facade.

*70 Anderson explained the plans still called for large, floor to ceiling windows as this was to be a retail premises: "[A] glass front is necessary to rent the space ..."

Commissioner Steinwachs stated that he had driven Gilman Boulevard and taken notes. The following verbatim statements by Steinwachs was placed into the minutes: "My General Observation From Driving Up and Down Gilman Boulevard".

I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay

windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design. Commissioner Nash agreed stating, "[T]here is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give this same feeling." Commissioner Steinwachs wondered if the applicant had any option but to start "from scratch". Anderson responded that he would be willing to change from stucco to wood facing but that, after working on the project for 9 months and experiencing total frustration, he was not willing to make additional design changes.

At that point, the Development Commission denied Anderson's application, giving four reasons:

- 1. After four [sic] lengthy review meetings of the Development Commission, the applicant has not been sufficiently responsive to concerns expressed by the Commission to warrant approval or an additional continuance of the review.
- 2. The primary concerns expressed relate to the building architecture as it relates to Gilman Boulevard in general, and the immediate neighborhood in particular.
- 3. The Development Commission is charged with protecting, preserving and enhancing the aesthetic values that have *71 established the desirable quality and unique character of Issaquah, reference IMC 16.16.010C. [FN[3]]

FN3. IMC 16.16.010(C) provides that one of the purposes of the code is "[t]o protect, preserve and enhance the social, cultural, economic, environmental and aesthetic values that have established the desirable quality and unique character of Issaquah[.]"

**749 4. We see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. On Gilman Boulevard we see heavy use of brick, wood and tile. We see minimal use of stucco. We see various methods used to provide both horizontal and vertical modulation, including gables, breaks in rooflines, bay windows, recesses and protrusions in front face. We see long, sloping, conspicuous roofs with large overhangs. We see no windows that extend to ground level. We see brick and wood panels at intervals between windows. We see earthtone colors avoiding extreme contrast. Anderson, who by this time had an estimated \$250,000 into the project, timely appealed the adverse ruling to the Issaquah City Council (City Council). After a lengthy hearing and much debate, the City Council decided to affirm the Development Commission's decision by a vote of 4 to 3.

The City Council considered formal written findings and conclusions on April 3, 1989. The City Council verbally adopted its action on that date but required that certain changes be made to the proposed findings and conclusions. Those changes were made and the final findings and conclusions were signed on April 5, 1989 (backdated to April 3). On April 5, a notice of action was issued to Anderson, stating that he had 14 days *from the date of that notice* in which to file any appeal.

Thirteen days later, on April 18, 1989, Anderson filed a complaint in King County Superior Court. The lawsuit was initially brought in the names of M. Bruce Anderson and Gary D. LaChance. At this time, LaChance still owned the property. On June 19, 1989, LaChance sold the property to M. Bruce Anderson, Inc. The complaint was amended by stipulation to add the corporation as a party plaintiff, without *72 prejudice to the City's right to argue that the corporation had been an indispensable party before the sale closed. The Washington State Attorney General was not named as a defendant. On August 28, 1990, prior to trial, the attorney general was served. [FN4] The attorney general declined the opportunity to participate in the action and waived notice of any further proceedings.

 $\overline{\text{FN4.}}$ Anderson was/is challenging the constitutionality of an Issaquah city ordinance. $\overline{\text{RCW 7.24.110}}$ provides that when declaratory relief is sought that a municipal ordinance is unconstitutional, the attorney general shall be served and shall be entitled to be heard. The statute does not require that the attorney general be named as a party.

In responding to the action, the City interposed affirmative defenses, alleging that the complaint had been filed 1 day past the 14-day deadline established by IMC 1.32.040; and that Anderson had failed to name an indispensable party, the attorney general. Later, the City argued that M. Bruce Anderson, Inc., should have been joined initially. Prior to trial, these affirmative defenses were stricken, following the grant of Anderson's request for summary judgment thereon.

Following trial, the court dismissed Anderson's complaint, rejecting the same claims now raised in this appeal.

DISCUSSION

1. Cross Appeal.

We first address the issues raised in the cross appeal, as a ruling in favor of the City on those issues would obviate Anderson's appeal.

By bringing the cross appeal the City has come within a hair's breadth of incurring sanctions under RAP 18.9 (frivolous appeal). We exercise our discretion and deny Anderson's request for sanctions primarily because the City is technically correct that, under *Birch Bay Trailer Sales, Inc. v. Whatcom Cy.*, 65 Wash.App. 739, 829 P.2d 1109, review denied, 119 Wash.2d 1023, 838 P.2d 690 (1992) and *DiGiovanni v. Tukwila*, 54 Wash.App. 627, 774 P.2d 1244 (1989), review denied, 114 Wash.2d 1001, 788 P.2d 1077 (1990), the **750 date of the City's "decision" was April 3, 1989, rather than April 5, 1989, when the formal *73 written findings and conclusions were actually signed. [FN5] *But see North St. Ass'n v. Olympia*, 96 Wash.2d 359, 361, 369-70, 635 P.2d 721 (1981), disapproved on other grounds in *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wash.2d 325, 815 P.2d 781 (1991) (30-day period in which to file a petition for writ of review did not commence to run from date of oral decision but rather from date of official notice of decision).

<u>FN5.</u> IMC 1.32.040 requires that any appeal to the superior court be filed within 14 days of the City Council's "decision".

Although the issue here raised is not in and of itself frivolous, we hold that the City waived the right to argue this issue when, on April 5, 1989, it sent Anderson a notice stating that Anderson had 14 days from the date of *that notice* to file an appeal. [FN6] Therefore, we need not decide the issue and decline to do so.

<u>FN6.</u> The existence of this notice was not revealed to this court by the City. Anderson pointed it out in the reply brief responding to the cross appeal.

[2] The City's claim that M. Bruce Anderson, Inc. should have been named as a party plaintiff at a time before the corporation purchased the property here in issue is wholly frivolous. A property owner in an action such as this is a necessary and indispensable party, *Veradale Valley Citizens' Planning Comm. v. Board of Cy. Comm'rs of Spokane Cy.*, 22 Wash.App. 229, 232-33, 588 P.2d 750 (1978), but the Anderson *corporation* did not become the owner of this property until June 1989. [FN7] We hold that the corporation did not become an indispensable party until it purchased the property, by which time M. Bruce Anderson, Inc. had been joined as a party. *See CR* 15(c).

<u>FN7.</u> The City also failed to point out *this* relevant fact to this court. Anderson pointed it out in the reply brief. This court is not favorably impressed by the City's lack of candor.

Finally, the City argues that Anderson's failure to promptly serve the attorney general is fatal to the claim. RCW 7.24.110 does require that the attorney general be served, although no time limit is stated. In *74 Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. 6, 118 Wash.2d 1, 11-12, 820 P.2d 497 (1991), our Supreme Court affirmed the dismissal of a claim which challenged the facial constitutionality of a state statute because the attorney general had never been served. In Leonard v. Seattle, 81 Wash.2d 479, 503 P.2d 741 (1972), an assistant attorney general, although that office had never been served, appeared specially at trial and testified that the attorney general's office was (at that time) being served with more than 250 such cases a year and that, had the attorney general's office been served in that case, it would have waived any right to participate in the litigation. Leonard, 81 Wash.2d at 482-83, 503 P.2d 741. The Leonard court held that, although service upon the attorney general is jurisdictional in a general sense, such service is subject to waiver by the attorney general and had been waived in that case. Leonard, 81 Wash.2d at 482, 503 P.2d 741.

In Zimmer v. Seattle, 19 Wash.App. 864, 869-70, 578 P.2d 548 (1978), the attorney general was served, although it is not clear from the decision just when this was done. The attorney general's office waived the opportunity to participate. This court noted that "the attorney general is not obliged to appear" and he or she may waive the requirement of service. Zimmer, 19 Wash.App. at 869-70, 578 P.2d 548 (citing Leonard, 81 Wash.2d at 482, 503 P.2d 741).

We hold that the attorney general's pretrial waiver of the statutory opportunity to intervene is dispositive of this issue. *Leonard* clearly controls. If the attorney general may waive the total failure to serve, he or she most certainly can waive "late" service. [FN8]

 $\overline{\text{FN8.}}$ We do not hold that the service here was "late". The statute does not require that the attorney general be named as a party and no deadline for service is contained in $\overline{\text{RCW}}$ 7.24.110.

****751** Because " 'all doubts as to whether [an] appeal is frivolous should be resolved in favor of the appellant' ", <u>Millers Cas. Ins. Co. v. Briggs</u>, 100 Wash.2d 9, 15, 665 P.2d 887 (1983) (quoting <u>Streater v. White</u>, 26 Wash.App. 430, 435, 613 P.2d 187 (1980)), we resolve the close issue of whether the cross appeal is wholly frivolous in ***75** favor of the City. Accordingly, we deny Anderson's request for sanctions for a frivolous cross appeal. 2. Constitutionality of IMC 16.16.060 (Building Design Provisions).

[5] [6] [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. Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). See also State v. Reader's Digest Ass'n, Inc., 81 Wash.2d 259, 273, 501 P.2d 290 (1972) and Burien Bark Supply v. King Cy., 106 Wash.2d 868, 871, 725 P.2d 994 (1986). In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning generally will be sustained against a charge of vagueness. Reader's Digest Ass'n, 81 Wash.2d at 273-74, 501 P.2d 290. The vagueness test does not require a statute to meet impossible standards of specificity. Chicago, M., St. P. & P. R.R. v. Washington State Human Rights Comm'n, 87 Wash.2d 802, 805, 557 P.2d 307 (1976).

[7] [8] In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. <u>Burien Bark Supply</u>, 106 Wash.2d at 871, 725 P.2d 994; <u>Grant Cy. v. Bohne</u>, 89 Wash.2d 953, 955, 577 P.2d 138 (1978). The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law. <u>Burien Bark Supply</u>, 106 Wash.2d at 871, 725 P.2d 994.

Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; *76 its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive ... transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of amici curiae, [FN9] we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Brief of Amici Curiae, at 1. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earth tones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and **752 the mountains, a particular project is supposed to be harmonious with, although "[h]armony in texture, lines, and masses" is certainly encouraged. IMC 16.16.060(B)(2). [FN10]

<u>FN9.</u> The amici curiae are the Seattle Chapter of the American Institute of Architects, the Washington Council of the American Institute of Architects, and the Washington Chapter of the American Society of Landscape Architects.

<u>FN10.</u> Apparently a particular building need not be particularly compatible with the design of an adjacent building in that it can be "made compatible" by the use of "screens and site breaks". IMC 16.16.060(B)(1).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or *77 "interesting". The commissioners stated that the City was "making a statement" on its "signature street" [FN11] and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done with flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code. [FN12]

FN11. The term "signature street" is not defined in the ordinance here at issue.

<u>FN12.</u> Although Commissioner Steinwachs stated that he saw heavy use of brick, wood and tile, minimal use of stucco, many gables, bay windows, and long, sloping vertical roofs, it is clear from the record that also to be seen on Gilman Boulevard are a number of approved and completed projects that do not bear these characteristics. Examples include a Shuck's Auto Supply store at 607 N.W. Gilman Boulevard; a strip mall known as Town and County Square at 1135 Gilman Boulevard; a Mobil gasoline station located at 55 N.W. Gilman Boulevard and a Skipper's Restaurant located at the southeast corner of Front Street and Gilman Boulevard.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

[10] [11] As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. [FN13] See, *78 e.g., Morristown Road Assocs. v. Mayor & Common Council & Planning Bd., 163 N.J.Super. 58, 394 A.2d 157 (1978). The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.

<u>FN13.</u> We reject the City's argument that Issaquah's comprehensive plan and its I-90 subarea amendment when read in conjunction with IMC 16.16.060 fills in the constitutional gap. The comprehensive plan contains only very general statements of policy, criteria, and goals. By the terms of the plan, the City stated its intention to enact and enforce specific regulations in order to carry out the comprehensive plan. It is one of these regulations that is at issue here.

Councilwoman McHenry said it very well during the appeal to the City Council: [M]aybe we haven't done a good job in ... communicating what kind of image we want. We all want an image. I bet you if I stated my image it would be certainly different from everyone of you here and everyone in the audience.... [I]f we want a specific design, I agree with proponent's counsel, and that is that we come up with a specific district design ... We don't have such a design requirement. So we all have to rely on some gut feel. And often times this gut feel gets us into trouble because it could be misinterpreted or misconstrued ...

**753 [12] Although the City argues that its code is not unconstitutionally vague, it primarily relies upon the procedural safeguards contained in the code. Because aesthetic considerations are subjective in concept, the City argues that they cannot be reduced to a formula or a number. The vagueness test does not require a statute to meet impossible standards of specificity. Chicago, M., St. P. & P. R.R. v. Washington State Human Rights Comm'n, 87 Wash.2d at 805, 557 P.2d 307.

As well illustrated by the appendices to the brief of amici curiae, aesthetic considerations are not impossible to define in a code or ordinance. [FN14] Moreover, the procedural *79 safeguards contained in the Issaquah Municipal Code (providing for appeal to the city council and to the courts) do not cure the constitutional defects here apparent. The City relies heavily upon <code>Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wash.2d 155, 500 P.2d 540 (1972)</code> and argues that, under that case, a city need only provide standards and guidelines that define in very general terms what is to be done, and by whom, together with sufficient procedural safeguards to control arbitrary administration. See also <code>State ex rel. Standard Mining & Dev. Corp. v. Auburn, 82 Wash.2d 321, 510 P.2d 647 (1973)</code> (applying <code>Barry</code> to an Auburn zoning ordinance).

<u>FN14.</u> Appendix A to the brief of amici curiae is a portion of the design objectives plan for entry way corridors for Bozeman, Montana. Appendix B is a portion of the development code for San Bernardino, California. Both codes contain extensive written criteria illustrated by schematic drawings and photographs. The illustrations clarify a number of concepts which otherwise might be difficult to describe with the requisite degree of clarity.

In *Barry*, the Washington Supreme Court decided first that the Washington Legislature had indeed delegated to the Director of the Department of Motor Vehicles the authority to promulgate a schedule of maximum fees which could be charged by employment agencies. The second question before the court was whether this was an unconstitutional delegation of legislative authority because of the absence of adequate legislative standards. The court held that it was not. "[T]he best way to work out policy is often for the legislative body to avoid generalization and to assign to an administrative agency the task of working out such policy on a case-by-case basis." *Barry*, 81 Wash.2d at 160, 500 P.2d 540, citing 1 K. Davis, *Administrative Law Treatise* § 2.08 (1958). It is clear, however, that the *Barry* court did not have in mind judicial approval of the kind of *ad hoc* case-by-case policy making which Anderson experienced before the Issaguah Development Commission:

The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power.... The focus of judicial inquiries thus should shift from statutory standards to administrative safequards and administrative standards. As soon as that shift is accomplished, the protections should grow beyond the non-delegation doctrine to a much broader requirement, judicially enforced, that as far as *80 is practicable administrators must structure their discretionary power through appropriate safeguards and must confine and quide their discretionary power through standards, principles, and rules. Barry, 81 Wash.2d at 161, 500 P.2d 540 (quoting 1 K. Davis, Administrative Law Treatise § 2.00 (Supp.1970)). In Barry, the Legislature authorized the Director of the Department of Motor Vehicles to adopt a uniform fee schedule, not to decide fee issues arbitrarily on a case-by-case basis. The Director was required to establish and publish the uniform standards, principles, and rules by which all employment agencies would be governed. Barry does not suggest that an administrative agency acting in the absence of clear legislative guidelines may arbitrarily impose vague, unarticulated and unpublished standards upon the public.

**754 In <u>Standard Mining & Dev. Corp.</u>, 82 Wash.2d 321, 510 P.2d 647, the Supreme Court dealt with the comprehensive plan and certain zoning regulations adopted by the City of Auburn to govern special use permits for gravel pit operations. The appellant mining company argued that the zoning regulation governing special use permits was invalid in that it contained no standards to guide the city council in formulating the conditions which shall attach to such permits. The Supreme Court responded to this argument as follows:

As we recently indicated in <u>Barry & Barry, Inc. v. Department of Motor Vehicles, 81</u> Wash.2d 155, 500 P.2d 540 (1972), the specification of standards is not always appropriate in administrative actions. The function of prescribing the conditions under which a special use permit may be enjoyed is one to which this principle is applicable. Only rarely will the environmental factors affecting different special use applications be the same. Generally speaking, the conditions imposed must necessarily differ from case to case. This does not mean that the applicant is denied due process of law or the equal protection of the laws--so long as he is granted a hearing, a right of appeal, and a chance to show that the conditions are unreasonable, that is, unnecessarily burdensome or unrelated to the purpose which they are legitimately designed to serve. Standard Mining & Dev. Corp., 82 Wash.2d at 330-31, 510 P.2d 647.

[13] The Standard Mining court pointed out that Auburn's comprehensive plan dealt extensively with the numerous *81 deposits of sand and gravel located within the Auburn city limits and that an applicant may appeal the imposition of conditions placed on a special use permit on the basis that the conditions are unduly burdensome or not reasonably calculated to achieve the purposes set forth in the comprehensive plan. Standard Mining & Dev. Corp., 82 Wash.2d at 331-32, 510 P.2d 647. Issaquah argues that Anderson is in the same position and, accordingly, that Standard Mining dictates that we must affirm. We disagree and hold that the principles of Barry as applied in Standard Mining do not apply to the code sections here at issue. Instead, we adopt the approach of the New Jersey court in Morristown Road Assocs., 394 A.2d at 163. A design review ordinance must contain workable guidelines. Too broad a discretion permits determinations based upon whim, caprice, or subjective considerations. Certainly, the IMC grants Anderson the right to appeal the adverse decision of the Development Commission. But just as IMC 16.16.060 provides no standards by which an applicant or the Development Commission or the City Council can determine whether a given building design passes muster under the code, it provides no ascertainable criteria by which a court can review a decision at issue, regardless of whether the court applies the arbitrary and capricious standard as the City argues is appropriate or the clearly erroneous standard as Anderson argues is appropriate. Under either standard of review, the appellate process is to no avail where the statute at issue contains no ascertainable standards and where, as here, the Development Commission was not empowered to adopt clearly ascertainable standards of its own. [FN15] The procedural safeguards provided here do not save the ordinance.

<u>FN15.</u> We do not decide whether such authority *could have been delegated* to this commission. Such authority was not delegated here.

[14] Anderson has argued strenuously in this appeal that a municipality has no power to deny a proposed development for aesthetic reasons alone. Anderson argues this issue is "settled" by Washington case law. See Polygon Corp. v. Seattle, 90 Wash.2d 59, 70, 578 P.2d 1309 (1978); *82 Duckworth v. Bonney Lake, 91 Wash.2d 19, 30, 586 P.2d 860 (1978); and Victoria Tower Partnership v. Seattle, 59 Wash.App. 592, 603, 800 P.2d 380 (1990) (holding a city can consider aesthetic impacts only "along with other adverse impacts"), review denied, **755 116 Wash.2d 1012, 807 P.2d 884 (1991). Relying on these same cases, the City argues that, although Anderson's land use certification admittedly was denied solely on the basis of aesthetics, IMC 16.16 is valid because aesthetic concerns are only one of the bases contained in the code for the exercise of police power relating to land use. The amici point out that the modern view is that aesthetics alone will justify a regulation, provided that there are adequate standards and they are appropriately applied. See 1 A. & D. Rathkopf, Zoning and Planning § 14.02 [4] (1986).

We believe the issue of whether a community can exert control over design issues based solely on accepted community aesthetic values is far from "settled" in Washington case law. The possibility certainly has not been foreclosed by our Supreme Court. See <u>Polygon</u>, 90 Wash.2d at 70, 578 P.2d 1309 ("While this court has not held that aesthetic factors alone will support an exercise of the police power, such considerations taken together with other factors can support such action."). See also <u>Duckworth</u>, 91 Wash.2d at 30, 586 P.2d 860 ("While we have indicated that aesthetic considerations alone *may* not support invocation of the police powers ..." Emphasis added.).

Clearly, however, aesthetic standards are an appropriate *component* of land use governance. Whenever a community adopts such standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street". It is equally unreasonable, and a deprivation of due process, to *83 expect or allow a design review board such as the Issaquah Development Commission to create standards on an *ad hoc* basis, during the design review process.

CONCLUSION

It is not disputed that Anderson's project meets all of the City's land use requirements except for those unwritten and therefore unenforceable requirements relating to building design which the Development Commission unsuccessfully tried to articulate during the course of several hearings. We order that Anderson's land use certification be issued, provided however, that those changes which Anderson agreed to through the hearing before the City Council may validly be imposed.

<u>SCHOLFIELD</u>http://web2.westlaw.com/Find/Default.wl?DB=WLD%2DPEOPLECITE&DocName=0258740101&FindType=h&AP=&mlac=FY&fn=_top&rs=WLW6.06&mt=Westlaw&vr=2.0&sv=Split" \t "_top, JJ., concur.

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