

BOUNDARY REVIEW BOARD HEARINGS AN ATTORNEY'S ADVICE

During BRB hearings, BRB members are under intense scrutiny. A proposal's proponents or opponents can file appeals based on the behavior of BRB members during hearings. BRB goals are neutrality, fairness and professionalism. I trust this information assists the reader achieve these goals.

1. Some Potential Pre-hearing Problems

A. Conflict of Interest

BRB law provides that no BRB member can be an official or employee of the county or a governmental unit in the county, or the contractually or regularly retained advisor or consultant of the county, any governmental unit in the county or any county or county governmental unit agency or association. RCW 36.93.061.

B. Bias or Prejudice

The problem of bias or prejudice arises when a BRB member already has an opinion about the proposal and, thus, cannot listen with an open mind to the witnesses and the evidence. Or, the BRB member may have made a public statement concerning his or her belief or opinions about the proposal.

In such a situation, the BRB member must not be a part of BRB proceedings on the issue. This problem must not be a part of BRB proceedings on the issue. This problem most frequently arises when BRB members give speeches or make public statement on issues that are or may later come before the BRB. BRB members are asked to carefully consider whether they should make any public statements relating to any project which is or may be before the BRB. Public statements are loosely defined as those you make to more than one person at one time.

C. Appearance of Fairness

A BRB decision may appear unfair if a BRB member owns land or resides in the area of a proposal under consideration or has had business dealings or extensive social interaction with the proponents or opponents of the proposal. The appearance of fairness issue also arises if a BRB member doesn't treat everyone at a hearing in basically the same way.

The BRB chair can make a public announcement before a hearing begins concerning the public's right to raise the appearance of fairness issue. The chair can ask each BRB member to state his or her involvement with the proposal and the people involved with the proposal. If no one in the audience raises the issue, the BRB need do nothing. If someone does raise the issue, the BRB member and the BRB must decide whether the challenge is legitimate. If it is, the BRB member challenged must leave the hearing room.

If the member remains involved in the BRB decision-making in such instances, the BRB's integrity could be compromised. If there is successful litigation, the court can void the BRB's decision on this basis. Regardless of the court's decision, the BRB's reputation in the community could be damaged.

The law provides that if a BRB member were to remove him or herself from the process and, as a result, a quorum of the board would no longer be available to hear the matter, the member can remain and the challenge against him or her will be invalid.

D. Ex Parte Communication

Ex parte communications occur when a BRB member has conversations or receives information outside of BRB public meetings and hearings about a proposal which is before the BRB. This is most strongly discouraged. BRB staff should be the recipients of such information, not the BRB member.

If a BRB member had such contacts, the BRB member must tell the other BRB members about them at the hearing so the BRB members all have the same information and the audience can respond to this information.

Conversations can be overheard. Overheard discussions may be construed as bias or a lack of neutrality. A BRB member could be challenged if this happens.

E. BRB Business is Public

All BRB business is required to be done during public BRB meetings. Front page news stories result from local governmental entities discussing board business in coat rooms or over meals. Such discussions could subject the BRB to litigation, costs and attorney's fees. Each individual BRB member could be subject to personal fines.

The temptation to discuss BRB matters outside public meetings most often occurs just before a meeting or hearing begins, at recesses, just after hearing a controversial matter when BRB members need to vent, or at social gatherings. Resist this temptation! At such times, conversations must concern other topics than BRB business. BRB business is anything concerning the BRB. BRB members are strongly encouraged to help other BRB members remember to discuss BRB business only during public BRB meetings.

If BRB business is accidentally discussed privately, the information gained by BRB members should be made available to other BRB members and the public.

Without exception, if three or more BRB members discuss BRB business anywhere at any time, the discussion must be advertised as an open public meeting with proper notice given to the public.

2. How to Avoid Some Potential Hearing Problems

A. Be fair

Treat everyone similarly. Allow BRB staff to interact with the audience. BRB members are decision-makers. Act as a judge would act.

B. Be courteous

Avoid comments, whispers, dozing or reactions while a witness testifies. Listen attentively. Treat everyone professionally.

C. Be neutral

Avoid head nodding, facial expressions such as rolling the eyes, arm crossing or other non-neutral body language. Identify the parties to the issue. If a hearing is needed, there are proponents and opponents of the proposal. The BRB is not an advocate for one side or the other. Avoid challenging the presenter. Word questions so they are neutral. Be cautious about cross-examining those who testify. Do not have a personal agenda. Mentally remain completely neutral. Consider testimony from all sides equally. Do not form opinions or beliefs until you have heard all the testimony. Anything you write or say can become relevant if an appeal is filed. Do nothing which evidences a lack of neutrality or fairness.

D. Ask questions

Do not give comments or opinions on personal matters or projects or on the evidence or testimony. Ask questions instead.

E. Know what is relevant

Ask questions which directly relate to the proposal being considered and the BRB criteria for decision-making. Ask clarifying questions of speakers only if you don't understand their specific testimony or if that specific speaker submitted written information you don't understand. General BRB meetings rather than hearings provide opportunities to learn nonrelevant information. Know the difference between lay witnesses and expert witnesses. In general, expert witnesses are receiving pay to be at the hearing. Ask experts technical questions. Lay witnesses generally cannot answer technical questions.

F. Be an active listener

Take notes when listening to testimony. Have a copy of the statutory factors and objectives upon which you can keep your notes.

G. Be a public servant

Be certain the public has access to exhibits entered in the record. The exhibits should be located in a clearly marked place at every hearing. Announce this location at the hearing. Ideally, only the chair should meet with staff privately during a public hearing. Otherwise, it appears the BRB is conducting private business during a public hearing. If a BRB member needs assistance, he or she can individually talk to the Chair or BRB staff during a recess. Three or more members of the BRB should avoid gathering in any one place for any reason while a public hearing is ongoing. If such a gathering is unavoidable, the group should be in a very public place so they can be overheard so it is clear the group is not discussing BRB business.

H. Be alert

Ask the Chair for a brief recess if you find it momentarily difficult to give speakers your full attention. You will be a better listener when you return after the break.

I. Be informed

If there is a question about how to conduct the hearing, ask the Chair for a recess. The Chair can consult with staff as necessary and make the appropriate decision.

If proponents or opponents need further information on the proposal, or the parties have presented conflicting testimony, the BRB can continue the hearing to provide time for the BRB Chief Clerk to invite or subpoena someone to provide further information. Ask staff to be certain all relevant government entities make you aware of all relevant documents and information so that you can consider it.

J. Be calm

If matters become complicated or heated during a hearing, BRB members can ask the Chair for a recess or the Chair may unilaterally make that determination. BRB members should not match the emotion of angry or hostile speakers. A brief recess will allow the public and the BRB to calm down and think through responses. Ask BRB staff to provide information to citizens if requested.

3. How to Best Use Your Board Attorney

A. Legal advice is private

A BRB attorney wants to provide the BRB with fast, excellent, private, inexpensive legal advice. Attorneys can only give legal advice to their clients. Public legal advice can lead to lawsuits, public debate of the advice and follow-up phone calls to continue the debate. If BRB members publicly state the attorney has given written advice, the public can ask for a copy of the written advice. Each of these time users cost the BRB legal fees.

To avoid these problems, the BRB should never ask its attorney for advice publicly or tell the public the attorney has given advice. If a BRB member decides otherwise, the member should first ask the BRB as a whole if it approves because BRB legal advice belongs to the BRB, not to individuals on the BRB. As a courtesy, warn the attorney the BRB will make the advice public before he or she writes the advice.

B. BRB attorneys are not on the BRB

The BRB attorney is not a BRB member. BRB decisions must be made by BRB members. Sometimes a BRB member during the hearing process asks for "legal advice". The appearance is the BRB is asking the attorney to make BRB decisions. During the hearing process, the BRB attorney should advise on procedure only. Attorneys are not authorized to assist with BRB decision-making. The BRB members must perform this function.

C. Allow preparation time

Plan ahead. Give your attorney time to research issues. Law is complex. An attorney needs time to research, think and analyze. To ask for immediate advice is to ask the attorney to guess. Such guesses can be incorrect.

D. Encourage proponent's or opponent's attorney to testify

If the proponents or opponents ask their attorneys to attend a BRB hearing, the BRB members may want to provide an opportunity for those attorneys to speak to the BRB. This allows the BRB to learn of any potential legal challenges. Then BRB members can ask the BRB's own attorney to research and analyze the other attorney's opinion. An attorney is an advocate for the entity paying for the service. Weigh such advice against your own knowledge and your own attorney's advice.

E. Only attorneys can give legal advice

BRB staff must not give legal advice. Only those licensed to practice law may give legal advice. Liability could arise from BRB staff giving incorrect legal advice.

F. Executive sessions must be used sparingly

Do not call an executive session during a public hearing. Avoid executive sessions immediately before or after a public hearing. Anticipate problems so this is not necessary. This is to avoid the appearance that decision-making is occurring outside of the public forum.

G. The BRB attorney represents the whole BRB, not individuals

The BRB attorney represents the BRB as a whole and not individual BRB members. If a BRB member asks for advice from the BRB attorney, the advice should be provided to all members. The BRB attorney cannot act as a private attorney for one BRB member. The only exception to this is when the BRB Chair needs procedural advice on behalf of the entire BRB.

H. Recap: Don't ask for public legal advice

If a BRB member determines the BRB needs legal advice immediately on behalf of the entire BRB, he or she should request that the meeting be recessed or adjourned or the hearing continued. Then the BRB attorney can prepare a legal analysis for the whole BRB before the next meeting or hearing. During a crisis, ask for a recess or continuance to gain time to think or ask questions.

4. Some Potential Post-Hearing Problems

A. Read all materials presented

The BRB cannot make a decision until it has read all the materials presented. If the BRB receives last-minute new information, the BRB must read the materials before making a decision. Failure to do so could be the basis for a court to reverse the decision of the BRB.

B. Listen to all testimony

If a BRB member misses some of the testimony, he or she must listen to the tape of the missed section of the hearing and publicly announce he or she did so.

C. Organize notes and thoughts

It may help to organize all evidence into the three areas the law requires the BRB to consider: the BRB factors and objectives, the three relevant portions of the Growth Management Act, relevant plans and policies, and the State Environmental Policy Act.

D. Refuse to discuss the matter except at BRB meetings

If anyone tries to discuss this matter with you when you are not in a BRB meeting, refer that person to BRB staff.

5. **Some Potential Problems in the Decision-Making Process**

A. Hold a spirited debate on the proposal

BRB members must have a thorough public discussion in which all members participate and discuss the BRB factors and objectives, the relevant parts of the Growth Management Act and how the proposal will impact the environment. Courteous disagreement is encouraged among the BRB members. Without it, the appearance may be the BRB has discussed the proposal prior to the public decision-making or that the members are not interested in the proposal.

If the BRB does not hold this debate, the Chief Clerk does not know what to say in the decision. It is most important for the BRB to discuss the matter on the record.

B. Determine if the record supports approval of the proposal

After the BRB has discussed the proposal, it can discuss whether the record is sufficient for approval of the proposal. If not, the BRB must next consider whether the record supports a modification of the proposal. There must be a basis in the record for the modification considered and various witnesses must have commented upon the modification. If the record supports neither approval or modification, the BRB can discuss whether the record supports disapproval of the proposal (or a recommendation to disapprove for incorporations of cities of at least 7,500 people).

C. Explain disagreements with direct testimony

The BRB discussion and vote must create a defensible record which fully explains the basis for the BRB decision. If a BRB member disagrees with the direct testimony of a governmental entity, the following process is suggested for how to do that in a defensible way. The disagreeing BRB member can:

1. State the name of the specific documents or persons relied upon in making the opinion. State why the documents or persons are important to consider.
2. State what pages in those documents contain the relevant information for the opinion. If reliance is placed on oral testimony, state the name of the person who gave it and the date on which the person testified and why this person is credible.
3. Read into the record the relevant portions of the documents or testimony for discussion with other members of the BRB. If the oral testimony has occurred on the same day as the BRB discussion, the court reporter can read back the testimony.
4. State a specific analysis of the reasons for the opinion. Accept comments and questions from other members of the BRB. Defend the position with provable facts which come from the record.

D. Vote on the BRB motion

After the BRB discussion, the Chair can ask for a motion on the proposal. The motion should include which of the objectives on balance are best met by the action being put forth. BRB members should state on the record they considered all relevant environmental impacts of the proposal, any adopted growth plans and development regulations of the relevant counties and cities that are required or choose to plan, and any other county-wide planning policies. RCW 36.93.157.

E. The BRB discussion becomes the written BRB decision

After the vote, BRB staff transcribe what the BRB said during the decision-making. The BRB reviews this draft decision at its next meeting and either approves or changes it.

F. Minority Opinions can be attached to the BRB decision

BRB members who disagree with the majority vote can prepare a minority opinion. This can be attached to the BRB decision when it is filed.

G. Action occurs when a majority of members vote together

Action only occurs if a majority of members agree. No action occurs when a minority of members agree. Once a majority of members have voted for a matter, the only actions left are to correct and approve the written decision which memorializes the oral decision.

H. There is a 30-day appeal period

The decision cannot be considered final for appeal purposes until the BRB members have approved the written decision and filed it with the County Legislative Authority. However, once three members have voted for the same decision, the decision has been made. Only the wording of the decision may be negotiated.

6. **Potential Hearing Process, Appeal Period and Lawsuit Problems**

A. Avoid public comments

The media or others may contact BRB members. Members might want to consider whether to make public comments. Such comments potentially could be misquoted in court documents to illustrate that the member was not a reasonable, fair and neutral decision maker. The BRB member can state a wish not to comment. The BRB may wish to have a policy that the Chief Clerk will handle all media contacts.

7. **Conclusion**

I trust these suggestions provide you with topics to consider and discuss with your BRB members and attorney. Discussion generally produces thoughtful decisions. May you be neutral, fair, wise, reasonable, thoughtful, courageous, patient, and sympathetic to all who come before you. You are to be commended for your willingness to be involved in the very important public business of your community by serving on your county's boundary review board.

SUMMARY OF HEARING PROCEDURES

Sign-in to Speak: A roster will be found on the table near the speaker's podium. Those who wish to testify must sign in before witnesses are sworn. All speakers will be called from this list.

Administration of the Oath: All those planning on presenting testimony at the hearing will be asked to stand, raise their right hand and recite the oath administered by the Chief Clerk.

Exhibits: Please submit all exhibits to the Chief Clerk for labeling before the hearing is called to order. The Board must retain all exhibits until a decision is filed and the appeal period of thirty days has ended.

Speakers: Please state your name and address and agency or group you represent for the benefit of the record prior to testifying. When referring to an exhibit, please state the exhibit letter.

Time Limits: If necessary, the Chair may employ a time limit of three to five minutes for individuals and ten minutes for organized groups.

Testimony: The Boundary Review Board Act requires the consideration of certain factors and specifies objectives the Board must seek to accomplish as well as complying with the purpose of the Act and of SEPA and GMA. Testimony and evidence related to these factors and objectives, the purpose of the Act, consistency with GMA and SEPA is the most effective.

Cross-Examination: Witnesses generally may not question other witnesses or the Board. The Chair may allow cross-examination of expert witnesses under limited circumstances.

Rebuttal: The Chair may limit rebuttal. Rebuttal must be prefaced by a recitation of the disputed evidence. Rebuttal may not include closing statements, a summary, or any new evidence.

Board Decision: The Board reviews on the record the factors to be considered by the Board (RCW 36.93.170), the objectives of the Boundary Review Board (RCW 36.93.180), consistency with the Growth Management Act (RCW 36.70A) and the requirements of the State Environmental Protection Act (RCW 42.21 C and WAC 197-11). The Board must discuss on the record the evidence and exhibits and state how they relate to the above mentioned criteria. After the record is made, the Board may then either approve, modify, or deny a proposal. (RCW 36.93.150)

Written Decision: The Board has 40 days from the final public hearing but not more than 120 days from the date that jurisdiction was invoked to file its written decision.

CHAIR'S MEETING GUIDE

PUBLIC HEARING
7:00 PM
October 25, 2005
ESD 101 Administration Building
4202 South Regal Street, Spokane

BRB 583-04: Proposed Annexation of 77.28 Acres to the City of Spokane (Shopko)

Good evening and welcome to the meeting of the Washington State Boundary Review Board for Spokane County. This Special Meeting is now called to order at _____pm.

The purpose of tonight's meeting is to give you an opportunity to present information and give testimony to the Boundary Review Board on BRB 583-04: Proposed Annexation of 77.28 Acres to the City of Spokane (Shopko).

I would now like to introduce the Board members and staff present at this time.

Public testimony will be taken at this hearing. Please sign the roster if you wish to testify. To be most effective in your testimony, speakers are asked to direct their comments to the factors and objectives the Boundary Review Board is required to consider in making its decision and consistency with the Growth Management Act. A list of the factors and objectives is also available.

Please submit all EXHIBITS to the Director for labeling. The Board must retain all exhibits until a decision is filed and the appeal period of thirty days has ended.

At tonight's public hearing, the staff will first present an overview of the annexation process and a brief overview of the Spokane annexation proposal. The City of Spokane will then present the basis for the proposal. Representatives of agencies affected by the proposal will then be given an opportunity to address the Board. And then, those signing the roster will be called in the order of signing.

Because of the formal nature of public hearings, only Board members can ask questions of the speakers. If you do have questions, the Boundary Review Board staff will be available at the break and after the hearing to assist you.

The PUBLIC HEARING will now please come to order. This hearing is called to gather facts and hear testimony in the matter of File No. BRB 582-04: Proposed Annexation of 644 Acres to the City of Liberty Lake (Inland Empire Paper).

I will now ask each Board member to state on the record if they have engaged in any ex parte communication, have any other appearance of fairness issues, or have conflicts of interest regarding this proposal.

(State whether you have had any, then ask each of the other Board members.)

Will all those who plan on speaking at tonight's public hearing please rise and raise your right hand. The Director will now administer the oath.

(The Director administers the oath to all standing.)

The Boundary Review Board Director will now present the proposal and describe the Boundary Review Board process.

(STAFF REPORT Purpose and Role of the Boundary Review Board; Factors and Objectives; Consistency with GMA, Zoning and Comp Plan; Overview of Staff Report; REVIEW OF EXHIBITS)

We will now hear from -----, City of Spokane, proponent of the annexation.

Do Board members have questions of _____?

We will now hear from (Affected Agencies).

Do Board members have questions of _____?

We will now hear testimony from those signing the roster. We would like you to limit your comments to three minutes each in order to hear from each person on the list.

The first person on the roster is _____. Will you please come forward and state your name, address and whom you represent.

Do Board members have questions of _____?

The next speaker on the roster is _____. Will you please come forward and state your name, address and whom you represent.

Do Board members have questions of _____?

That concludes all of the testimony for this evening's hearing. The Board can close the public hearing at this time or continue the hearing to receive additional testimony

Do Board members feel that they have sufficient information to make their decision?

NOTE: (At this point, Board members may want to review the exhibits received and notes they have made on testimony received to determine if enough information has been received to evaluate whether or not each objective has been met.)

Is there any specific information that Board members require? Are there any further questions of the Board?

I will now entertain a motion to close/continue the PUBLIC HEARING.

IF the Public Hearing is CONTINUED:

This public hearing is continued to _____ (time) _____ pm, (_____ date)
(_____ (location) _____) The Board will receive additional testimony at that time.

This meeting is adjourned at _____ pm.

IF the Public hearing is CLOSED:

This public hearing is now closed to further presentations and the Boundary Review Board will meet in a (special) meeting ----- to deliberate and make its decision in the matter.

With no other business of the Board, this meeting is adjourned at _____ pm.

IF the Public hearing is CLOSED and Board is ready to make decision:

This public hearing is now closed to further testimony. The Board will deliberate and make its decision. The Board has specific factors to be considered in making its decision and specific objectives that each decision shall attempt to achieve. In addition, the Board is required to make decisions consistent with the plans and policies adopted under the Growth Management Act.

The Board will begin its deliberations on BRB 583-04: Proposed Annexation of 77.28 Acres to the City of Spokane (Shopko).

Do Board members wish to comment on the proposal?

(COMPREHENSIVE BOARD DISCUSSION)

Is there a motion on BRB 583-04: Proposed Annexation of 77.28 Acres to the City of Spokane (Shopko)?

(SAMPLE MOTION: I move that staff be directed to prepare a Resolution and Hearing Decision approving/disapproving/modifying the proposal.)

A second to the motion?

It's been moved and seconded that staff be directed to prepare a Resolution Approving/Disapproving/Modifying the proposal. Is there any discussion?

(Board members may elaborate on the factors of importance to them in making their decision and in which objectives were met or not met by the proposal.)

The Board's written decision will be filed by December 3, 2004. An appeal period of thirty days follows the filing of the Board's written decision. During that time, an appeal may be filed with the Superior Court.

This meeting of the Boundary Review Board is adjourned at _____ pm.