Supreme Court No. 91200-9
Court of Appeals No. 45571-II

SUPREME COURT OF THE STATE OF WASHINGTON

MARCUS GERLACH and SUZANNE GERLACH,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

RESPONDENT CITY OF BAINBRIDGE ISLAND'S ANSWER TO PETITION FOR REVIEW

James E. Haney, WSBA #11058
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I. IDENTITY OF RESPONDENT

The Respondent is the City of Bainbridge Island ("the City"), a city located in Kitsap County, Washington. The City was the defendant in the trial court below and the respondent in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

The Petitioners, Marcus and Suzanne Gerlach ('the Gerlachs") seek review of the unpublished opinion of Division II of the Court of Appeals in *Marcus Gerlach and Suzanne Gerlach v. City of Bainbridge Island,* Case No. 45571-4-II, filed on December 16, 2014. In that opinion, a unanimous panel of the Court of Appeals affirmed the Kitsap County Superior Court's dismissal of the Gerlachs' lawsuit, holding that the appearance of fairness doctrine does not apply to a decision of the City's Planning Director on a shoreline substantial development permit ("SSDP") when no public hearing is required.

III. COUNTERSTATEMENT OF THE ISSUES

As stated by the Court of Appeals, the sole issue in this case "is whether the Gerlachs met the prerequisite for filing a declaratory judgment action by demonstrating that the appearance of fairness doctrine applies to decisions made by the City Planning Department." Court of Appeals opinion at p. 3. The Court of

Appeals correctly answered this question in the negative and upheld the trial court's dismissal of the Gerlach's declaratory judgment action.

IV. COUNTERSTATEMENT OF THE CASE

As noted by the Court of Appeals, the Gerlachs' history with the City began in 2005, when they applied for an SSDP to install a mooring buoy in Eagle Harbor in the vicinity of their residence. CP 52. This application was withdrawn several months after it was filed. CP 243. In 2010, the Gerlachs filed a new SSDP application for a mooring buoy. CP 244. After this 2010 application was denied, the Gerlachs appealed and made numerous allegations of misconduct by members of the City Planning Department, including an allegation that Joshua Machen, the planner assigned to the application, was biased against them because they had refused to employ his personal business to wash their windows. CP 52; CP 225.

The City negotiated a settlement with the Gerlachs regarding the permit application, agreeing to issue the 2010 SSDP with certain conditions. CP 245; CP 206-10. During the course of the settlement negotiations, the Gerlachs demanded that the settlement agreement include provision contractually obligating the City to act in good faith regarding all future permit applications submitted by the Gerlachs. The City's attorney, Jack Johnson,

rejected this request, stating that, "The City has an obligation to treat the applications of the Gerlachs and every other citizen in good faith, but I am not going to have the City make such general obligations into contractual settlement terms. The Gerlachs need not fear retaliation." CP 207-08.

After the settlement was agreed to, the Gerlachs filed a lawsuit against the City and Mr. Machen for violation of their civil rights. CP 216. This lawsuit was removed to federal court, where the U.S. District dismissed the civil rights claim, holding that the Gerlachs' allegations of improper conduct on the part of Mr. Machen were "essentially a conclusory inference unsupported by the facts." CP 225. The dismissal was upheld by the Ninth Circuit Court of Appeals on January 6, 2014. *Gerlach v. City of Bainbridge Island*, 551 Fed. Appx. 418 (Jan. 6, 2014).

Meanwhile, on July 31, 2012, the Gerlachs filed a new SSDP application to build a 110 linear-foot bulkhead; a 174-foot dock; a 196 square-foot gatehouse/boathouse; and a 50 linear-foot retaining wall on their property. CP 52, 228. Given the Gerlachs' (unfounded) insistence in the past that Joshua Machen had retaliated against the Gerlachs and improperly denied their permits, the City's Planning Director, Kathy Cook, assigned the Gerlachs' permit application to Associate Planner Heather Beckmann for review, and the City took steps to ensure that Mr.

Machen was not involved in the review in any way. CP 229, 236, 240. Ms. Cook directed Ms. Beckmann to report directly to her on any matters involving the Gerlachs' application so as to avoid any possibility that the Gerlachs could claim Machen retaliated against them when reviewing their permit application. *Id.*

The City's Code establishes the administrative process used to review and issue SSDPs. CP 237. Namely, the Department of Planning Director issues an administrative decision on an SSDP application. *Id.;* BIMC 16.12.360.E.4. No public hearing is permitted or required. *Id.* Rather, the Planning Director issues a written decision, containing findings of fact and conclusions of law, approving, denying, or approving with modifications any SSDP without a public hearing. *Id.* Pursuant to BIMC 16.12.370, only when an applicant timely appeals a decision of the Planning Director on an SSDP application is an open record hearing held before the City's hearing examiner. *Id.*; BIMC 16.12.370.A.3.

Prior to the issuance of the Planning Director's decision, a notice of application is published and a 30-day public comment period is opened for interested persons to comment on an SSDP application. CP 237; BIMC 16.12.360.E.3. During the public comment period on the Gerlachs' application, 11 comments were received, including a letter from Maradel Gale, a member of the City's Planning Commission. CP 90-91, 229. This letter was

written by Ms. Gale as a private citizen, recommending denial of the Gerlachs' requested bulkhead. *Id.* Contrary to the Gerlachs' assertions, Ms. Gale's letter did not contain any language "directing" Ms. Beckmann to deny the permit application but, rather, simply requested denial in the same manner as any other citizen would. *Id.*

The Planning Commission had absolutely no role in the City's processing of the Gerlachs' SSDP application. CP 237. The City Code provides that the Planning Director "may refer [an SSDP] application to the planning commission for review and recommendations prior to deciding the application" and that the application "shall also be referred to the planning commission for a recommendation at the request of the applicant." *Id.*; BIMC 16.12.360.E.4.f. In this case, the Planning Director did not refer the Gerlachs' application to the Planning Commission for review and recommendation prior to issuing her decision, nor did the Gerlachs request such a referral. CP 237-38.

Of note, two other written comments received on the Gerlachs' application during the public comment period were signed by anonymous citizens. CP 229. Ms. Beckmann knew the identity of one of these commenters but, according to Ms. Beckmann, Mr. Gerlach never directly asked her to reveal his identity. *Id.* Instead, Mr. Gerlach merely asked Ms. Beckmann

whether it was common for the City to receive anonymous comments, and Ms. Beckmann responded that the City had received anonymous comments before. CP 229-30. Shortly thereafter, however, Mr. Gerlach contacted the Bainbridge Island Police Department alleging that one of the authors had trespassed onto his property to take photographs and make observations related to his comments. CP 230. Mr. Gerlach later discovered the identity of the commenter through the City Police Department investigation report on his trespass complaint. *Id.*

On December 21, 2012, the City received a letter from the Gerlachs requesting that the City relinquish review of the Gerlachs' SSDP application to Kitsap County for review. City Manager Doug Schulze responded to the Gerlachs on January 11, 2013, denying the request and reiterating that Ms. Gale and the Planning Commission were not involved in any way in the Gerlachs' application. CP 100.

The Gerlachs filed this action in Kitsap County Superior Court on January 17, 2013, asking that the trial court issue a declaratory judgment finding the appearance of fairness doctrine had been violated during the course of the City Planning Department's review of their SSDP application. CP 1-14. The Gerlachs requested that the trial court order the City to transfer the

SSDP application to Kitsap County for review and approval. CP 13.

The Gerlachs did not seek a stay of the City's decision-making process as part of their lawsuit, and on March 22, 2013, the City issued a Notice of Administrative Decision approving the Gerlachs' application to build the gatehouse/boathouse, retaining wall, and dock (subject to conditions), and denying the application to build the proposed concrete bulkhead. CP 231, 238. The City denied the Gerlachs' application to build the concrete bulkhead for several reasons, including the fact that the bulkhead was proposed to be located in a saltwater marsh environment where the City's Code prohibits bulkheads. CP 231. The Gerlachs filed an appeal of the Planning Department's decision to the Bainbridge Island Hearing Examiner, who stayed the appeal pending the outcome of this litigation.

The Gerlachs moved for summary judgment before the trial court and the City, in response, requested summary judgment in its favor as the nonmoving party. CP 26-60; CP 168-199. The City argued that, as a matter of law, the lawsuit must be dismissed because (1) the Gerlachs had a completely adequate remedy in the form of an appeal to the hearing examiner, the Shoreline Hearings Board, and the courts, and (2) because the appearance of fairness doctrine does not apply to the initial decision on an SSDP

application by the City Planning Director which is made without a public hearing or contested case proceeding. CP 168-199. The trial court agreed with the City and dismissed the Gerlachs' action. CP 354-58. The Court of Appeals affirmed the trial court and the Gerlachs now seek review by the Washington Supreme Court.

V. ARGUMENT

A. THE PETITION FOR REVIEW DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The Gerlachs argue that their (unfounded) allegations of misconduct on the part of the City's public officials makes this case one of "substantial public interest," thus meeting the criteria of RAP 13.4(b)(4) for Supreme Court review. According to the Gerlachs, "there is no greater public interest than public servants working for municipalities." Petition for Review at 11. But the legal issue involved in this case is not nearly so broad. Both the trial court and the Court of Appeals refused to reach the merits of the Gerlachs' allegations of misconduct (which the City vigorously denies), focusing instead on the failure of the Gerlachs' legal theory: that the alleged misconduct, if true, violated the appearance of fairness doctrine. Both the trial court and the Court of Appeals relied on the plain language of RCW 42.36.010, which provides that

> Application of the appearance of fairness doctrine to local land use decisions *shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section.* Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties *in a hearing or other contested case proceeding.* Quasi-judicial decisions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning regulations or the adoption of a zoning amendment that is of area-wide significance.

(Emphasis added). It is undisputed in this case that the decision of the Bainbridge Island Planning Director on SSDPs (including the Gerlachs' SSDP application) is made without an open, public hearing or contested case proceeding. Therefore, both the trial court and the Court of Appeals correctly held that "the clear and unambiguous language" of RCW 4.36.010 makes the appearance of fairness doctrine inapplicable to this case and requires that the Gerlachs' lawsuit be dismissed.

The application of an unambiguous statute to undisputed procedural facts is not a matter of "substantial public interest" meriting Supreme Court review under RAP 13.4(b). Here, the state legislature has spoken as to the scope of the appearance of fairness doctrine and the Bainbridge Island City Council has spoken as to the process under which the City's Planning Director

makes an SSDP decision. Under the plain language of RCW 42.36.010, the appearance of fairness doctrine does not apply to the Planning Director's decision. The Supreme Court need not step in and "impose fairness" as the Gerlachs request where the extent and application of the appearance of fairness doctrine have already been clearly established by statute and interpreting case authority.

The Gerlachs also argue that this case presents an issue of substantial public interest because the Court of Appeals' decision (1) promotes further unethical conduct by public servants and (2) directs the Hearing Examiner to resolve an issue (violations of the appearance of fairness doctrine) that he lacks the authority to resolve. Petition for Review at 11. But both of these arguments miss the fundamental point that, not only is the legal issue much narrower than suggested by the Gerlachs, but also that unethical conduct will not be perpetuated or encouraged by the Court of Appeals' decision. As the City previously argued with respect to the availability of an adequate remedy at law below, the City's Hearing Examiner may address whether the City's land use decision on the SSDP application was decided correctly on the merits and in accordance with lawful permitting criteria. If the City's decision was biased and unfounded, the Hearing Examiner will reverse the decision without reaching the specific application

of the appearance of fairness doctrine. Consequently, administrative land use decisions will not be made arbitrarily and unethically as a result of the Court of Apeals' decision and no substantial public interest is implicated.

B. THERE IS NO SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IN THE PRESENT CASE.

The Gerlachs argue that the Supreme Court should accept discretionary review under RAP 13.4(b)(3) because the case involves significant questions of constitutional law under the Equal Protection Clause of the U.S. Constitution and Article 1, Section 12 of the Washington Constitution. Petition for Review at 13-19.

Preliminarily, the City notes that the Gerlachs failed to raise an equal protection argument before either the trial court or the Court of Appeals. Under RAP 13.7(c), the Supreme Court's scope of review is limited by the circumstances set forth in RAP 2.5. RAP 2.5(a) says that the Court may refuse to review any claim of error which was not raised in the trial court. The same principle has been extended to issues not raised in the Court of Appeals. Thus, as a general rule, the Court will not consider an issue that is raised for the first time in the petition for review. *See, e.g., Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998); *State v. Clark*, 124 Wn.2d 90, 875 P.2d 613 (1994) (overruled on other grounds by, *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997)).

Moreover, the exception in RAP 2.5(a)(3) allowing a party to raise a manifest error affecting a constitutional right for the first time on appeal should not apply to excuse the Gerlachs failure to previously raise an equal protection argument in this case. In *In re Guardianship of Cobb*, 172 Wn. App. 393, 404, 292 P.3d 772 (2012), the court noted that an "appearance of fairness claim is not 'constitutional' in nature under RAP 2.5(a)(3) and, thus, may not be raised for the first time on appeal." *Id.* (citing *State v. Morgensen*, 148 Wn. App. 81, 90–91, 197 P.3d 715 (2008); *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978)). Likewise, where the Gerlachs' superficial discussion of their equal protection claim reveals nothing more than a reiteration of their appearance of fairness arguments (which are not constitutional in nature), the Court should not accept review on the basis of a constitutional question.

In addition, RAP 2.5(a)(3) requires the petitioner to establish that a "manifest" error affecting a constitutional right exists, meaning that the petitioner must show actual prejudice and that the asserted error had practical and identifiable consequences at trial. *State v. Grimes*, 165 Wn. App. 172, 186-87, 267 P.3d 454 (2011). Again, because the Gerlachs still retain an adequate remedy at law via an administrative appeal on the merits of their

SSDP application, no prejudice results from their failure to assert constitutional claims.

Because of the Gerlachs' cursory treatment of their newly-asserted equal protection claim, they have failed to establish that any constitutional issue truly exists for the Court to determine. The cases cited by the Gerlachs, *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969) and *Buell v. Bremerton*, 8- Wn.2d 518, 495 P.2d 1350 (1972), do not even mention the equal protection clause, and the Gerlachs have failed to explain how the doctrine applies to their case aside from general statements that fairness in decisionmaking should be afforded to them. Given this lack of specificity, review should not be accepted on this basis.

C. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND ANY CASE CITED BY THE GERLACHS.

The Gerlachs' final argument is that there is a conflict between the decision of the Court of Appeals in this case and controlling precedent of the Supreme Court and Court of Appeals, thereby making this case qualify for review under RAP 13.4(b)(1) and (2). To make this argument, the Gerlachs first take a single sentence of the Court of Appeals' decision out of context and conflate it with what they term "an improper approach to legal analysis and established precedent." Petition for Review at 17. In context, what the Court of Appeals did was to quote the prohibition

on expanding the appearance of fairness doctrine found in RCW 42.36.100, and then to hold that

> Based on the legislature's clear directive, we do not have the authority to apply the appearance of fairness doctrine to actions other than quasi-judicial actions by local decision-making bodies. To the extent that any case cited by the Gerlachs provides otherwise, we must conclude that it was wrongly decided.

Court of Appeals Opinion at 6-7. Read in context, the last sentence of this quoted passage was clearly not an acknowledgement that the Court's ruling conflicted with any prior precedent; it was simply the Court's shorthand way of dismissing the Gerlachs' tortured reading of that precedent in light of the statutory mandate. The Gerlachs' emphasis on this language is a misreading of the Court's opinion.

Moreover, none of the cases cited by the Gerlachs are in actual conflict with the Court of Appeals' ruling. The Gerlachs first cite *Westmark Dev. Corp. v. City of Burien,* 140 Wn. App. 540, 166 P.3d 813 (2007), arguing that an inconsistency exists with the *Westmark* holding that "a municipality may not 'single out' a building project or use its permitting process to block a project's development." *Id.* at 558. But *Westmark* was not an appearance of fairness case[1] and did not address the application of the doctrine to administrative decisions made without an open, public hearing.

[1] The quoted statement from *Westmark* was made in the context of a damages claim for tortious interference with a business expectancy, a cause of action that requires proof that the defendant interfered with that expectancy for an improper purpose.

There is no conflict between *Westmark's* holding and that of the Court of Appeals in this case.

The Gerlachs next cite *Hayden v. City of Port Townsend,* 28 Wn. App. 192, 662 P.2d 1291 (1981). The appearance of fairness doctrine *was* at issue in *Hayden*, but in that case the Port Townsend planning commission's action was clearly quasi-judicial because the commission was required to hold a public hearing and make a recommendation on a rezone. 28 Wn. App. at 193. In this case, just as clearly, the decision of the Planning Director on the Gerlachs' SSDP application was not quasi-judicial because no "hearing or other contested case proceeding" was involved. Thus, the *Hayden* decision is also not inconsistent with the Court of Appeals' decision.

The Gerlachs also cite *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969), and *Chrobuck v. Snohomish County,* 78 Wn.2d 858, 480 P.2d 489 (1971). Again, both *Smith* and *Chrobuck* involved rezones on which the county planning commissions were required by law to hold at least one public hearing. The Supreme Court held in both cases that the appearance of fairness doctrine applied because a hearing was required:

> It is axiomatic that, *whenever the law requires a hearing of any sort as a condition precedent to the power to proceed*, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well. A public hearing, if the public is entitled by law to participate, means then a

> fair and impartial hearing. When applied to zoning, it means an opportunity for interested persons to appear and express their views regarding proposed zoning legislation.

(Emphasis added). *Smith v. Skagit County, supra,* 71 Wn.2d at 739. *Accord, Chrobuck v. Snohomish County,* 78 Wn.2d at 869. The decisions of the Supreme Court in *Smith* and *Chrobuck* are entirely consistent with the decision of the Court of Appeals in the case at bar, in which no public hearing was held.

Finally, the Gerlachs cite *Anderson v. Island County,* 81 Wn.2d 312, 501 P.2d 594 (1972). In *Anderson*, as in *Hayden*, *Smith,* and *Chrobuck*, the appearance of fairness doctrine was at issue, the decision involved was a rezone with a public hearing, and the conduct involved was that of a commission member. Using the same language as it had in *Smith,* the Supreme Court held that the appearance of fairness doctrine applies "whenever the law requires a hearing of any sort as a condition precedent to the power to proceed." 81 Wn.2d at 326. Because the City Planning Director's decision on the Gerlachs SSDP application did not require a public hearing, the Court of Appeals' decision in the case at bar is also completely consistent with the Supreme Court's holding in *Anderson.*

The Gerlachs have failed to show any inconsistency between the decision of the Court of Appeals in this case and any prior decision of this Court or the Court of Appeals. To the

contrary, Washington appellate courts have clearly and consistently ruled that the appearance of fairness doctrine does not apply to administrative decisions where no public hearing is held. *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 744-45, 291 P.3d 930 (2013); *Zehring v. City of Bellevue*, 103 Wn.2d 588, 591, 694 P.2d 638 (1985); *Polygon Corp. v. City of Seattle,* 90 Wn.2d 59, 67–68, 578 P.2d 1309 (1978). The decision of the Court of Appeals in this case is entirely consistent with these prior rulings. The requirements of RAP 13.4(b)(1) and (2) are not met in this case and do not provide a basis for granting review.

VI. CONCLUSION

For all of the reasons set forth above, the Gerlachs' Petition for Review should be denied. None of the grounds for accepting review under RAP 13.4(b) are present in this case and the decision of the Court of Appeals should be allowed to stand.

RESPECTFULLY SUBMITTED this 9th day of February, 2015.

OGDEN MURPHY WALLACE, P.L.L.C.

By _____

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DECLARATION OF MAILING

I, Gloria J. Zak, an employee of Ogden Murphy Wallace, PLLC, make the following true statement:

I provided Respondent City of Bainbridge Island's Answer to Petition for Review as follows:

Via Regular Mail and Email:
Marcus Gerlach and Suzanne Gerlach
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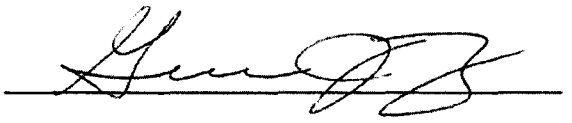
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 9th day of February, 2015.



Gloria J. Zak

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Attached is Respondent City of Bainbridge Island's Answer to Petition for Review. A hard copy follows via regular mail to Appellants.

Gloria Zak, Legal Asst to James E. Haney

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