Case No 91200-9

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

MARCUS GERLACH and SUZANNE GERLACH, Petitioners

v.

CITY OF BAINBRIDGE ISLAND, Respondent

KITSAP COUNTY SUPERIOR COURT CASE NO. 13-2-00136-7

Court of Appeals Case 45571-4-II
Appeal from the Superior Court of the
State of Washington for Kitsap County

PETITION FOR REVIEW

Marcus Gerlach
WSBA No. 33963
Attorney for Petitioners
579 Stetson Place
Bainbridge Is., WA 98110
(925) 984- 9631

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

IDENTITY OF PETITIONERS.....5

CITATION TO COURT OF APPEALS DECISION.....5

ISSUES PRESENTED FOR REVIEW.....5

STATEMENT OF THE CASE.....6

The Gerlachs Expected to be Treated Fairly and In Good Faith.....6

The Gerlachs Only Sought a Neutral and Unbiased Reviewer.....7

The City Staff Acted In Bad Faith and Unfair Dealings.....8

ARGUMENT WHY THE REVIEW SHOULD BE GRANTED.....9

A) The Underlying Decisions Involve Issues Of Substantial Public Interest.....10

B) The Appearance Of Fairness Must Apply To Public Servants.....13

C) The Lower Courts' Decisions Conflict With Controlling Case Law.....17

CONCLUSION.....19

Appendixes.....21

TABLE OF AUTHORITIES

Table of Cases

Anderson v Island County 81 Wn.2d 312; 501 P2d 594 (1972).....19

Buell v Bremerton., 80 Wn.2d. 518, 495 P.2d 1358 (1972).....13

Chrobuck v Snohomish County, 78 Wn.2d. 858, 480 P.2d 489 (1971) 14, 16

Columbia Community Bank v Newman Park 177 Wn 2d 566; 304 P3d 472 (2013).....15

Hayden v City of Port Townsend, 28 Wn. App. 192, 662 P.2d 1291 (1981).....18

Mission Springs v City of Spokane, 134 Wn.2d 947, 962-963, 954 P.2d 250 (1998).....13

Smith v Skagit County 75 Wn.2d 715, 453 P.2d 832 (1969).....13, 16

Westbrook v Burien, 140 Wn.App. 540, 166 P.3d 813 (2007).....17

Constitutions, Regulations and Rules

Rule of Appellate Procedure 13.4 (b) 3.....13

Rule of Appellate Procedure 13.4 (b) 4.....11

Revised Codes of Washington 42.36.....14

Revised Code of Washington 42.36.010.....15

Revised Code of Washington 42.36.080.....28

United States Constitution, Equal Protection Clause.....13

Washington State Constitution, Art 1, Sec 12.....13

Appendixes

Appendix A- Kitsap County Superior Court opinion, September 5, 2013

Appendix B- Court of Appeals Div 2 opinion, dated December 16, 2014

Appendix C- Declaration of Francine Shaw dated April 29, 2013

Appendix D- City Memo to Josh Machen, February 24, 2003

Appendix E- Transcript of Trial Court dated June 14, 2013 pgs 47/48

Appendix F- City Brief to Hearing Examiner, June 7, 2013

Appendix G- Declaration of Lafe Myers, dated May 7, 2013

Appendix H- Declaration of Brian Sonntag, dated April 30, 2013

IDENTITY OF PETITIONERS

Marcus Gerlach and Suzanne Gerlach (Gerlachs) ask the Washington State Supreme Court to accept review following the Court of Appeals' decision.

CITATION TO COURT OF APPEALS DECISION

The Gerlachs seek review of the Court of Appeals' unpublished opinion, *Marcus Gerlach and Suzanne Gerlach v. City of Bainbridge Island,* No. 45571-4-II, filed on December 16, 2014, which affirmed the Kitsap County Superior Court Order dismissing the Gerlachs' request to impose the Appearance of Fairness Doctrine upon the City of Bainbridge Island.

ISSUES PRESENTED FOR REVIEW

1) Does the Appearance of Fairness Doctrine (AFD) apply to public servants mandating a fair and unbiased review of a permit application, by a neutral and impartial permit reviewer?

2) Pursuant to the AFD, are the public servants of a municipality precluded from applying biased standards, concealing evidence, and making dishonest statements in the review of an application for a permit?

3) If the Trial Court finds "troubling character"[1] that is in conflict with the AFD, but dismisses the case and the Appeal Court finds that case law cited by the Gerlachs, in favor of the AFD, was "wrongly decided"[2] should the Supreme Court grant review to decide if the lower courts' acts were proper?

---

[1] Appendix A Superior Court Order pg 5.
[2] Appendix B, Court of Appeals order pg 7

STATEMENT OF THE CASE

The Gerlachs own property on Bainbridge Island and sought a permit from the City of Bainbridge Island (City), expecting the City to act in good faith, fair dealings and review the application in a fair and impartial fashion.[3] Instead of fairness, the City's staff, agents and employees engaged in bad faith, deceit, and dishonesty, in violation of the AFD. The staff's violations breached the City's mandatory obligation to review permit applications in a fair and unbiased manner. The lower courts ignored the troubling conduct and sought to cure the City's defective actions by eviscerating the AFD.

The Gerlachs expected to be treated fairly and in good faith by the public servants at the municipality. Unfortunately, the City's public servants failed to act fairly and in good faith regarding the permit application. Shortly after the Gerlachs sought a permit from the City, the Gerlachs realized that the City's employees, staff and agents were acting in an unfair and biased manner. The Gerlachs were forced to file litigation against the City for the violations under the AFD. The Gerlachs only wanted fair treatment and asked that their application be reviewed by the Kitsap County Planning Department (KCPD) or any other unbiased reviewer. The Gerlachs filed their litigation before the City issued an untimely and defective decision on

[3] The City promised in writing on June 23, 2011, to treat the Gerlachs in good faith and not to retaliate. (CP 387)

their application, as required by the AFD. The City violated their own municipal code and violated the AFD when they issued their untimely and defective decision.[4] The Gerlachs only sought a fair and impartial permit review process, not a permit according to the Declaratory Relief for AFD.

The Gerlachs petitioned the Trial Court to vacate the City's defective decision and have the application reviewed by the KCPD via a declaratory judgment. Instead of applying the AFD to the City, the Trial Court denied the request for fairness. (Appendix A) The Trial Court's opinion was in contradiction to the City's own belief that the AFD applied to the City's Planning Department actions.[5] Instead of applying fairness to the Gerlachs' application, the Trial Court's opinion endeavored to refer the AFD matter to the Hearing Examiner (HEX). This referral by the Trial Court created another conundrum, as the City's attorney previously admitted that the HEX could not determine the AFD issues pled in the litigation. (Appendix F) The Trial Court's opinion created more problems than resolutions. The Trial Court tried to overlook many of the biased acts and "troubling character" by the City's employees, while sanctioning unfair conduct and acts of bad faith by dismissing the litigation in violation of the AFD.

---

[4] Appendix C Declaration of Francine Shaw pg 5

[5] On February 24, 2003 the City Manager warned City Staff that the AFD would be applied to City staff. (Appendix D)

The Gerlachs' provided substantial evidence of the City's deliberate and intentional bad acts by the City's staff, agents and employees, which violated the AFD. The City has a long history of violating the AFD[6] by planning department staff. Even after the City promised to act in good faith via email, stating "The City has an obligation to treat the applications of the Gerlachs...in good faith..." (CP 387), the City's employees, agents and staff refused to act in good faith. Faced with the surmounting evidence of bias and bad faith, the City's Attorney finally admitted that the City was *not* required to treat the Gerlachs applications in good faith. (Appendix E) (Verbatim transcript pgs 47 and 48; CP 367, 387)

The City's acts of bad faith included: a) the City's Planning Commissioner, Maradel Gale (Gale), specifically directed the planner Heather Beckmann (Beckmann) to deny Gerlachs' application (this direction *troubled* the Trial Court); b) in order to conceal relevant evidence, the planner Beckmann failed to identify an alleged trespasser to the Gerlachs during the

---

[6]The lower courts failed to reference the City Planning Manager's window washing side-business, The City's employee Josh Machen (Machen) has an ongoing "side-business" washing windows for permit applicants. Photographic evidence of Machen's work at locations with pending City permits was provided to the Court. (CP 5, 52, 62, 373, 381, 424-427, 429-431) The Court failed to address the obvious conflicts (see Appendix D). The Gerlachs and Respondents are involved in another pending action involving Machen's soliciting of the Gerlachs for his "side-business." This solicitation occurred while the Gerlachs had a pending permit before him.

applications' review, c) during a City police interrogation, the identity of the alleged trespasser was revealed and he admitted to the police that the City planners did not like the Gerlachs; d) The City violated their own municipal code (BIMC) by issuing a defective and untimely decision, which mirrored the directive of Gale; and e) the City discriminated against only the Gerlachs' application while permitting other neighboring applications.

If the lower courts will not require public servants to act in an unbiased and neutral manner, when reviewing permit applications, then the Supreme Court should accept review of this case and issue a published opinion mandating municipalities and public servants be fair, neutral and unbiased in the review of permit applications. To deny review allows municipalities and public servants to continue to act in a biased, unfair and prejudicial manner without any repercussions for their bad faith on permit actions.

I. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Trial Court and Court of Appeals issued unpublished opinions of general public interest and importance, which sought to determine unsettled questions of law and constitutional principles without regard to established case law. The opinions challenge legislative actions and are contrary to recognized legal authority (some originating from this Court).

When the Court of Appeals held that existing cases, cited by the Gerlachs in support of their petition for fairness and neutrality were, "wrongly decided"(Appendix B, pg. 7) they established conflicting precedent.

The lower courts' opinions seem to refer the AFD violations to the City's HEX. The City's Attorney knew that the HEX did not have the authority to determine if the City violated the AFD. (Appendix F) It is a matter of public interest when the lower courts are directing the HEX to resolve an issue, which the HEX does not have the authority to resolve. Furthermore the HEX is obligated to give deference to the City – even for the City's biased, partial and unfair decisions. (this issue was raised before the Court of Appeals.) Giving deference to the City is biased and partial on its face.

The City's argument that their 53 page Staff Report/Decision is not a quasi-judicial action is false. This document references 24 BIMC codes, 11 Washington Cases, 3 RCWs, 3 WACs, and 1 Shoreline Board case. Their Decision was predicated upon the City's "quasi-judicial capacity."

A. Underlying Decisions Involved Issues of Substantial Public Interest

The Rules of Appellate Procedure (RAP) provide that the Supreme Court will accept review of a decision by the Court of Appeals if it "involves an

issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4) There is no denying that the opinions in this case involve an issue of substantial public interest. The Supreme Court should accept review of these issues because there is no greater public interest than public servants working for municipalities. The problems pertaining to public servants in this case represent problems found throughout Washington. Public servants must be required to act in a fair and unbiased manner. Planning Commissioners, like Gale, should not be allowed to direct a planner to deny a neighbor's permit, merely to increase the value of her own property.[7] Planner, Beckmann, should not conceal the identity of alleged trespassers- merely to prevent admissions that the "City's planning staff do not like the Gerlachs." (CP 38, 389) Planning Managers, like Machen, should not operate "side-businesses" working on properties with pending City applications/permits. (CP 52, 62-63). It is the AFD, which provides the last line of defense for citizens, against an attack by corrupt, dishonest and deceptive public servants. When the lower courts fail to require even a mere *appearance of fairness* via the AFD, then the substantial public interest here requires the Supreme Court to accept this Petition, review this case and impose fairness to the Petitioners.

[7] Appendix G Declaration of Lafe Meyers pg 3

The Supreme Court should also accept this Petition because ignoring the application of the AFD to public servants will cause many public servants to act unfairly and in a biased manner in the decision making process of permits, without fear of any ramifications. The opinions of the lower courts effectively protected and insulated public servants from any acts of corruption, unfairness and dishonesty. When the Court of Appeals stated, "[T]he AFD does not apply to decisions made by the City Planning Department..." (Appx B pg 7) it promoted further unethical conduct by public servants. To extrapolate on this misinterpretation of the law would allow public servants to: a) extort an applicant to hire a planner's "side-business" in order to get a permit, b) it would allow planning commissioners to order denial of a neighbor's application thereby increasing the value of their own property, c) permit City staff to act in bad faith without conscience or consequence, d) authorize City planners to engage in activities that conflict with the City's responsibilities, e) sanction public servants to violate the municipality's codes by issuing untimely, defective and unsigned Decisions in violation of the *Appearance* of Fairness Doctrine. It is no surprise that all of the aforementioned acts occurred in this case by the City staff, agents and employees.

B. The Appearance Of Fairness Doctrine Must Apply To Public Servants

The RAP also provides that the Supreme Court will accept review of a decision from the Court of Appeals if it involves "significant questions of law under the Constitution of the State of Washington or the United States." RAP 13.4(b)(3) The Equal Protection Clause of the U.S. Constitution and Article 1 Sec 12 of the Washington State Constitution afford equal protection of the law and fairness to property owners. These Acts are interpreted via case law. Washington State established clear case law regarding permits. The procedures of obtaining permits must comply with constitutional due process rights, or fairness. *Mission Springs v City of Spokane* 134 Wn.2d 947, 962-963, 954 P.2d 250 (1998). The AFD requires fairness, or at least the *appearance of fairness,* in all stages of permit processing.

Equal protection, pursuant to the Federal and State Constitutions, was judicially recognized in Washington State in 1969. Case law required permit application proceedings to be procedurally fair, (*Smith v Skagit Co.* 75 Wn.2d 715, 740 453 P.2d 832 (1969) and appear to be conducted by impartial decision makers, *Buell v Bremerton* 80 Wn.2d 518, 523, 495 P.2d 1350 (1972). In several 1969 cases, the Washington Supreme Court invalidated local land use actions, made by public servants, because the

proceedings appeared unfair, or public servants (with apparent motives or biases) failed to disqualify themselves from the proceedings. The Court decided that the strict fairness requirements of impartiality were mandated in property matters. Property matters were also protected under the Washington State Constitution. Past Courts believed in the importance of maintaining the public's confidence in land permit/use decisions.

The Court in *Chrobuck* held, "Circumstances or occurrences arising within such processes that, by their appearance, undermine and dissipate confidence in the exercise of zoning power, however innocent they might otherwise be, must be scrutinized with care and with the view that the evils sought to be remedied lie not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions that, by their very existence, create suspicion, generate misinterpretation and cast a pall of partiality, impropriety, conflict of interest or prejudgment over proceedings to which they relate. *Chrobuck v Snohomish County* 78 Wn.2d 858, 868, 480 P.2d 489 (1971)

In 1982, the Washington State Legislature codified the AFD under Revised Code of Washington (RCW) 42.36. The AFD was designed to guarantee that the strict procedural requirements were not only fair, but

also appeared fair. The only way for the AFD to apply to the municipalities, is through the public servants employed by the municipalities. The AFD was developed as a method of assuring that due process protections apply to administrative decisions. The AFD was predicated upon equity. The goal of equity is to do substantial justice. Washington Courts embrace a long and robust tradition of applying the doctrine of equity. The doctrine of equity was recently upheld in *Columbia Community Bank v Newman Park LLC* 177 Wn.2d 566, 304 P.3d 472 (2013). The AFD attempted to bolster public confidence in fair and unbiased decision-making by making certain, in both ***appearance*** and in fact, in order to assure that parties receive equal treatment. Public servants cannot hold citizens hostage through the decision making process, in violation of the AFD, merely because they are the municipal authority.

The AFD is an equitable remedy for aggrieved persons who demonstrate the *appearance* of discrimination in local land use decisions. (RCW 42.36.010). The AFD is a rule of law requiring governmental decision-makers to conduct non-court proceedings in a way that is fair and unbiased in both appearance and fact. The very title of the RCW is the "*Appearance* of Fairness," but this title could also include the "appearance of discrimination" against permit applicants.

The Gerlachs demonstrated actual discrimination by the City's staff, agents and employees. Discrimination by public servants is prohibited under the AFD. The AFD prohibits one City agent to direct another City staff to deny only one specific application (Gerlachs' application). The actions of the City's staff, agents and employees clearly violated the AFD under the standards of *Chobruck (supra)*.

Anyone seeking relief based upon the AFD must raise a challenge prior to the issuance of a decision. (RCW 42.36.080). The Gerlachs filed the Complaint for Declaratory Relief **before** the City issued its defective decision. The Gerlachs sought a fair and impartial review of their permit application **before** the City issued their unsigned decision, **not after**.

The AFD has consistently been applied in permit applications. *Smith v Skagit County* 75 Wn.2d 715, 453 P.2d 832 (1969) "The core of the doctrine announced in *Smith* and repeated often, is that the application process must not only be fair in fact, but must appear fair and be free of the aura of partiality, impropriety, conflict of interest or prejudgment. *Chrobuck v Snohomish County* 78 Wn.2d 858, 480 P.2d 489 (1971). The lower courts' orders, however, redefined "fairness" in the AFD and carved out an impermissible exception for municipalities and public servants.

C. The Lower Courts' Decisions Conflicted with Controlling Case Law

The Trial Court's opinion contradicted the facts, admissions by the City and all controlling case law. The Court of Appeals' opinion compounded this dilemma by simply contradicting controlling case law. The Court of Appeals' opinion stated, "To the extent that any case cited by the Gerlachs provided otherwise [application of the AFD] we must conclude that it [all controlling case law] was ***wrongly decided." (emphasis added)***[8] The Supreme Court should accept review because the Court of Appeals does not provide any meaningful guidance regarding which cases were "wrongly decided" and what legal bases the previous courts wrongly decided the cases. The lower court's improper approach to legal analysis and established precedent mandates review by the State Supreme Court.

Simply put, the lower courts endorsed the proposition that a municipality, via their public servants, may discriminate against certain citizens. The lower courts effectively authorized a discriminatory permit process that treated the Gerlachs in a dissimilar fashion. Municipalities are not allowed to apply permit criteria so as to exclude, or single-out a permit applicant and treat them in a dissimilar fashion. *Westbrook v Burien* 140 Wn.App. 540, 588, 166 P.3d 813 (2007).

[8] Appendix B pg. 7 The Court was not bound by case law.

The AFD was undoubtedly violated when the City's Planning Commissioner (Gale) directed the City's planner to "Deny this request."[9] The holding in *Hayden v City of Port Townsend* 28 Wn.App. 192, 662 P.2d 1291 (1981) specifically addressed improper interactions by vested members of municipal planning commissions. The *Hayden* court stated, "As it has developed, the appearance of fairness doctrine has been applied not only to cases where actual conflict of interest is demonstrated, but also to situations where a conflict of interest may have affected an administrative decision." *Id* at 195. The *Hayden* court further stated, "[T]he doctrine prevents the presentation of views by public officials **acting even in their *private capacity* in order to advance the goal of assuring public confidence in the fairness of the quasi-judicial decision-making process.**" **(emphasis added)** *Id* at 198. The lower courts issued opinions in direct contradiction with the *Hayden* Court.

It is obvious that prejudgment, or partiality in any decision-making process will result in bias, or prejudgment, toward a pending application. "The AFD mandates municipal officers act without bias or impropriety in order to preserve the public's trust in government."[10] (Appendix H)

[9] Appendix E - October 14, 2012 letter from the City's Commissioner to Planner to deny only the Gerlachs' permit.
[10] Appendix H Declaration of Brian Sonntag pg 3

The Court in *Anderson v Island County* 81 Wn.2d 312, 326-327, 501 P.2d 594 (1972) overturned a land use decision because a councilmember had prejudged a particular issue. Once Commissioner Gale made an unauthorized and unsolicited predetermination on *only* the Gerlachs' application, the AFD was impermissibly violated.

CONCLUSION

There is a significant question of law under the Constitution of the State of Washington and the United States. The lower courts' orders do not appear to be bound by this Court's prior decisions and are in conflict with established and controlling decisions from past Washington State Supreme Court opinions, or other Court of Appeals opinions. The lower courts redefined the AFD to exclude all of the City's public servants who violated the public's trust, concealed evidence, and created substantial public interest issues. The RAP requires this case be reviewed by the Washington State Supreme Court in order to remedy these violations.

Public servants are supposed to be neutral, fair and impartial in their decision making, but the evidence offered to the lower courts unfortunately indicated that Gale, Beckmann and Machen violated the AFD by creating irrefutable conflicts. Deceit, deception and dishonesty

are not permissible characteristics under the AFD. The facts in this case indicate there are serious violations of the AFD, which warrant review of the lower courts' orders.

When the lower courts ignored the mendacities of the public servants the lower courts abandoned any interest in justice, or judicial efficiency. Citizens who request permits for development must know that a public servant is fair and unbiased in the decision-making process. The Washington State Supreme Court is obligated to intercede in order to preserve justice and respect precedent. Allowing the opinions of the lower courts to go unchallenged will promulgate further violations by public servants resulting in additional litigation. It is in the interest of judicial efficiency that the Supreme Court accept review of this case.

DATED this 12 day of January, 2015

Marcus Gerlach SBN 33963
Attorney for Marcus Gerlach
and Suzanne Gerlach

APPENDIX A

SUPERIOR COURT OF WASHINGTON
IN AND FOR KITSAP COUNTY

MARCUS GERLACH and SUZANNE L. GERLACH, husband and wife, Plaintiffs, vs. CITY OF BAINBRIDGE ISLAND, a Municipal Corporation, et. al., Defendants.	NO. 13-2-00136-7 MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE ****clerk's action required****

THIS MATTER comes before the Court upon Plaintiff's Motion for Summary Judgment ("Motion"), filed May 15, 2013. Defendant City of Bainbridge Island ("Defendant") has requested that summary judgment be granted in favor of Defendant, and that the case be dismissed; or, alternatively, that summary judgment be denied. On June 14, 2013, the Court heard oral argument from Plaintiff and Defendant, and took the matter under advisement.

In addition to the June 14 oral argument, the Court has considered the following written materials in making the present decision:

1. Plaintiff's Motion for Summary Judgment;
2. All declarations attached to the Motion;
3. Defendant's Response to the Motion for Summary Judgment;
4. All declarations attached to the Response;
5. Plaintiff's Reply to the Motion for Summary Judgment;
6. The supplemental declaration of Marcus Gerlach attached to the Reply;

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

7. Defendant's supplemental argument on the Hearing Examiner's scheduling order; and
8. Plaintiff's supplemental briefing on the Hearing examiner's scheduling order.

DISCUSSION

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party.[2] The burden initially is upon the moving party to show an absence of material fact. After the moving party has met its initial burden, the inquiry shifts to the nonmoving party to set forth facts that show there is a genuine issue for trial.[3]

1. Exhaustion of remedies

Where a party seeks declaratory relief, it must show that its remedies have been exhausted in order to establish standing to raise the issue.[4] However, "the court will not require a party to exhaust its remedies if to do so is shown to be futile."[5] Plaintiffs seek as relief transfer of their permit application from the Defendant to Kitsap County; in other words, Plaintiffs request that this Court interrupt the current and pending permit review process and transplant it to another jurisdiction. Essentially, Plaintiffs request as relief access to "fair process." But Plaintiffs already have access to such remedy via their pending appeal with the Hearing Examiner. Plaintiffs present no argument that the hearing in front of the Hearing Examiner has been tainted by the appearance of impropriety or otherwise. Plaintiffs have provided no other evidence that such appeal is futile. Thus, this Court finds that Plaintiffs have not exhausted their administrative remedies and this Court does not have jurisdiction to determine the pending matter.

---

[1] CR 56(c).
[2] *Vallandingham v. Closer Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).
[3] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 189 (1989).
[4] *Harrington v. Spokane County*, 128 Wn. App. 202, 210, 114 P.3d 1233 (2005).
[5] *Harrington* at 215.

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

2. *Appearance of fairness doctrine*

Alternatively, had the Court retained jurisdiction at this point, Plaintiffs' complaints once again would have been stymied, as the Appearances of Fairness Doctrine does not apply to the facts at bar. The Appearance of Fairness Doctrine was first articulated in *Smith v. Skagit County*, which held that

> public hearings . . . must not only be fairly undertaken in a genuine effort to ascertain the wiser legislative course to pursue, but must also appear to be done for that purpose. In short, when the law which calls for public hearings gives the public not only the right to attend but the right to be heard as well, the hearings must not only be fair but must Appear to be so. It is a situation where appearances are quite as important as substance.

The purpose of the doctrine is "to provide a due-process type standard for statutorily required hearings of the legislative body acting in a quasi-judicial capacity."[6] Limitations were codified in 1981 in RCW 42.36, et. seq.

The appearance of fairness doctrine has never been applied to administrative action except where a public hearing was required by statute.[7] For local land use decisions, the application of the appearance of fairness doctrine is limited to quasi-judicial actions of local decisionmaking bodies that determine the legal rights, duties, or privileges of specific parties in a *hearing or contested case proceeding*.[8] The Bainbridge Island City Code sets forth the administrative process used to review and issue Shoreline SSDP applications. BIMC 16.12.360.E.4 establishes that, after the requisite 30-day public comment period, the City Director of Planning ("Planning Director") shall issue a decision on a pending permit application. Prior to issuing a decision, the Planning Director *may* refer the issue to the Planning Commission for recommendations.[9] After the Planning Director issues a written decision, the applicant may appeal to the hearing examiner.[10]An open record hearing is conducted as part of the appeal only.[11] Plaintiffs do not offer a satisfactory argument, in conjunction with applicable

---

[6] *Polygon Corp. v. Seattle*, 90 Wn2d 59, 67, 578 P.2d 1309 (1978).
[7] *Polygon Corp.* 90 Wn.2d at 67–68 (appearance of fairness doctrine not applicable to building permit application process).
[8] *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 744-745, 291 P.3d 930 (2013) (citations omitted).
[9] BIMC 16.12.360.E.4.f.
[10] BIMC 16.12.370.
[11] BIMC 16.12.370.

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

authority, to support application of the doctrine to the planning director's decision in the instant case, and the Court would decline to extend such an application.

Despite this, the Court notes the troubling character of the letter to Defendant, written by Planning Commissioner Gale. Whether or not the appearance of fairness doctrine applies in this case, such a letter written under the auspices of an official – and potentially influential – role bears this Court pause.

CONCLUSION

Because Plaintiffs have not exhausted their administrative remedies and, consequently, the Court does not have jurisdiction in this case.

It is hereby

ORDERED that Plaintiff's Motion is **DENIED** and that Defendant's request for summary judgment is **GRANTED.** The case is hereby **DISMISSED** without prejudice.

Dated: This 5th day of Sept, 2013.

Jeanette Dalton

HON. JEANETTE DALTON
JUDGE

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

CERTIFICATE OF SERVICE

I, Gemma N. Zanowski, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On 9/5/2013 I caused a copy of the foregoing document to be served in the manner noted on the following:

James E. Haney Ogden Murphy Wallace, P.L.L.C. 901 5th Ave Ste 3500 Seattle, WA 98164-2008	☐ Via U.S. Mail ☐ Via Fax: ☐ Via Hand Delivery ☐ Via E-mail:
Marcus Gerlach Suzanne Gerlach 579 Stetson Place Bainbridge Island, WA 98110	☐ Via U.S. Mail ☐ Via Fax: ☐ Via Hand Delivery ☐ Via E-mail:

DATED September 5, 2013 at Port Orchard, Washington.

Gemma N. Zanowski
Judicial Law Clerk
Kitsap County Superior Court

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION

MARCUS GERLACH and SUZANNE L. GERLACH, husband and wife, Appellants, v. CITY OF BAINBRIDGE ISLAND, a municipal corporation and DOES 1-10, Respondents.	No. 45571-4-II UNPUBLISHED OPINION

LEE, J. — Marcus and Suzanne Gerlach appeal the trial court's order dismissing the Gerlachs' declaratory judgment action against the city of Bainbridge Island (the City). Because the appearance of fairness doctrine does not apply to decisions made by the "City Planning Department," there is no legal basis for the Gerlachs' claims, and the trial court properly dismissed their declaratory judgment action. We affirm.

FACTS

The Gerlachs' history with the City began in 2005, when the Gerlachs applied for a permit to install a mooring buoy. The Gerlachs withdrew their permit request several months later. In 2010, the Gerlachs filed another permit application for a mooring buoy. This permit application was denied. After the permit was denied, the Gerlachs appealed and made numerous allegations of misconduct by members of the City Planning Department. The Gerlachs also filed a federal lawsuit against the City for violation of their civil rights.

The City negotiated a settlement with the Gerlachs regarding the permit application. Ultimately, the Gerlachs obtained a permit for a mooring buoy. The Gerlachs continued their federal litigation, but the U.S. District Court dismissed their civil rights claims.

In 2012, the Gerlachs filed a shoreline substantial development permit (SSDP) application to build a dock, a gate house, a boat hoist, a retaining wall, and a hard-armored (concrete) bulkhead. During the permit review process, the Gerlachs made numerous allegations of unfair treatment by the City Planning Department. Before the City Planning Department issued a decision on their SSDP application, the Gerlachs filed an action for declaratory relief in Kitsap County Superior Court. The Gerlachs requested that the trial court issue a declaratory judgment finding that the City Planning Department violated the appearance of fairness doctrine by considering their SSDP application. The Gerlachs requested that the trial court order the City to transfer their SSDP application to Kitsap County for review and approval.

Before the City filed an answer to the Gerlachs' complaint for declaratory relief, the City Planning Department issued its decision on the Gerlachs' SSDP application. The City Planning Department granted a permit for the dock, gatehouse, and retaining wall but denied the permit to build a concrete bulkhead. The Gerlachs appealed the City Planning Department's decision to the city hearing examiner. The Gerlachs' administrative appeal is stayed pending the outcome of this litigation.

The City filed an answer to the Gerlachs' complaint for declaratory relief and requested that the case be dismissed. The Gerlachs then filed a motion for summary judgment. In response, the City requested that summary judgment be granted in favor of the City as a nonmoving party. The City argued that, as a matter of law, the Gerlachs' action must be dismissed because (1) the

Gerlachs had completely adequate alternative remedies, and (2) the appearance of fairness doctrine did not apply to the initial consideration of an SSDP application by the City Planning Department. The trial court agreed with the City, granted summary judgment in the City's favor, and dismissed the Gerlachs' declaratory judgment action. The Gerlachs filed a motion for reconsideration, which the trial court denied. The Gerlachs appeal.

ANALYSIS

Due to the contentious nature of this case and the Gerlachs' insistence on arguing the underlying substantive nature of their allegations against the City, it is important to be clear about what question is before this court. The dispositive question 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. As explained below, the trial court properly determined that the appearance of fairness doctrine does not apply to the initial consideration of the Gerlachs' SSDP application by the City Planning Department. Therefore, there is no legal basis to provide the Gerlachs with relief, and the trial court properly dismissed the Gerlachs' declaratory judgment claim.[1]

We review the trial court's order on summary judgment in a declaratory judgment action de novo. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Summary judgment is appropriate if, when viewing the facts in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving

[1] The Gerlachs appeal both the trial court's order granting summary judgment in favor of the City and the trial court's order denying their motion for reconsideration. However, because the trial court's order granting summary judgment in favor of the City and dismissing the case was proper. there was no basis for granting a motion for reconsideration.

party is entitled to judgment as a matter of law. CR 56(c). Summary judgment may be entered in favor of the nonmoving party if there are no disputed facts and as a matter of law the nonmoving party is entitled to summary judgment dismissing the action. *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967) ("While there is authority for granting summary judgment for a nonmoving party . . ., it would be expected that such judgment would be either one of dismissal, or for relief sought by or uncontestedly due that second party."); *see also Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961).

Here, the trial court concluded that the Gerlachs had no legal basis for relief because the appearance of fairness doctrine, codified in RCW 42.36.010, does not apply to the initial consideration of a permit when the permit decision is made without a quasi-judicial action in an open, public hearing. The trial court was correct. The appearance of fairness doctrine applies to judicial or quasi-judicial actions where there is an open, public hearing or contested proceeding. RCW 42.36.010. The Gerlachs have not presented any legitimate basis for applying the appearance of fairness doctrine to a purely administrative decision made by executive branch officials without an open, public hearing or contested proceeding.

The appearance of fairness doctrine, as it applies to land use decisions, is codified in chapter 42.36 RCW. RCW 42.36.010 strictly defines the application of the appearance of fairness doctrine in land use decisions:

> 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, zoning adjuster, 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 actions 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 ordinances or the adoption of a zoning amendment that is of area-wide significance.

Under the plain language of RCW 42.36.010 the appearance of fairness doctrine does not apply to administrative decisions made by the City Planning Department without an open, public hearing or contested proceeding.

Statutory interpretation is a question of law that we review de novo. *Clallam County v. Dry Creek Coal.*, 161 Wn. App. 366, 385, 255 P.3d 709 (2011) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000)). When the plain language of the statute is unambiguous, our inquiry ends. *Dry Creek Coal.*, 161 Wn. App. at 385 (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995)). "Unambiguous statutes are not subject to interpretation, one looks at the plain language of the statute without considering outside sources." *Durland v. San Juan County*, 174 Wn. App. 1, 22-23, 298 P.3d 757 (2012) (citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

The plain language of RCW 42.36.010 is clear and unambiguous. In order for the appearance of fairness doctrine to apply, the decision must be a quasi-judicial action made by a local decision-making body. And, a quasi-judicial action requires a hearing or other contested case proceeding. RCW 42.36.010.

Here, there was no quasi-judicial action because there was no hearing or contested case proceeding. The initial consideration of the Gerlachs' SSDP application was made by the City Planning Department after reviewing the Gerlachs' application materials and public comments. The Gerlachs argue that consideration of their SSDP application was a public hearing because the

application was posted publically and members of the public were invited to comment. However, they cite no authority to support their proposition that posting an application for public comment transforms the City Planning Department's consideration of a permit application into a hearing or other contested proceeding. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Accordingly, the Gerlachs cannot show that consideration of their SSDP application was a quasi-judicial action.

Moreover, the City Planning Department is not a legislative body, planning commission, hearing examiner, zoning adjuster, or board that determines legal rights, duties, or privileges of parties in a hearing or contested case proceeding. Therefore, any action taken by the City Planning Department is not an action taken by a local decision-making body as defined in RCW 42.36.010. Accordingly, RCW 42.36.010 does not apply to the actions of the City Planning Department.

The Gerlachs argue that some cases imply that the appearance of fairness doctrine applies to land use decisions made before administrative hearings. But the Gerlachs' argument lacks merit. The legislature has specifically prohibited us from expanding the application of the appearance of fairness. RCW 42.36.100 is explicit:

> Nothing in this chapter prohibits the restriction or elimination of the appearance of fairness doctrine by the appellate courts. Nothing in this chapter may be construed to expand the appearance of fairness doctrine.

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.

Thus, because the appearance of fairness doctrine codified in RCW 42.36.010 does not apply to decisions made by the City Planning Department, there is no legal basis for the Gerlachs' claim. Accordingly, we affirm the trial court's order granting summary judgment in favor of the City and dismissing the Gerlachs' declaratory judgment action.

A majority of the panel having determined that this opinion will not be published in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

APPENDIX C

THE SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KITSAP

MARCUS GERLACH and SUZANNE GERLACH, husband and wife, Plaintiffs v. CITY OF BAINBRIDGE ISLAND, a Municipal Corporation and DOES 1-10, Defendants	No. 13 2 00136 7 DECLARATION OF FRANCINE SHAW

I, Francine Shaw, am above the age of 18 and not a party to this action. I have personal knowledge of the facts set forth in this declaration and if called to testify, could and would testify competently. I make the following statements based upon my own knowledge.

1. In 2005, I became the owner and operator of Planning and Permit Services, LLC., a full service land use and building permit coordination business that facilitates the processing and permitting of construction projects in Washington. I have provided various permit services throughout Washington since 2005.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

2. Prior to starting my own business, I served as a Project Planner with the City of Spokane from 1989 to 1990. In 1990, I began working for Spokane County Division of Building and Planning and was ultimately promoted to the position of Current Planning Administrator and served Spokane County until 2001. While employed with Spokane County, I administered the Growth Management program, including the preparation and implementation of regulations and planning concepts. I drafted staff reports and received applications for review of land use permitting. I was also charged with reviewing multi-family, commercial and industrial building permits.

3. Following my employment with Spokane County, I was employed as a Senior Permit Planner with Ramm Associates Inc., from 2001 to 2003. I prepared and tracked land use applications and permits for private individuals and corporate customers.

4. Upon completion of my work with Ramm Associates Inc., I was employed by San Juan County in the Community Development and Planning Department. I served as the Deputy Director of Development and Planning from 2003 to 2005, and the Interim Director in 2004. While employed with San Juan County, I was tasked with evaluating and processing complex Shoreline Substantial Development (SSD) permits, conditional use permits and variances. I was required to interpret and understand municipal codes and draft staff reports regarding permit applications, as well as oversee planning materials produced by subordinate staff. I represented the County before the Hearing Examiner and County Council, and reviewed SEPA and NEPA Environmental Documents and issued threshold determinations including EIS preparation. I am readily familiar with the duties, functions and responsibilities of a City/County Permit Planner, Current Planning Administrator and Director.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

5. In addition to my work experience, my formal education consists of a Bachelor of Science from the University of Washington in Architecture Studies in 1985 and an additional Bachelor of Architecture from the University of Washington, graduating cum laude in 1986.

6. I am familiar with the Plaintiff's Complaint and the underlying facts in the above-captioned litigation. I am also readily familiar with the Plaintiffs' underlying litigation (Litigation) against the Defendants, City of Bainbridge Island (COBI) and Joshua Machen, which was filed in the U.S. District Court, Western District of Washington, (Case 3:11-cv-05854-BHS). The Litigation involves allegations of extortion and the arbitrary and capricious application of COBI permit criteria after the Plaintiffs refused to pay a COBI planner to wash windows at their residence. It is my understanding that the Litigation is pending before the United Stated Court of Appeals, (Ninth Circuit).

7. Based upon the allegations in the Litigation, COBI's Department of Community Development planner inappropriately solicited the Plaintiffs to hire his private window cleaning business, while a COBI permit was pending before the exact same COBI planner. The Plaintiffs' refused to hire COBI planner, resulting in a prolonged application process of 6 years. In that matter, I previously testified that it was improper to allow a planner to engage in a business, which conflicts with official city business, or has the potential to conflict with city business. All cities have an obligation to properly supervise their employees, so as to avoid any improprieties or appearances of impropriety. All planners have an ethical obligation to assure they are not creating said conflict.

8. My review of documents relevant to this matter indicated that the Plaintiffs sought a permit from COBI following the Litigation and were required to submit their application to the COBI Planning Department. The COBI Planning Department's Current Planning Manager is Josh Machen (a named defendant in the Litigation).

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

The COBI planner, who was assigned to review the Plaintiffs' recent application, works for COBI's Planning Department and is subordinate to Mr. Machen. The COBI director was aware of the Litigation when the Plaintiff's application was submitted. The Litigation between COBI and the Plaintiffs was ongoing at all times during the application process. To a disinterested observer - such as myself, the situation certainly appeared awkward, as the Plaintiffs needed to apply for a permit from the same municipality that they were suing in the Litigation. In such a situation, a concern regarding retaliation, or retribution, from municipal officers appeared very possible, because of the Litigation.

9. Based upon my experience as a director, planning administrator and planner in various cities and counties in Washington State, I believe that permit applications usually involve significant property right matters and their review requires careful analysis - including the utmost objectivity and impartiality - in the decision-making process. In each of the numerous applications I have reviewed in the past, both as a planner, planning administrator and director, I avoided all conflicts of interest, or potential conflicts of interest in order to preserve credibility in the process and integrity of the municipality.

10. Based upon my education, experience and training as a planner, planning administrator, director, and permit coordinator, I believe that a potential conflict of interest existed with COBI's review of the Plaintiffs' application. Based upon my experience, I believe that the Plaintiffs' application should have been transferred by COBI to a disinterested reviewing party, in order to avoid any impropriety, or the appearance of impropriety especially considering the Plaintiffs' request to do just that. I believe that it is better to retain the credibility of the municipality by agreeing to resolve a conflict, or potential conflict, by transferring the application to a disinterested reviewing party, than to be involved in a situation where there is an obvious potential for impropriety and a potential lawsuit.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

11. In the present case, the Plaintiffs' application was not transferred to a neutral and unbiased party. The Plaintiffs' filed a Complaint for Declaratory Relief to obtain a Court Order to transfer the application to Kitsap County. COBI was served with the Complaint on, or about, February 14, 2013. On March 22, 2013, a Notice of Administrative Decision (Decision) was issued by COBI regarding the application. This Decision denied part of the Plaintiff's application. The Decision was issued more than 200 days after the Plaintiffs' application was deemed complete. My review of the Bainbridge Island Municipal Code, Section 2.16.020 (J)(1), requires a land use decision within 120 days, unless the applicant consents to an extension. I did not review any documents that indicated the applicants consented to an extension. The only correspondence that I reviewed, which specifically discussed postponement of the Decision, was dated February 14, 2013 and was sent to COBI's Heather Beckmann. The Plaintiffs' letter to COBI, dated February 14, 2013 specifically asked COBI to refrain from issuing a Decision because COBI was recently served with a Complaint for Declaratory Relief. It appears COBI ignored the Complaint and issued a Decision.

12. Based upon my 22 years of experience permitting numerous applications on behalf of governmental agencies and private citizens, I know that the public's trust can be easily lost when a conflict, or potential conflict, is not avoided. The Litigation between the Plaintiffs and COBI created a potential conflict of interest that should have been avoided with the transfer to a neutral and unbiased third party. It would have been in the best interest of COBI to transfer the Plaintiff's application to avoid the appearance of impropriety. It would have been in the Plaintiffs' best interest to have the file transferred to a neutral and unbiased third party because the applicant would have no cause for any allegation of a conflict of interest.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

13. As a past planner, planning administrator and director of various municipalities, I can attest that the entangling influences of the past Litigation created a high potential for a conflict of interest and should have required the transfer of the Plaintiffs' application to a neutral third party for permit review. Based upon my experience and education, COBI did not act in the best interest of itself, or in the best interest of the Plaintiffs' when the application was not transferred to a neutral and unbiased third party.

I declare under penalty of perjury that all of the above statements are true and correct.

Executed in the City of Friday Harbor, Washington

DATED THIS 29th day of April, 2013

Francine Shaw

Francine Shaw

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

APPENDIX D

City of Bainbridge Island
EXECUTIVE DEPARTMENT

MEMORANDUM

TO: Josh Machen, Associate Planner

FROM: Lynn Nordby, City Administrator

DATE: February 24, 2003

RE: Outside Employment

This memo will confirm our discussion last Thursday regarding the issue of your window washing business.

As we discussed, you have a small business outside of your work as a Planner for the city washing windows, primarily for private residences. I was recently made aware that you have also done some window washing for new construction within the community. As you explained to me the majority of your work has been for owner occupied single family residences and that you do not advertise but have been referred by one customer to another.

In response to my question about working for contractor's on newly constructed homes you told me that you have done some but that it is not your primary source of business. You also stated firmly that you believed that your AICP certification, track record with the city, professional education, background in Scouting and religious faith would assure that your ethics were above reproach.

I have no evidence to the contrary. However, I pointed out that, even then, someone could assert that there could be an appearance of fairness problem with a city employee doing contract work, no matter how minimal, for a contractor who might be before the same department for permits or regulation.

Therefore, I'm directing that you immediately stop all work for new construction or for contractors doing business within Bainbridge Island. You may continue window washing for private homes and other businesses as long as there is no connection to any activity regulated through the Department of Community Development.

Thank you for your willingness to meet to discuss this in a positive manner.

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KITSAP

MARCUS S. GERLACH and SUSAN L. GERLACH, husband and wife,	)	
Plaintiffs,	)	
vs	)	No. 13-2-00136-7
CITY OF BAINBRIDGE ISLAND, a Municipal Corporation; and DOES 1-10,	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS

June 14, 2013

Honorable Jeanette Dalton
Department No. 1
Kitsap County Superior Court

APPEARANCES

For the Plaintiffs:	MARCUS GERLACH Attorney at Law
For the Defendants:	JAMES HANEY Attorney at Law

JAMI R. JACOBSEN-HETZEL, CCR #2179
Official Court Reporter
614 Division Street, MS-24
Port Orchard, Washington 98366
Phone: (360) 337-4793

appearance-of-fairness claim.

The third legal point that I want to make is the inapplicability of the duty of good faith and fair dealings. Mr. Gerlach has replied upon an e-mail from Mr. Johnson, two City attorneys ago, I believe he said, and has argued, that there is some duty of good faith and fair dealings coming out of that e-mail.

As we have pointed out, the doctrine of good faith and fair dealings is a contractual doctrine. It deals with the obligation of people to act in good faith to enable contractual terms.

THE COURT: If I may?

MR. HANEY: Sure.

THE COURT: I am aware of the public duty doctrine with respect to public agencies and dealing with the public versus the contractual obligations private parties have. So do you think that the public duty doctrine would apply in any way?

MR. HANEY: Well, Your Honor -- and maybe we are having a difference in terms. To me, the public duty doctrine means the doctrine where the municipality owes a duty to the general public but not to any individual.

THE COURT: Unless they have made some sort of statement.

MR. HANEY: Unless they have made some sort of

special statement. That is a tort doctrine, and that deals with whether or not the municipality is liable for negligence. And the Court has said that because the elements of negligence are duty, breach, causation, damages, that there is no duty under the Public Duty Doctrine. But this is not a negligence case, and I don't think that it has that application.

THE COURT: All right. So there wouldn't have been any kind of expectation overtly that one could -- or obligation, I guess an expectation, that one could impose because of Mr. Johnson's e-mail.

MR. HANEY: No. The duty of good faith and fair dealing, Mr. Johnson specifically said in his e-mail, "I am not willing to make this general obligation of the City to act in good faith a contractual term that you can enforce in a settlement agreement."

And that was the context of Mr. Johnson's e-mail. Mr. Gerlach's attorneys in previous matters were asking that the settlement agreement on a previous permit include a term obligating the City of Bainbridge Island to act in good faith, and Mr. Johnson rejected that. And somehow from that, Mr. Gerlach conflates that into a binding obligation on the part of the City to act in food faith, so we simply don't believe that that applies.

The fourth point that I wanted to address is the

APPENDIX F

BEFORE THE HEARING EXAMINER

OF THE CITY OF BAINBRIDGE ISLAND

In re SEPA and Administrative Decision (Shoreline Substantial Development Permit) Appeal of Marcus Gerlach	File No. SSDP13500 CITY OF BAINBRIDGE ISLAND'S BRIEFING ON SCHEDULING

As stated in the Hearing Examiner's "Notice for Briefing on Scheduling," Applicant Marcus Gerlach appealed to the Hearing Examiner the administrative decision denying in part his Shoreline Substantial Development for a concrete bulkhead and conditions imposed in the associated Mitigated Determination of Nonsignificance. In his Appeal Statement, the Applicant states that the MDNS and the SSDP decision was "improperly and prematurely issued" because the application is the subject of litigation, *Gerlach v. City of Bainbridge Island*, No. 13-2-00136-7, in Kitsap County Superior Court, filed on January 17, 2013. The Applicant requested that his appeal be "postponed to avoid any decision which could improperly affect the outcome" of the Kitsap County litigation.

The Kitsap County litigation is a declaratory judgment action, seeking an order declaring that the City violated the appearance of fairness doctrine in processing the Gerlachs' application, that the City violated a covenant of good faith and fair dealing, and that the City violated a

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

at 1:30 p.m. in Kitsap County Superior Court. Haney Dec., Ex. F (Note for Motion). The City has already filed a Response in Opposition to the Gerlachs' Motion for Summary Judgment and supporting declarations. In its Response, the City requested that the court grant summary judgment in favor of the City as a nonmoving party because it is apparent, in the City's view, that the Gerlachs will never be entitled to the relief they seek as a matter of law. Haney Dec., Ex. G (City's Response in Opposition to the Gerlachs' Motion for Summary Judgment). Thus, it is very possible that, given both parties' belief that the Gerlachs's Kitsap County litigation can be resolved on summary judgment, there will be no need for the Hearing Examiner to delay consideration of the instant appeal.

However, should the Kitsap County court deny both parties' requests for summary judgment and require trial as a result of disputed issues of material fact, the City nevertheless encourages the Hearing Examiner to set the instant appeal for hearing in July or August 2013 without delay. Clearly, the Hearing Examiner lacks authority to determine whether the City violated covenants of good faith and fair dealing or covenants against retaliation, as alleged in the Kitsap County litigation. The Hearing Examiner's authority is limited to "an administrative proceeding to determine whether or not a particular piece of property is subject to a [city] land ordinance." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984). Purely legal issues beyond the scope of interpreting and applying local regulations fall outside a hearing examiner's authority. Thus, the Hearing Examiner may not rule on the issues of whether the City breached contractual covenants where they are not obligations contained within the City Code.

In addition, the Hearing Examiner does not have the authority to determine whether City staff, as alleged in the Kitsap County litigation, violated the appearance of fairness doctrine in processing the Gerlachs' SSDP application. As an administrative decision made by the Planning Director, the decision on an SSDP application is not subject to a public hearing at the staff level. *See* BIMC 16.12.360.E.4; BIMC 16.12.370.A.3. Accordingly, the appearance of fairness

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

The City's order of preference for the Hearing Examiner's proposed dates for this appeal is: (1) August 1st and (2) July 19th. The City's Planning Director will not be available on July 25th.

DATED this 7th day of June, 2013.

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

By _____
James E. Haney, WSBA #11058
Kristin N. Eick, WSBA #40794
Attorneys for City of Bainbridge Island

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

APPENDIX G

THE SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KITSAP

MARCUS GERLACH and SUZANNE GERLACH, husband and wife, Plaintiffs v. CITY OF BAINBRIDGE ISLAND, a municipal Corporation and DOES 1-10, Defendants	No. 13 2 00136 7 DECLARATION OF LAFE MYERS

I, Lafe Myers, am above the age of 18 and not a party to this action. I have personal knowledge of the facts set forth in this declaration and if called to testify, could and would testify competently. I make the following statements based upon my knowledge.

1. I am a resident of Bainbridge Island and previously served on the City of Bainbridge Island (COBI) Planning Commission. I provide testimony regarding COBI Planning Commission issues, as well as the Appearance of Fairness Doctrine regarding comments by Planning Commissioners.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island, WA 98110
Telephone: (925)984-9631

2. I was appointed to the COBI Planning Commission by the Mayor of COBI, with concurrence by the City Council on February 28, 2002. My term as a Planning Commissioner expired on January 31, 2003.

3. The BIMC, Chapter 2.14, sets forth the purpose and role of the COBI Planning Commission. According to the BIMC, the members of the COBI Planning Commission serve as an advisory body and a quasi-judicial, decision-making body, under the Director of the COBI Planning Department. The COBI Planning Commission members are charged with reviewing the Comprehensive Plan for COBI, COBI zonings and other advisory duties specified in the BIMC.

4. As a Planning Commissioner, I was charged with the task of reviewing proposed amendments to the Comprehensive Plan and Land Use (Zoning codes). All other city boards and commissions coordinate their Comprehensive Plan and land use activities with the Planning Commission.

5. I am familiar with the statutes in the RCW and WAC, which pertain to the authority to create and empower a Planning Commission to review Comprehensive Plans, in addition to case law that defines the policies and procedures of the Appearance of Fairness Doctrine. The Appearance of Fairness Doctrine applies to quasi-judicial decision-making bodies such as the COBI Planning Commission.

6. I reviewed a letter drafted on October 13, 2012 and submitted by COBI Planning Commissioner Maradel Gale and sent to Heather Beckmann, COBI associate Planner.

7. As a COBI Planning Commission member, Maradel Gale has a public official's obligation to recognize her position of civic authority and to abstain from using her independent initiative to influence administrative decision making by COBI

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island, WA 98110
Telephone: (925)984-9631

staff. Her actions are especially egregious and improper in that as a resident of the Eagle Harbor Community she is seeking what can be construed as a personal benefit. This is an abuse of her position as a community officer. At the very least her letter should have identified her comment as a personal statement and made clear that if any part of the contested issue came before the Planning Commission, she would recuse herself from all deliberations and voting on this subject.

8. The Appearance of Fairness Doctrine is a rule requiring decision-makers to conduct proceedings in a way that is fair and unbiased in both appearance and in fact. The Doctrine attempts to make sure that parties to a decision receive equal treatment. It is a recognized tenet of the justice system that entangling influences and personal interests, which demonstrate bias, invalidate land use decisions because the appearance of impropriety cannot yield a fair, equitable and just result.

9. Based upon my review of the October 13, 2012 recommendation by COBI Commissioner Gale and the COBI Administrative Decision for the Gerlachs' application , it appears that the COBI Planning Department simply adopted the recommendations of Commissioner Gale and confirmed COBI Planning Commissioner Gale's request to deny the bulkhead. This denial, based upon Commissioner Gale's lobby efforts, violated the Appearance of Fairness Doctrine.

10. Based upon my experience and service with COBI's Planning Commission, I believe that it would be a conflict of interest for a Planning Commissioner to improperly advocate against a site-specific land use application, whether for personal, or financial interest/gain.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island, WA 98110
Telephone: (925)984-9631

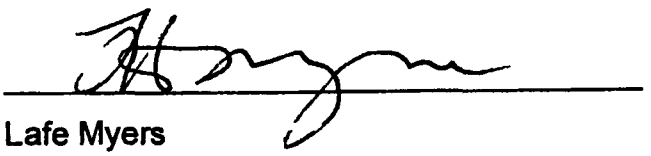
11. I reviewed a February 24, 2003 COBI memorandum, wherein Joshua Machen was directed to avoid impermissible conflicts, or appearances of impropriety, while he was acting as a COBI Planning Department employee. COBI appears to have an internal problem with Appearance of Fairness matters in the COBI Department of Community Development. A city employee (whether acting as a planner or a commissioner) should not violate the Appearance of Fairness or engage in actions that create an appearance of impropriety. Violations of the Appearance of Fairness doctrine can lead to claims of bias, discrimination or favoritism and should be avoided by COBI's municipal officers. No COBI employee should engage in any business, which can conflict with city duties, or violate the Appearance of Fairness Doctrine.

12. My review of correspondence from the Kitsap County Community Development Department (Kitsap County), indicated that Kitsap County is ready willing and able to process the Gerlachs' application as a neutral and unbiased administrator. I believe that the interest of justice would be best served by transferring this application to the above-mentioned neutral and unbiased decision-maker in accordance with the Appearance of Fairness Doctrine.

I declare under penalty of perjury that to my knowledge, all of the above statements are true and correct.

Executed in the City of Bainbridge Island, Washington

DATED THIS 7th day of May , 2013



Lafe Myers

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island, WA 98110
Telephone: (925)984-9631

APPENDIX H

THE SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KITSAP

MARCUS GERLACH and SUZANNE GERLACH, husband and wife, Plaintiffs v. CITY OF BAINBRIDGE ISLAND, a Municipal Corporation and DOES 1-10, Defendants	No. 13 2 00136 7 DECLARATION OF BRIAN SONNTAG

I, Brian Sonntag, am above the age of 18 and not a party to this action. I have personal knowledge of the information in this declaration and if called to testify, could and would testify competently. I make the following statements based upon my knowledge.

1. In 1978, I was elected to public office as the Pierce County Clerk, in Washington State, working as the Chief Administrative officer for the Superior Court.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

2. In 1986, I was elected to the office of Pierce County Auditor and served as the Auditor for Pierce County, Washington State, where I was responsible for fair elections, public document recording, vehicle licensing and business licensing.

3. In 1992, I was elected to the Washington State Auditor and was re-elected at the end of each term until my retirement in 2012. The Washington State Auditor's Office independently serves the citizens of Washington State by promoting accountability, fiscal integrity and openness in state and local government. I was responsible for ensuring the efficient and effective use of public resources.

4. In 1999, I was awarded the Warren G. Magnuson Award for implementing performance measures and performance audits as constructive tools for state and local governments, allowing them to operate more efficiently and be more accountable to their constituencies.

5. My formal education includes time spent at Tacoma Community College and the University of Puget Sound.

6. I previously served as a member of the Board of Directors with the United Way and the Boys and Girls Club. I presently serve on the Board of Directors of The Rescue Mission in Tacoma, as the Chief Financial Director.

7. During my 34 years serving the public with more than 20 years as the State Auditor, I witnessed the good, bad and ugly in government. During the last 20 years as Auditor, I actively tried to root out government waste and abuses. My goal was to improve government practices and promote good government policies that serve to educate the public and improve the public's trust in government.

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

8. Washington State law requires the Washington State Auditor's Office investigate both known and suspected illegal activities in all state agencies and local governments. As the Washington State Auditor, it was my responsibility to conduct investigations in order to uncover and prevent fraud in accordance with Washington State law.

9. I am familiar with the Plaintiff's Complaint and the underlying facts in the above-captioned litigation and I provide a general opinion regarding the Appearance of Fairness in government and the potential for breaches of public trust when certain individuals in local government seek to use undue influence in order to manifest a probable outcome because of their biased participation.

10. The Appearance of Fairness Doctrine was created to ensure and require governmental decision-makers to conduct themselves in a fair and unbiased manner. This principal of fairness is codified in the Revised Codes of Washington (RCW) and requires equal treatment without improper participation, or influence for personal gain. I believe that the RCW seeks to prevent partiality in government decisions that can eventually lead to corrosion of public trust in government.

11. My review of documents relevant to this matter revealed that the Plaintiffs sought a permit from the City of Bainbridge Island (COBI), while simultaneously pursuing a federal action, against COBI. The Plaintiffs sought transfer of the permit application after a COBI Planning Commissioner, Maradel Gayle, sought to interject her personal preferences and directed the COBI planner to deny the bulkhead application. The Appearance of Fairness Doctrine mandates municipal officers act without bias, or impropriety, in order to preserve the public's trust in government decision-making abilities. It is difficult to regain a position of trust, once it is violated.

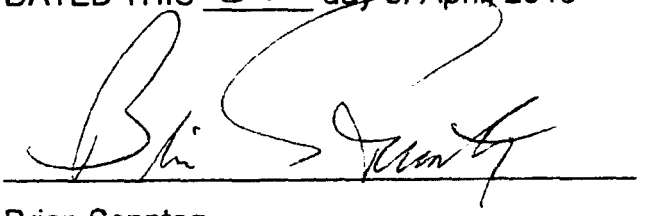
Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

12. Based upon my experience as a public officer, who was in charge of preserving the public's trust in state government, I believe it is imperative that government officials act in an unbiased and neutral capacity when making decisions that significantly affect their constituencies. It would be improper for one government agent to lobby another government agent to affect the outcome of a matter based upon personal bias, or prejudice. In order to avoid the appearance of bias or prejudice in the instant case, I would recommend that the Plaintiffs' application be transferred to a disinterested reviewing agency. An independent and unbiased review would avoid any actual impropriety, or appearance of impropriety, in the review process.

I declare under penalty of perjury that all of the above statements are true and correct.

Executed in the City of Tacoma, Washington

DATED THIS 30th day ~~of April~~, 2013



Brian Sonntag

Marcus Gerlach
579 Stetson Place SW
Bainbridge Island WA 98110
Telephone: (925) 984-9631

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing (Petition For Review) on the party mentioned below:

James Haney, Esquire Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	**[ ] Email** **[ ] Fax** **[ ] Legal Messenger** **[ ] Process Service**
Julie Cederberg, Receptionist for James Haney, Esq. Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	**[ ] Email** **[ ] Fax** **[ ] Legal Messenger** **[ ] Process Service**

DATED at Seattle, Washington, this ___th day of January , 2015.

_____

David Dean

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing (Petition For Review) on the party mentioned below:

James Haney, Esquire Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	**[ ] Email** **[ ] Fax** **[ ] Legal Messenger** **[ ] Process Service**
~~Julie Cederberg,~~ Molly Lonkgan Receptionist for James Haney, Esq. Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	**[ ] Email** **[ ] Fax** **[ ] Legal Messenger** **[ ] Process Service**

DATED at Seattle, Washington, this 12th day of January, 2015.

David Dean