

70141-0

70141-0

Court of Appeals No. 70141-0-I

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JEFFREY CONNELL and JOELLEN CONNELL, APPELLANTS

v.

CITY OF BOTHELL, RESPONDENT

REPLY BRIEF OF APPELLANTS

Paul A. Spencer, WSBA #19511
Oseran, Hahn, Spring, Straight & Watts, P.S.
10900 NE Fourth Street, Suite #1430
Bellevue, Washington 98004
425-455-3900 Telephone 425-455-9201 Fax
pspencer@ohswlaw.com

~~FILED~~
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JAN -7 PM 3:25

ORIGINAL

TABLE OF CONTENTS

	PAGE
I. Introduction	1
II. Reply	1
A. The Appearance of Fairness Doctrine was preserved both at the original Board of Appeals Hearing and at the Superior Court Level	1
B. The Appearance of Fairness Doctrine was violated by Mr. Delack's participation.	4
C. The Respondent city of Bothell should not be awarded its attorneys' fees and costs.	5

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGES</u>
<u>Amalgamated Transit Union Local 587 v State</u> , 142 Wn2d 183, 11 P.3d 762 (2000)	1
<u>Harrison v County of Stevens</u> , 115 Wn. App. 126, 61 P.3d 1202 (2003)	3
<u>Habitat Watch v Skagit County</u> , 155 Wn2d. 397, 120 P.3d 56 (2005)	3
<u>Hayden v Port Townsend</u> , 28 Wn. App. 192, 622 P.2d 1291 (1981)	5
<u>State v Post</u> , 118 Wn.2d 596 826 P.2d. 172 (1992)	4
 <u>STATUTES/COURT RULES:</u>	
RCW 4.84.370	5

I. INTRODUCTION

Appellants' Jeffrey and JoEllen Connell offer this brief in strict Reply to the Respondent's brief offered in opposition to Appellants Opening Brief.

II. REPLY

In Appellants' opening brief, they argued three assignments of error, this Reply will be limited to the issue pertaining to the underlying Board proceedings violation of the Appearance of Fairness Doctrine. In its response brief, Respondent City argues that that the Appearance of Fairness Doctrine was not preserved for Appeal and that if preserved, it was not violated under the circumstances.

A. **The Appearance of Fairness Doctrine was preserved both at the original Board Of Appeals hearing and at the Superior Court Level.** In its response brief, the Respondent City argues that the issue with respect to appearance of fairness was not raised and/or adequately briefed below. The City cites Harrison v. County of Stevens, 115 Wn.App. 126, 61 P.3d 1202 (2003) in support of its position that the matter was not preserved. However, in Harrison an argument was raised for the first time in appeal in a reply brief filed with the Court of Appeals and was not considered simply because it had not

been raised before the hearing examiner or in the underlying Superior Court proceeding.(See footnoteNo.3 at p.142). In the case at bar, the issue was raised both to the Board at the hearing and before the Judge (both in briefing and argument) at the Superior Court level.

Notably, Respondent City's response brief does not take issue with the Appellants' citation to the record below.

Respondent representative Delack went from advising the Board of Appeals on procedural issues to offering testimony and advocating on behalf of the City of Bothell, Appellants' counsel timely and immediately objected – pointing out to the Board of Appeals that “He [Mr. Delack] is not counsel” nor was he testifying as a witness. (See ROP 20) In response, the Board simply swore Mr. Delack in – recognizing at that point that Mr. Delack was offering substantive testimony.

A short time later, Respondent representative Delack stood and undertook to cross-examine Appellants' building manager and began questioning him. (See ROP 51) Appellants' Counsel again objected and raised the issue of Mr. Delack's ability to advocate (and ask questions) on behalf of the Respondent City. ROP 52. After considering the matter briefly, the Board of Appeals found that Respondent representative Delack was wearing his ex-officio Board Member hat and allowed him to question the witness just like any other Board member. (ROP 54) Notably, Respondent City's attorney inadvertently acknowledges the appearance of fairness conflict by pointing out to the Board that “this is an informal proceeding” and that Mr. Delack is both a Board Member and “He's also a party” to the proceeding. ROP 54-55.

(Appellants' opening brief at pages 14 to 15)

Simply put, the issue was raised by counsel immediately as Mr. Delack's posture changed in the proceedings – even being acknowledged by the Respondent City's attorney. How can Respondent City argue that the matter was not preserved – when the issue was literally addressed during the hearing.

Respondent City also relies upon Habitat Watch v. Skagit County, 155 Wn2d. 397, 120 P.3d 56 (2005) and Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762 (2000). In Habitat Watch the Court declined to consider argument that a party suggested would be briefed (ie. attorneys' fees) after a decision had been made. Habitat Watch at p. 416 footnote No.10) The issue was not whether or not a party had preserved the appearance of fairness defense or similar defense as advocated in the case at bar.

Similarly Respondent's reliance on Amalgamated Transit Union Local 587 v. State is also misplaced. In the Amalgamated Transit Union Local 587 case, an issue of standing was raised for the first time on appeal. Further, the petitioning party simply referenced a case and provided no argument. In the case at bar, counsel for Appellants' at the underlying proceeding and at the Superior Court level each raised and argued the appearance of fairness doctrine – and factually in each instance argued as to how it applied to Mr. Delack's function at the hearing. There

is no question, appearance of fairness was an issue raised at both the underlying proceeding before the Board of Appeals and at the Superior court Level.

B. The Appearance of Fairness Doctrine was violated by Mr. Delack's participation. The City cannot and doesn't take issue with the various hats its building official was wearing during the Appeals hearing which is the subject of this action. As elaborated in Appellants' opening brief, Mr. Delack (1) acted as a ex-officio member of the Board of Appeals below and advised the Board of Appeals on pertinent policies and procedures that governed the appeals; (2) at the same time he represented the Respondent City of Bothell in questioning of witnesses in the proceeding below; and (3) also acted as the primary witness for the Respondent City of Bothell. There is no question as to the scope and pervasive involvement of Mr. Delack.

In the Respondent's brief in opposition it relies entirely on State v. Post, 118 Wn.2d 596, 826 P.2d. 172 (1992). State v. Post was a criminal case involving a prosecution for rape and first degree burglary. In Post, the defendant was seeking to apply the Appearance of Fairness doctrine to include a community correction officer who prepared a presentence report – and then impute his bias to the judge who is actually sentencing the

Defendant. The Post Court declined to do so on the basis that the probation officer was not the decision maker at the hearing. Post at p. 618. There is a considerable difference between a criminal proceeding and consideration of a presentence report, and a LUPA Appeal where the Respondent's building official is the star witness and is also advising the Board of Appeals on process, procedure, cross examining witnesses and all at the same time acting as a Board Member himself.

The case at bar is virtually identical to the board members situation Hayden v. Port Townsend, 28 Wn.App. 192, 622 P.2d.1291 (1981). Like the board member in Hayden, Mr. Delack may not have voted in the ultimate outcome, but he was advocating on behalf of the City, questioned witnesses and advised the board on process and procedure. Simply put, there is no question that the Appearance of Fairness doctrine was violated below, and Respondent City of Bothell doesn't and cannot dispute Mr. Delack's pervasive involvement.

C. The Respondent City of Bothell should not be awarded its attorneys' fees and costs. Respondent City also contends that it should be awarded its attorneys' fees and costs on appeal pursuant to RCW 4.84.370. To do so, Respondent City of Bothell must prevail at both the Superior Court and at the Court of Appeals levels. In this case, the

decision of the Superior Court and of the Board of Appeals should be reversed and the case remanded back to the Board of Appeals for consideration without the involvement of Mr. Delack. His involvement clearly violated the Appearance of Fairness doctrine and accordingly should be reversed.

Dated this 3rd day of January, 2014.



Paul A. Spencer, WSBA #19511
Attorney for Appellants

CERTIFICATE OF MAILING/SERVICE

The undersigned, Cheryl C. Cook, certifies that on the 6th day of January, 2014, she caused to be served via email and/or U.S. Mail, postage prepaid, a copy of the Appellants Reply Brief and this Certificate of Service to the following:

Joseph N. Beck
City of Bothell
18305 101st Ave NE
Bothell, WA 98011-3499
Joe.beck@ci.bothell.wa.us

Paul Reginald Byrne, II
City of Bothell
18305 101st Ave NE
Bothell, WA 98011-3499
Paul.byrne@ci.bothell.wa.us

Peter J. Eglick
Joshua A. Whited
Eglick, Kiker Whited PLLC
1000 2nd Ave, Suite #3130
Seattle, WA 98104
Eglick@ekwlaw.com
Whited@sklaw.com

In addition, the Appellant's Reply Brief in this matter was forwarded for filing with the Washington State Court of Appeals, Division I, 600 Union Street, Seattle, WA.

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.


Cheryl Cook, Legal Assistant
Oseran, Hahn, Spring, Straight & Watts, P.S.