

Supreme Court Case No 91200-9

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

Received
Washington State Supreme Court

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Ronald R. Carpenter
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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

PETITIONERS' REPLY FOR REVIEW

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Respondent, City of Bainbridge Island (City) filed an Answer to the Petition for Review, which did not comport with the RAP 13.4 (d) as it did not raise new issues in the Answer, but rather re-asserted a cross-petition, similar to their original Answer to the Declaratory Relief Complaint. The City's original Answer (CP 23) to the Complaint claimed a counterclaim asserting that a request for fairness was frivolous. The City raises this issue again in their Answer to Petition by stating, "But the legal issue involved in this case [fairness] is not so nearly broad..." (Answer to Petition pg. 8), implying that a request for fairness should be narrowly construed, excluding fairness under the Appearance of Fairness Doctrine (AFD). The Petition for Review by Marcus Gerlach and Suzanne Gerlach (Gerlachs), simply seeks the imposition of fairness under the AFD, which is neither broad, nor narrow, but merely equitable. In support of the City's counter-claim they assert that "The Supreme Court need not step in and 'impose fairness' as the Gerlachs request..." (Ans to Pet pg 10). This Reply is made pursuant to RAP 13.4 (d) and addresses three points about the City's allegations regarding the AFD.

THE CITY'S ALLEGED FACTS ARE MISREPRESENTATIONS

It seems only proper that the Supreme Court make an informed decision, based upon real facts, rather than inaccurate misrepresentations, which are unsupported by any evidence. The City's allegations, or distortions in their Counterstatement did not comport with the actual facts and evidence.

ACTUAL FACTS/EVIDENCE

CITY’S MISREPRESENTATIONS

<p>The Complaint was filed before the City made a Decision. The Gerlachs requested the City not issue a Decision until after the litigation was resolved (CP 112)</p>	<p>“The Gerlachs did not seek a stay of the City’s decision-making process...” (City’s Answer to Petition pg 7)</p>
<p>City’s Beckmann concealed the identity of the alleged trespasser and did not cooperate with police until after the City Manager required her cooperation (CP 133)</p>	<p>“Ms. Beckmann knew the identity of one of the commenters but, according to Ms. Beckmann, Mr. Gerlach never directly asked to reveal his identity.” (City’s Answer to Petition pg 5)</p>
<p>Commissioner Gale stated to Beckmann, in written correspondence, “Deny this request...” (CP 91)</p>	<p>“Ms. Gale’s letter did not contain any language ‘directing’ Ms. Beckmann to deny the permit application...” City’s Answer to Petition pg. 5)</p>
<p>Planning Commissioner Gale’s comment was neither private nor impartial, and was intended to be part of the formal record. This improper participation by the Commissioner made the trial court pause. (CP 90;Appx A pg 4)</p>	<p>“The Planning Commission had absolutely no role in the City’s processing of the Gerlachs’ SSDP application.” City’s Answer pg. 5) “Ms. Gale and the Planning Commission were not involved in any way in the Gerlachs’ application (Answer to Petition pg 6)</p>
<p>The HEX <u>cannot</u> decide the AFD issues as alleged in the litigation, according to the City’s attorney. (CP 351; Appx F pg 5)</p>	<p>“[T]he Gerlachs had a completely adequate [fair] remedy in the form of an appeal to the hearing examiner...” (Answer to Petition pgs 7 and 10)</p>
<p>The participation by Commissioner Gale and 13 other adversaries satisfied the <i>contested case proceeding</i> requirement. (CP 97-98)</p>	<p>“[T]he appearance of fairness doctrine does not apply to the initial decision on an SSDP application by the City PD, which is made without a public hearing or <i>contested case proceeding</i>.”(Answer to Petition pg 8)</p>

The litigation, filed before the City issued an untimely and defective decision, merely sought only a fair process, via the County. The deliberate and intentional bad acts by City staff, agents and employees, was clearly unfair and biased. The character of the City’s Planning Commissioner and

staff was very troubling¹ to the Trial Court (Petition Appx. A, Pg. 4). The City's attorney knowingly admitted that the Hearing Examiner (HEX) could not determine the AFD issues pled in the litigation. (Pet. Appx. F pg 5)

THE AFD APPLIES TO CONTESTED CASE PROCEEDINGS

The actions by the City's Commissioner Gale and employee Beckmann, 13 adversarial letters, a filed Complaint and a Decision (citing numerous statutes and supporting case law) by the City mirroring Gale's directive, amounted to a *contested case proceeding* pursuant to RCW 42.36. The AFD applies to quasi-judicial actions [proceedings protected by the United States Constitution and Washington State Constitution] in hearings or other *contested case proceedings*. (Answer to Petition pg 9) The lower courts did not recognize the obviously contested nature of the case proceedings. The *contested case proceedings* required the imposition of equal protection and fairness, via due process. Contrary to the City's Answer to Petition claiming that Equal Protection and Due Process arguments were not raised in the appeal process (Answer to Petition pg 11), the Gerlachs cited both the Federal and State Constitutions as authority in the Appellant's Reply (Court of Appeals- Reply Brief pgs 22-24). The Substantial Shoreline Development Application was a *contested case proceeding* under the AFD / RCW 42.36.

¹ The AFD prevents Commissioners "acting even in their private capacity" from interjecting any comment. Hayden v Port Townsend 28 Wn.App. 192,195 662 P.2d 1291 (1981)

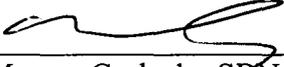
THEIR PERMIT PROCESS IS INCAPABLE OF FAIRNESS

The City requested referral of the litigation to the HEX or Shoreline Hearing Board (SHB) for review (Ans. To Pet. pgs 7, 10), even though the HEX cannot decide AFD issues (Pet. Appx F pg 5). The City seeks HEX review because the HEX will provide deference to the City. The HEX and SHB are required by law to give substantial weight and deference to the City.² It is axiomatic that impartiality is unavailable to the Gerlachs when the City will be afforded deference and substantial weight by the HEX or SHB. For the City to suggest deference in favor of the City is equal to fairness under the AFD, for the applicants, is nonsensical. Indeed, the City does not believe that the Gerlachs are entitled to fairness based upon the City's own (verbatim transcript) statements (Pet. Appx E pg 48).

CONCLUSION

The Court of Appeals stated in their unpublished opinion that it need not be bound by the existing case law (Pet. Appx. B, Pg 7) The lower courts refused to impose the AFD to the City's public servants mandating review.

DATED this 20 day of February 2015



Marcus Gerlach ~~SBN 33963~~
Attorney for Petitioners

² Brown v Tacoma 30 Wn.App. 762,764 637 P.2d 1005 (1981, quoting Ancheta v Daly 77 WnWn.2d 255, 259-260 461 P.2d 531 (1969). Please see also, Moss v City of Bellingham 109 Wn.App. 6, 21, 31 P.2d 703 (2001)

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 (Reply 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	<input type="checkbox"/> Email <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Process Service
Julie Cederberg , <i>Amea Frodke</i> Receptionist for James Haney, Esq. Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98164 Tel: (206) 447-7000 Fax: (206) 447-0215	<input type="checkbox"/> Email <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Process Service

DATED at Seattle, Washington, this 20th day of February, 2015.



David Dean