

Case No 45571-4-II

(Kitsap County Superior Court No 13 2 00136 7)

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

*SLC*  
SUPERIOR COURT  
BAINBRIDGE ISLAND  
FEB 20 11 30 AM '13

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MARCUS GERLACH and SUZANNE GERLACH, Appellants

v.

CITY OF BAINBRIDGE ISLAND, Respondent

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

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APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
THE HONORABLE JEANETTE DALTON

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APPELLANTS' OPENING BRIEF

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

TABLE OF CONTENTS

INTRODUCTION.....6

ASSIGNMENTS OF ERROR AND ISSUES RELATED TO  
ASSIGNMENTS OF ERROR .....11

1. The City Breached A Promise Requiring the City To Treat the  
Gerlachs In Good Faith.....11

2. The Gerlachs Were Already Involved in Litigation Against City Staff  
Thereby Creating Entangling and Prejudgment Issues of  
Impartiality.....11

3. The City Staff Concealed The Identity Of An Alleged Criminal  
Trespasser Who Admitted That The City Planners are Prejudiced  
Against The Gerlachs.....11

4. The City’s Planning Commissioner Violated the Appearance of  
Fairness Doctrine By Directing City Staff to Deny Only The  
Gerlachs’ Application.....12

5. The City’s Decision to Deny Part of the Gerlachs’ Application Was  
Defective and Invalid Because the City Violated the Municipal  
Code.....12

6. The City Cannot Recognize an Obvious Conflict Of Interest If the  
City’s Planning Manager Is Allowed to Solicit His Side Business

and Wash Windows on Properties Seeking City Permit Approval..	12
7. The City Discriminated Against Only The Gerlachs’ Bulkhead Application And Permitted Other Bulkheads In Eagle Harbor, Including the City’s Own 340 Foot Long Cement Bulkhead.....	12
8. The City’s Attorney Mislead the Trial Court Regarding the Hearing Examiner’s Authority To Adjudicate Appearance Of Fairness Issues.....	13
STATEMENT OF THE CASE.....	13
ARGUMENT.....	25
1) THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE CITY.....	25
a. Summary Judgment is reviewed <i>De Novo</i> .....	25
b. The Appearance of Fairness Doctrine is applied to permitting procedures and protocol.....	26
c. The Gerlachs only sought a fair permitting process, not a guaranteed permit.....	29
d. The City’s defective and invalid Decision must be vacated before a neutral and unbiased permit reviewer can properly determine the Gerlachs’ application.....	32
2) THE COURT SHOULD HAVE GRANTED THE GERLACH’S MOTION FOR RECONSIDERATION.....	35
CONCLUSION.....	35
Appendixes.....	37

## TABLE OF AUTHORITIES

### Table of Cases

<i>Anderson v Island County</i> 81 Wn.2d 312; 501 P2d 594 (1972).....	34
<i>Buell v Bremerton.</i> , 80 Wn.2d. 518, 495 P.2d 1350 (1972).....	26, 32
<i>Chrobuck v Snohomish County</i> , 78 Wn.2d. 858, 480 P.2d 489 (1971) .....	26, 28
<i>Columbia Community Bank v Newman Park</i> 177 Wn 2d 566; 304 P3d 472 (2013).....	27
<i>Folsom v Burger King</i> 135 Wn2d 658; 958 P2d 301 (1998).....	25
<i>Hayden v City of Port Townsend</i> , 28 Wn. App. 192, 662 P.2d 1291 (1981).....	31, 32
<i>Samis Land Co v City of Soap Lake</i> 143 Wn2d 798; 23 P3d 477 (2001).....	25
<i>Save A Valuable Environment v City of Bothell</i> 89 Wn.2d 862; 576 P2d 401 (1978).....	33
<i>Smith v Skagit County</i> 75 Wn.2d 715, 453 P.2d 832 (1969).....	26, 28
<i>Versuslaw Inc v Stoel Rives LLP</i> 127 Wn.App. 309; 111 P3d 866 (2005).....	25
<i>Westbrook v Burien</i> , 140 Wn.App. 540, 166 P.3d 813 (2007).....	29

Regulations and Rules

City of Bainbridge Island Municipal Code 2.16.020 J 1 .....31

Revised Codes of Washington 42.36.....9, 10, 25 , 27

Revised Codes of Washington 42.36.010.....25

Revised Code of Washington 42.36.080.....28

Revised Codes of Washington 42.36.110.....28

Washington State Oath of Attorney...#5.....9

Washington State Rule of Professional Conduct 3.3.....9

Appendixes

- Appendix A- Covenant from City to Gerlachs, June 23, 2011
- Appendix B- Trial Court Order, September 5, 2013
- Appendix C- City Brief to Hearing examiner, June 7,2013
- Appendix D- Declaration of Francine Shaw
- Appendix E- Declaration of Lafe Myers
- Appendix F- Declaration of Brian Sonntag
- Appendix G- City Memo to Josh Machen, February 24, 2003

## INTRODUCTION

This case concerns the Appellants' request to have their application for a permit be reviewed in a fair and unbiased manner, and by a neutral and impartial permit reviewer. The Appellants, Marcus Gerlach and Suzanne Gerlach (Gerlachs), own property on Bainbridge Island, in Kitsap County. (Clerk's Papers 3, 5, 51) In 2011, the Gerlachs sought a permit from the Respondents, City of Bainbridge Island (City) to construct a dock/bulkhead. (CP 7, 52, 58-61) During the application for the permit, the Gerlachs discovered that the City's staff, agents and employees committed multiple violations of the Appearance of Fairness Doctrine (AFD). The violations breached the City's mandatory obligation to review permit applications in a fair and unbiased manner.

When the Gerlachs realized that the City was reviewing the bulkhead/dock application in an unfair and biased manner, the Gerlachs filed litigation against the City for violations of the AFD (CP 5, 52) and only sought removal of the application to Kitsap County for an unbiased review. The Gerlachs filed the litigation before a decision on the application was issued by the City. It was not until just before the City filed their Answer that the City issued a decision on the application. In its Answer, the City denied knowledge of many allegations, (CP 15-25) despite obvious contradictory

evidence, offered at the Motion for Summary Judgment. (CP 25-50). The Gerlachs only sought a fair and impartial permit review process. The Gerlachs petitioned the Trial Court to vacate the City's defective decision and have the application reviewed by the Kitsap County Planning Department (KCPD) via a declaratory judgment.

The Gerlachs' Complaint and Motion for Summary Judgment provided evidence of several deliberate and intentional acts by the City's staff, agents and employees, which violated the AFD. During oral argument, the Trial Court was told by the City Attorney that the City's Hearing Examiner (HEX) could determine AFD issues. The Trial Court correctly noted the "troubling character"<sup>1</sup> of the City's acts, but denied the motion and directed the Gerlachs seek relief from the HEX. Instead of providing for a fair and impartial review process, the Trial Court denied the Motion and dismissed the entire litigation. (CP 354-356) The Gerlachs filed a Motion for Reconsideration pointing out to the Trial Court that the City's own attorney told the City's HEX something completely different, when he stated, "[T]he HEX does not have the authority to determine ...the AFD in processing the Gerlachs' SSDP application" (CP 246, 351, 370, 381, 433) . The Trial Court denied the Reconsideration without analysis. (CP 445)

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<sup>1</sup> Memorandum Of Decision, September 5, 2013, page 4 ln 2-6

This was not the first time the Gerlachs realized that the City misused its permit process as indicated in the Motion for Summary Judgment and the Motion for Reconsideration. Unfortunately for the Appellants, they discovered several years earlier that the City treats permits applicants in a disparate fashion. Prior to the instant 2011 permit, the Gerlachs sought permits from 2005 through 2011, for a pre-existing mooring buoy. After the Gerlachs refused the City Planning Manager's solicitation to hire his window washing side-business, the Gerlachs then became involved in a 6-year fight for a simple mooring buoy permit. (CP 352) During the 6 years, the City permitted numerous mooring buoys surrounding the Gerlachs' property, but denied/ignored/returned the Gerlach's mooring buoy applications. Only after engaging legal counsel and exposing the City's fraudulent basis for the denials, did the City issue the Gerlachs a mooring buoy permit. It was during this settlement of the mooring buoy permit litigation that the City Attorney stated in an email, "The City has an obligation to treat the applications of the Gerlachs...in good faith..." Oddly, the City Attorney refused to include this language into the settlement agreement, because the City never intended to treat the Gerlachs applications in good faith. (CP 387) The City Attorney's covenant that the "Gerlachs need not fear retaliation [from the City's staff]." was likewise specious because the City's review of the Gerlachs' instant shoreline permit

application violated the AFD. (CP 52, 65 - Appendix A)

The AFD, a tenant in law based in equity, was codified under RCW 42.36. The AFD mandates a fair, impartial and unbiased permit process. In the litigation, the Gerlachs asserted that they were unable to receive a fair and impartial permit review from the City. The Complaint noted violations of RCW 42.36 and was filed before the City issued an administrative decision.

When the Trial Court chose to overlook the AFD violations, despite noting the “troubling character”<sup>2</sup> (CP 356 - Appendix B) of the City’s actions, the Trial Court committed error. The Court’s acknowledgement of “troubling character” of the City was a sufficient legal basis to confirm a violation of the AFD. The AFD does not require actual violations of unfairness, but merely the *appearance of unfairness*.

The Trial Court’s September 5, 2013 Decision mistakenly assumed that the HEX could decide the AFD violations. Even the City Attorney knew that the HEX **could not** decide AFD violations. When the City Attorney misled the Court/Judge Dalton during the June 14, 2013 hearing, the City Attorney violated the Washington State Attorney Oath (§5) and violated RPC 3.3

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<sup>2</sup> Memorandum of Order on Motion for Summary Judgment pg 4 ln 2-6 Appendix B

(CP 371). The City Attorney's statement to the Trial Court was mendacious. The City Attorney's June 7, 2013 Briefing to the HEX was correct, as the Trial Court was the only entity to have jurisdiction over the AFD, see RCW 42.36. (CP 352 – Appendix C).

The AFD was designed to ensure the permit process is fair. In essence, the Trial Court found a violation of AFD when the Court noted the “troubling character” of Commissioner Gale's intrusive and unauthorized directive to deny the bulkhead. However, instead of vacating the defective planning decision, the Trial Court ordered the Gerlachs to proceed to the HEX appealing the defective planning decision. Going to the HEX with the defective planning decision did not solve the AFD violation. In addition, the Trial Court was under the mistaken impression that the HEX could address the AFD violation. The City's own attorney knew that the HEX could not address the AFD and in fact misrepresented to the Court that the HEX could address the AFD issue. (Appendix C)

Any permit decision must be free from any AFD violations before being brought to the HEX. The Trial Court committed error when it denied the Motion for Summary Judgment and dismissed the entire action. Accordingly, the Court of Appeal should reverse the Trial Court's Decision.

## ASSIGNMENTS OF ERROR

**Assignment of Error #1** The Trial Court erred by ignoring that the City breached a promise to treat the Gerlachs in good faith.

**Issue:** Did the City have a duty to act in good faith regarding the Gerlachs' subsequent permit applications and did the City breach the duty to treat the Gerlachs' application in good faith?

**Assignment of Error #2** The Trial Court erred by failing to recognize that the Gerlachs were involved in litigation with the City and that any decision by City staff would not appear to be neutral and unbiased.

**Issue:** Does the AFD require the City to make fair and unbiased decisions and when factors prevent a fair and unbiased decision, does the AFD require an unfair decision be vacated?

**Assignment of Error #3** The Trial Court ignored the concealment by City staff, of the identity of an alleged criminal trespasser. The alleged trespasser later admitted to the police that the City planners are actually prejudiced against the Gerlachs.

**Issue:** Does the AFD require City staff to be honest and truthful when providing testimony and evidence to the Court and does the admission by the alleged trespasser corroborate the AFD violations?

**Assignment of Error #4:** The Trial Court accurately noted the City Planning Commissioner's violation of the AFD when the Commissioner directed City staff to deny only the Gerlachs' application, but the Trial Court erred in refusing to vacate the City's defective and invalid decision.

**Issue:** When a violation has occurred, does the AFD require that the defective and invalid decision be vacated? If so, is it error to make Appellants proceed to a HEX based upon a defective decision where the HEX has no jurisdiction to determine a violation of the AFD?

**Assignment of Error #5:** The Trial Court unlawfully tried to cure the City's defective and invalid decision after the City violated its own municipal code.

**Issue:** Can the Court cure a defective City decision and ignore the requirements of the AFD, which mandate a fair and impartial permit review process?

**Assignment of Error #6:** The Trial Court ignored the obvious conflicts of interest and AFD violations when it disregarded the City Planning Manager's side business - washing windows on properties - which are simultaneously under City permit review.

**Issue:** A) Is there an AFD violation, or conflict of interest, when a City Planning Manager's job duties (reviewing an application), is influenced by an applicant's refusal (or agreeing) to hire the same City Planning Manager's side-business - washing windows? B) Is it appropriate for a Planning Manager to solicit his side-business over the permit counter to a permit applicant? C) Is it appropriate to retaliate against the applicant who refuses the solicitation?

**Assignment of Error # 7:** The Trial Court disregarded the City's discriminatory practice against only the Gerlachs' bulkhead application while the same City was permitting other bulkheads in Eagle Harbor, including the City's own 340 foot long cement bulkhead.

**Issue:** Does the AFD mandate that all permit applications for a bulkhead be treated fairly and uniformly without discriminating against only one application?

**Assignment of Error #8:** The Trial Court was misled by the City Attorney regarding HEX's authority to adjudicate AFD issues.

**Issue:** Can the Trial Court ignore false and misleading statements by the City's Attorney resulting in an improper hearing with the HEX?

**Assignment of Error #9:** The Trial Court erred in denying the Gerlachs' Motion for Summary Judgment based upon multiple AFD violations.

**Issue:** Do the numerous facts presented by the Gerlachs' warrant a transfer of their application to Kitsap County Planning Department in order to obtain a fair and impartial permit review?

**Assignment of Error #10:** The Trial Court erred in denying the Gerlachs' Motion for Reconsideration based upon the AFD violations.

**Issue:** Do the facts presented in the Reconsideration support a finding of AFD violations that require the permit application be transferred to the Kitsap County Planning Department for fair and impartial permit review?

### **STATEMENT OF THE CASE**

The Gerlachs' property is located on Eagle Harbor. (CP 3, 51). The property title includes ownership of the waterward tidelands/bedlands, out to the center of Eagle Harbor. This ownership is unique and valuable.

Eagle Harbor is not a pristine or untouched harbor, but rather serves as a ship harbor on Bainbridge Island and contains the Washington State Ferry shipyard, terminal, in addition to several private marinas. Approximately 80% of the properties already contain hard armor bulkheads and/or docks. Based upon a previous promise by the City's previous attorney, not to retaliate against the Gerlachs, the Gerlachs filed an application for a dock/bulkhead on their property in 2012. (CP 52 , 64 – Appendix A)

The previous promise by the City Attorney not to retaliate against the Gerlachs was born out of a settlement brokered by the City after the Gerlachs sought a mooring buoy permit from the City. (CP 6, 64) In order to obtain the prior (mooring buoy) permit, the Gerlachs were forced to file four applications and hire an attorney to prove that the City staff (planner Josh Machen), tried to include permit criteria language which was not required by the Municipal Code, the City staff (Machen) improperly modified the language that was in the Municipal Code and the City staff (Josh Machen) used an altered and counterfeit U.S. Army Corps map to deny the Gerlachs' mooring buoy applications. (CP 28)

As part of the settlement allowing the Gerlachs to finally obtain their mooring buoy permit, the City Attorney wrote an email message to the Gerlachs. The City's Attorney (Jack Johnson) stated, "The City has an obligation to treat the applications of the Gerlachs...in good faith." (CP 6, 64 – Appendix A) The City attorney refused to include this language into the settlement agreement, because the City did not want to be bound by

their promise not to discriminate against the Gerlachs' future applications. The City also promised that "The Gerlachs need not fear retaliation." (CP 6, 64) As indicated below, nothing could be further from the truth as the City staff, agents and employees sought to retaliate against the Gerlachs at every opportunity. Indeed, even the City's Attorney stated during argument on June 14, 2013 that the City did not have a contractual duty to act in good faith. When asked by the Trial Court if there would be an expectation of future good faith and fair dealings, the City's current attorney stated, "No." (CP 367, 387) "[W]e simply don't believe that that applies [expectation of good faith and fair dealings because of Mr. Johnson's email].

Upon issuance of the mooring buoy permit, the Gerlachs filed litigation against the City and Machen (hereinafter "Litigation"). The Litigation was and still is, ongoing at this time. Oddly, the Litigation also raised the issue of the Appearance of Fairness Doctrine because on February 24, 2003, the City Manager, Lynn Nordby, warned Machen against committing violations of the Appearance of Fairness Doctrine regarding Machen's side business. (CP 52, 62) According to City documents, Machen is no stranger to the Appearance of Fairness Doctrine.(CP 63, 62 – Appendix G)

Soon after filing the dock/bulkhead application, the Gerlachs met with one of the City's Planners, Heather Beckmann (Hereinafter "Beckmann").

Beckmann works in the City's Current Planning Department. The City's Current Planning Department Manager is Machen, and Beckmann works directly for Machen. Beckmann and Machen are aware of the Litigation and knew, or should have known, about the covenant entered into by the City Attorney, Jack Johnson, to treat the Gerlachs' applications in good faith and without retaliation. (CP 132, 137). Before filing the application, the Gerlachs recognized the awkward situation they were subjected to – having to apply for a permit from the same municipality that they were suing in Federal Court, particularly when the City's employees filed false declarations against the Gerlachs. (CP 156-157 – Appendix D)

Beckmann, under the supervision of Machen, began making incongruous demands upon the Gerlachs regarding their application. Beckmann disparately enforced standards to the detriment of the Gerlachs, which the City/ Machen refused to impose on the City in order to obtain their own permits. (CP 5-6, 31) The City, via staff, initiated retribution against the Gerlachs' application. The City's dissimilar treatment of the Gerlachs' application was predicated upon inequitable standards as it continued through the public hearing process. (CP 5-6, 132).

In order to begin the legal process of permit review, the City was required to post legal notice of the application. Once this legal posting occurred, the legal process of administrative hearings was underway. Legal hearings today, unlike in the past that occurred at City Hall, now occur via

email, internet exchanges and electronic public debates via a City-provided forum. As a result of the public hearings, several public comments were received. Some of the comments were unsigned, however Beckmann knew one individual who appeared to have trespassed, but Beckmann concealed the identity of the individual from the Gerlachs until a criminal investigation was initiated by law enforcement. The alleged criminal trespasser was known to Beckmann as Bruce Woolever, despite the City's Answer, which denied knowing the identity of the "anonymous" author (CP 18- paragraph 3.8 "whoever they may be"). Only after law enforcement extricated the "anonymous" name from Beckmann, did the Gerlachs become aware that the alleged trespasser admitted (during police questioning) that **"the planners [City staff] don't like the Gerlachs."** (CP 38, 389). This covert prejudice explained why Beckmann refused to tell the Gerlachs the identity of the alleged trespasser. This evidence supports the allegation that Beckmann is biased against the Gerlachs.

Another one of the public comments was authored by the City's Planning Commissioner, Maradel Gale. Commissioner Gayle's October 13, 2012, letter directed Beckmann to deny the Gerlachs' application. (CP 8-9, 54, 91-92) City Planning Commissioner, Maradel Gale was a municipal officer and the correspondence was drafted during her term as Planning Commissioner. (CP 86) Commissioner Gale reviewed the Gerlachs' application and directed Beckman to deny only the Gerlachs' application for a bulkhead. (CP 54, 91-92) The Planning Commissioner was not

asked to comment on the Gerlachs' application (which was required for her to comment), nor was the Commission charged with the task of reviewing or commenting on site-specific applications for individual applications of shoreline development (CP 165-166 – Appendix E), but this did not prevent Commissioner Gale's directive to deny only the Gerlachs' application. Despite the City's rules, Commissioner Gale, who is not a licensed geotechnical specialist, wildlife ecologist, or a licensed soil analyst, directed the City's Planning Department to deny the bulkhead. It was this directive that caused the Trial Court considerable concern.

Oddly, Commissioner Gale claimed the Gerlachs' bulkhead was not necessary in Eagle Harbor, despite the existence of more than 25 other bulkheads on neighboring properties, including Commissioner Gale's personal residence. Commissioner Gale resides on an Eagle Harbor waterfront development that is **protected by an 8 foot tall 158 foot long hard-armored bulkhead.** (CP 94-96) Commissioner Gale also failed to utilize the same powers of direction in preventing other bulkheads in Eagle Harbor, including the City's own 340-foot long cement bulkhead at the entrance to Eagle Harbor. (CP 381, 419-421) Commissioner Gale's directive against only the Gerlachs' application was in conflict with the City's "No Retaliation" clause and directed at only the Gerlachs' application.

City Commissioner Gale's directive against only the Gerlachs' application, during her term as a municipal officer, violated the AFD. The AFD prevents municipal officers, including Planning Commissioners, to lobby other municipal officers, including planning staff, to deny a specific permit application. (CP 164-167 – Appendix E) The AFD requires government officials to act in an unbiased and neutral capacity. 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. (CP 163 – Appendix F)

The Gerlachs informed Beckmann on December 31, 2012 of the conflict of interest between Commissioner Gale's public comment and the Gerlachs' pending application, as it clearly violated the AFD and disqualified the City from making any fair and impartial decision on the application, but Beckmann ignored the conflict. On January 2, 2013, and January 14, 2013 the Gerlachs informed City Manager, Doug Schulze of the conflict of interest between Commissioner Gale and the pending application, as it violated the Appearance of Fairness Doctrine. On January 11, 2013, City Manager Douglas Schulze, refused to recognize the obvious violation of the AFD and ignored the actual conflict of interest. (CP 9,54, 98-99) Manager Douglas Schulze drafted a letter to the Gerlachs on January 11, 2013 which stated, "The Planning Commission is **not involved in any administrative function**, such as permit application review or approval." (**emphasis added**) But before the inaccurate letter

was sent to the Gerlachs, the Planning Director admonished Douglas Schulze on January 11, 2013 and recommended changes to Schulze's letter. (CP 101-106) A second letter stated, "The **Planning Commission does review certain types of land use applications**, however, the Commission is not involved in the review or approval of shoreline permits" and this letter was sent to the Plaintiffs (**emphasis added**). (CP 101-106) The City is hopelessly unable to be fair with the Gerlachs and simply refuses to acknowledge violations of the AFD.

After discovering the violations of the AFD by Commissioner Gale, the Gerlachs sought review and enforcement of the pending permit application - via a transfer - to a neutral and unbiased agency in order to receive a fair and impartial assessment of the application, (CP 98-99) but the City refused. The Kitsap County Planning Department indicated its willingness to accept the transfer to review the Gerlachs' permit. The Kitsap County Department of Community Development [indicated it was] ready, willing and able to assist the City and review the Gerlach application. (CP 110). The City failed to provide any legal authority or justifiable analysis and simply refused to transfer the application to a fair and impartial agency. The City would not stipulate to a transfer to a fair and impartial agency despite the obvious need for a neutral and unbiased permit review. (CP 154-159 - Appendix D, 160-163, Appendix F).

The City continued to act with contempt towards the Gerlachs and the Court when **after the Complaint for Declaratory relief was filed and served, but before an Answer to the Complaint was required, the City issued a Notice of Administrative Decision (Decision), which adopted the directive of Commissioner Gale.** The City knew that the matter was before the Court when the City issued a defective, improper and untimely Decision. The City acted with willful disregard for the authority of the Court. In addition, the City violated its own Municipal Code requirements by issuing the defective decision (CP 158, Appendix D). The City thumbed-its-nose at the Court by issuing the Decision before filing their Answer. The Trial Court ignored the defects contained in the decision when it denied the Plaintiffs' motion. The Trial Court's acts served as an attempt to cure the defects *sua sponte* and in effect, sanctioned the City's disdain for the Appearance of Fairness Doctrine.

The Gerlachs only seek fair and equitable treatment in their application review, pursuant to the AFD. The AFD requires government decision-makers to act in a way that is fair and unbiased in both appearance and fact. This AFD was developed to insure that due process protections extend to certain types of administrative decision-making hearings. The AFD requires parties receive equal treatment and does not allow a party to be unfairly singled out. The City's municipal officers failed in all aspects to abide by the AFD with regard to the Gerlachs' application, necessitating transfer to Kitsap County for a fair and impartial review.

The Gerlachs fear retribution from the City's staff, including Machen after the Gerlachs refused to hire Josh's Window Cleaning to wash windows. (CP 373) Machen's side business thrives on Bainbridge despite no advertizing because Machen is the City's Current Planning Manager. (CP 5, 52, 62 – Appendix G) Despite the lack of any advertizing, various permit applicants miraculously hire Machen to wash their windows, most often when they have a permit pending with the City. The Gerlachs provided the Court with various photographs of Machen "working" on properties where City permits/stop work orders are currently under review. At 576 Stetson, Machen was hired to wash windows at a vacant house, while the City had a Stop Work Order posted. (CP 381, 429-431) Remarkably, the City's Stop Work order was vacated shortly after Machen completed his "work." On another "job" Machen was hired while a shoreline substantial development permit was under review by the City. (CP 424-427)

As indicated in the Appellants' Petition for Appeal, the City recently conducted an investigation of Machen to determine if he violated the City's February 24, 2003 Memorandum. Incredibly, the City found no violations despite additional photographs of Machen "working" at locations with pending City permits. In one case, Machen was washing windows for a business that was not even in operation - but had a pending City permit (Machen was the planner in charge). Despite the demonstrative evidence, none of the permit applicants ever admitted to

bribing a public official. Mr. Gerlach has personally testified in investigations and knows the difference between a real investigation and a “white-wash.” Mr. Gerlach warned the City’s investigator that the investigation would appear to be an orchestrated cover-up unless the City compared Machen’s client list with City permit applicants. When asked about providing a client list, Machen stated, “Absent a court order, I [Machen] will not be turning over private business records [client list].” Absent any investigation into pending permit applicants, who also hired Machen, the investigation resulted in a Facebook-style “Like” “Don’t Like” analysis of potential customers/ clients. Many builders and contractors (some of whom regularly appear before the Planning Department and desperately need permits to survive) wrote statements favorable to Machen to curry favor for their projects. It was obvious to the Gerlachs, and many Bainbridge Island residents that the City’s investigation was a sham because the investigator never actually performed an investigation into Machen’s client list. The City’s fake investigation into alleged corruption was similar to the way the City treated (or rather mistreated) alleged violations of the AFD.

Before the Trial Court directed the Gerlachs to seek relief from the HEX, the Court specifically asked the City Attorney if the HEX could provide a remedy. The City Attorney told the Court, “[T]he Gerlachs will have every opportunity to contest the decision before the HEX.” (CP 438-439) The Court specifically asked, “Including bringing up the Appearance of

Fairness issue?” (CP 439) The City Attorney replied, “ They can certainly bring up the issue of believing that the staff is biased and that the staff’s decision is biased against them, Yes.” (CP 442) Still not convinced the Court questioned the City Attorney, “So your interpretation of that statutory provision would allow Mr. Gerlach the opportunity to raise the issue with the hearing examiner?” The City Attorney stated unequivocally, “Yes.” (CP 442) This testimony before a tribunal appears to directly contradict a signed document from the same City Attorney, drafted 7 days earlier to the HEX wherein the City Attorney stated, “*Purely legal issues beyond the scope of interpreting and applying the local regulations fall outside a hearing examiner’s authority. Thus the Hearing Examiner may not rule on 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 Kitsap County litigation, violated the appearance of fairness doctrine in processing the Gerlachs’ application.*” (CP 434 –Appendix C) (emphasis added) In sum, the Trial Court committed error by not finding a violation of the AFD and not granting the Plaintiffs’ Motion for Summary Judgment or the Reconsideration.

## I. ARGUMENT AND AUTHORITY

### A. Summary Judgment is Reviewed *De Novo*.

A trial court's summary judgment order is reviewed *de novo*. *Folsom v Burger King* 135 Wn.2d 658, 663 (1998). A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Summary judgment is authorized when the moving party can demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See Samis Lan Co v City of Soap Lake* 143 Wn.2d 798, 803 (2001); CR 56 (c). *See also Versuslaw Inc. v Stoel Rives LLP* 127 Wn.App. 309, 319 (2005).

### B. The Appearance of Fairness Doctrine is Codified in Washington State

The Revised Codes of Washington (RCW) 42.36 defines the Appearance of Fairness Doctrine. 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," not just "Actual Fairness."

The AFD was judicially established in Washington State in 1969, and required proceedings to be procedurally fair, (*Smith v Skagit Co.* 75 Wn.2d 715, 740 (1969) and **appear to be conducted by impartial decision makers** *Buell v Bremerton* 80 Wn.2d 518, 523 (1972). In several 1969 cases, the Washington Supreme Court invalidated local land use actions because the proceedings appeared unfair, or public officials (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. The Court believed in the importance of maintaining the public's confidence in land permit/use decisions.

The Court 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 (1971) (**emphasis added**)

In 1982, the Washington State Legislature codified the Appearance of Fairness Doctrine that applies to land use proceedings in RCW 42.36. The Appearance of Fairness Doctrine is designed to guarantee that strict procedural requirements are followed so that quasi-judicial proceedings are not only fair, **but also appear fair**.

The AFD was developed as a method of assuring that due process protections, which normally apply in courtroom settings, extend to certain types of administrative decisions. The AFD is 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 very recently upheld in *Columbia Community Bank v Newman Park LLC* 177 Wn.2d 566 (2013). The AFD attempts 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.

In the Trial Court, the Gerlachs demonstrated actual discrimination by the City's staff, agents and employees. This discrimination is prohibited. The AFD prohibits discrimination by one City agent to direct another City staff to deny a specific application because of retribution. 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 a defective decision. A party may challenge local land use decisions where actual violations can be demonstrated (RCW 42.36.110). The Gerlachs sought a fair and impartial review of their permit application **before** the City issued an administrative decision, **not after**. The AFD has consistently been applied to quasi-judicial land use decisions. *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 prejudice.** *Chrobuck v Snohomish County* 78 Wn.2d 858, 480 P.2d 489 (1971).

The City's contradiction of the written obligation promising to treat the Gerlachs fairly and in good faith was enough to establish an appearance of partiality and unfairness. The City's position that it had no contractual obligation to treat the Gerlachs in good faith violated the AFD and

warranted transfer of the Gerlachs' application to a neutral and unbiased permit review agency. It is axiomatic that the Gerlachs cannot receive a fair and impartial permit review when the reviewers do not intend to act in good faith.

The AFD mandates a neutral and unbiased permit process. The existing litigation between the Gerlachs and the City casts an aura of partiality as the City staff clearly dislike the Gerlachs because they are suing the City. Where an aura of partiality exists, the permit process cannot be fair or impartial.

The Gerlachs established that the City inequitably applied its standards to the Gerlachs. Beckmann, under the supervision of Machen, disparately applied the City's life span rule against only the Gerlachs. 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 (2007).

The City is no stranger to violations of the AFD and Machen was previously warned not to commit violations of the AFD. Despite the warnings Machen, acting with the City's consent, continued to "work" on

projects that were simultaneously under the City's permit review. When the Gerlachs refused to hire the window washing City Planner (Machen), the City initiated a scheme of retribution. The acts of retribution stemming from the denial of a simple mooring buoy permit, were not based in law (municipal code) or fact (non-existent permit criteria/ counterfeit maps). It is clear to the Gerlachs that the Bainbridge Island residents who hire the window washing planner, obtain their permits or get their Stop work Order vacated without delay. The City's actions do not promote trust and do not preserve confidence in the government's decision-making abilities.

The inability of City staff to be honest and forthright, particularly when they protect alleged criminal trespassers, is alarming to the Gerlachs. It was only after the local law enforcement became involved with Beckmann that she inexplicably recalled the name (Bruce Woolever) of the alleged criminal trespasser. It is impossible to have any faith or confidence in the City when the staff cannot even be trusted to disclose the identity of an alleged criminal, only because they would rather seek retribution against the Gerlachs.

The AFD was undoubtedly violated when Commissioner Gale directed Beckmann to “Deny this request.”<sup>3</sup> The plain violation of the AFD was a significant basis for the Complaint. The City ignored the Gerlachs request to remedy this violation by transferring the application to a neutral reviewing agency. The City subverted the AFD rules by issuing an untimely (violation of BIMC 2.16.020(J)(1)) decision, moments before filing the City’s Answer. The City violated its own Municipal Code, but the Trial Court refused to recognize the violation of the AFD.

The holding in *Hayden v City of Port Townsend* 28 Wn App 192, (1981) specifically addressed improper interactions by vested members of municipal planning commissions. The Trial Court in *Hayden*, much like the Court in the instant action, failed to recognize the AFD violation. The Court of Appeals in *Hayden* was forced to reverse the improper decision made by the Trial Court and provided guidance regarding the improper imposition of commissioner opinions in the application process. 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.

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<sup>3</sup> October 14, 2012 letter from the City’s Commissioner Gale to Planner Beckmann to deny only the Gerlachs’ permit.

The AFD reaches the appearance of impropriety, not just its actual presence. *Buell v Bremerton* 80 Wn 2d 518, 495 P.2d 1350 (1972). 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.**” *Id* at 198. Overlooking this violation was in error.

### C. The Elements For An Appearance of Fairness Violation

Courts have long been concerned with entangling influences and personal interest which demonstrates bias. Courts have additionally invalidated land use decisions where the proceedings appeared unfair, or public officials acted with improper motives and failed to disqualify themselves. The Court in *Buell v Bremerton* 80 Wn.2d 518, 524 (1972) identified three major areas of bias, which constitute grounds for disqualification. According to *Buell* these areas include: 1) personal interest, 2) prejudgment of issues, and 3) partiality. **Any one of the three constitutes grounds for disqualification.**

#### 1) Personal Interest

Any entangling influences impairing the ability to be, or remain, impartial

constitute a personal interest. *Save A Valuable Environment v City of Bothell* 89 Wn.2d 862 (1978). The Litigation against the City, specifically against Machen, is a matter of personal interest that mandates the City's disqualification. Machen is the City's Current Planning Manager and the Litigation alleged that Machen committed multiple acts of moral turpitude. The entangling influences of the Litigation are impossible to avoid and compromised the City's ability to be fair and impartial. Beckmann works directly for Machen. Beckmann's decision to improperly apply rules only the Gerlachs- and not to Machen- is evidence that she can be easily manipulated by Machen, to the detriment of the Gerlachs. Beckmann actively concealed the identity the author of the "anonymous" letter. Beckmann cloaked the author knowing that Bruce Woolever would admit that the City planners are prejudiced against the Gerlachs. It was only after a criminal investigation was initiated and local law enforcement confronted Beckmann, that Beckmann revealed their knowledge of the secret "anonymous" source. Bruce Woolever confirmed what the Gerlachs already knew, "The planners don't like the Gerlachs" and will do anything to deny the Gerlachs' application.

The Gerlachs refused to hire Machen to wash windows at their home and the City's municipal officers are now retaliating against the Gerlachs. The

Gerlachs appear to be the only Island residents who refuse to ignore corruption at City Hall and more importantly refuse to be bullied by irresponsible municipal staff, agents or employees. The Gerlachs agree with some residents who refer to Bainbridge Island as COBI (Corruption on Bully Island).

## 2) Prejudgment of Issues

Decision-makers need to reserve judgment until after all the evidence is presented. Impartiality in a proceeding may be undermined by a decision-maker's bias or prejudice toward a pending application. The Washington State Supreme Court in *Anderson v Island County* 81 Wn 2d 312, 326-327 (1972) overturned a decision because a councilmember had prejudged a particular issue. Once Commissioner Gale made a predetermination on *only* the Gerlachs' application, the appearance of fairness was violated. When Commissioner Gale lobbied Planner Beckmann, in a written letter dated October 13, 2012, to deny only the Gerlachs' application, the City's municipal officer pre-judged the application and this prejudice was fatal to the Gerlachs' ability to obtain a fair and impartial review.

### 3) Partiality

Partiality cannot be tolerated when a municipality is required to conduct fair and impartial proceedings or deliberations. The existence of hostility or favoritism will turn an otherwise unbiased proceeding into an unfair and biased proceeding. Partiality results in a waste of valuable resources and time. Planning Commissioner Gale's directive to Beckmann was a direct attempt to lobby for the denial of the application. When the City issued a permit to itself in order to construct a 350 ft long hard armor bulkhead at Rockaway Beach, Commissioner Gale was eerily silent.

### **CONCLUSION**

The Trial Court stated in its order that the Gerlachs "have not exhausted their administrative remedies." This is error. Only the Courts can determine the AFD violations, as indicated by the City Attorney, on June 7, 2013. Only this Court has jurisdiction over the AFD violations. The AFD violations, asserted in this litigation can only be adjudicated by the Court and not the City's Hearing Examiner. To ignore the statement by the City Attorney acknowledging that the HEX cannot decide the AFD violations would be akin to turning a deaf ear to a plea for justice. The HEX correctly predicted that the Court would not be interested in

resolving “thorny policy questions...before they reached the appellate level.”<sup>4</sup> The facts of this case indicate there are serious violations of the AFD, which warrant a reversal of the Trial Court’s order. The Court should not allow an attorney to attempt to mislead a Court in order to gain a legal advantage. Because of the compelling facts and evidence in this matter, this Court must overturn the trial Court’s Decision.

DATED this 14 day of February, 2014



Marcus Gerlach SBN 33963  
Attorney for Marcus Gerlach  
and Suzanne Gerlach

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<sup>4</sup> The City’s hearing examiner Order stayed any hearing examiner decision until **after** resolution of litigation and appeals.

Case No 45571-4-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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MARCUS GERLACH and SUZANNE GERLACH, Appellants

v.

CITY OF BAINBRIDGE ISLAND, Respondent

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

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APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
THE HONORABLE JEANETTE DALTON

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APPENDIXES A - G

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# APPENDIX A

**REDACTED**

**From:** jjohnson@bainbridgewa.gov [mailto:jjohnson@bainbridgewa.gov]

**Sent:** Thursday, June 23, 2011 11:30 AM

**To:** [REDACTED]

**Subject:** RE: ER 408 Privileged Communication (Gerlach)

[REDACTED]

We would go this far in the direction of your counter-proposal:

1. The Gerlachs submit an SSDE application for an individual buoy permit at the location proposed, with the following conditions:
  - a. removal of the remaining pieces of the cement block anchor;
  - b. use of a helical screw type anchor design and the float system proposed by WDFW in its 12/13/2011 e-mail;
  - c. incorporation of technology that will assure that the anchor line will not drag the bottom at extreme low tides.
2. The City would agree to give the permit application priority processing, moving it through the approval process as quickly as practicable;
3. The City would apply code-required SEPA review and other permit requirements, but would agree in advance that the construction limit line would not disqualify this specific permit. Likewise, depth and navigation factors would not categorically disqualify the SSDE application, although adjustments to the location may be necessary to address these requirements;  
Note that the proximity of the proposed buoy to neighboring property lines may severely limit the size of the boat that could legally be moored there.
4. Assuming the application met these requirements, the City would promptly issue the permit;
5. We do not agree to waive permit fees. But if the City denies this application, it would refund the application fee;
6. The appeal hearing would be continued to a date in August;
7. The appeal would be dismissed with prejudice upon issuance of the permit and expiration of the appeal date.

The City has an obligation to treat the applications of the Gerlachs and every other citizen in good faith, but I am not going to have the City make such general obligations into contractual settlement terms. The Gerlachs need not fear retaliation.

-Jack

# APPENDIX B

SEP - 5 2013

DAVID W. PETERSON

SUPERIOR COURT OF WASHINGTON  
IN AND FOR KITSAP COUNTY

MARCUS GERLACH and SUZANNE L.  
GERLACH, husband and wife,

Plaintiffs,

NO. 13-2-00136-7

vs.

CITY OF BAINBRIDGE ISLAND, a  
Municipal Corporation, et. al.,

Defendants.

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;

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

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

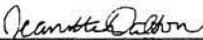
7 **CONCLUSION**

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

10 It is hereby

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

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14 Dated: This 5<sup>th</sup> day of Sept, 2013.

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17 HON. JEANETTE DALTON  
18 JUDGE  
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# APPENDIX C

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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

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

10 However, should the Kitsap County court deny both parties' requests for summary  
11 judgment and require trial as a result of disputed issues of material fact, the City nevertheless  
12 encourages the Hearing Examiner to set the instant appeal for hearing in July or August 2013  
13 without delay. Clearly, the Hearing Examiner lacks authority to determine whether the City  
14 violated covenants of good faith and fair dealing or covenants against retaliation, as alleged in  
15 the Kitsap County litigation. The Hearing Examiner's authority is limited to "an administrative  
16 proceeding to determine whether or not a particular piece of property is subject to a [city] land  
17 ordinance." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638, 689 P.2d 1084  
18 (1984). Purely legal issues beyond the scope of interpreting and applying local regulations fall  
19 outside a hearing examiner's authority. Thus, the Hearing Examiner may not rule on the issues  
20 of whether the City breached contractual covenants where they are not obligations contained  
21 within the City Code.

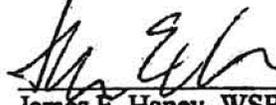
22 In addition, the Hearing Examiner does not have the authority to determine whether City  
23 staff, as alleged in the Kitsap County litigation, violated the appearance of fairness doctrine in  
24 processing the Gerlachs' SSDP application. As an administrative decision made by the Planning  
25 Director,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

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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

# APPENDIX D

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RECEIVED  
MAY 15 2013  
DAVID W. PETERSON

**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.

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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.

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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 States 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).

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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.~~

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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.

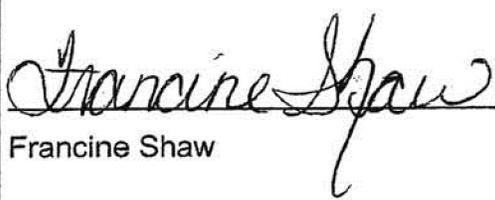
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13. As a past planner, planning administrator and director of various municipalities, I can attest that the entangling influences of the past Litigation created a high potential for a conflict of interest and should have required the transfer of the 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 29<sup>th</sup> day of April, 2013

  
Francine Shaw

# APPENDIX E

FILED  
CLERK OF SUPERIOR COURT

MAY 15 2013

DAVID W. PLTERSON

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**THE SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KITSAP**

MARCUS GERLACH and SUZANNE  
GERLACH, husband and wife,

No. 13 2 00136 7

Plaintiffs

DECLARATION OF LAFE MYERS

v.

CITY OF BAINBRIDGE ISLAND, a  
municipal Corporation and DOES 1-10,  
Defendants

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.

- 1 2. I was appointed to the COBI Planning Commission by the Mayor of COBI, with  
2 concurrence by the City Council on February 28, 2002. My term as a Planning  
3 Commissioner expired on January 31, 2003.
- 4 3. The BIMC, Chapter 2.14, sets forth the purpose and role of the COBI Planning  
5 Commission. According to the BIMC, the members of the COBI Planning  
6 Commission serve as an advisory body and a quasi-judicial, decision-making  
7 body, under the Director of the COBI Planning Department. The COBI Planning  
8 Commission members are charged with reviewing the Comprehensive Plan for  
9 COBI, COBI zonings and other advisory duties specified in the BIMC.
- 10  
11 4. As a Planning Commissioner, I was charged with the task of reviewing proposed  
12 amendments to the Comprehensive Plan and Land Use (Zoning codes). All  
13 other city boards and commissions coordinate their Comprehensive Plan and  
14 land use activities with the Planning Commission.
- 15  
16 5. I am familiar with the statutes in the RCW and WAC, which pertain to the  
17 authority to create and empower a Planning Commission to review  
18 Comprehensive Plans, in addition to case law that defines the policies and  
19 procedures of the Appearance of Fairness Doctrine. The Appearance of  
20 Fairness Doctrine applies to quasi-judicial decision-making bodies such as the  
21 COBI Planning Commission.
- 22  
23 6. I reviewed a letter drafted on October 13, 2012 and submitted by COBI Planning  
24 Commissioner Maradel Gale and sent to Heather Beckmann, COBI associate  
25 Planner.
- 26  
27 7. As a COBI Planning Commission member, Maradel Gale has a public official's  
28 obligation to recognize her position of civic authority and to abstain from using  
29 her independent initiative to influence administrative decision making by COBI  
30

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

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

16  
17 9. Based upon my review of the October 13, 2012 recommendation by COBI  
18 Commissioner Gale and the COBI Administrative Decision for the Gerlachs'  
19 application , it appears that the COBI Planning Department simply adopted the  
20 recommendations of Commissioner Gale and confirmed COBI Planning  
21 Commissioner Gale's request to deny the bulkhead. This denial, based upon  
22 Commissioner Gale's lobby efforts, violated the Appearance of Fairness  
23 Doctrine.

24  
25 10. Based upon my experience and service with COBI's Planning Commission, I  
26 believe that it would be a conflict of interest for a Planning Commissioner to  
27 improperly advocate against a site-specific land use application, whether for  
28 personal, or financial interest/gain.  
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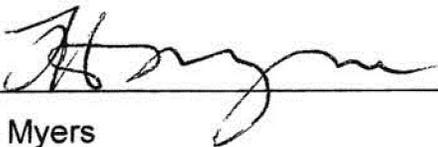
1 11. I reviewed a February 24, 2003 COBI memorandum, wherein Joshua Machen  
2 was directed to avoid impermissible conflicts, or appearances of impropriety,  
3 while he was acting as a COBI Planning Department employee. COBI appears  
4 to have an internal problem with Appearance of Fairness matters in the COBI  
5 Department of Community Development. A city employee (whether acting as a  
6 planner or a commissioner) should not violate the Appearance of Fairness or  
7 engage in actions that create an appearance of impropriety. Violations of the  
8 Appearance of Fairness doctrine can lead to claims of bias, discrimination or  
9 favoritism and should be avoided by COBI's municipal officers. No COBI  
10 employee should engage in any business, which can conflict with city duties, or  
11 violate the Appearance of Fairness Doctrine.

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

18  
19 I declare under penalty of perjury that to my knowledge, all of the above statements are  
20 true and correct.

21  
22 Executed in the City of Bainbridge Island, Washington

23  
24 DATED THIS 7<sup>th</sup> day of May , 2013

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28 Lafe Myers

# APPENDIX F

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**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.

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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.

1  
2 8. Washington State law requires the Washington State Auditor's Office investigate  
3 both known and suspected illegal activities in all state agencies and local  
4 governments. As the Washington State Auditor, it was my responsibility to  
5 conduct investigations in order to uncover and prevent fraud in accordance with  
6 Washington State law.

7  
8 9. I am familiar with the Plaintiff's Complaint and the underlying facts in the above-  
9 captioned litigation and I provide a general opinion regarding the Appearance of  
10 Fairness in government and the potential for breaches of public trust when  
11 certain individuals in local government seek to use undue influence in order to  
12 manifest a probable outcome because of their biased participation.

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

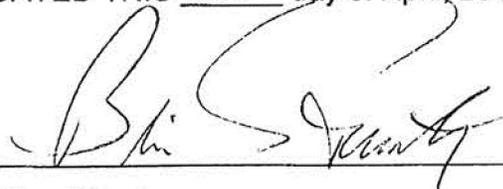
20  
21 11. My review of documents relevant to this matter revealed that the Plaintiffs sought  
22 a permit from the City of Bainbridge Island (COBI), while simultaneously pursuing  
23 a federal action, against COBI. The Plaintiffs sought transfer of the permit  
24 application after a COBI Planning Commissioner, Maradel Gayle, sought to  
25 interject her personal preferences and directed the COBI planner to deny the  
26 bulkhead application. The Appearance of Fairness Doctrine mandates municipal  
27 officers act without bias, or impropriety, in order to preserve the public's trust in  
28 government decision-making abilities. It is difficult to regain a position of trust,  
29 once it is violated.  
30

1  
2 12. Based upon my experience as a public officer, who was in charge of preserving  
3 the public's trust in state government, I believe it is imperative that government  
4 officials act in an unbiased and neutral capacity when making decisions that  
5 significantly affect their constituencies. It would be improper for one government  
6 agent to lobby another government agent to affect the outcome of a matter based  
7 upon personal bias, or prejudice. In order to avoid the appearance of bias or  
8 prejudice in the instant case, I would recommend that the Plaintiffs' application  
9 be transferred to a disinterested reviewing agency. An independent and  
10 unbiased review would avoid any actual impropriety, or appearance of  
11 impropriety, in the review process.  
12  
13

14 I declare under penalty of perjury that all of the above statements are true and correct.  
15

16 Executed in the City of Tacoma, Washington  
17

18 DATED THIS 30<sup>th</sup> day of April, 2013  
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23 Brian Sonntag  
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# APPENDIX G

*City of Bainbridge Island*  
**EXECUTIVE DEPARTMENT**



**MEMORANDUM**

TO: Josh Machen, Associate Planner  
FROM: Lynn Nordby, City Administrator  
DATE: February 24, 2003  
RE: Outside Employment

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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.

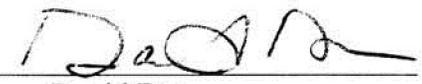
COUNTY OF KING  
 FEB 20 PM 3:30  
 STATE OF WASHINGTON  
 DEPUTY

**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 (Petitioner's Opening Brief) 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, 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 14th day of February, 2014.

  
 \_\_\_\_\_  
 David Dean