

WASHINGTON LAND USE CASE LAW DIGEST

A Summary of Land Use Case Law in Washington State



Prepared by Sound Law Center

**Michael Duggan
&
Ted Hunter**

This digest of Washington Land Use cases is a summary of all important cases governing land use for cities and counties in Washington State. It is an essential tool for the lawyer, planner, elected official or administrator involved in land use. Case summaries are included for every type of land use application, as well as caselaw on procedural due process, statutory interpretation and the Land Use Petition Act. Those involved in land use in Washington State will find this digest an invaluable educational document. It will also save hours of time when looking for what the courts have to say about the land use issue you are trying to decide. You may purchase either a digital version that is search-able or a hard copy that will be mailed to you. It comes with a money-back guarantee. If you are not satisfied for any reason, just let us know and your purchase price will be refunded to you.

TABLE OF CONTENTS

INTRODUCTION TO THE CASE LAW DIGEST

Preparation & Focus of the Digest

How to use this Digest

I. PROCEDURAL DUE PROCESS

Introduction

a) Appearance of Fairness

b) Notice

c) Site View

d) Failure to Decide

II. AUTHORITY TO REVIEW

Introduction

a) Hearing Examiner Authority

b) Res Judicata

c) Failure to Assign Error

III. STANDARD OF REVIEW

Introduction

a) Standard of Review

b) Burden of Proof

c) Deference to Administrative Agencies

IV. STATUTORY INTERPRETATION

Introduction

a) Statute and Code Interpretation

V. SUBDIVISIONS, RCW 58.17

Introduction

a) Vested Rights

b) Conditions for Subdivision Under RCW 58.17.110

c) Subdivision Exemptions

d) Preliminary Plat Approval / Conditions of Approval

e) Revocation of Plat Approval

f) Fees and Taxes

g) Traffic and Road Conditions

h) Road Vacation

i) Ownership Interest

j) Water Damage

VI. STATE ENVIRONMENTAL POLICY ACT (SEPA) RCW 43.21C

Introduction

a) Decision-making Authority under SEPA

b) Threshold Determination and Determination of Nonsignificance (DNS)

c) Conditions/Mitigations under SEPA

d) EIS: Adequacy and Reasonable Alternatives

e) Application Denial Under SEPA

f) Exemptions under SEPA

VII. SHORELINE MANAGEMENT ACT (SMA) – RCW 90.58

Introduction

a) Authority under SMA

- b) Substantial Development and Uses
- c) Critical Areas Ordinance

VIII. REZONES AND ZONING

Introduction

- a) Rezones
- b) Zoning

IX. COMPREHENSIVE PLAN

Introduction

- a) Comprehensive Plan

X. CONDITIONAL, SPECIAL, REASONABLE AND NONCONFORMING USES

Introduction

- a) Conditional Use Permit
- b) Special Use Permit
- c) Reasonable Use Exception
- d) Other Nonconforming Uses

XI. VARIANCES

Introduction

- a) Variances

XII. LUPA CASES OF INTEREST

Introduction

- a) LUPA Cases of Interest

XIII. SPECIAL LAND USE TOPICS

- a) Telecommunications

XIV. TABLE OF CASES

INTRODUCTION TO THE CASE LAW DIGEST

Preparation & Focus of the Digest

This document is a comprehensive summary of land use decisions by Washington State Appellate Courts. The intent of this digest is to provide a tool for efficient research of cases relevant to municipal land use applications and appeals heard by a City Council, Board of Commissioners or a Hearing Examiner. Issues outside of the authority or jurisdiction of those decision makers, such as claims of unconstitutional takings, were not considered for the digest.

The digest was created by assembling relevant case law, sorting them into topic areas, and continually updating the caselaw within those topic areas. The limited number of cases contained within reflects our efforts to include only the most relevant published cases. Many cases with similar or identical holdings have been omitted, as have all unpublished cases. Considerable effort was taken to ensure that all cases included in this digest are "good law", that court holdings are accurately characterized, and that developments affecting the authority of the cases as precedent have been duly noted.

Sections I through IV of the digest - procedural due process, authority to review, standard of review and statutory interpretation - were developed from a list of issues faced by hearing examiners when writing decisions. Judicial review of land use decisions often focuses on the process used to make that decision. Court decisions stress the importance of adhering to the requirements of procedural due process, the standard a court will use to review a decision, the jurisdictional authority of a decision maker, and whether the ordinance in question was properly interpreted. Although the decisions cited focus on decisions of a hearing examiner, the guidance of the court decisions are equally applicable to land use decisions made by elected officials sitting in a quasi-judicial capacity.

Sections V - XI of the digest focus on specific types of land use decisions made at the local level. An introduction to each section describes the type of application or appeal, and references any applicable state statutes that may affect the application of a local ordinance. For example, Section V (Subdivisions) provides a brief review of the subdivision statute, RCW 58.17. The caselaw generated by a review of RCW 58.17 is extensive. The case law digest focuses on RCW 58.17.110, the subdivision application review criteria. This is the section of the state statute most 'in play' when a city or county is deciding a land use subdivision application. Washington appellate court decisions from 1980 to present were examined, and the most significant cases are included in this digest. Thus, a review of hundreds of cases decided under an applicable statute may yield merely a dozen for inclusion in the digest. The digest is focused on case law that would assist someone participating in a land use application review process or appeal; either at the initial hearing or upon appeal to the judicial system.

Sections VI and VII focus on two of the most significant Washington environmental statutes. Both the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA) were enacted in 1971. Due to the volume of cases decided under each of these statutes, research was initially limited to Washington State Supreme Court cases from 1971 forward. Court of Appeal decisions were added for the most recent decisions, from 1990 forward. The remaining sections on land use applications include both Washington State Supreme Court and Court of Appeal cases from 1970 forward. These search restrictions generated a controllable number of cases with relevant authority for all jurisdictions.

Section XII provides an introduction to the Land Use Petition Act (LUPA). LUPA is the exclusive means by which one must appeal a local land use decision. We thought it helpful to include significant LUPA court decisions, as one should be aware of the limits of judicial review when making a record of the decision at the local level. LUPA appeals review only the record of the local decision and do not generally offer an opportunity to present new evidence. Thus, the preparation of an adequate record at the application or appeal hearing is critical to a successful outcome of any land use decision.

Land use issues are never-ending, and land use law is always evolving. As a result, this case law digest represents the law only on the day it was prepared. It will need to be updated with the most recent land use cases as they are decided to help ensure accurate references to relevant caselaw. Sound Law Center will provide updates on a regular basis, but the wise practitioner will also conduct his or her own research to make certain the best case law is cited. It is our intent to help on that journey by finding the most relevant case law and providing summaries of that caselaw in this digest. This should help focus the land use practitioner on those kernels of wisdom that exist within the large field of land use law.

INTRODUCTION TO THE CASE LAW DIGEST

How to use this Digest

This Digest was created to be a secure, efficient, and cross-referenced tool for research. It contains a map of the sections of the Digest, and is linked internally for easy and efficient navigation. To jump to any section or subsection of the Digest, simply click the subheading in the Table of Contents. This will take you directly to that section. For instance, clicking "**How to use this Digest**" from the table of contents would take you to this explanation. From within the Digest, you can click on the bold heading that begins the section to jump back up to the table of contents. For instance clicking "**How to use this Digest**" above will take you back to the Table of Contents.

Some cases have been listed more than once because of their relevance to multiple issues. Where appropriate, cases in multiple locations have been edited to display only the information that relates to the subsection into which they are placed in order to avoid repetition and enhance efficiency of research. These cases are followed with links to their other locations, indicated by "*Also under:*" followed by a clickable link naming the additional section under which the case can be found. Clicking this will take you directly to that section.

The Table of Cases at the end of the digest gives a quick list of the cases summarized within. By clicking on the bold headings in this section, you can jump directly to the section in containing the case you are looking for. Links have been omitted from the text of case summaries in order to facilitate copying to your work.

I. PROCEDURAL DUE PROCESS

Introduction

The fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Rabon v. Seattle*, 107 Wn. App. 734, 34 P.3d 821 (Div. I, 2001). This is equally true whether the party is before the Supreme Court or the local City Council. Failure to provide due process to a party who is affected by a land use decision can create undesirable legal and financial liability for the decisionmaker.

Procedural Due Process dictates that a party cannot be deprived of a legitimate property interest without notice of the possible deprivation, opportunity to be heard and to examine any witness or testimony in opposition to their interest and the ability to appeal the decision once it is made. (This is sometimes confused with substantive due process, which addresses the purpose and legality of laws themselves, and is beyond the authority of Hearing Examiners.) The right to procedural due process is derived from the United States Constitution, and protects parties from any process that works to deprive them of their rights or interests unfairly, or without them knowing.

Washington State has adopted a more stringent approach to the prevention of conflicts of interest than is required by constitutional law. The "Appearance of Fairness" doctrine requires that legal proceedings not only be conducted without conflict of interest, but that they must also *appear* fair to all parties involved. If a party has reasonable belief, supported by evidence, that a public officer has possible partiality to one of the opposed interests in the proceeding, the "Appearance of Fairness" doctrine prevents that public officer from taking part. *Faghieh v. Washington State Dept. of Health, Dental Quality Assurance Commission* 148 Wn. App. 836, 202 P.3d 962 (Div. I, 2009)

Regarding adequate notice, RCW 36.70A.035 requires that notice to a party be "reasonably calculated to provide notice to property owners and other [s] affected." Specific requirements of the correct method and manner of providing notice are more commonly provided by local statutes, which must be thoroughly understood and adhered to in order to prevent a decision from being illegitimate for lack of notice.

I. PROCEDURAL DUE PROCESS

a) Appearance of Fairness

Faghih v. Washington State Dept. of Health, Dental Quality Assurance Commission 148 Wn. App. 836, 202 P.3d 962 (Div. I, 2009), stated in a succinct summary that:

"The supreme court has applied the appearance of fairness doctrine "to administrative tribunals acting in a quasi-judicial capacity in two circumstances: (1) when an agency has employed procedures that created the appearance of unfairness ... and (2) when one or more acting members of the decision-making bodies have apparent conflicts of interest creating an appearance of unfairness or partiality...." *City of Hoquiam v. Public Empl. Relations Comm'n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). The test is whether " 'a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, [would] be reasonably justified in thinking that partiality may exist[.]' *Id.* (quoting *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976)). ... The presumption is that public officers will properly and legally perform their duties until the contrary is shown. *Id.* at 489. A party claiming an appearance of fairness violation is required to present specific evidence of a violation, not speculation. *Sherman v. Moloney*, 106 Wn.2d 873, 883-84, 725 P.2d 966 (1986).

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 197 P.3d 1153, (2008), held that a chairman on the site evaluation council did not violate the Appearance of Fairness Doctrine where he had advocated pre-emption of county zoning ordinance, where the council was required to seek compliance with county zoning prior to seeking preemption, and where a site locations act favored preemption.

Nationscapital Mortgage Corporation v. Dep't of Financial Institutions, 133 Wn. App. 723, 758-759, 137 P.3d 78 (2006), held that, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. The doctrine is intended to avoid the evil of participation in the decision-making process by a person who is personally interested or biased. Under the appearance of fairness doctrine, it is not necessary to show that a decisionmaker's bias actually affected the outcome, only that it could have. But in the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials will properly perform their duties. To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. **Also Listed Under: a) Standard of Review*

Swoboda v Town of La Conner, 97 Wn. App. 613, 628, 987 P.2d 103 (1999), held that a claim that the denial of a permit application violated the appearance of fairness doctrine can only succeed if the appellant produces evidence of actual or potential bias. The argument that the Planning Commission and Hearing Examiner were biased because they "accorded too much

weight to testimony that was unfavorable to [the applicant], while not according enough weight to testimony that was favorable to him” does not meet evidentiary requirements.

OPAL v. Adams County, 128 Wn.2d 869, 888-889 (1996), held that a decisionmaker who engages in prohibited ex parte communications can validly participate in a decision on the proposal only if he or she places on the record "the substance of any written or oral ex parte communications." RCW 42.36.060(1). The statute requires that a decisionmaker must provide that "a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related." RCW 42.36.060(2). The purpose of the disclosure requirement is to provide opposing parties with an opportunity to rebut the substance of any ex parte communications. See RCW 42.36.060(2). **Also Listed Under: EIS: Adequacy and Reasonable Alternatives*

Swift, et al v. Island County, et al, 87 Wn.2d 348, 552 P.2d 175 (1976), held that the doctrine of appearance of fairness was violated when a member of the County Board of Commissioners who voted to approve the project had previously been chairman of the board of directors of a Savings and Loan that had financial interest in the project. Therefore, the deliberations and vote by the county commissioners was void. **Also Listed Under: Threshold Determination and Determination of Nonsignificance (DNS)*

I. PROCEDURAL DUE PROCESS

b) Due Process and Notice

Bonneville v. Pierce County, 148 Wn. App. 500, 202 P.3d 309 (Div. II 2008), held that petitioner's due process rights were not violated by revocation of CUP when the permit was expressly conditioned on allowing county officials access to the property, petitioner violated the condition, and was given both notice of the violation and opportunity to be heard.

Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd., 156 Wn.2d 131, 124 P.3d 640 (2005), stated " there are two notice provisions within the GMA. Under the first, local governments are required to provide for "early and continuous public participation in the development and amendment of comprehensive land use plans." RCW 36.70A.140. Under the second, notice must be "reasonably calculated to provide notice to property owners and other [s] affected" RCW 36.70A.035. Neither of these statutes specifically require individualized notice; however, publication in a newspaper of general circulation is listed as an example of reasonable notice. Woodway, by publishing notice of the proposed amendments in the Everett Herald, has complied with the explicit notice provisions of the GMA." (at 138)

Holbrook, Inc. v. Clark County, 112 Wn. App. 354, 49 P.3d 142 (Div. II, 2002), held that due process did not require individual notice to landowner that a portion of his land would be classified as forest resource even though it significantly affected his ability to make use of the land, because the designation was premised on an area-wide analysis and did not affect Holbrook uniquely, nor significantly greater than other affected landowners.

Samuel's Furniture, Inc. v. State, Dept. of Ecology, 147 Wn.2d 440, 54 P.3d 1194, (2002), held that the Department of Ecology does not have a due process right to notice of a city's determination that a project does not fall within the shoreline jurisdiction, because the Dept. has legislative and administrative rulemaking authority under which it could require such notice. The Dept. cannot claim violation of due process as a defense to its own failure to require notice under state law. "Under the SMA, Ecology's primary role is to review and approve SMPs. RCW 90.58.080. In this sense, it is "reviewing" local government action. However, once an SMP has been approved, the SMA specifically grants local governments the exclusive power to administer the permit system. RCW 90.58.140(3). Nowhere in the statute is Ecology explicitly given the right to directly review a local government's decision regarding a substantial development permit." *Samuel's Furniture*, 147 Wn.2d at 455.

Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd., 113 Wn. App. 615, 53 P.3d 1011 (Div. II, 2002), held that due process did not require individual notice to a property owner of the "down zoning" of his property, where the record showed his written involvement and personal attendance in the decision-making process with the county, board, and courts.