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Legal Opinion 2018-005

TO: Mayor John Engen; City Council; Dale Bickell; Mike Haynes; Don Verrue; Denise Alexander; Mary McCrea; Laval Means; Drew Larson; Anita McNamara; Jen Baker; Jen Gress; Tom Zavitz; Marty Rehbein; Kirsten Hands; Ginny Merriam; Ellen Buchanan; Chris Behan; Kevin Slovarp; Troy Monroe; Donna Gaukler; John Wilson; Lori Hart

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE January 11, 2018

RE: Appearance of Fairness legal doctrine requires that, with respect to public bodies, quasi-judicial land use decisions concerning property rights, the review process must be fair and appear to be fair, neutral, impartial, unbiased and objective in order to be valid.

FACTS:

A land use conditional use request for townhomes that is going to be determined by the city council is generating active citizen participation, with respect to city council review of the land use application. Some citizens desire that city council decision makers meet with them outside of a public meeting that would not have been publicly open and available for public observation or participation.

ISSUE(S):

Is the Appearance of Fairness legal doctrine applicable to land use applications directly involving property owner property rights that are presented to the city council for approval, conditional approval or denial applicable to the city council's decision making process?

CONCLUSION(S):

Yes. With respect to specific land use decisions determined by the city council involving property rights, the Appearance of Fairness legal doctrine requires that quasi-judicial land use decisions involving specific property rights be fair and appear to be fair in order to be valid.

LEGAL DISCUSSION:

Quasi-judicial acts are acts that determine specific fundamental rights of citizens, such as specific property rights potentially affected by application for a land use approval, conditional approval or denial. Quasi-judicial acts may be valid if there is no abuse of discretion. *Black's Law Dictionary, Eighth Edition,* Page 1278.

The Appearance of Fairness legal doctrine ensures that owners of property rights related to a land use application before a public body are not deprived of their due process right to impartial, unbiased, neutral, fair, objective public body reviews and decision making.

Public body land use decisions pertaining to a property owner's application for a specific use of land in a certain manner clearly directly significantly affect specific individual property owner rights as well as potential community interests. Local government public body land use decisions potentially involve several constitutional issues including equal protection, due process, procedural fairness and takings of property requiring just compensation. Constitutional due process requires notice as well as a reasonable, fair and impartial opportunity to be heard. Fairness and impartiality to be heard also require that the process is impeccably a public record process pursuant to law. Neutrality and impartiality of a public body making specific land use decisions pertaining to property rights is essential to the fair, proper, credible operation of the public body.

Local government land use decisions must be considered on their merits based on public record evidence and information and not on ex parte, non-public record, lobbying efforts. *Black's Law Dictionary* 472-473 (7th ed. 2000) defines the term "ex parte" as:

> **ex parte** adv. On or from one party only, usu. without notice to or argument from the adverse party.
>
> **ex parte** adj. Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.
>
> **ex parte communication.** A generally prohibited communication between counsel and the court when opposing counsel is not present.
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> Also see *Black's Law Dictionary, Eighth Edition,* pages 616-617 and page 296.
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> "The Appearance of Fairness legal doctrine requires that quasi-judicial land use decisions, such as rezone, must be fair and appear to be fair, in order to be valid." *Alger v. Mukilteo,* 107 Wash 2nd 541, 547, 730 P.3d 1333, 1987 Wash.LEXIS 1027 (1987) and *Sheng-Yen Lu v King County,* 110 Wash.App.92, 103, 38 P3d 1040, 2002 Wash.App.LEXIS 148 (2002).
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> *Rathkopf's The Law of Zoning and Planning,* Volume 2, §32.17, pages 32-54 through 32-58 indicates that the "appearance of fairness" doctrine attempts to restrict and prohibit conflicts of interest. Some courts, such as Washington, have

> applied appearance of fairness to local government public body land use decisions of a quasi-judicial nature that significantly affect individual property rights as well as potential community interests. Reasons for the appearance of fairness doctrine are that it provides public confidence in a public record public process and more sense of security of individual rights of property owners being considered as part of the land use decision making. The appearance of fairness doctrine applied to land use decisions is intended to prevent the appearance of unfairness as well as the actual existence of unfairness.

Quoting *Chorbuck v. Snohomish County*, 78 Wash. 2d 858, 868, 480 P.2d 489 (1971) *Rathkopf* at pages 32-57 and 32-58 states:

> … by the very nature of our society, the initial imposition of zoning restrictions or the subsequent modification of adopted regulations compels the highest public confidence in the governmental processes bringing about such action. Circumstances or occurrences arising in the course of such processes which, by their appearance, tend to 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 evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate. *(Emphasis added.)*

Rathkopf goes on to state:

> The Supreme Court of Washington has noted that under this appearance of fairness doctrine, "public officers impressed with the duty of conducting a fair and impartial fact-finding hearing upon results significantly affecting individual property rights as well as community interests, must so far as practicable, consideration being given to the fact that they are not judicial officers, be open minded, objective, impartial, and free of entangling influences or the taint thereof. . . . They must be capable of hearing the weak voices as well as the strong. To permit otherwise would impair the requisite public confidence in the integrity of the planning commission and its hearing procedures. The doctrine is applied by Washington courts to any administrative or zoning proceeding (including site-specific rezoning) where a public hearing is required by statute. *(Emphasis added.)*

As a cautionary note, with respect to the public hearing process, often unsworn public comment and personal opinions or personal views do not necessarily equate to legally defensible evidence for land use decision-making purposes. The Montana Supreme Court in *Lowe v. City of Missoula*, 525 P.2d 551 (1974), when invalidating the Missoula City Council's downzoning of lands on the east side of Waterworks Hill as an "abuse of discretion," stated supra at 555:

This Court not only has authority to review the record made before the City Council plus the new testimony, but also has the responsibility to provide supervision in accord with established principles of practice. Where the information upon which the City Council and the district court acted is so lacking in fact and foundation, as heretofore noted, it is clearly a mistake of fact and constitutes an abuse of discretion. It is within the power of this Court to correct this mistake of fact by judicial review of the entire record.

This Court in *Freeman v. Board of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538, restricted zoning where it imposed unjust limitations on property and deprived the owner of his property rights. The Court held:

"Under the guise of protecting the public or advancing its interest, the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights." *City of Jackson v. Bridges*, 243 Miss. 646, 139 So.2d 660; *Garner v. City of Carmis*, 28 Ill.2d 560, 192 N.E.2d 816.

. . . .

Considering the volatility of problems that arise under zoning ordinances and laws regulating the use of land, we note with approval the language of the federal district court of the District of Columbia, in *American University v. Prentiss*, 113 F.Supp. 389, 393, affd. 94 U.S.App.D.C. 204, 214 F.2d 282, 348 U.S. 898, 99 L.Ed. 705, 75 S.Ct. 217, wherein the court held:

" * * * Although possible impairment of property values seemed to be the main argument, very little actual evidence on the subject was produced. The testimony consisted chiefly of emotional outbursts on the part of individual homeowners, to the general effect that they had been informed by real estate experts that if the hospital were erected, the value of their property would decrease anywhere from thirty-five to fifty percent. Naturally such assertions are not evidence. * * *

"It is well established that administrative agencies are not required to apply the rules of law governing admissibility of evidence. These rules are binding only on judicial tribunals. Nevertheless, the probative weight of evidence is the same, irrespective of where the evidence is introduced, and must be tested by the same standards whether it is tendered to a court or to an administrative body."

In view of the mistake of facts submitted to the City Council and upon which the district court based its decision, we find such was an abuse of discretion necessitating reversal.

Judgment is reversed and the City Council is directed to set aside Ordinance No. 1549. (*Emphasis added*.)

Courts have indicated that land use rezoning before public bodies are quasi-judicial and require procedural fairness.

Rathkopf, Volume 3, Section 40.18, pages 40-34 and 40-35 explains:

> The movement to the quasi-judicial characterization of rezonings received great impetus from a 1972 student law review comment and was first embraced in the states of Washington and Oregon. The doctrine was favorably received by commentators, and was incorporated in the American Law Institute's 1975 Model Land Development Code and endorsed by an American Bar Association Advisory Commission. Several other states have adopted the doctrine either in whole or in part.
>
> Probably the greatest benefit of the quasi-judicial approach to rezonings is that it requires local governments to afford enhanced procedural rights to the proponents and opponents of a rezoning, and to engage in reasoned decision-making based on articulated standards. In this respect, it serves as an antidote to what is nearly universally regarded as an overly politicized, arbitrary, and abused mechanism of the zoning process. . .

Rathkopf in Volume 3 of *The Law of Zoning and Planning* § 40.23, page 40-56, footnote 1, set forth American Bar Association's policy statement with respect to the elements of procedural fairness owed by local government decision makers to parties in land use decision making:

> The ABA Advisory Commission on Housing and Urban Growth, Housing for All Under Law (*Fishman* ed. 1978), urged in its policy Statement No. 2:
>
> A government body, in granting or denying development permission for a specific parcel of land at the request of a particular party, is engaged in an adjudicatory process. As such, the essentials of procedural due process normally expected of administrative bodies-adequate notice, an opportunity to be heard, a fair and impartial tribunal, and findings based on an adequate record must be met. Furthermore, such local actions, when reviewed by the courts, need not be accorded the traditional presumption of legislative validity. (Emphasis added.)

Oregon and Washington Supreme Court cases generally judicially imposed these safeguards with respect to government land use decision making prior to the above-quoted policy statement of the ABA Advisory Commission on Housing and Urban Growth pursuant to the "appearance of fairness doctrine." See Fleming v. City of Tacoma, 502 P.2d 327, 331 (Wash. 1972); *Fasano v. Board of County Commissioners*, 507 P.2d 23, 30 (Oregon 1973); *Hartley v. Colorado Springs*, 764 P.2d 1216 (Colo. 1988) (in conducting a hearing the decision maker may not consider ex parte communications without giving notice thereof to all parties); *Idaho Historic Preservation Council Inc. v. City Council of Boise*, (June 30, 2000).

Court decisions focusing on due process rights in land use proceedings indicate interested (affected) parties are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, and to a decision making body that has no pre-hearing ex parte contacts or dealings between interested parties and members of the decision making body. For example see *Fasano v. Board of County Commissioners*, 507 P.2d 23, 30 (1973) and *Rathkopf*, supra, Volume 3, §

40.23, page 40-50, footnote 1. If there are unavoidable ex parte potentially substantive contacts with decision makers the substance of the contacts are to be timely publicly disclosed in the public record in time for public comment so that all interested parties will be aware of the substance of the contacts and have a reasonable opportunity to comment, critique or rebut. It violates constitutional procedural due process for there to be non-public record, hidden reasons for members of a public body to be basing a land use decision that affects private property rights.

Ensuring procedural fairness also requires a local government public body member to enter into the record any significant aspect of an on-site inspection that may be influencing that governing body member's decision making. The public must be timely provided a reasonable opportunity to comment on whatever the public body member is potentially relying on. The New Jersey Superior Court in *Smith v. Fair Haven Zoning Board of Adjustment*, 761 A.2d 111 (N.J. 2000) stated the following with respect to a land use decision making body's on-site inspection with respect to a matter pending before a zoning board of adjustment.

> We have stated that "a board may and indeed is expected to bring to bear in its deliberations the general knowledge of the local conditions and experiences of its individual members." *Baghdikian v. Board of Adjustment, Borough of Ramsey*, 247 N.J. Super. 45, 50, 588 A.2d 846 (App. Div. 1991); see also *Kramer v. Board of Adjustment of Sea Girt*, 45 N.J. 268, 284, 212 A.2d 153 (1965). In addition to reliance on personal knowledge, site inspection by zoning board members has been approved by our Supreme Court. *Giordano v. City Comm'n of City of Newark*, 2 N.J. 585, 588, 67 A.2d 454 (1949). In view of its flexible role, "it makes good sense not to straightjacket a board of adjustment with all of the rigid procedural standards imposed upon trial judges." *Baghdikian v. Board of Adjustment, Borough of Ramsey*, 247 N.J. Super. at 50. **Nevertheless, "the knowledge gained from a site inspection must be placed on the record so that the essence of a fair hearing is provided and a full reviewable record is made**." *Baghdikian*, 247 N.J. Super. at 51 (citing *Giordano v. City Comm'n of City of Newark*, 2 N.J. at 588-89; *Peoples Trust Co. of Bergen County v. Board of Adjustment of Hasbrouck Heights*, 60 N.J. Super. 569, 575, 160 A.2d 63 (App. Div. 1959)). **Although counsel and opposing parties need not be present during the site inspection, "it is preferable that prior notice be given at the hearing to afford the applicant and interested parties an opportunity to prepare a response to the knowledge gained by the board member as a result" of his or her visit to the property**. *Baghdikian*, 247 N.J. Super. at 52. 588 A.2d 846. *(Emphasis added.)*

In *Schalow vs. Waupaca County*, 407 N.W.2d 316, 139 Wisconsin 2d 284 (Wis. App. 1986), the Wisconsin Court of Appeals held it would be a denial of a zoning variance applicants' right to procedural due process for the zoning board of adjustment to base their decision upon a hidden reason which the applicants for the variance had no opportunity to rebut. In the *Schalow* case, the zoning variance applicants were denied their application for a variance request in which they sought a variance from the lot size and setback requirements of the county zoning ordinance to construct a single family dwelling on their vacant lot. In response to the applicants' application for a variance, the zoning board of adjustment had made an on-site inspection of the lot in

question and determined that the vegetation on the lot indicated a low area. No testimony to this effect was presented at the hearing, nor was there testimony as to whether building on the lot would violate flood plain or shore land zoning regulations or have undesirable environmental consequences. Although the zoning board of adjustment based their decision on these factors, at no point during the public hearing, or anytime outside the public hearing, did they ever indicate to the applicants for the zoning variance that these matters were a concern to them as board members. The *Schalow* court stated supra, at 319, as follows:

> . . . it would be a denial of the Schalow's right to procedural due process to base a decision upon a hidden reason which they had no opportunity to rebut. 4 Anderson, supra, sec. 22.38, p. 104; *Hot Shoppes, Inc. vs. Clouser*, 231 F.Supp. 825, 832-33 (D.D.C. 1964 aff'd. 346 F.2d 834 (D.C.Cir. l965). In this respect the board acted contrary to law. *(Emphasis added.)*

If the land use decision is not made at the conclusion of the public hearing it is imperative for basic elementary fairness, credibility and integrity of the public process that there be no owner, interested party or citizen ex parte non- public record lobbying contacts with City decision-makers. Basic fairness requires contacts with land use decision makers that may influence the outcome of the land use decision be public record for the public to be aware of and able to comment on or rebut the information, comment or data. Hidden reasons or motives influencing decision-making pertaining to land use matters involving real property rights and values could jeopardize the validity and legality of the land use decision.

Public body land use determinations involving private property rights may be voided and/or members of the public body making the land use determination may be disqualified from participating in the determination if they have publicly expressed a preconceived view, bias or prejudice, attitude or prejudgment conduct that indicates bias or prejudice. *Cage v Zoning Board of Appeals of Town of Madison, 148 Conn 497, 172 A.2nd 911 (1961)* and *Acierno v Folsom, 337 A.2d 309 (Del. 1975)*. Safeguards are necessary to protect interests of those significantly, substantively or severely affected by a land use decision. For example see *Strawberry Hill 4 Wheelers v. Board of Commissioners*, 601 P.2d 769, 775-76 (1979) and *Rathkopf*, supra, Volume 3, Sections 40.20 and 40.21, pages 40-44 through 40.55. *Rathkopf*, Volume 3, *The Law of Zoning and Planning*, Section 40.23 pages 40-56 through 40-63, pertaining to procedural rights in land use rezoning matters explains that characterization as "means that parties are entitled to greater procedural rights":

> Characterization of a rezoning as carries with it an implicit recognition that there are "interested quasi-judicial parties" to the decision--usually the property owner seeking rezoning and opposed neighbors -- whose interests in the matter are higher than those of municipal residents generally, and whose interests can virtually be considered as rights and therefore not to be adjusted or withdrawn in the absence of procedures according with due process or fundamental fairness.
> The procedural rights attendant upon characterization of a rezoning as quasi-judicial include not only the right to notice and opportunity to be heard but also, variously, the right to present evidence and witnesses, and to rebut opponents' evidence and witnesses, the right to a record of the proceedings, and the right to

> be supplied by the decision making body with a written statement of fact findings and reasons.
>
> Another aspect of procedural fairness deriving from the quasi-judicial characterization is the right to seek disqualification from the decision making body of persons whose financial interests or biases make their ability to function as impartial decision makers suspect. Related hereto may also be a prohibition on ex parte contacts or dealings between interested parties and members of the decision making body during the time the rezoning is under consideration, so that there is assurance that the decision is made solely on the basis of matters of record. *(emphasis added)*

Fasano vs. Board of County Commissioners of Washington County, 264 Or. 574, 507 P.2d 23 (1973) a leading case pertaining to the importance of an impartial decision making body in land use matters stated, supra at 30:

> . . . . with future cases in mind, it is appropriate to add some brief remarks on questions of procedure. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter - i.e. having had no pre-hearing or ex parte contacts concerning the question at issue-and to a record made and adequate findings executed. Comment, Zoning Amendments-The Product of Judicial or Action, 33 Ohio St.L.J. 130 - 143 (1972).
>
> When we apply the standards we have adopted to the present case, we find that the burden was not sustained before the commission. The record now before us is insufficient to ascertain whether there was a justifiable basis for the decision. The only evidence in the record, that of the staff report of the Washington County Planning Department, is too ******* and superficial to support the zoning change. It merely states: "The staff finds that the requested use does conform to the residential designation of the Plan of Development. It further finds that the proposed use reflects the urbanization of the county and the necessity to provide increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning . . . " Such generalizations and conclusions, without any statement of the facts on which they are based, are insufficient to justify a change of use . . .
>
> *(Emphasis added.)*

Rathkopf The Law of Zoning and Planning, Volume 3, Section 40.20 pages 40-44 and 40-45, indicates the quasi-judicial approach to land use decision making was actually earlier embraced in *Fleming v. City of Tacoma*, 502 P.2d 327, 331 (Wash. 1972). Ex parte non-public record contacts in land use proceedings could prejudice decision-makers without an opportunity for differing opinion comment or rebuttal. Subsequent to the *Fleming* decision, the 1982 Washington State Legislature statutorily limited the "appearance of fairness doctrine" and limited the application of the "appearance of fairness doctrine" to quasi-judicial land use decisions. These statutory revisions were explained in *Raynes v. City of Leavenworth*, 821 P.2d 1204, 1209 (Wash. 1992):

> The appearance of fairness statute limits the rule announced in *Fleming*. The unambiguous language of the statute indicates that not all amendments to zoning ordinances should be classified as quasi-judicial. The statute defines quasi-judicial to include actions of local legislative bodies "which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." RCW 42.36.010. But it goes on to specifically exclude three categories of actions: those adopting or revising comprehensive plans, those adopting area-wide zoning ordinances, and those adopting zoning amendments of area-wide significance. RCW 42.36.010. *(Emphasis added.)*

Courts appear to be cognizant of the fact that there are almost irresistible pressures on the part of citizens and interested parties to contact decision-makers to express their concerns. The *Fasano* decision should not be interpreted as an absolute-prohibition on ex parte contacts but as requiring that in those instances where an ex parte communication does take place, it should be placed on the public record in order to enable all interested parties or persons to rebut the substance of the communication. The public disclosure requirement should not be viewed as an authorization for decision makers to initiate or willingly engage in ex parte contacts; but should be viewed as being more a recognition of the fact that it is almost unavoidable that on occasion there will be some sort of ex parte contact made to a decision maker by an interested party in a pending land use matter.

The Oregon Supreme Court in *Peterson vs. City Council for City of Lake Oswego*, 574 P.2d 326, 331 - 332 (1978), when interpreting *Fasano* stated:

> We have interpreted *Fasano* as not placing an absolute prohibition on ex parte contacts between county governing boards and parties to decisions pending before them. Rather, we have stressed that if an ex parte communication does take place it must be placed on the public record to enable interested persons to rebut the substance of the communication. In *Tierney vs. Duris*, Pay Less Properties, 21 Or.App. 613, 629, 536 P.2d 435, 443 (1975), we stated:
> "In any event, we hold there is no violation of Fasano when, as in this case: (1) the "ex parte contracts, [sic] were not with the proponents of change or their agents, but, rather, with relatively disinterested persons; (2) the contacts only amounted to an investigation of the merits or demerits of the proposed change; and, most importantly, (3) the occurrence and nature of the contacts were made a matter of record during a hearing so that parties to the hearing then had an opportunity to respond * * * As we read in Fasano its basic requirement is an impartial tribunal; ex parte contacts were just mentioned as one way in which impartiality could be compromised * * * " (emphasis supplied.) See also *West vs. City of Astoria*, 18 Or. App. 212, 226 N.3, 52A P.2d 1216 (1974) (specially concurring opinion); Peck regulation and control of ex parte communications with administrative agencies, 76 Harv.L.Rev. 233, 266-68 (1962) . . .
> Courts in other jurisdictions which have also considered the propriety of ex parte contacts in a zoning context have also reached similar conclusions. See *Hot Shoppes, Inc. vs. Clouser*, 231 F.Supp. 825, 832-33 (D.C.D.C. 1964); *Jarrott vs. Scribener*, 22 F.Supp. 827, 834 (D.C.D.C. 1964); *Sheridan-Kalorama Neigh. C.*

> *vs. D.C.Bd. of Zon. Adj.*, 341 A.2d 312, 318 (D.C.App. 1975; *Wilson vs. District of Columbia Bd. of Zoning Adjust*., 289 A.2d 380, 383-84 (D.C.App. 1972). These courts recognize that an ex parte contact between a zoning board and an interested party which is neither revealed to other interested parties nor made a part of the public record is a ground for reversing the decision of a zoning board. *(Emphasis added.)*

Another Oregon case, *Neuberger vs. City of Portland*, 586 P.2d 351, 358 (l978), found that opponents of rezoning were not prejudiced or denied an impartial tribunal by ex parte contact between city and an applicant for rezoning. The ex parte contacts between city and an applicant for the zone change pertained to the city's purchase of a parcel of land different from the one under consideration for rezoning and the second contact occurred after the rezoning decision had already been made by the decision making authority. *Neuberger*, supra at 161 also indicated that fuller procedures are required "when a particular action by . . . government is directed at a relatively small number of identifiable persons and when that action also involves the application of existing policy to a specific factual setting, the requirement of procedures has been implied from the governing law." Also see *Neuberger v. City of Portland*, 603 P.2d 771, 775 (1979).

CONCLUSION(S):

Yes. With respect to specific land use decisions determined by the city council involving property rights, the Appearance of Fairness legal doctrine requires that quasi-judicial land use decisions involving specific property rights be fair and appear to be fair in order to be valid.

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/s/

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