

**SULTAN CITY COUNCIL
2008 WINTER RETREAT
AGENDA ITEM COVER SHEET**

DATE: February 9, 2008

SUBJECT: Council's Quasi-Judicial Role

CONTACT PERSON: Deborah Knight, City Administrator *D. Knight*

ISSUE

The issue before the City Council is to review its procedures for quasi-judicial closed record hearings on preliminary plat applications, preliminary planned unit development (PUD) applications, variances, and conditional use permits.

SUMMARY

The City has a new Mayor, Carolyn Eslick and a new City Attorney, Kathy Hardy with Kenyon Disend. At the closed record hearings held on January 24, 2008, there was some confusion about taking public comments on quasi-judicial actions prior to the City Council actually taking action on the matter.

The Mayor is requesting a review and discussion of the City's closed record hearing procedures (Attachment A) to ensure compliance with State law and City code.

Under the city's process, these applications first go to the Hearing Examiner for an open record hearing. The Hearing Examiner then makes a recommendation to the City Council that either recommends approval, approval with conditions, or denial of the application. The Hearing Examiner can also deny with prejudice which means the applicant cannot apply with the same project under the same circumstances.

The City Council holds a quasi-judicial closed record hearing where it can accept the recommendation, reject the recommendation, or remand the application back to the Hearing Examiner for further proceedings.

The City's process is somewhat confusing because Sultan Municipal Code 2.26.140 and 2.26.150 (Attachment B) which describes the Hearing Examiner and appeal process was not amended following Regulatory Reform in 1995 (see Attachment C for more information).

BACKGROUND

Open and Closed Record Hearings

Under Regulatory Reform, all cities and counties (GMA and non-GMA) must have established a project permit process to do the following (RCW 36.70B.050):

1. Combine SEPA review process with process for review of project permit applications (see above), and
2. Provide for no more than one open record hearing and one closed record appeal on a project permit application.

What is an open record hearing?

It is the traditional public hearing in which testimony, evidence, and other information (reports, studies, etc.) is presented, where the record for the decision on the project permit is developed. It may be held prior to the decision on the project permit or it may be held on an appeal (such as from an administrative decision). (RCW 36.70B.020(3))

What is a closed record hearing?

It is a proceeding (typically this would be before the legislative body) held after an open record hearing on a project permit application. No, or only limited, new evidence or information may be presented (the record is closed). Basically, all that can be presented would be oral argument based on the record. (RCW 36.70B.020(1))

The City can hold only one open record hearing on a land use application involving a quasi-judicial decision (Chapter 36.70B RCW). The purpose of the hearing is to give the public an opportunity to present evidence to be included in the official record. Participation by everyone with an interest is highly encouraged. The official record becomes the source for making the final decision.

Defining Quasi-judicial

The City Council acts as the quasi-judicial board on limited land use matters. Quasi-judicial generally relates to site specific land use action affecting specific parties and includes evidence for or against the proposal. These types of decisions are different than legislative actions, such as adopting new zoning ordinances, which tend to affect a much wider area and involve many more people. (Note: planning matters involving legislative action go through the Planning Board and require City Council approval.)

See Attachment D for a review of subdivision requirements.

Due Process

Quasi-judicial decisions, as a matter of law, require constitutional guarantees of due process. When the City fails to follow proper due process, exposure can occur to court orders requiring payment of monetary damages to the applicant. In Washington State, proper due process includes the following:

- Appearance of fairness by the decision maker (Chapter 42.36 RCW);
- Proper notice of the hearing;
- A proper hearing process;
- A complete record; and
- A decision or recommendation based on the record that meets legal requirements.

Role

The Hearing Examiner and City Council serve in a role similar to that of a judge. The Hearing Examiner ensures that parties receive proper due process; and issues final decisions on some land use applications and makes recommendations to the City Council on others.

The Public's Role in the Quasi-judicial Process

Anyone interested in the outcome of project approval process has a right to be heard during the open record hearing. The public can present oral and/ or provide written testimony for or against the proposal.

Public testimony ensures that a complete record is available for a decision. When providing testimony, it is very important to present facts because facts are the foundation for issuing a decision.

The decision must meet the legal criteria, which comes from applying city's ordinances and state statutes. If the legal criteria are satisfied, the decision must be to approve, even if popular opinion is contrary. If the criteria are not satisfied, the decision must be not to approve.

Prohibited Ex Parte Communications

Because the Hearing Examiner hearings are quasi-judicial, all persons are prohibited from contacting the examiner outside the public hearing for the purpose of influencing a decision. Any contacts made, must be publicly disclosed at the hearing. Similarly, contacting a member of the City Council for the purpose

of influencing a decision on a quasi-judicial action before them can lead to disqualifying that councilmember from the decision. If a person believes that ex parte communications have occurred, it should promptly be brought to the attention of the affected official.

ANALYSIS

The issue before the City Council is to review its procedures for taking public comment during the closed record hearing. State law requires one open record hearing and closed record hearing. State law is clear that no, or only limited, new evidence or information may be presented (the record is closed). Basically, all that can be presented would be oral argument based on the record. (RCW 36.70B.020(1))

The purpose of the hearing is to give the public an opportunity to present evidence to be included in the official record. Participation by everyone with an interest is highly encouraged. The official record becomes the source for making the final decision.

The final decision must meet the legal criteria, which comes from applying city's ordinances and state statutes. If the legal criteria are satisfied, the decision must be to approve, even if popular opinion is contrary. If the criteria are not satisfied, the decision must be not to approve.

The City Council discussed its involvement in the land use process and directed staff to propose changes to remove the City Council from most land use actions. This work was partially completed by former Community Development Director, Rick Cisar. This work is on hold until a new Community Development Director is hired by the City.

ATTACHMENTS

- A – Sultan Closed Record Hearing Procedures
- B – SMC 2.26 Hearing Examiner
- C – Regulatory Reform
- D - Subdivision Requirements
- E – Appearance of Fairness Doctrine

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The Closed Record Hearing for consideration of the _____
[eg. Recommendation of the Hearing Examiner] is now open.

I request that all persons who participated in the Open Record Hearing on this matter before the Hearing Examiner wishing to be heard sign in if they have not already done so.

- 01) This Public Hearing will proceed in an orderly fashion and I would like to ask your cooperation in the procedures followed. This is a Closed Record Hearing. There has been an Open Record Hearing before the Hearing Examiner. Under state law, there is only one Public Hearing allowed in this proceeding. A Closed Record Hearing means that the Council bases its decision on the record developed at the Public Hearing before the Hearing Examiner. Therefore, except in very limited circumstances, no new testimony is allowed. Comments from speakers must be in the nature of argument only, based on and limited to facts in the written and oral record developed before the Hearing Examiner. If any one present comments that are not based on facts in the record, anyone may make an objection. If an objection is made, the person speaking will stop until the issue of the objection is resolved.
- 02) All comments should be made from the speaker's rostrum and each speaker is reminded to being by giving his or her name and address. Please speak clearly and slowly.
- 03) If anyone requires special accommodation in order to speak, please let me know and we will make arrangements.
- 04) In fairness to all in attendance, each person will be given an opportunity to address the Council for an initial period not to exceed 3-minutes. Staff will introduce the subject of tonight's Hearing and summarize the Hearing Examiner's Decision. The Applicant if present will them be allowed - minutes to make an initial presentation if desired. The public will then be given an opportunity to speak, but remember comments must be based upon the record created before the Hearing Examiner.
- 05) It is not necessary that you be a proponent or an opponent of the matter under consideration to be allowed to speak.

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- 06) There should be no demonstrations such as clapping or cheering during or at the conclusion of anyone's presentation
- 07) Because this is a quasi-judicial hearing both appearance of fairness and conflict of interest must be addressed. All Council members and this includes me as the Mayor should now give consideration as to whether they have (1) a demonstrated bias for or against any party to the proceedings, (2) a direct or indirect monetary interest in the outcome of the proceedings, (3) a prejudgment of the matter prior to consideration of the facts in the record, (4) ex parte contact with any individual, excluding administrative Staff prior to the commencement of this Hearing. Does any council member have an appearance of fairness or a conflict of interest issue or disclosure to make?
- 08) Is there anyone in the audience who objects to my participation or any Council member's participations in these proceedings?
- 09) Staff's introduction may now proceed: _____.
- 10) The Applicant may now present argument based upon the record and the recommendation: _____.
- 11) Now is the time for members of the public to speak. Remember that you must base your comments on the record created before the hearing examiner. Any member of the public may now speak, please identify yourself, and supply your address: _____.
- 12) The Applicant may now respond to any public comments: _____.
- 13) Does Staff wish to respond to any subjects raised: _____.
- 14) At this time any Council member may ask any questions of any speaker or Staff.
- 15) Does any person have any comments solely to clarify or answer any issue raised by a Council member's questions. You may not raise new issues. Your comments should be limited to clarifying any item raised by any Council member or Staff _____.

The Closed Record Hearing is closed at this time. It is now in order for the Council to discuss this matter and for a Council Member to make a Motion to take action in one manner or another.

- 16) Is there any further discussion by Council Members?
- 17) The Chair would entertain a Motion.
- 18) Motion: _____.
- 19) This concludes the Public Hearing in this matter.

Chapter 2.26 HEARING EXAMINER

Attachment B

Sections:

- 2.26.010 Purpose.
- 2.26.020 Creation of hearing examiner position.
- 2.26.030 Appointment.
- 2.26.040 Qualifications.
- 2.26.050 Removal.
- 2.26.060 Freedom from improper influence.
- 2.26.070 Conflict of interest.
- 2.26.080 Rules.
- 2.26.090 Duties of the examiner – Applications.
- 2.26.100 Reports of city departments.
- 2.26.110 Public hearing.
- 2.26.120 Examiner's decision.
- 2.26.130 Notice of examiner's decision.
- 2.26.140 Appeal from examiner's decision.
- 2.26.150 Council consideration.
- 2.26.160 Effect of council action.
- 2.26.180 Local improvement district assessment roll hearings.

2.26.010 Purpose.

The purpose of this chapter is to establish a system of land use regulatory hearings which will satisfy the following basic needs:

A. A more prompt opportunity for a hearing and decision on alleged violations of land use regulations, and such other regulations as may be assigned to the hearing examiner;

B. To provide an efficient and effective system for deciding variances and appeals from administrative decisions;

C. To help ensure procedural due process and appearance of fairness by holding such hearings before a neutral party, competent in the fields of land use and procedural requirements. (Ord. 550, 1990)

2.26.020 Creation of hearing examiner position.

Pursuant to Chapter 35A.63 RCW, the office of hearing examiner, hereinafter referred to as examiner, is created. All land use matters of a quasi-judicial nature, not requiring a modification of any ordinance or legislation shall be referred to the examiner who shall interpret, review and implement land use regulations in accordance with the procedures set forth herein. (Ord. 701, 1999; Ord. 550, 1990)

2.26.030 Appointment.

The hearing examiner shall be appointed by the mayor from a list of qualified persons approved by the council. The compensation of the hearing examiner shall be approved by the council as with other professional and consultant positions. (Ord. 701, 1999; Ord. 550, 1990)

2.26.040 Qualifications.

Examiners shall be appointed solely with regard to their qualifications for the duties of their office and will have such training and experience as will qualify them

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to conduct administrative or quasi-judicial hearings on regulatory enactments and to discharge the other functions conferred upon them. Examiners shall hold no other elective or appointive office or position in the city of Sultan. (Ord. 550, 1990)

2.26.050 Removal.

An examiner may be removed from office for cause by the mayor with concurrent majority vote of the city council. (Ord. 550, 1990)

2.26.060 Freedom from improper influence.

No person, including city officials, elected or appointed, shall attempt to influence an examiner in any matter pending before him, except at a public hearing duly called for such purpose, or to interfere with an examiner in the performance of his duties in any other way; provided, that this section shall not prohibit the city's attorney from rendering legal service to the examiner upon request. (Ord. 550, 1990)

2.26.070 Conflict of interest.

No examiner shall conduct or participate in any hearing, decision or recommendation in which the examiner has a direct or indirect substantial financial or familial interest or concerning which the examiner has had substantial prehearing contacts with proponents or opponents. Nor, on appeal from an examiner's decision, shall any member of the council who has such an interest or has had such contacts participate in consideration thereof. (Ord. 550, 1990)

2.26.080 Rules.

The examiner shall have the power to prescribe rules for the scheduling and conduct of hearings and other procedural matters related to the duties of his office. Such rules may provide for cross-examination of witnesses. (Ord. 550, 1990)

2.26.090 Duties of the examiner – Applications.

The examiner shall receive and examine available information, conduct public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon those facts, which conclusions shall represent the final action on the application unless appeal, as specified in this section, for the following types of applications:

- A. Denials of conditional use permits;
- B. Denials of variance;
- C. Appeals on short plats and subdivisions;
- D. Appeals from administrative determination of the city's land use regulation codes;

E. The examiner is empowered to act in lieu of the board of adjustment, and such other officials, boards or commissions as may be assigned. Whenever existing ordinances, codes or policies authorize or direct the board of adjustment, or other officials, boards or commissions to undertake certain activities which the examiner has been assigned, such ordinances, codes or policies shall be construed to refer to the examiner.

F. The hearing examiner is empowered consistent with SMC 2.26.120(D) and rules adopted by the hearing examiner to reconsider decisions or recommendations of the hearing examiner. (Ord. 764-01; Ord. 550, 1990)

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2.26.100 Reports of city departments.

On any land use issue coming before the examiner, the building official shall coordinate and assemble the reviews of other city's departments, governmental agencies, and other interested parties and shall prepare a report summarizing the factors involved and the planning commission/city council findings and recommendations. At least seven calendar days prior to the scheduled hearing, the report shall be filed with the examiner and copies thereof shall be mailed to the applicant and made available for public inspection. Copies thereof shall be provided to interested parties upon payment of reproduction costs. In the event that information to be provided by the applicant or other parties outside of city control has not been provided in sufficient time for filing seven days in advance of the hearing, the examiner may reschedule the hearing and notify interested parties. (Ord. 550, 1990)

2.26.110 Public hearing.

A. Before rendering a decision or recommendation on any application, the examiner shall hold at least one public hearing thereon.

B. Notice of the time and place of the public hearing shall be given as provided in the ordinance governing the application. If none is specifically set forth, such notice shall be given no less than 10 days before the public hearing.

C. The examiner shall have the power to prescribe rules and regulations for the conduct of hearings under this chapter and also to administer oaths, and preserve order. (Ord. 821-03 § 1; Ord. 550, 1990)

2.26.120 Examiner's decision.

The examiner shall render a written decision within 10 working days of the conclusion of a hearing, unless a longer period is agreed to in writing by the applicant. The decision shall include at least the following:

A. Findings of fact and conclusions of law based upon and supported by the record;

B. A decision on the applicant to grant, deny or grant with such conditions, modification and restrictions as the examiner finds reasonable to make the application compatible with its environment, zoning ordinance, comprehensive plan, other official policies and objectives, and land use regulatory enactments. Examples of the kinds of conditions, modifications and restrictions which may be imposed include, but are not limited to, additional setbacks, screenings in the form of fencing or landscaping, easements, dedications or additional right-of-way and performance bonds;

C. No application for a variance shall be granted unless the examiner finds:

1. The variance shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the property on behalf of which their application was filed is located; and

2. That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated; and

3. That such variance is necessary:

a. Because of special circumstances set forth in the findings relating to size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and

b. Because for reasons set forth in the findings, the variance as approved would contribute significantly to the improvement of environmental conditions,

either existing or potentially arising from the proposed improvement;

D. All decisions or recommendations of the hearing examiner are subject to reconsideration, unless reconsideration is waived. Reconsideration is waived unless within seven calendar days of the date of mailing of the decision or recommendation, the applicant, the city or a party of record submits a written request for reconsideration in accordance with rules issued by the hearing examiner. Pending reconsideration by the hearing examiner, a decision or recommendation shall not be deemed final for the purpose of commencement of the period of time in which to commence an appeal. If reconsideration is waived because no timely request for reconsideration is made, the initial decision or recommendation of the hearing examiner, subject to any right of appeal, shall be deemed final as of the eighth calendar day after the date of mailing of the decision or recommendation. If a timely request for reconsideration is made, the hearing examiner shall grant or deny reconsideration within 10 calendar days of the date of receipt of the request for reconsideration. All periods of time provided for in this code for filing an appeal of a hearing examiner's decision, or for council consideration of a hearing examiner's recommendation, shall commence to run from the later of the eighth calendar day after mailing of the hearing examiner's decision or recommendation or the date of the hearing examiner's order granting or denying reconsideration.

E. All fees associated with the reconsideration shall be set by council resolution.

F. A statement of the date the decision will become final unless appealed, together with a description of the appeal procedure. (Ord. 764-01; Ord. 550, 1990)

2.26.130 Notice of examiner's decision.

Not later than three working days following the rendering of a written decision, copies thereof shall be mailed to the applicant and to other parties of record in the case. "Parties of record" shall include the applicant and all other persons who specifically request notice of decision by signing a register provided for such purpose at the public hearing, or otherwise provide written request for such notice. (Ord. 550, 1990)

2.26.140 Appeal from examiner's decision.

A. The grounds for filing an appeal of an examiner's decision shall be limited to the following:

1. Newly discovered evidence which is material to the examiner's decision and which could not reasonably have been produced at the examiner's hearing;
2. The examiner exceeded his jurisdiction;
3. The examiner failed to follow the applicable procedure in reaching his decision;
4. The examiner committed an error of law or misinterpreted the applicable zoning ordinance, comprehensive plan, provisions of the city's code or other city or state law or regulation; or
5. The examiner's findings and conclusions are not supported by the record.

B. 1. Where the examiner's decision is final and conclusive with right of appeal to the council, any such appeal shall be filed by the applicant, a department of the city, or other aggrieved person or agency with the city clerk/treasurer within 10 calendar days following the rendering of the examiner's decision pursuant to SMC 2.26.120. In computing the time in which to file an appeal with the council, the date the examiner's decision is rendered shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a legal holiday.

2. Appeals filed with the city clerk/treasurer shall be in writing, shall contain a

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detailed statement of grounds for appeal and the facts upon which the appeal is based, and shall be accompanied by a fee of \$50.00; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant. All council proceedings shall be limited to those matters expressly raised in a timely written appeal or appeals.

3. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the council or withdrawn.

C. 1. If the appeal is to the council, the timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated or withdrawn.

2. Within seven calendar days following the timely filing of an appeal with the city clerk/treasurer, notice thereof and of the date, time and place for council consideration shall be mailed by the clerk's office to the applicant, to the examiner and to all other parties of record. Such notice shall additionally indicate the deadline for submittal of written comments as prescribed in SMC 2.26.150.

D. Where the examiner's decision is final and conclusive, with right of appeal to court, the procedures for appeal are as set out in the underlying ordinance or statute governing the land use permit or other quasi-judicial hearing. (Ord. 550, 1990)

2.26.150 Council consideration.

A. An examiner's decision which has been timely appealed pursuant to SMC 2.26.140 shall come on for council consideration in open public meeting no sooner than 21 nor longer than 35 calendar days from the date the appeal was filed. The council shall consider the matter based upon the record before the examiner, the examiner's decision, the written appeal statement and any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting date set for council consideration.

B. At the public meeting, the council may concur with the findings and conclusions of the examiner and affirm the examiner's decision; remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions; or the council may determine to hear the appeal at public hearing. In those instances in which the council affirms the examiner's decision or remands the matter to the examiner, the council's decision shall be reduced to writing and entered into the record of the proceeding within 15 days of the public meeting. Copies of the decision shall be mailed to all parties of record.

C. In those instances in which the council determines to conduct a public hearing, notice of the hearing shall be given by publication in the city newspaper no less than 10 days prior to the date set for the hearing and written notice shall also be given by the council by mail to all parties of record before the hearing examiner.

D. All council hearings conducted pursuant to this section shall be de novo and shall be limited to those matters raised in the appeal. The council shall consider the appeal based upon the record before the examiner and all written and oral testimony presented at the council hearing. All testimony at any public hearing shall be taken under oath.

E. At the conclusion of the public hearing, the council shall enter its decision which shall set forth the findings and conclusions of the council in support of its decision. The council may adopt any or all of the findings or conclusions of the examiner which support the council's decision. The council may affirm the decision of the examiner, reverse the decision of the examiner either wholly or in part, or may remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions.

F. The council's decision shall be reduced to writing and entered into the record of the proceedings within 15 days of the conclusion of the hearing. Copies of the decision shall be mailed to all parties of record. (Ord. 550, 1990)

2.26.160 Effect of council action.

The council's decision to affirm an examiner's decision or remand a matter to the examiner pursuant to SMC 2.26.150(B), or the council's decision after public hearing on an appeal, shall be final and conclusive with right of appeal to the Superior Court of Snohomish County by writ of certiorari, writ of prohibition or writ of mandamus within 15 calendar days of the council's decision. The cost of transcription of all records ordered certified by the court for such review shall be borne by the applicant for the writ. (Ord. 550, 1990)

2.26.180 Local improvement district assessment roll hearings.

A. As authorized by RCW 35.44.070, the city council hereby provides for delegating, whenever directed by majority vote of the city council, the duty of conducting public hearings for the purpose of considering and making recommendations on final assessment rolls and the individual assessments upon property within local improvement districts to a hearing examiner appointed under this section, and the hearing examiner is directed to conduct such hearings and make those recommendations when thus authorized by the city council.

B. All objections to the confirmation of the assessment roll shall be in writing and identify the property, be signed by the owners and clearly state the grounds of the objection. Objections not made within the time and in the manner prescribed and as required by law shall be conclusively presumed to have been waived.

C. The hearing examiner shall conduct the hearing to be commenced at the time and place designated by the city council, cause an adequate record to be made of the proceedings, and make written findings, conclusions and recommendations to the city council following the completion of such hearings, which may be continued and reconvened as provided by law whenever deemed proper by the hearing examiner, and the city council shall either adopt or reject the recommendations of the hearing examiner.

D. The recommendations of the hearing examiner shall be that the city council correct, revise, lower, change or modify the roll or any part thereof, or set aside the roll in order for the assessment to be made de novo, or that the city council adopt or correct the roll or take other action on the roll as appropriate, including confirmation of the roll without change. The recommendations of the hearing examiner shall be filed with the city clerk and be open to public inspection. All persons whose names appear upon the recommended assessment roll who timely filed written objections to their assessments shall receive mailed written notification of their recommended assessments.

E. Any persons who shall have timely filed objections to their assessments may appeal the recommendations of the hearing examiner regarding their properties to the city council by filing written notice of such appeal with the city clerk within 10 calendar days after the date of mailing of the hearing examiner's recommendations.

F. The appeal shall be based exclusively upon the record made before the hearing examiner and shall be considered by the city council at a public meeting. No new evidence may be presented. Arguments on appeal shall be either oral or written as the city council may order.

G. The city council shall adopt or reject the recommendations of the hearing examiner at a public meeting, after considering any appeals, and shall act by ordinance in confirming the final assessment roll.

H. Any appeal from a decision of the city council regarding any assessment may be made to the superior court within the time and in the manner provided by law.

I. The procedures set forth in this section are independent of and alternative to any other hearing or review processes heretofore or hereafter established by the city, and shall govern the conduct and review of final assessment hearings conducted before hearing examiners and related proceedings when authorized by

Regulatory Reform (ESHB 1724) Overview

The 1995 Legislature adopted "regulatory reform" legislation (ESHB 1724) for the purpose of simplifying and integrating the various state land use and environmental regulations. Most of this legislation is embodied in chapter 36.70B RCW. All of this legislation's requirements apply to cities and counties planning under the Growth Management Act (GMA), while only part of its requirements apply to non-GMA cities and counties. Cities and counties were required to implement locally the requirements that apply to them by March 31, 1996. What follows is a summary of the major provisions of this legislation, including amendments adopted since 1995.

I. Provisions of most significance:

A. Coordination/consolidation of local permit process with State Environmental Policy Act (SEPA) review (RCW 43.21C.075(3)).

1. Before regulatory reform: SEPA review of threshold determination appeal hearings (if provided for) occurred before hearing(s) on underlying land use permit. Some cities and counties allowed a threshold determination appeal hearing (such as before a hearing examiner) and then an appeal of that decision to the legislative body (city council, board of county commissioners). [Emphasis Added – this seems to be the origin on **Sultan Municipal Code 2.26**] Problem with this procedure - length of permit process, duplication of review.
2. Regulatory reforms: Apply to all cities and counties, GMA and non-GMA
3. SEPA appeal hearing (if any is provided) on negative threshold determination (DNS) must occur at the same hearing in which a hearing body (e.g. planning commission) or officer (hearing examiner) makes a recommendation (to legislative body) or decision on the underlying land use permit. This is the "open record hearing," discussed below.
4. SEPA appeal hearing (if any is provided) on DS (requiring that an EIS be prepared) may occur before any hearing on the underlying land use permit. (As in pre-regulatory reform days, any appeal of a SEPA determination is to superior court along with the appeal on the underlying permit.)

B. Project permit process.

3. Definition of project permit (RCW 36.70B.020): any land use or environmental permit or license required by a city for a project action, including building permits, subdivisions, planned unit developments, shoreline permits, site-specific rezones. (Some of these project permits may, however, be excluded from most project permit process requirements; see below.) Does not include: comprehensive plan adoption or amendment; area-wide zoning.

4. All cities and counties (GMA and non-GMA) must have established a project permit process to do the following (RCW 36.70B.050):
 - o Combine SEPA review process with process for review of project permit applications (see above), and
 - o Provide for no more than one open record hearing and one closed record appeal on a project permit application.

What is an open record hearing? It is the traditional public hearing in which testimony, evidence, and other information (reports, studies, etc.) is presented, where the record for the decision on the project permit is developed. It may be held prior to the decision on the project permit or it may be held on an appeal (such as from an administrative decision). (RCW 36.70B.020(3))

What is a closed record appeal? It is an appeal proceeding (typically this would be before the legislative body) held after an open record hearing on a project permit application. It is not a hearing, because no, or only limited, new evidence or information may be presented (the record is closed). Basically, all that would be presented would be oral argument based on the record. (RCW 36.70B.020(1))

5. GMA cities and counties must have established an integrated and consolidated project permit process. This is the requirement that causes the most sweat and fuss for GMA cities and counties. (RCW 36.70B.060)

This integrated and consolidated process includes the following requirements (these are not all of them, but they are the most significant):

- o A determination of completeness of a project permit application. This must be done within 28 days of a city or county receiving a project permit application. This determination must state that the application is complete or that it is not complete and indicate what is needed to complete the application. (RCW 36.70B.070)
- o A notice of application that is to be provided to the public and any agencies with jurisdiction. It must be provided within 14 days of the determination of completeness. There are many requirements for this notice. (RCW 36.70B.110). Note that this statute was amended in two different ways in two separate bills passed by the 1997 Legislature. Under statutory rules for resolving conflicts between bills on the same subject, the amendments that were part of chapter 429, Laws of 1997 control.)
- o An optional consolidated project permit review process. This process is to be available when there are two or more project permits relating to a proposed action. The determination of completeness and the notice of application would include all of the project permits addressed by the consolidated procedure.

- A determination of consistency. (RCW 36.70B.030, 36.70B.040) During project permit review, the city or county must determine the proposed project's consistency with its development (zoning) regulations or, in the absence of such regulations, with the comprehensive plan adopted under the GMA.
- The one open record hearing and one closed record appeal limitation is again referenced here.
- A decision on the application within the time period established by local ordinance for that decision, which time period should not exceed 120 days. (RCW 36.70B.080, as amended by ESHB 1458 (Chapter 322, Laws of 2001)). The time period for local government action may exceed 120 days only if the local government makes written findings that a specified period of additional time is necessary for processing. Local governments are subject to potential liability under RCW 64.40.020(1) for failure to make a decision on an application within the time period they have established for making that decision.
- Other requirements relating to the project review process. (RCW 36.70B.030) One important element of this review process is the authorization to determine that the environmental analysis conducted for and the mitigation measures included in applicable development/zoning regulations provide adequate mitigation of a project's adverse impacts. One of the important regulatory reform policies that is implemented here is to avoid duplication in environmental review. This policy recognizes that the environmental analysis of a comprehensive plan and of specific development regulations may adequately address the impacts of certain developments/projects permitted under the plan and regulations.
- Exclusions allowed. (RCW 36.70B.140) A local government may exclude certain project permits from most of the above provisions. A city or county may by ordinance or resolution exclude landmark designations, street vacations, other approvals relating to the use of public areas or facilities, and other project permits that the city or county determines present special circumstances that warrant a different review process.

A city or county may also exclude certain project permits from some of the above provisions. Such excludable project permits include boundary line adjustments, building permits, and similar approvals that are categorically exempt from SEPA.

II. Selected other elements of regulatory reform:

A. Shoreline Management Act (SMA) changes, including integration of SMA planning and GMA planning. The goals and policies of a local government's

shoreline master program now function as an element of its comprehensive plan adopted under the GMA. (RCW 36.70A.480)

B. Optional "development agreements" authorized (for all cities and counties). (RCW 36.70B.170 - .210) A development agreement, consistent with development regulations, may be agreed to between a local government and a developer that would define the development standards and environmental mitigations that would apply to the development project.

C. A local government may now delegate to a hearing examiner the authority to hear and make final decisions on all project permit applications, with the exception of site-specific rezones, for which the legislative body must make the final decision. Thus, a city council or board of county commissioners may take itself almost entirely out of the land use permit appeal process, with that one exception.

D. New rules for judicial appeals of local land use decisions. The "Land Use Petition Act," codified in chapter 36.70C RCW, establishes a uniform procedure for appealing land use decisions to the superior court. A party now has 21 days from the issuance of a land use decision to appeal to the superior court. The new rules include uniform procedures for such appeals.

Subdivisions Contents

- Introduction to Regulation of Subdivisions
- Reference Sources
- Documents

Introduction to Regulation of Subdivisions

The subdivision of land into lots is governed in Washington State by chapter 58.17 RCW and by city and county ordinances adopted under that chapter's authority. Chapter 58.17 RCW establishes two subdivision types that are regulated differently:

- "Subdivisions," which are defined as the "division or redivision of land into five or more lots, tracts, or parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership" (RCW 58.17.020(1)); and
- "Short subdivisions," which are defined as the "division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership" (RCW 58.17.020(6)).

Any city or town may increase the number of lots that can be regulated as short subdivisions up to a maximum of nine. Counties planning under the Growth Management Act may do the same with respect to unincorporated land within an urban growth area.

"Plats" and "short plats" are the maps or representations of subdivisions and short subdivisions respectively that show the division of land into lots and the streets, alleys, dedications, easements, etc. RCW 58.17.020(2).

Subdivisions, other than short subdivisions, are to be regulated by cities and counties according to the procedures set out in chapter 58.17 RCW. So, local ordinances adopting subdivision procedures must conform to the procedures set out in chapter 58.17 RCW. The statutory procedures involve a two-step process for the approval of subdivisions, "preliminary plat" approval followed by "final plat" approval. Compliance with local ordinances such as those dealing with zoning, road standards, shorelines, utilities, and drainage is required for subdivision and short subdivision approval. See RCW 58.17.110.

Preliminary plats. Preliminary plat review is a quasi-judicial process that involves initial review and hearing by the city or county planning commission or agency, which then makes a recommendation to the city council or board of county commissioners or county council. RCW 58.17.100; see RCW 42.36.010 for a definition of quasi-judicial land use actions.

A city or county may establish a hearing examiner system as an alternative to having a planning commission or agency hear and issue recommendations for preliminary plat approval. RCW 58.17.330.

Unless the applicant requests otherwise, a preliminary plat must be processed simultaneously with applications for accompanying rezones, variances, planned unit developments, site plan approvals, and similar quasi-judicial or administrative actions to the extent that the procedural requirements for those actions allow for simultaneous processing.

Preliminary plats must be approved, disapproved, or returned to the applicant for modification within 90 days of the filing of the plat application, unless the applicant consents to an extension. RCW 58.17.140.

A city or county may not approve a preliminary plat unless the city council, board of county commissioners or county council, or hearing examiner, as the case may be, makes written findings regarding certain matters identified in RCW 58.17.110, including open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, and playgrounds.

Final plats. Following preliminary plat approval, the applicant has five years in which to submit the plat for final approval, though a city or county may adopt procedures for extensions of that time period. Final plat approval, which must be made by the legislative body (RCW 58.17.100), is in the nature of a ministerial, non-discretionary process; that is, if the applicant meets the terms of preliminary approval and the plan conforms with state law and local ordinances, final approval must be granted. RCW 58.17.170.

There is no public hearing for a final plat approval.

Among the statutory requirements for final plat approval are: recommendation for approval by the local health department or the agency that would be furnishing sewer and water; approval by the city or county engineer; a complete survey; and certification that all taxes and delinquent assessments for the property have been paid. See RCW 58.17.150; RCW 58.17.160; RCW 58.17.165. Final plats must be approved, disapproved, or returned to the applicant for modification within 30 days of the filing of the short plat application, unless the applicant consents to an extension. RCW 58.17.140.

Lots in a subdivision cannot be sold until final plat approval is obtained and the plat is recorded with the county auditor. RCW 58.17.195. Before filing with the county auditor, approved final plats must be submitted to the county assessor for "the sole purpose of assignment of parcel, tract, block and or lot numbers," if the county assessor has adopted an "assessor's plat" for the county. RCW 58.18.010. Approved final plats are "vested" with respect to the conditions of plat approval and with respect to applicable laws for a period of five years from final plat approval, except when "a change in conditions creates a serious threat to the public health or safety in the subdivision." RCW 58.17.170.

Attachment D

This information was taken from the Municipal Research website
<http://www.mrsc.org/Subjects/Planning/overeshb.aspx>

Short plats. No process is set out in state law for approval of short plats; cities and counties are required by RCW 58.17.060 to adopt by ordinance their own regulations and procedures that provide "summary approval" of short plats through an administrative process. Because it must be an administrative process, there is no public hearing for a short plat application, and the legislative body is not involved in the process. To approve a short plat, the administrative personnel assigned to review short plat applications must make the same written findings in RCW 58.17.110 that are required for plat applications. Short plats must be approved, disapproved, or returned to the applicant for modification within 30 days of the filing of the short plat application, unless the applicant consents to an extension. RCW 58.17.140. They must be filed with the county auditor and are not deemed "approved" until such filing. RCW 58.17.065. And, as with final plats, approved short plats must be submitted to the county assessor before filing with the county auditor. RCW 58.18.010. No limitation on the vesting period exists with respect to approved short plats as there is for final plats. See Noble Manor v. Pierce County, 133 Wn.2d 269, 281-82 (1997)

Exemptions. Certain land divisions are exempt from state subdivision laws. See RCW 58.17.040. These exempt divisions include burial plots, divisions into lots above a certain size, those "made by testamentary provisions, or the laws of descent," boundary line adjustments (no additional lots created), divisions for industrial or commercial use when a binding site plan is approved, divisions for leasing lots for mobile homes when a binding site plan is approved, and divisions where a portion of the property is developed as a condominium (and certain other requirements, including a binding site plan, are met). RCW 58.17.035 authorizes cities and counties to, by ordinance, establish procedures for use of a binding site plan as an alternative to the subdivision process for the divisions identified in RCW 58.17.040 that require approval of a binding site plan to be exempt.

MRSC Inquiries

Appearance of Fairness Doctrine

1. What is the Appearance of Fairness Doctrine?

The "appearance of fairness doctrine" governs the conduct of certain hearings. Basically, the rule requires that for justice to be done in hearings that affect individual or property rights ("quasi-judicial" proceedings), the hearings must not only be fair, they must also be free from even the appearance of unfairness. Although the appearance of fairness doctrine usually applies to land use hearings, it has been applied to civil service and other hearings as well.

2. How does a city council decide whether a matter is quasi-judicial?

Quasi-judicial actions are defined by state statute to be: "...those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." RCW 42.36.010.

3. Which land use matters are legislative actions?

Legislative actions include adoption, amendment, or revision of comprehensive, community, or neighborhood plans or other land use planning documents, or adoption of zoning ordinances or amendments which are of area-wide significance. See RCW 42.36.010.

4. What is an ex parte communication?

An ex parte communication is a one-sided discussion between a decision-maker and the proponent or opponent of a particular proposal which takes place outside of the formal hearing process on a quasi-judicial matter. No member of a decision-making body is allowed to engage in ex parte communication when quasi-judicial matters are pending.

5. How is it determined whether a matter is pending?

"Pending" means after the time the initial application is filed or after the time an appeal is filed with the city council. Thus, if a matter would come before the council only by appeal from a decision by the hearing examiner or planning commission, it is not considered pending with respect to city councilmembers until an appeal is filed. It would, however, be pending with respect to the hearing examiner or planning commissioners.

6. Is a council hearing on the adoption of an area-wide zoning ordinance subject to the appearance of fairness doctrine?

No. Even though it requires a public hearing and affects individual landowners, this type of proceeding is legislative rather than adjudicatory or quasi-judicial.

7. Is a rezone hearing subject to the doctrine?

Yes. The decision to change the zoning of particular parcels of property is adjudicatory and the appearance of fairness doctrine applies. (See Leonard v. City of Bothell, 87 Wn. 2d 847, 557 P.2d 1306 (1976).

8. Is an annexation subject to the appearance of fairness doctrine?

No. An annexation is a legislative action and not a quasi-judicial action.

9. Does the appearance of fairness doctrine apply to preliminary plat approval?

Yes, preliminary plat approval is quasi-judicial in nature and must be preceded by a public hearing. Therefore, it is subject to the doctrine of appearance of fairness. See Swift v. Island County, 87 Wn.2d 348, 552 P.2d 175 (1976).

10. Does the appearance of fairness doctrine apply to a final plat approval?

A public hearing is not required for final plat approval. The doctrine only applies to quasi-judicial land use matters for which a hearing is required by law.

11. Does the doctrine apply to street vacations?

No. Even though a hearing is held, this is a legislative policy decision, not an adjudicatory matter.

12. Which city officials are subject to the doctrine?

According to RCW 42.36.010, council members, planning commission members, board of adjustment members, hearing examiners, zoning adjusters, or members of boards participating in quasi-judicial hearings which determine the legal rights, duties or privileges of specific parties in a hearing or other contested case proceeding," are all subject to the doctrine.

13. Are any city officials or employees exempt from the appearance of fairness rule?

Even though required to make decisions on the merits of a particular case, department heads and city staff persons are not subject to the appearance of fairness rules.

14. If a councilmember announces before the hearing has even been held that her/his mind is already made up on a matter, what should be done?

The member should disqualify her/himself. (See Chrobuck v. Snohomish County, 78 Wn.2d 858, 480 P.2d 489 (1971).

15. May a councilmember meet with a constituent on matters of interest to the constituent?

Yes, as long as there is no discussion of quasi-judicial matters pending before the council. See RCW 42.36.020; *West Main Associates v. City of Bellevue*, 49 Wn.App 513, 742 P.2d 1266 (1987).

16. May the council and planning commission meet jointly to consider a presentation by a developer?

If no specific application has been filed by the developer, the council probably may meet jointly with the planning commission to consider a proposal by a developer. The appearance of fairness doctrine has been held by the courts to apply only to situations arising during the pendency of an action. If no application has been filed, no action is pending before the city. But if a formal application for a rezone has been filed, a joint meeting would probably violate the doctrine.

17. May councilmembers meet with a developer prior to an application for a project?

Yes, if no application has been filed. A member of a decision-making body is not allowed to engage in ex parte communications with opponents or proponents of a proposal during the pendency of a quasi-judicial proceeding unless certain statutory conditions are met. In *West Main Associates v. Bellevue*, 49 Wn. App. 513, 742 P.2d 1266 (1987), the court indicated that ex parte communications were not prohibited until an actual appeal has been filed with the city council relating to a quasi-judicial matter.

18. May councilmembers discuss a quasi-judicial matter outside of council chambers?

If a situation occurs in which communication with a councilmember occurs outside of the city's hearing process, the councilmember should place the substance of the written or oral communication on the record, make a public announcement of the content of the communication, and allow persons to rebut the substance of the communication. Failure to follow these steps could result in an overturning of the council's decision, should it ever be challenged in court.

19. Is there an appearance of fairness problem if a planning commission member owns property within an area proposed for rezone?

It would violate the appearance of fairness doctrine if a planning commission member who owns property in the area to be rezoned participates in the hearing and/or votes. In the leading case on this issue, *Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972), a planning commissioner owned property adjacent to an area to be rezoned. The court determined that the commissioner's self-interest was sufficient to invalidate the entire proceeding.

20. May a planning commission member who has disqualified himself on a rezone action, discuss the application with other planning commission members?

A planning commission member who has disqualified himself on a specific action should not attempt to discuss the application with other planning commission members either inside or outside of the hearing process. See *Hayden v. Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981).

- 21. If a councilmember has disqualified herself from participation in a council hearing because she is an applicant in a land use matter, may she argue her own application in writing before the council?**

Our courts have ruled that once a member relinquishes his or her position for purposes of the doctrine, he or she should not participate in the hearing. A disqualified decision maker should not join the hearing audience, act on behalf of an applicant, or interact in any manner with the other members. See *Hayden v. Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981).

- 22. May a relative of a councilmember who is also a developer act as an agent for that councilmember in presenting the proposal to council?**

Yes, a relative would be allowed to act as the agent in these circumstances.

- 23. May the spouse of a disqualified councilmember testify at a hearing before the council?**

If the councilmember disqualifies him or herself on a quasi-judicial issue coming before the council, his/her spouse may testify as long as the councilmember leaves the room and does not attempt to vote or participate in the deliberations.

- 24. May a councilmember vote on a legislative issue if her husband is a planner for the county and the issue could indirectly affect his work?**

Yes. If the vote is on a legislative matter, then the appearance of fairness doctrine does not apply.

- 25. May a city staff person present a development proposal to the planning commission and city council on behalf of a developer who is also a city councilmember?**

The staff member can present a report and recommendation to the council or planning commission on behalf of the city. It is not appropriate for city staff to present both the city and the developer's position.

- 26. In a situation in which the chairman of the planning commission is a realtor and represents a client wishing to purchase property in an area of the city that is being considered for a rezone, may the chairman participate in the hearing and vote on the rezone application?**

The fact that the chairman is a realtor does not in itself disqualify him from participation in rezone hearings. However, his representation of a client

wanting to purchase property in the area being considered for a rezone constitutes sufficient reason for disqualification from participation.

27. Will a violation of the appearance of fairness doctrine invalidate a decision even if the vote of the "offender" was not necessary to the decision?

Yes. Our courts have held that it is immaterial whether the vote of the offender was or was not necessary to the decision.

28. Are contacts between a decision-maker and city staff members considered to be ex parte contacts prohibited by the appearance of fairness doctrine?

The role of a city department is to create a neutral report on a proposal and issue a recommendation to grant or deny a proposal that is subject to further appeal or approval. Contacts with city staff would only be prohibited if the city department involved is a party to quasi-judicial action before the council.

29. May a councilmember participate in a vote on leasing city property to an acquaintance?

Because the lease of city property is not a quasi-judicial matter and does not involve a public hearing, the appearance of fairness doctrine does not apply. [Note: There could be a potential conflict of interest question if the councilmember is likely to reap financial gain from the lease arrangements.]

30. May a councilmember who is running for mayor state opinions during the campaign regarding quasi-judicial matters that are pending before the council and that will be decided before the election?

RCW 42.36.040 provides that "expression of an opinion by a person subsequently elected to a public office, on any pending or proposed quasi-judicial actions" is not a violation of the appearance of fairness doctrine. However, this statute has never been interpreted by any appellate court, and it is unclear how it applies to an incumbent councilmember who might speak during his or her campaign (for mayor in this case) concerning a quasi-judicial matter that will be decided by the current council before the upcoming election. It would be best for the councilmember running for mayor not to speak on the pending matter. To do so could compromise the fairness of the hearing on the matter. RCW 42.36.110 operates to protect the right to a fair hearing despite compliance with other requirements of chapter 42.36 RCW. Although RCW 42.36.040 clearly allows non-incumbents running for office to speak on such a matter, the rights of the parties to a fair hearing might outweigh the right of an incumbent to speak out.

A councilmember who is also chair of the local housing authority would like to participate in a hearing at which the council is asked to review a

proposed low-income housing project. If she can't participate as a councilmember, can she make her views known as a private citizen? Because the council will be meeting as a quasi-judicial body, the appearance of fairness doctrine is implicated. Consequently, the councilmember should not only refrain from participation and voting on the issue but should also physically leave the room when the remaining councilmembers discuss the matter. This removes any potential claim that the councilmember has attempted to exert undue influence over the other councilmembers.

31. If a councilmember is disqualified from participation on appearance of fairness grounds and discusses the issue with another councilmember, may the second councilmember still participate and vote?

If the first councilmember is disqualified then any discussion between the disqualified member and the other councilmember could be construed as an ex parte communication. If the content of the conversation is placed on the record according to the requirements of RCW 42.36.060, the other member could probably participate.

32. May a councilmember attend a planning commission hearing on a quasi-judicial matter?

Although RCW 42.36.070 provides that participation by a member of a decision-making body in an earlier proceeding that results in an advisory recommendation to a decision-making body does not disqualify that person from participating in any subsequent quasi-judicial proceeding, such participation could potentially affect the applicant's right to a fair hearing. RCW 42.36.110 provides:

Nothing in this chapter prohibits challenges to local land use decisions where actual violation of an individuals' right to a fair hearing can be demonstrated.

Out of perhaps an excess of caution, this office generally recommends that city councilmembers not attend planning commission hearings on quasi-judicial matters because it is possible that their attendance might give rise to a challenge based on the appearance of fairness doctrine. We are not aware of any court decisions in which such a challenge has been adjudicated.

33. Can a candidate for municipal office accept campaign contributions from someone who has a matter pending before the council?

Yes. Candidates may receive campaign contributions without violating the doctrine. RCW 42.36.050; Improvement Alliance v. Snohomish Co., 61 Wn.App. 64, 808 P.2d 781 (1991). However, contributions must be reported as required by public disclosure law. Chapter 42.17 RCW.

34. Aren't elected officials supposed to be able to interact with their constituents?

Absolutely. Accountability is a fundamental value in our representative democracy and requires public officials to be available to interact with their constituents. The statute addresses this by limiting the doctrine to quasi-judicial actions and excluding legislative actions.

35. Can a quorum be lost through disqualification of members under the appearance of fairness doctrine?

No. If a challenge to a member or members of a decision-making body would prevent a vote from occurring, then the challenged member or members may participate and vote in the proceedings provided that they first disclose the basis for what would have been their disqualification. This is known as the "doctrine of necessity" and is codified in RCW 42.36.090.

36. What should a decision-maker do if an appearance of fairness challenge is raised?

The challenged decision-maker should either refrain from participation or explain why the basis for the challenge does not require him or her to refrain.

37. Are there any limitations on raising an appearance of fairness challenge?

Yes. Any claim of a violation must be made "as soon as the basis for disqualification is made known to the individual." If the violation is not raised when it becomes known, or when it reasonably should have been known, the doctrine cannot be used to invalidate the decision. RCW 42.36.080.

38. If a violation is proved, what is the remedy?

The remedy for an appearance of fairness violation is to invalidate the local land use regulatory action. The result is that the matter will need to be reheard. Damages, however, cannot be imposed for a violation of the doctrine. See *Alger v. City of Mukilteo*, 107 Wn. 2d 541, 730 P.2d 1333 (1987).

39. Does the appearance of fairness doctrine prohibit a decision-maker from reviewing and considering written correspondence regarding matters to be decided in a quasi-judicial proceeding?

No. Decision-makers can accept written correspondence from anyone provided that the correspondence is disclosed and made part of the record of the quasi-judicial proceeding. RCW 42.36.060.

40. What city department oversees application of the appearance of fairness doctrine?

No person or body has the authority to oversee application of the appearance of fairness doctrine to members of a city council. It is up to the individual councilmembers to determine whether the doctrine applies to them in a particular situation, and to disqualify themselves if it does. Some

city councils have established rules that allow the votes of the council to disqualify a member in the event of an appearance of fairness challenge. A city council probably has the authority to establish such a rule based upon its statutory authority to establish rules of conduct.