

Land use and the appearance of fairness doctrine

By Gordy Van

A citizen in one of our cities wished to make an addition to his home that would result in a structure above the city's height limitation. The citizen applied for a variance. The City Planning Commission, after reviewing the variance application, recommended denial. The City Council, in their role as quasi-judicial decision makers, considered the variance and issued a resolution denying the variance. One of the City Council Members recused himself from participating in the decision since he lived in close proximity to the citizen.

Following issuance of the denial, the citizen filed a Land Use Petition Act (LUPA) lawsuit wherein the petitioner included the assertion that City Council Members had personal biases against the petitioner that were not disclosed and therefore the process violated the appearance of fairness doctrine.

The appearance of fairness doctrine is codified in [RCW 42.36](#). [RCW 42.36.010](#), Local Land Use Decisions, states:

Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are 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. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

The appearance of fairness doctrine can be used to challenge land use decisions where a violation of an individual's right to a fair hearing is demonstrated. Unfair hearings may also result in a claim for violation of an individual's constitutional due process rights. It is important for members of the decision making body to not engage in communications outside the hearing with either proponents or opponents of the pending proceeding unless the member places on the record the substance of such oral or written communications and provides a public announcement of the content of the communication and of the parties right to rebut the substance of the communication. This needs to be made at each hearing where action is taken or considered on that subject. Communication between a citizen and his or her elected official is not prohibited as long as the correspondence is made part of the record.

In the claim above, the Council Member's recusal from hearing the matter overcame the appearance of fairness allegation in the complaint. WCIA recommends appointing Hearing Examiners to be the final decision maker on land use matters. This effectively removes any real or perceived bias on the part of Council Members on what can be hotly contested issues of their citizenry.