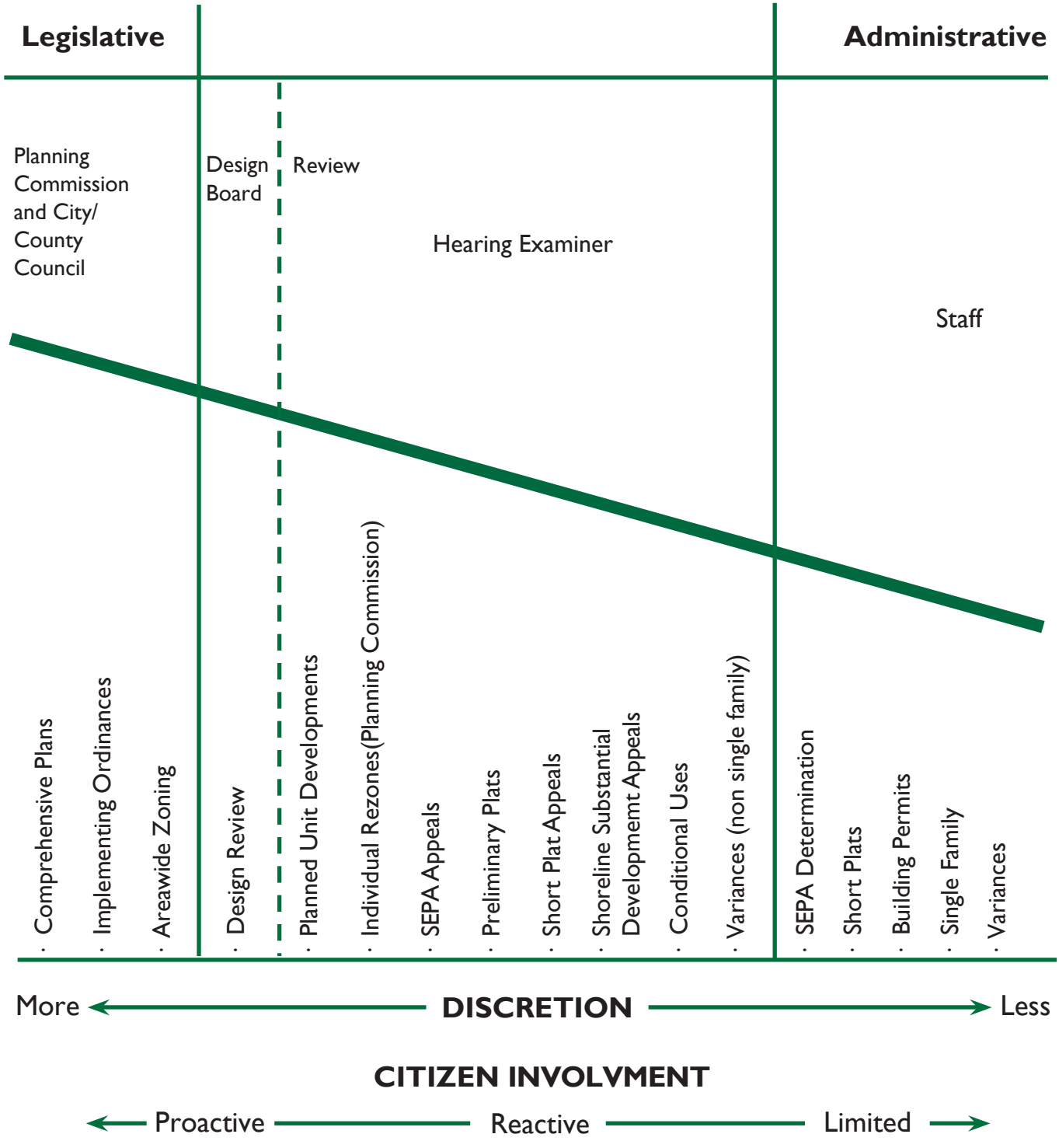
V. A Development Decision Making



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V. B RIGHTS AND RESPONSIBILITIES IN PLANNING

CONSTITUTIONAL RIGHTS AND RESPONSIBILITIES IN PLANNING[1]

Chapter 4

Community planning must balance many issues and countervailing forces while creating an outline or model for growth. A framework of rules and regulations, designed to limit and shape the authority of the planning process, covers constitutional rights, duties, and obligations of municipalities as a whole (and the citizens they represent generally), and property owners and citizens directly involved in the planning process.

Constitutional rights and responsibilities must be met and balance in the heat of the moment, in cases that can tear at a community.[1] Citizens will cry for action before a lay group that is not always trained, or even specifically advised, on legal issues. This chapter will help public agencies identify the two constitutional issues most directly affected by planning—due process and the taking issue—and suggests when additional guidance may be needed.

"Due process" has two components: 1) "**Procedural,**" which says that a rule or action was properly adopted after proper notice and opportunity to be heard; and 2) "**Substantive**," which means the rule or action gives adequate notice of what is intended or regulated, and is reasonably related to a matter appropriate for government regulation.

"Taking is the right not to be deprived of property without just compensation.

A. Due Process

Due process is the primary constitutional issue dealt with in planning. Due process arises under the Washington State Constitution,Article I § 3, and Article V of the U.S. Constitution, as applied to state action through the XIV Amendment to the Constitution.

As applied to planning, due process most commonly takes these forms:

- **Procedural Due Process**—a right to have certain rules followed before significant changes occur to one's rights, responsibilities or property.
- **Substantive Due Process**—the right to have rules adopted which are reasonable in aim and scope, and which are targeted to objectives appropriate for municipal action.

Washington State is fortunate to have several decisions in which the courts have gone out of their way to articulate due process guidelines and principles.These are helpful in evaluating situations and making decisions.

1. Procedural Due Process

Adequate notice is the prerequisite of any lawful municipal action. State law requires municipal agencies to establish regular meeting times and places, and to publish special notices for meetings held at other than regularly scheduled times. Failure to give proper notice of a meeting will invalidate any action taken at that meeting.

Planning cases require special, rather than general, notices. It is not sufficient merely to give notice that a meeting usually will occur. Courts have held:

> *Procedural due process requires notice which is reasonably calculated under the circumstances to apprise affected parties of the pending action and to afford them an opportunity to present their objections.*[2]

When a county enacts or amends a zoning ordinance, it is required by statute to give notice of the time, place and purpose of the meeting[3]. Where the board is to consider amendments must be available for review in advance of the hearing.

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Finally, if an action of a council deprives a property owner of a right previously enjoyed, personal notice and hearing are required.[4] This would apply, for example, to a zoning ordinance that seeks to terminate existing practices (eliminate vested rights), rather than merely regulate or prevent new uses from occurring in the future. Personal notice and hearing would be required before taking effect.

Notices to "owners of record" may be inadequate in some cases with substantial effect on tenants, or when county records lag weeks or months behind local real estate transactions. (Addresses on record at the county often are mortgage companies more interested in having taxes paid on time than forwarding official notices to owners or tenants possibly affected by planning activities.)

PRACTICE TIP: ***Communities are encouraged to adopt notice policies reasonably calculated to notify interested or affected parties. Major changes may require extra notice, such as large signs on affected property or direct mail to owners of record and residents.***

2. Substantive Due Process—Proper Exercise of the Police Power

Substantive due process is divided into cases which concern:

- *The overall property of the action taken, or the limits of the "police power" in general.*
- *The clarity with which the action is taken, known as the "vagueness" inquiry, and*
- *The connection between the action taken and the problem created by a project or proposal, known as the "nexus" inquiry.*

Two separate and district inquiries must be made:

- *The nature and purpose of the decision to use regulation, rather than acquisition, to secure the municipal rights in question.*
- *The nature of the municipal rights secured, and the reasonableness of the use remaining after the regulation is imposed.*

Both of these inquiries are considered part of the "taking issue."

To analyze a municipal regulation under substantive due process challenge, courts will make a three-part substantive inquiry.[6] To understand the nature of the inquiry, planning commissions and their respective boards and councils should consider and address the following issues:

Does the regulation seek to achieve a legitimate public purpose?

In most cases, planning enactments seek to protect stated community values, the "object" or "purpose" of the planning effort will be deemed legitimate.

For example, regulations aimed at protecting public health and water quality seek to achieve a legitimate public purpose.[7] On occasion, a community may want to adopt planning rules that give one constituency a competitive advantage over another. Courts would certainly scrutinize this legislation closely. If improper purpose is shown, the presumption of validity may be overcome.

Are the means used to accomplish the lawful purpose reasonably necessary to the stated objective?

Even when a stated aim is proper, courts will examine whether the means chosen are appropriate.8 In protecting neighborhood values, for example, a municipality might require modern construction techniques and adequate storage before permitting modular housing in a community. The municipality

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could be challenged, however, if it assumes that modular housing is always inferior (a demonstrably false assumption), and seeks to ban modular housing or "mobile homes" to "protect the quality of single-family neighborhoods."

Is the chosen regulation unduly burdensome on the land owner?

This inquiry aims at balancing the municipality's interests with those of the property owner. The greater the public harm, up to a point, the greater the public intrusion warranted in solving the harm. The greater the intrusion on the use of property, the closer the scrutiny required—based on whether a less intrusive alternative would have accomplished the same result, or whether it is fair to make the property owner bear the burden of solving a community problem.

In making the "unduly burdensome" inquiry, courts and commentators have developed a list of inquiries to help evaluate the issues involved:[9]

- *The nature of the harm to be avoided*
- *Whether less drastic protective measures are available and effective, and*
- *The economic loss suffered by the property owner.*

Another formulation asks these relevant questions:[10]

- **On the public side:** *the seriousness of the public problem, the extent to which the owner's land contributes to the problem, the degree to which the proposed regulation solves the problem, and the feasibility of less oppressive solutions, and*
- **On the owner's sure:** *the amount and percentage of value lost, the extent of remaining uses (past, present, and future), the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.*

When a regulation fails to pass the balancing test, or where it goes too far (either on its face or as applied to a single parcel), the remedy is to invalidate the ordinance.[11]

3. Substantive Due Process—The Vagueness Inquiry

If a municipal regulation is to be enforceable, it cannot be unconstitutionally vague. People enforcing the regulation, and those affected by it, must have a sense of the nature and extent of the regulation and the conduct it permits or prohibits.

Courts have held ordinances unconstitutionally vague in the following context:

> *An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application…Such an ordinance violates the essential element of due process of law—fair warning*[12]

In the cited case, a zoning ordinance permitted a "limited degree" of manufacturing in a commercial zone. The question was whether certain machinery fell inside or outside the permitted uses.As stated by the court:

> *In the area of land use a court does not look solely at the face of the ordinance; the language of the ordinance is also tested in its application to the person alleged to have violated it. …The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law.*[13]

The court invalidated the ordinance's proscription of "limited use" because, as applied to the machine in question, no one could know or understand the reasonable limitations intended.

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A similar situation existed in a city where a design review ordinance called for buildings to be "in good relationship" with the surrounding views, have "appropriate proportions" and "harmonious colors," and be "interesting." In the transition between the old town and a nearby development area, the court found the design review commission could not express the code requirements in other than personal preferences. As such, the code as applied to the building in question was unenforceable.

While aesthetic issues can be difficult to articulate, communities may want to use a combination of words and designs to express the range of options in which a project should operate.

If a city wishes to enforce a "statement" or a "policy," it must first pass some ordinance or regulation that gives standing to the policy or statement. Mere expressions of preference, without more, cannot be a basis for denying land use decisions. As stated by the court:

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> *…Commissioner's individual concepts [of "policy"] were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.*[16]

If a municipality is to avoid a claim of vagueness, it must create a standard (in words and pictures, if needed) that permits those involved in the process to understand what is expected or required.[17] Alternatively, the Legislature must set up a process for creating a standard that can be fairly and uniformly applied, and reviewed in subsequent cases.

4. Substantive Due Process—The Nexus Issue

The "nexus" issue involves the extent to which a municipality can impose a requirement on a particular individual to solve a specific problem, or respond to a community need. There must be a logical connection between the problem the community is trying to solve and the limitation, regulation or exaction sought by municipal action.

The earliest example of the "nexus" doctrine arises in a United States Supreme Court case known as **Nollan**.[18] In the **Nollan** case, the California Coastal Commission sought to require a property owner to dedicate a beach front public walkway as a condition to a request to remodel a home.

The court noted that a municipality could acquire a beach front walkway at any time by condemnation. The question in the case is whether the municipality could require the owner to dedicate the walkway without compensation, since the owner was seeking a permit to remodel the house on the lot.

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The court's answer was "no," a beach front walkway was beyond the authority of the community in this case.

In deciding the case, the court said there must exist some logical connection between connection between the problem identified, the municipal interest, and the solution proposed. Thus, a municipality could require setbacks from side yards for safety or aesthetic reasons, because construction of a house raises both issues. But appropriation of a walkway across a back yard for public use did not solve a problem created by construction of the house. It only contributed to solving a public need—a linear park along the waterfront. Since there was no connection between the impacts caused by the project and the exaction sought by the municipality, the exaction could not be required, no matter how important the improvement was to the community. The question is not the importance of the public need, but the fairness of imposing the solution of that need on the builder of a nearby project.

The "nexus" requirement received additional attention in the recent case known as **Dolan**.[19] In the **Dolan** case, the municipality imposed conditions on a building permit requiring the applicant to permanently dedicate a portion of its land for storm drainage and as a pedestrian/bicycle path. The applicant argued that the City failed to adequately justify the condition with the required "nexus".[20]

The United States Supreme Court agreed with the applicant/property owner. The court reaffirmed its decision in **Nollan**, and added that the "nexus" test asks whether there is a "rough proportionality" between the condition imposed and the impact intended to be mitigated by the condition. The most important feature of the **Dolan** case, however, for the local planner is that the court in **Dolan** turned the "burden of proof" in these cases on its head. Prior to **Dolan**, courts had required applicants to bear the burden of proving that the conditions were unconstitutional. The **Dolan** court reversed the burden and required local governments to prove that they had justified the condition with the necessary "nexus."[22] This represents a fundamental shift for local governments.

Planning staffs must now begin, at the review stage of an application and not wait until the applicant has appealed the decision or filed a lawsuit. Planners are encouraged to explain in detail the reasons for imposing any exaction, the connection to the anticipated impact, and the desired result of the exaction.

Municipal actions that appropriate private property for public use (rather than regulate activity on the site), will usually be examined closely.[23] The appropriation must be warranted to solve a particular impact, not merely to meet a community need.

In a similar case in Washington State, a city could not require a developer to complete an adjoining roadway near a project under construction, where the construction did not cause the need for the roadway.[24] (See Chapter 5 for further discussion on the limitations of development conditions.)

PRACTICE TIP: ***When commissioners and council members are drafting an ordinance that requires improvements as a condition of seeking a permit, they must assure a stated connection between the approval given, a particular on-site or off-site improvement or dedication, and the impact to be mitigated.***

Where project-specific approvals are concerned, the decision maker should make specific findings on the issue of impact and the fairness of imposing specific improvements that respond to these impacts.

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B. The Taking Issue

The United States Constitution states that property should not be taken without just compensation. Similarly, the Washington State Constitution states that property should not be damaged or taken without just compensation.[25] Of all the challenges to land use regulations, the one most frequently heard is that property has been "taken" through the regulatory process.

Commissioners and council members involved in regulating land frequently face the question of unjust taking. People who see substantial reductions in property value, or significant limitations on the uses of property, will feel that government should pay for the devaluation. All of these claims are analyzed under the taking issue doctrine.

Taking claims arise in three circumstances: (1) when property has been physically invaded or appropriated; (2) when land-use regulations deprive an owner of a reasonable use of his or her property; and, (3) when conditions are imposed on land-use permits.

PRATICE TIP: ***When commissioners and council members are drafting an ordinance that requires improvements as a condition of seeking a permit, they must assure a stated connection between the approval given, a particular onsite or off site improvement or dedication, and the impact to be mitigated.***

Where project-specific approvals are concerned, the decision maker should make specific findings on the issue of impacts and the fairness of imposing specific improvements that respond to these impacts.

Where a regulation does in fact materially interfere with use of a specific property, the courts look at several factors:

1. Physical Invasion or Appropriation

Historically, a physical invasion of property had to occur before a court would find that property had been "taken" in violation of the constitution. Today, the appropriation of property by government continues to be a common ground for a takings challenge, such as the **Nollan** and **Dolan** cases discussed above. A right of public access or use, or across private property, may be for people, utilities, or stormwater, and usually requires compensation—unless the municipality can show that the facility need was generated by the project requiring the appropriation.

2. Regulations Affecting Reasonable Use

If the municipality is not acquiring a public right in the property (and is merely limiting the owner's use), the only "taking issue" question is whether the regulation leaves the owner a reasonable use of the property.[26]

While "reasonable use" limitations are based on individual cases, courts routinely uphold planning or other land use regulations designed to create a well ordered community. These include zoning patterns[27] and regulations that protect public health and safety or environmental concerns, such as wetland regulations,[28] even when these actions substantially reduce the property's fair market value.

The rationale for this is based on Washington's broad vesting rules. Each individual is entitled to use property according to the laws on the books at the time an application is made. A property owner who wants to take advantage of a particular zone or right can do so, simply by filing and processing an application.

However, no law requires a community to hold a zone available forever. If a community decides to change zoning to serve the needs of the larger community, it may do so, even if this limits or takes away previously authorized rights to use property.

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In looking at a "taking" claim based on regulatory enactments, the court will look at several factors:

> *…The "threshold inquiry"… is whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area. A regulation which does that is to be contrasted with one which goes beyond preventing a public harm and actually enhances a publicly owned right in property. Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership—the right to possess, to exclude others, and to dispose of property. If a regulation does not infringe on a fundamental attribute of ownership, and if it protects the public from one of the foregoing listed harms, then no constitutional "taking requiring just compensation exists."*

If a regulation enhances a publicly-owned right in property, or violates one of the fundamental rights of ownership, then further inquiry is needed to determine if a compensable taking has occurred.

First, if the regulation does not advance a legitimate state interest, then a taking has occurred for which compensation is required. The "legitimate state interest" analysis requires the community to state the nexus it is using to validate a limitation or exaction.

Second, if on its face the regulation deprives the owner of all economically viable use of a property a compensable taking has occurred.

To decide whether all reasonable use has been eliminated, the court must determine the property interest limited, and its effect on using the remainder of the property.

The reasonable use inquiry calls for a look at the entire parcel.This, if a wetland regulation deprives the owner of using one-third of the property, but the other two-thirds is available for use, the court most likely would find that a taking has not occurred.32 Alternatively, if the regulation limited the use of the property solely to picnicking when surrounding lots were developed as housing, the court may find a taking—unless a strong case is made for undue hazard in the area, as in a flood way or storm surge area.33

3. The Economic Impact of the Regulation on the Property[34]

If the cost of developing the property exceeds the return to be made from its sale, then the regulation is considered to have deprived the property of all economic benefit (even though some use may be made). The question is the "economic use" of the remaining property.

4. The Extent of the Regulation's Interference with Investment-Backed Expectations

Courts will look differently upon owners who have owned property for some time, and are caught in a world of changing regulations; and owners who purchased property at a substantially diminished price—reflecting a severe limitation—and then seek advantage under the taking clause to avoid the limitation.

5. The Character of the Government's Actions

This doctrine takes us back to the question of whether the limitation is to mitigate a problem caused by use or development of the property (which is lawful); or to advance a public interest not directly related to the use and development of the property (which is unlawful without compensation).35

6. Conditions on Land-Use Permits

When the court analyzes a claim that a condition imposed on a land use permit is a "taking," the court will consider four factors:

> *First, when the government conditions a land-use permit, it must identify a public problem or problems that the condition is designed to address…*

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> *Second, the government must show that the development for which a permit is sought will create or exacerbate the identified public problem…*
>
> *Third, the government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem…*
>
> *Fourth, the government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development.36*

The first two factors seek to establish a relationship between the land-use project and the identified public problem.[37] The last two factors seek to establish a relationship between the identified public problem and the proposed solution to that problem. If the proposed condition or exaction is reasonably related to all or part of an identified public problem that is created or exacerbated by the development project, the courts will uphold the condition.

"Taking" cases and due process limitations on regulations are among the most complex and least understood of all guidelines for regulatory actions.According to one commentator on land use law,"[r] egulatory taking doctrine is the most perplexing area of American land use law."[38]

This information is not intended to be a definitive analysis of constitutional issues affecting municipal regulation. However, municipal officials can take heart: the courts recognize that planning a community is a difficult task, and there is a need to give due deference to local planning actions.As one Superior Court Judge commented (paraphrased),"I do not get paid to sit in hearings 'til one o'clock in the morning or to choose between conflicting and competing needs of the community.That is the job of your elected officials. I do not rule on the wisdom of the rule adopted, only that the rules of adoption were properly followed."[39]

If municipal officials are careful to identify these central themes of constitutionality, the courts will most likely uphold their enactments.

For further information, commissions may wish to review the Attorney General's memorandum on the taking issue, created as part of the growth management planning process.[40] It provides important additional information on constitutional rights and responsibilities of planning.

PRACTICE TIP: ***Councils and commissions should take several actions to assure that legislation, as written and applied, meets constitutional scrutiny:***

- ***Identify the public purpose to be accomplished.***
- ***Identify the connections between the harm to be avoided and the regulation or limitation on action the ordinance requires.***
- ***When limiting use of a property (either by use limitations or prohibitions),make sure that the limitation or prohibition still permits a reasonable use of the remainder of the property.***

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ENDNOTES FOR CHAPTER 4

1. See Munns v. Martin, 131 Wn.2d 192, 930 P.2d 318 (1997) (the Washington Supreme Court grappled with the question of whether Walla Walla's historic preservation ordinance violated the Constitution when applied to a church structure. The court held that the city's ordinance mandating up to a 14 month waiting period before such facilities could be demolished was unconstitutional).
2. Pease Hill v. County of Spokane, 62 Wn.App. 800, 806, 816 P.2d 37 (1991); Bass Partnership v. King County, 79 Wn.App. 276, 281, 902 P.2d 668 (1995).
3. Glaspey & Sons v. Conrad, 83 Wn.2d 707, 711, 521 P.2d 1173 (1974); Responsible Urban Growth v. Kent, 123 Wn.2d 376, 386, 868 P.2d 861 (1994).
4. Wenatchee Reclamation District v. Mustell, 102 Wn.2d 721, 725-726, 684 P.2d 1275 (1984); sheep Mt. Cattle Co. v. Department of Ecology, 45 Wn.App. 427, 726 P.2d 55 (1986), review denied, 107 Wn.2d 1036 (1987).
5. Under the Land Use Petition Act, a challenge to a land use decision brought in superior court must name the owner of the property at issue. If the owner is not known, the person identified as the taxpayer in the records of the county assessor must be named. RCW 36.70C.040(2)(c).
6. Presbytery of Seattle v. King County, 114 Wn.2d 320, 330-331, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990); Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992); Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992); Christianson v. Snohomish Health District, 133 Wn.2d 647, 946, P.2d 768 (1997); Guimont v. Seattle, 77 Wn.App. 74, 896 P.2d 70 (1995); Brutsche v. Kent, 78 Wn.App. 370, 898 P.2d 319 (1995).
7. Christianson v. Snohomish Health District, 133 Wn.2d at 661.
8. See Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998) (city council's withholding for two months of grading permit for which developer had already satisfied statutory and ordinance criteria, so that additional traffic impact studies could be completed, constituted deprivation of property right without due process); Lester v. Town of Winthrop, 87 Wn.App. 17, 939 P.2d 1237 (1997) (a slight delay in the issuance of a permit to consider a condition of approval that is ultimately determined to be unlawful was not a violation of due process); Thurston County Rental Owners Ass'n v. Thurston County, 85 Wn.App. 171, 931 P.2d 208 (1997) (septic system regulations found to be reasonably related to protecting health and safety of County residents).
9. Presbytery, 114 Wn.2d at 320; Christianson, 133 Wn.2d at 665. See also Weden v. San Juan County, 135 Wn.2d 678, 706-07, P.2d (1998) ("It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm.").
10. Christianson v. Snohomish Health District, 133 Wn.2d at 665; Guimont v. Clarke, 121 Wn.2d 586, 610, 854 P.2d 1 (1993), cert. denied, 114 S. Ct. 1216 (1994) (quoting Presbytery, 114 Wn.2d at 331); accord Sintra v. Seattle, 119 Wn.2d at 22.
11. Robinson v. City of Seattle, 119 Wn.2d 34, 521, 830 P.2d 318 (1992).
12. Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986)(citations omitted).
13. Id. At 871 (citations omitted).
14. Anderson v. City of Issaquah. 70 Wn.App. 64, 75-76, 851 P.2d 744 (1993).
15. See also Western Homes v. Issaquah, 1998 WL 184900 (Wn.App. Div. 1, April 20, 1998) (the court found the City's bonus point award system to be unconstitutionally vague. The ordinance allowed a range of densities, but contained largely subjective and arbitrary standards for awarding higher densities).
16. Andersen, 70 Wn.App. At 78.
17. More recently, however, the Washington Supreme Court has stated that specific standards are not necessary; general standards are sufficient. See Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 796-797, 903 P.2d 986 (1995).
18. Nollan v. California Costal Comm., 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987).

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ENDNOTES FOR CHAPTER 4 (continued)

19. Dolan v. City of Tigard, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994).
20. Id. 129 L. Ed. 2d at 315
21. Id.At 320
22. Id.At 320 n. 8.
23. See Snider v. Board of county Commissioners, 85 Wn.App. 371, 932 P.2d 704 (1997) (because the county had conditioned a developer's subdivision approval on obtaining rights-of-way from third parties, but had not required the developer to dedicate any of his own property, the court distinguished the case from Dolan, reasoning that the county had not physically taken any of his propert). But see Benchmark v. City of Battle Ground, Wn.App. , P.2d (Div. II 1999)("We decline to follow Snider…")
24. Unlimited v. Kitsap County, 50 Wn.App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988).
25. Washington State Constitution,Article I § 16.
26. The U.S. Supreme Court in Suitum v.Tahoe Reg. Plan.Agency, 137 L Ed 2d 980 (1997) held that where a landowner received a final decision from an agency denying the right to construct a house on her undeveloped lot, even though she had not yet attempted to sell her transferable development rights, her § 1983 regulatory taking claim was ripe.
27. Carlson v. Bellevue, 73 Wn.2d 41, 435 P.2d 957 (1968).
28. Presbytery, 114 Wn.2d at 329.
29. Id.At 329-330.
30. See Ventures Northwest v. State, 81 Wn.App, 342, 914 P.2d 756 (1996) (a claim that enforcement of a land use regulation has resulted in an unconstitutional taking is not established unless the property owner establishes that the regulation proximately caused the loss).
31. Lucas v. South Carolina Coastal, 505 U.S. 1003, 1016, 120 L.Ed 2d 798, 112 S. Ct. 2886 (1992); See Sintra v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997) (where a property owner in a temporary regulatory taking loses use of the monetary value of property from time of taking until payment is made, payment of interest is required as part of just compensation).
32. Presbytery 114 Wn.2d at 334.
33. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).
34. Ventures Northwest Limited Partnership v. State, 81 Wn.App. 353, 363, 914 P.2d 1180 (1996) (an owner claiming loss of the economically viable use of property must show that the challenged government regulation proximately caused the loss of all such use.)
35. See Manufactured Housing v. State, 90 Wn.App. 257, 270, 951 P.2d 1142 (1998). (the court held that the Mobile Home Parks-Resident Ownership Act, by offering tenants a right of first refusal, did not destroy a fundamental attribute of property ownership enjoyed by the owner or constitute a taking by physical invasion by a new owner after a sale).
36. Burton v. Clark County, 91 Wn.App. 505, 520-23, 958 P.2d 353 (1998).
37. Id.At 524.
38. Presbytery, 114Wn.2d at 323.
39. Hewett Henry, J.,Thurston County, in response to a request by an applicant that a city had made the wrong choice in ruling on a hotly contested case.
40. Attorney general Memorandum entitled "Recommended Process and Advisory Memorandum for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property." March 1995.The Attorney General's Office has indicated that is intends to publish an update of this advisory memorandum within the next year.

V. C Appearance of Fairness

Presentation to the Kirkland Design Review Board

By Rod P. Kaseguma

December 1, 1999

I. Statement of Appearance of Fairness Doctrine.

Quasi-judicial proceedings must not only be fair, but must appear to be fair. They must be free from even the appearance of unfairness. The test is whether a reasonably prudent and disinterested observer would conclude that all parties obtained a fair and impartial hearing.

II. Origin of Appearance of Fairness Doctrine

The doctrine has its roots in common law principles of impartiality, disinterestedness and fairness on the part of a judge; it is not constitutionally based. Bellevue v. King County Boundary Review Board, 90 Wn.2d 856, 863, 586 P.2d 470 (1978).

The doctrine was first applied to quasi-judicial proceedings by the Washington Supreme Court in 1969. Smith v. Skagit County, 75 Wash. 2d 715, 453 P. 2d 832 (1969).

III. Applicability of Appearance of Fairness Doctrine.

The doctrine applies to quasi-judicial decision-makers acting in quasi-judicial proceedings. It does not apply to legislative, ministerial, administrative, or judicial proceedings. It also does not apply to city employees and consultants, such as department heads, planning staff, the city attorney, or special legal counsel.

IV. Definition of Quasi-Judicial Decision-Maker.

A quasi-judicial decision-maker is a legislator, or an official appointed by a legislator, who sits on a tribunal with peers, deciding the legal rights and privileges of parties under a statute or ordinance. Examples of quasi-judicial decision-makers are city council members, community council members, planning commission members, and civil service commission members.

A Planning Commission is a decision-maker even where it renders only a recommendation. Buell v. Bremerton, 80 Wn.2d 518, 525, 495, P. 2d 1358 (1972).

V. Definition of Quasi-Judicial Proceeding

Three factors are indicative of a quasi-judicial action:

1. The matter involves identifiable parties;
2. The decision would have a greater impact on the parties than on the public in general; and
3. A public hearing or other contested case preceding is statutorily required.

VI. Elements of an Appearance of Fairness Violation.

The appearance of fairness doctrine has two basic elements:

1. The fairness of the hearing procedures (the fairness standard); and
2. The impartiality of the decision-makers (the bias standard).

To satisfy the fairness standard, the interested parties must be afforded;

1. Adequate notice;
2. The opportunity to be heard;
3. The right to cross-examine the witness; and

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4. Knowledge of all communications with the decision-maker.

In addition, a verbatim record must be kept.

The bias standard forbids prejudgment of the issue.

VII. Decision-Maker Disqualifications.

Decision-makers have been disqualified in the following circumstances in Washington Supreme Court cases:

1. A decision-maker announced the decision before the hearing.
2. A decision-maker told opponents of the proposal before the hearing that they were wasting their time.
3. A decision-maker owned property adjoining property to be rezoned (two lots away) (presumed appreciation in property value).
4. A decision-maker was employed by the successful proponents of a zoning action two days after the decision.
5. A decision-maker was a former owner of the applicant's company.
6. A decision-maker was a loan officer of a bank which held a mortgage on the property of the applicant (the decision-maker had no knowledge of the bank's mortgage on the property).
7. A decision-maker was stockholder and chairperson of the board of directors of a bank which held a mortgage on a portion of the land included in a development proposal.
8. A decision-maker was a stockholder and chairperson of the board of directors of a savings and loan association which had a "financial interest" in a portion of the property being platted (association was a dedicator of another plat in the same large project).
9. Husband and wife decision-makers voted on the same side of an issue.
10. Decision-makers included an executive director and a member of the board of directors of the Chamber of Commerce which actively promoted a rezone for a shopping center.
11. A decision-maker was a branch manager of a savings and loan association which had an option to purchase the development site.
12. Decision-makers met with proponents but excluded opponents in executive session.
13. A decision-maker made a trip to another state to view similar use property with expenses paid by applicant.

The Washington Supreme Court had held that acquaintances with persons or casual business dealing are insufficient to disqualify decision-makers.

VIII. Statutory Limitation of Appearance of Fairness Doctrine.

In 1982, the legislature restricted the applicability of the doctrine to land use decisions (Chapter 42.36 RCW, a copy of which is attached).

The basic provisions of the statute are as follows:

1. The doctrine applies to quasi-judicial actions of local decision-making bodies.

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2. 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.
3. Quasi-judicial actions do not include the adoption, amendment, or revision of comprehensive, community, or neighborhood plans or other land use planning documents, or the passage of area-wide zoning ordinances or zoning amendments that are of area-wide significance.
4. A violation of the doctrine cannot be based on the conduct of business between a decision-maker and a constituent prior to the pendency of a quasi-judicial action.
5. Candidates for public offices may express opinions and act upon those opinions in a quasi-judicial proceeding, and may receive campaign contributions from the parties to a pending proceeding, without violating doctrine.
6. A challenged decision-maker may participate in a proceeding when a disqualification of several decision-makers would destroy a quorum, making it impossible for the decision-making body to vote or deliberate; however, the challenged decision-maker must disclose the basis of the challenge in order to vote.
7. A party raising the doctrine as a basis for disqualifying a decision-maker must do so before the decision is rendered, where the basis for disqualification is known or should reasonably have been known prior to the decision
8. A decision-maker who participates in proceedings that result in an advisory recommendation to a decision-making body is not disqualified from participating in the subsequent quasi-judicial proceeding.
9. While a quasi-judicial proceeding is pending, a decision maker cannot engage in ex parte communications with opponents or proponents with regard to the proposal or proceeding, unless the decision-maker:
    a. Places on the record the substance of any written or oral ex parte communications; and
    b. Announces the content of the communications and the parties' right to rebut the substance of the communications at each hearing where action is considered or taken on the proposal or proceeding.
10. A decision-maker may seek in a public hearing specific information or data from the parties if the request and the results are made a part of the record.
11. Even if a violation of the doctrine has not occurred, a decision still may be challenged where there is an actual violation of the right to a fair hearing.

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IX. Written Ex Parte Communications.

A decision-maker who receives written ex parte communications regarding a pending proceeding should not read the communications but should forward them to staff or place them in a file.At the first public hearing, the decision-maker should place the communications on the record. This procedure should be followed for e-mail ex parte communications as well as for hard copy ex parte communications by hand delivery, mail, or facsimile transmission.

X. Public Hearing Procedure.

At the commencement of the design review conference, the chairperson should make the following announcement:

"Is there anyone in the audience who objects to the participation of any board member in this proceeding?"

If a person objects to any board member, the chairperson should request the person to state the reasons for the objection.The purpose of the question is to elicit challenges, which are waived if not made before a decision is rendered.

XI. If a court concludes that a violation of the doctrine has occurred, the decision is voided, even if the vote of the offending decision-maker is not necessary to the decision.

Damages cannot be imposed for a violation of the doctrine. See Alger V. City of Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987).

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E-MAIL COMMUNICATIONS AND THE OPEN PUBLIC MEETINGS ACT SUMMARY OF WOODS V. BATTLEGROUND SCHOOL DISTRICT

1. General holding of a case.
   a. E-mail exchanges between members of a governing body of a public agency can constitute a "meeting" under the Open Public Meetings Act ("OPMA").
2. Facts of the case.
   a. School board comprised of five members.
   b. Topic of e-mails: Institution of a declaratory judgment lawsuit regarding superintendent's contract, evaluation of superintendent's performance, and structuring of Board liaison duties.
      i. Court characterizes these topics as "**related to Board business.**"
   c. Sequence of e-mails:
      i. November 30: Sharp sent e-mail to all Board members.
      ii. November 30: Sharp sent e-mail to three Board members.
      iii. December 1: Sharp sent e-mail to all Board members, attaching response received from Striker about "matter they had discussed" (Presumably Striker responded to topic in the e-mail).
      iv. December 3: Kim sent e-mail to Sharp, with copies to three Board members in response to Sharp's earlier e-mail.
      v. December 5: Sharp sent e-mail to all Board members.
      vi. Note: Unclear whether majority of Board responded to any particular e-mail.
      vii. Note: Majority of Board received and responded to e-mails in reasonably short period of time.
3. Court characterization of e-mails.
   a. E-mails were **active exchange of information and opinions,** as opposed to **mere passive receipt of information,** which suggests **collective intent to deliberate and/or discuss Board business.**
      i. Plaintiff Wood established a prima facie case of a "meeting" by e-mails; case remanded to trial court to determine whether the Board members in fact held a "meeting."

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4. Court holding: Exchange of e-mails can constitute a "meeting"
   a. OPMA is liberally constructed
   b. "Meeting" is broadly defined
      i. OPMA defines "meeting" as "meetings at which action is taken, regardless of the particular means used to conduct it."
      ii. Physical presence of members in same location is not required,
         1. Court cites with approval three California cases that prohibit:
            a. Series of telephone calls between members and attorney to develop collective commitment or promise on public business.
            b. Successive meetings between school superintendent and individual school board members.
            c. Serial electronic communication by quorum of public body to deliberate toward or to make a decision.
      iii. Court cites with approval an Attorney General "Open Records & Open Meetings Deskbook," which concludes that "telephone trees," where members repeatedly phone each other to form a collective decision, are inappropriate under OPMA.
   c. In holding that exchange of e-mails can constitute a meeting, court recognizes need for balance between right of public to have its business conducted in the open and need for members of governing bodies to obtain information and communicate in order to function effectively.
      i. As a result, court stated that **mere use or passive receipt of e-mail does not automatically constitute a "meeting."**
5. Specific court holdings.
   a. No meeting if less than a majority of governing body meet.
   b. Participants must **collectively intend to meet to transact the governing body's official business.**
   c. Participants must communicate about **issues that may or will come before the governing body for a vote**.
   d. OPMA is not implicated when participants receive **information about upcoming issues** or communicate amongst themselves about **matters unrelated to the governing body's business**.

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6. Recommended application of Wood case to e-mail exchanges.
    a. Note: Recommendation is conservative but practical application of case.
    b. Note: Recommendation interprets case as allowing members to read an e-mail containing statements of opinion or position or position on council business, as long as no responses or exchanges occur. In other words, council does not violate OPMA when one council member sends such e-mails and recipients do not wish to receive them and/or respond to them.
    c. Upon receipt of e-mail, read it.
    d. Determine whether e-mail relates to council business
        i. If it does, proceed to next step
        ii. If it does not, respond if desired
    e. Determine whether e-mail relating to council business is "information only" or "statement of opinion or position"
        i. If information only, respond if desired
        ii. If statement of opinion or position, proceed to next step.
    f. Determine whether issue (or topic) is or may come before council for a vote.
        i. If it is not or will not come before council, respond if desired.
        ii. If it is or will come before council, do not respond.
            1. Note:A liberal but risky alternative is to determine the addressee and copy recipients of the e-mail, and if less than a majority of council has received the e-mail, respond to sender if desired.
                a. Risk is that sender of e-mail may have sent separately the same e-mail to other council members
                b. Risk also is that sender of first e-mail, upon receipt of a response, may then send another similar e-mail to other council members, either attaching response or referencing it, and eventually total number of council members engaged in all exchanges constitutes a majority of council.
7. Examples of e-mail exchanges
    a. Each example below assumes that a majority of council members receive the e-mail and eventually respond to it or to e-mails on same issue (topic) within a short period of time. A "yes" means that the exchange is a violation of the OPMA.
    b. During budget adoption, e-mail attaching Municipal Research Services Center budget suggestions pamphlet, with no comment attached. No.

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c. During budget adoption time, e-mail with comments supporting one expenditure item for one department. Yes.
d. During budget adoption time, e-mail attaching newspaper article on anticipated revenue shortfall for city. No.
e. During budget adoption time, e-mail of schedule for budget hearings, committee meetings and council meeting. No.
f. E-mail attaching copy of Planning Commission minutes. No.
g. E-mail attaching copy of Planning Commission minutes, calling attention to a recommendation on a matter that will come before City Council, and praising the recommendation of Planning Commission. Yes.
h. E-mail attaching presentation outline of speaker at national conference regarding innovative affordable housing sighting and design. No.
i. E-mail attaching same speaker's suggested amendments to affordable housing element of City's comprehensive plan, with no comment attached. Probably no.
j. E-mail attaching same speaker's suggested amendments to affordable housing element of City's comprehensive plan, and recommending serious consideration of suggestions. Yes.