What Ever Happened to the Appearance of Fairness Doctrine? Local Land Use Decisions in an Age of Statutory Process

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I. INTRODUCTION

In our society, it is an article of faith, as well as of constitutional law, that a judicial hearing must be fair to the parties involved, both in its actual conduct and in its appearance. Today, many hearings on public actions are conducted not by judges but by elected officials, appointed boardmembers, administrative staff, and professional adjudicators. The individual rights at issue in these actions are often as important as those resolved in judicial courtrooms. Yet it has never been clear whether we can hold nonjudicial adjudicators and their proceedings to the same standards of fairness we expect from judges—and, if we should, how best to do so.

All states have codes of judicial conduct that unambiguously require judges to maintain integrity and impartiality and to avoid personal entanglements, both in actual judicial conduct and elsewhere, in order to promote public confidence in the judiciary.¹ Judges must disqualify themselves whenever they have bias or prejudice concerning parties, personal knowledge of disputed facts, or personal interest connected to the matter.²

All states guarantee constitutional due process and fairness for both judicial and quasi-judicial proceedings. They differ, however, on the legal standard of fairness to apply to quasi-judicial proceedings. Many states rely on due process guarantees, that is, a proceeding which

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1. WASHINGTON STATE CODE OF JUDICIAL CONDUCT Canon 2 (1994).
2. *Id.*, Canon 3(D)(1)(a-d).
is fair in actual substance and procedure. Washington, however, has adopted more of the judicial standard for quasi-judicial actions, requiring "a hearing not only fair in substance, but fair in appearance as well." This "appearance of fairness doctrine" was originally developed within the context of local land use decisions. Later, it was applied to a broader spectrum of administrative proceedings.

Applying judicial standards to a diverse assortment of quasi-judicial decision makers and proceedings has been fraught with difficulties. Foremost is the fact that many local land use decisions are made by legislative bodies, composed of elected officials who have policy positions and personal contacts, creating a "conflict in values." The Washington Legislature has exempted from the doctrine purely legislative actions and some political activity, but the problem persists. What constitutes an appearance of unfairness is determined through the eyes of a "reasonably prudent and disinterested observer." This standard, however, leaves considerable uncertainty for the decision makers and much discretion to the courts.

In recent years, Washington courts have exhibited an unwillingness to find violations of the appearance of fairness doctrine, even with significant evidence of unfairness. At the same time, the statutory

3. See, e.g., Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 30 (Or. 1973) (["Parties at county board hearings] are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no prehearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.").


landscape for land use project review and approval has changed dramatically, becoming more public and technical and resulting in greater professional staff involvement and less discretion for legislative bodies and planning commissions.11

Although the appearance of fairness doctrine is indisputably still good law, the question today is whether courts will apply it. And, if courts will not apply the doctrine, then the question is what procedural standard applies to quasi-judicial decision makers and how that standard fits within the framework of land use statutes enacted in recent decades. To address this question, this Comment first traces the evolution of the doctrine from its initial announcement by the court to the most recent decisions. Part III then examines the enforcement and ambiguity problems posed by the doctrine today. Part IV evaluates whether the doctrine has become increasingly irrelevant because of the ever-expanding procedural protections in statutes governing land use decision making.

The conclusion from this analysis is that this emergent statutory scheme has greatly increased public participation in, and scrutiny of, land use project proposals, has reduced the role of the legislative bodies to which the original doctrine was addressed, and has given much more decision-making authority to professional staff and adjudicators. A further consequence of this statutory supplantation has been a judicial modification of the doctrine, transforming the doctrine’s standard into an approximation of constitutional due process. As a result, today’s courts are unlikely to invoke the appearance of fairness doctrine to protect the public interest even though violations of the doctrine still can and do occur, and the doctrine has been relegated to an inactive status as a relic of the needs of an earlier generation.

II. EVOLUTION OF THE APPEARANCE OF FAIRNESS DOCTRINE

The roots of the appearance of fairness doctrine extend well back into Washington’s history, but its modern incarnation began with a court decision in 1969 and developed rapidly for more than a decade until the legislature limited its scope. Since then, despite numerous actions invoking the doctrine, the court has not invalidated a single

land use decision on violation of it. This part summarizes this ascent and decline of Washington's appearance of fairness doctrine.

A. Roots of the Doctrine

"The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts."12 So stated the court in the first Washington case where the judicial apparent fairness standard to a quasi-judicial administrative board was applied. The doctrine has roots in both common law and constitutional due process applied to administrative decision makers.13 The early courts seemed to assume a constitutional basis for apparent fairness as a component of due process, probably because the doctrine derived from the Judicial Code.14 The court ultimately disavowed a constitutional basis for the doctrine, which then permitted the legislature to curtail it.15

B. Doctrinal Development

The seminal decision came in 1969 in a case involving the rezoning of island property for heavy industrial use.16 Smith v. Skagit County set the framework from which the doctrine developed.17 The Smith rule had three components governing public actions: first, if a public hearing is required by law, it must be fair in appearance as well as in substance;18 second, the standard applies to both legislative and

14. See State ex rel. Beam v. Fulwiler, 76 Wash. 2d 313, 315-16 (1969) (quoting In re Murchison, 349 U.S. 133, 136 (1955) "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law").
16. Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832. Only months after the Skagit County Board of County Commissioners adopted a comprehensive plan and zoning ordinance designating all of Guemes Island as Residential/Recreational, the county received a proposal to rezone 700 acres and 7,000 waterfront feet of the island for an aluminum reduction plant. The county planning commission, frustrated by a contentious public hearing, held a closed session to review the proposal, allowing only project proponents to attend. The planning commission then approved the proposal. The commissioners approved the rezone in their first and only meeting on the proposal, at which no public comments were permitted. The opposition, led by Seattle attorney John Ehrlichman, appealed the decision to the courts on the novel theory of a necessity for apparent fairness as well as actual fairness.
17. The appearance of fairness foundation in Smith, however, could be considered dictum because the court invalidated the commission's action primarily on the basis of illegal spot zoning.
quasi-judicial proceedings, and third, the test for fairness is that the hearing "must not only be open-minded and fair, but must have the appearance of being so," based on the perspective of a fair-minded person in attendance at all of the meetings on a given issue.

The Smith court’s reluctance to separate the legislative and quasi-judicial functions of the county’s governing body apparently led the court beyond traditional due process, which arguably could have sufficed for a quasi-judicial action. The court wrestled with the distinction in subsequent cases. In Chrobuck v. Snohomish County, the court determined that an appointed planning commission had quasi-judicial functions in order to find appearance of fairness violations by a member of the commission. In Fleming v. City of Tacoma, the court distinguished between a legislative body’s actions in adopting a comprehensive plan or zoning code and in amending the code or rezoning a property: the former is legislative, the latter is quasi-judicial. In Polygon Corp. v. City of Seattle, the court held that purely administrative actions, where no public hearing was required, were not subject to the doctrine.

In the land use context, virtually all of the appearance of fairness violations have been by members of city councils, boards of county commissioners, and planning commissions. Occasionally, the

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19. Id. at 740, 453 P.2d at 846.
20. Id. at 741, 453 P.2d at 847.
21. Vache, supra note 13, at 487. Legislative functions descend from the representative political process, while quasi-judicial functions are variants of judicial hearings, subject to constitutional due process for parties. By contrast, the Oregon court in its seminal Fasano decision did differentiate the functions and has been able to stay with a due process standard. Fasano v. Board of County Comm’rs of Washington County, 507 P.2d 23, 29-30 (Or. 1973).
23. Fleming v. City of Tacoma, 81 Wash. 2d 292, 298-99, 502 P.2d 327, 331 (1972). The court left this dichotomy in somewhat general language, a problem which was touched on, but never completely resolved, in Byers v. Board of Clallam County Commm’rs., 84 Wash. 2d 796, 803, 529 P.2d 823, 829 (1974), and Westside Hilltop Survival Comm’r v. King County, 96 Wash. 2d 171, 178, 634 P.2d 862, 865-66 (1981). This dichotomy was adopted and codified by the legislature in title 42, chapter 36, section 010, of the Washington Revised Code.
doctrine has been applied to quasi-judicial administrative actions outside the context of land use decisions. In one case for example, the court found a violation in an employment discrimination complaint to the state human rights commission, because of personal interest by a commission member. 26 In another administrative area, the court did not find a violation of the doctrine by members of the Washington Medical Disciplinary Board for combined investigatory and adjudicatory functions. 27

The appearance of fairness doctrine parallels due process requirements by mandating (1) public meeting notice and opportunity to be heard, and (2) impartial decision makers. The first of these, deficiencies in public meeting procedures, is the less frequent class of violation. The actual appearance of fairness violation found in Smith was flaws in the public hearings, especially the exclusion of opponents from a closed meeting and insufficient opportunity for opposing testimony. 28 Normally, cross-examination is not a feature of land use hearings, but the Chrobuck court found the absence of cross-examination to be a violation of appearance of fairness. 29 In another case, the court suggested that sufficient meeting notice may also be a requirement of the doctrine. 30

But most of the attention for the appearance of fairness doctrine is on the impartiality of the public officials making the decision. The Buell v. City of Bremerton court identified three elements of bias: prejudgment of the issue, hostility or favoritism toward a party, and a

City council members and county commissioners are elected officials who constitute the legislative body of their local governments. See WASH. REV. CODE §§ 35A.12.010, 35A.13.010, 35.18.010, .160 (city councils); WASH. REV. CODE §§ 36.32.005, .120 (county commissions). Members of planning commissions are usually appointed by the council or board of commissioners. They review planning, zoning, and project proposals and recommend an action to their council or board. See WASH. REV. CODE § 35.63 (planning commissions), § 36.70 (planning enabling act). Membership on planning commissions has traditionally been attractive to people with interests in local land development and with local political ambitions.

28. Fleming, 81 Wash. 2d at 296, 502 P.2d at 329 ("In Smith we focused our attention upon defects in the hearing itself rather than upon motives of the members who conducted the hearing . . . . We were particularly disturbed by the planning commission's closed executive session to which proponents were invited and opponents excluded, and by the county commissioners' refusal to allow opponents to present their views on certain occasions.").
personal interest in the outcome of the decision. These are not necessarily discrete elements: hostility or favoritism is likely to be manifested as prejudgment of the case, while personal interests and contacts can often be the basis for hostility or favoritism toward parties. Verbal statements of prejudgment by decision makers, violating appearance of fairness, have been linked to partiality and personal interest. Personal interest has been the favorite basis for finding violation: ownership of adjacent land, future employment with a party, and current employment indirectly linked to a party have been held to violate the proscription against biased decision makers. Ex parte contacts, between one party and a decision maker, are often a feature of all three elements of bias.

C. Legislative Clarification

After the court's declaration that the appearance of fairness doctrine was not constitutionally based, the Washington Legislature acted in 1982 to limit and clarify the doctrine's application in local land use decisions. The primary focus of the Appearance of Fairness Statute was the distinction between legislative and quasi-judicial actions and the role of elected decision makers with respect to appearance of fairness strictures.

Codifying the court's distinction in Fleming, the Appearance of Fairness Statute expressly limits the doctrine's application in local land use decisions to quasi-judicial actions of legislative bodies, planning commissions, hearing examiners, and other boards which determine

31. 80 Wash. 2d at 524, 495 P.2d at 1362.
32. See SETTLE, supra note 30, at 212.
35. Buell, 80 Wash. 2d at 525, 495 P.2d at 1362-63.
36. Chicago, Milwaukee, St. P. & Pac. R.R., 87 Wash. 2d at 810-11, 557 P.2d at 312-13; Fleming v. City of Tacoma, 81 Wash. 2d at 300, 502 P.2d at 331-32.
38. The Buell court may not have treated ex parte contacts as a distinct element, but the legislature treated them separately in the Appearance of Fairness Statute. WASH. REV. CODE § 42.36.060.
39. City of Bellevue v. King County Boundary Review Bd., 90 Wash. 2d 856, 863, 586 P.2d 470, 475 (1978). However, the court did indicate that the doctrine was related to traditional due process considerations, which are constitutionally based.
40. The Appearance of Fairness Statute, WASH. REV. CODE § 42.36 (1996).
individual parties' rights. No legislative action, defined as adoption, amendment, or revision of comprehensive plans and area-wide zoning ordinances, can be invalidated by the appearance of fairness doctrine.

Recognizing the political duties of elected decision makers, the Legislature mandated that no appearance of fairness violation can be found for conducting the business of the decision maker's office, or for statements by candidates for public office or contributions to such candidates. But, addressing an inevitable problem with elected decision makers, the legislature prohibited ex parte communications by decision makers during a quasi-judicial proceeding unless (1) the contents are put in the hearing record, and (2) there is announcement and opportunity for rebuttal at the hearing. A decision maker may not be disqualified by prior participation in advisory proceedings on the same issue.

Challenges to decision makers' participation on appearance of fairness grounds must be brought as soon as the challenger learns of the grounds. But, acknowledging the small size of many decision-making boards, such as county commissioners, the legislature permitted full participation by a disqualified decision maker under the doctrine of necessity if nonparticipation would destroy a quorum.

Finally, in a couple of intentional swipes at the judicial doctrine itself, the Legislature declared first that nothing in the statute would prevent challenges to a decision based on actual unfairness of the proceedings, thus expressly acknowledging the due process foundations of the doctrine, and, second, that nothing prevented the courts from restricting or eliminating the doctrine altogether.

41. WASH. REV. CODE § 42.36.010. Land use actions to which the doctrine applies include: zoning map amendments (rezones), zoning variances and conditional use permits, preliminary plat approvals, and shoreline permits. See SETTLE, supra note 30, at 208-09.
42. WASH. REV. CODE §§ 42.36.010, .030.
43. WASH. REV. CODE §§ 42.36.020, .040, .050.
44. WASH. REV. CODE § 42.36.060.
45. WASH. REV. CODE § 42.36.070.
46. WASH. REV. CODE § 42.36.080.
47. WASH. REV. CODE § 42.36.090.
48. While the Appearance of Fairness Statute as enacted mostly codified and clarified then-existing case law, the legislative history indicates animosity toward the doctrine. In 1981, the legislature passed a bill, vetoed by the governor, which attempted to abrogate the doctrine altogether.Sections 100 and 110 of the 1982 statute, acknowledging the underlying right to due process and expressly authorizing the courts to restrict or eliminate the doctrine, are remnants of that legislative sentiment. See SETTLE, supra note 30, at 223.
49. WASH. REV. CODE § 42.36.110.
50. WASH. REV. CODE § 42.36.100.
The Legislature thereby set the statutory framework within which the appearance of fairness doctrine has functioned ever since. In doing so, the Legislature resolved some issues that the court either had not been able to resolve or had been reluctant to address. First, the Legislature identified classes of actions to which the doctrine would and would not apply. Further, it protected elected officials from liability for campaign activities and provided a mechanism for handling the inevitable ex parte contacts. But it also kept the doctrine alive, which disappointed the doctrine’s antagonists who wanted it repudiated. They continued their fight after the statute became law.

D. Judicial Retreat

Immediately after enactment of the statute, Justice Utter, in a series of dissenting and concurring opinions, attacked the appearance of fairness doctrine and advocated its elimination and replacement with either the Code of Judicial Conduct or the constitutional due process standard. Utter’s concerns centered on three main issues. First, the “speculative claims of injustice” of some appearance of fairness challenges subject nonjudicial decision makers to a higher standard than is applied to judges themselves. Second, the doctrine is misleading and confusing to apply, for both courts and decision makers. Third, there is no substantial difference between the appearance of fairness doctrine as applied and due process principles, since the latter also have an implicit element of apparent fairness.

After the statute was enacted, the Washington Supreme Court began to restrict the doctrine’s application by interpreting the scope of quasi-judicial action more narrowly. In Harris v. Hornbaker, the court held that when a board of county commissioners decides where to

51. WASH. REV. CODE § 42.36.060. The statutory procedure for ex parte communications is similar to the due process requirements reflected in the Administrative Procedure Act, WASH. REV. CODE § 34.05.455 (1996), and in such federal cases as Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).


54. Harris, 98 Wash. 2d at 667 n.3; 658 P.3d at 1230 n.3.


locate a highway interchange, the board acts legislatively, and thus, the appearance of fairness doctrine would not apply. In Zehring v. City of Bellevue (Zehring II), the court reversed a previous decision on the same issue in holding that a planning commission’s design review hearings, on which a city council rezone was contingent, were not quasi-judicial because no public hearing was required by statute. In Raynes v. City of Leavenworth, the court held that all textual zoning changes are legislative, not quasi-judicial, even when they affect only one specific site and one property owner. This decision, then, broadly interpreted the limiting language in the Appearance of Fairness Statute and overruled Fleming to the extent it was conflicting.

Another way the court restricted application of the doctrine was to establish a new threshold inquiry for challenges under the doctrine. “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” This test, announced in the State v. Post criminal appeal, is clearly intended as a threshold requirement for all appearance of fairness challenges. Mandating as a threshold at least some evidence of decision-maker bias is a major departure from the standard of the “disinterested person” observing the process, which distinguished “fair in appearance” from the merely “fair in substance.”

Finally, the court’s most recent statement on the appearance of fairness doctrine was a rather brusque dismissal of all challenges based on decision makers’ prejudgment and ex parte contacts during permit proceedings in the context of a county decision concerning a major landfill site in eastern Washington. The Organization to Preserve

57. Harris, 98 Wash. 2d at 659, 658 P.3d at 1222.
60. Id.
61. Id. at 619 n.8, 826 P.2d at 185 n.8; Organization to Preserve Agric. Lands v. Adams County, 128 Wash. 2d 869, 890, 913 P.2d 793, 805 (1996) [hereinafter OPAL v. Adams County].
62. Id.
64. OPAL v. Adams County, 128 Wash. 2d 869, 913 P.2d 793 (1996). In OPAL, an opposition group challenged the decision of the Adams County Board of County Commissioners to grant an unclassified use permit allowing a large private company to develop and operate a regional solid waste landfill and recycling facility in the county. The opponents based their challenge on alleged violations of the Washington Environmental Policy Act, the Open Public Meetings Act, and public contracting statutes, in addition to the appearance of fairness doctrine. One commissioner had 63 long distance telephone calls with project proponents before the public
Agricultural Lands (OPAL) v. Adams County decision, while not adding anything to the doctrine other than in reaffirming the Post test, is significant as a statement by a unanimous court narrowly applying the existing law on appearances. In the face of flagrantly partial behavior by decision makers, the court expansively interpreted the statutory limitations on application of the appearance of fairness doctrine, especially for elected officials’ business of office and ex parte contacts, and broadly deferred to the trial court’s discretion. Interestingly, the OPAL court implied that under the Post test the standard to be applied to the prejudgment claim may have to be actual bias and unfairness on the merits and not just as a threshold showing. If this was the court’s intent, the appearance of fairness doctrine suffered yet another serious blow.

E. Summary of the Current Appearance of Fairness Doctrine

The objective of the doctrine is that “whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.” The test for fairness is whether a “reasonably prudent and disinterested observer” could conclude from a proceeding that (1) “everyone had been heard who, in all fairness, should have been heard,” and (2) “having been apprised of the totality of a board member’s personal interest in a matter being acted upon, [can] be reasonably justified in thinking that partiality [did not] exist.” This test thus contains two requirements: that quasi-judicial hearings be procedurally fair and that decision makers be, and appear to be, impartial.

hearing on the proposal. Another commissioner made clear, public statements of his support for the project and threatened project opponents (a private businessman and the planning director) with retribution through his public office. The court affirmed the trial court’s upholding of the board’s decision on all claims presented.

65. OPAL, 128 Wash. 2d at 890, 913 P.2d at 805.
66. Id. at 886, 913 P.2d at 803.
67. Id. at 887, 913 P.2d at 804-05.
68. Id. at 890, 913 P.2d at 805.
71. Smith, 75 Wash. 2d at 741, 453 P.2d at 847.
Generally, any proceeding determining the rights of individual parties must be open—with adequate notice and opportunity for the parties and/or the public to be heard—and even to cross-examine—and must have decision makers without partiality as to the parties or prejudgment or personal interest as to the issue at hand, all as determined by the reasonable, disinterested person standard. Any hearing without such procedures should be canceled, and any decision maker with such interest or bias should disqualify himself or herself, or else be subject to a disqualification challenge and risk subsequent invalidation of the action by courts upon review.

The thorny questions concern to whom, when, and in what actions the fairness in decision making applies. The Appearance of Fairness Statute declares that the doctrine applies to quasi-judicial actions of local decision-making bodies, which it defines as those which "determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding," while area-wide plans and zoning are legislative and cannot be invalidated by application of the doctrine. The doctrine thus applies to all types of decision makers who are acting in quasi-judicial proceedings. In recent years, however, the court has been increasingly narrow in its interpretations of what is quasi-judicial for purposes of appearance of fairness, thus in effect restricting application of the doctrine under the statute.

The statute provides additional protections for legislators who might be involved in quasi-judicial actions. Their campaign activities, such as statements of opinion or campaign contributions, are exempt from challenge on appearance of fairness grounds. So too is any

74. Fleming, 81 Wash. 2d at 296, 502 P.2d at 329.
75. Chrobuck, 78 Wash. 2d at 870, 480 P.2d at 496.
76. Buell, 80 Wash. 2d at 524, 495 P.2d at 1362.
77. The remedy for appearance of fairness violations, as for most due process infringements, is invalidation of the government action in which the violation occurred. Alger v. City of Mukilteo, 107 Wash. 2d 541, 547, 730 P.2d 1333, 1336 (1987); SETTLE, supra note 30, at 199-200. See also MUNICIPAL RESEARCH AND SERVICES CENTER, THE APPEARANCE OF FAIRNESS DOCTRINE IN WASHINGTON STATE 14-15 (Report No. 32, 1995) [hereinafter MSRC REPORT].
78. WASH. REV. CODE § 42.36 (1996).
79. WASH. REV. CODE § 42.36.010.
80. Id.
81. WASH. REV. CODE § 42.36.030.
82. See Raynes, 118 Wash. 2d at 248-49, 821 P.2d at 1210; Zehring II, 103 Wash. 2d at 590-91, 694 P.2d at 639; Harris, 98 Wash. 2d at 659, 658 P.2d at 1223.
83. WASH. REV. CODE §§ 42.36.040, .050; see also Snohomish County Improvement Alliance v. Snohomish County, 61 Wash. App. 64, 808 P.2d 781 (1991).
prior participation on advisory panels on the issue considered or any activities related to the business of his or her office. Thus, the doctrine does not apply to a legislator's past activities, campaign opinions and obligations, and current business connections, that could pertain to the subject even of quasi-judicial decisions.

Nevertheless, the doctrine comes into play for all decision makers, including legislators, during any quasi-judicial proceeding. In the course of such proceedings, no decision maker is permitted to have ex parte communications with proponents or opponents concerning the subject proposal, unless (1) the contents of the communication are placed in the record and (2) an announcement of the content and an opportunity to rebut are provided at each hearing. The decision maker is permitted to consult with his or her staff if the staff is not strongly associated as the proponent of the proposal. Despite these statutory strictures, the OPAL decision indicates that the courts will give wide berth to ex parte communications by legislators acting in a quasi-judicial role.

In practice, the decision makers are normally apprised of the applicability of the doctrine to the action they are undertaking, upon which they recite for the record any interests, opinions, or contacts they may have had with respect to the proposal or its proponents. An appearance of fairness challenge to participation of a decision maker must be made either at the time of disclosure or as soon as the challenger learns of the basis for a disqualification. Otherwise, the right to challenge is waived.

84. WASH. REV. CODE §§ 42.36.020, 42.36.070.
85. WASH. REV. CODE § 42.36.060.
86. North Kingston Community Ass'n v. Lindsey, No. 36235-6-I, 1996 Wash. App. LEXIS 332 (Wash. App. Sept. 3, 1996). rev. denied, 131 Wash. 2d 1016, 936 P.2d 416 (holding that the county staff is not a "party" for purposes of the ex parte communication proscription, even when the staff recommended approval of the project); cf. Weyerhaeuser v. Pierce County, 124 Wash. 2d 26, 873 P.2d 498 (1994) (holding that county staff members can be witnesses subject to cross-examination, because the county was essentially a real party in interest in the project proposal).
87. See OPAL, 128 Wash. 2d 869, 913 P.2d 793.
88. Id. at 885, 913 P.2d at 803. See MSRC REPORT, supra note 77, at 35-36. Disclosure may be a partial alternative to self-disqualification, at least for contacts and some types of personal interest. Disclosure also shifts the burden to any potential challenger to assert a violation of the doctrine or waive the right to do so forever. See SETTLE, supra note 30, at 220, 222. Settle also suggests a strategy of disqualifying a sympathetic decision maker whose participation might be a basis for subsequent invalidation of the action once undisclosed disqualifying information has become known. Id. at 222.
89. WASH. REV. CODE § 42.36.080 (1996). This section is a codification of the doctrine of laches, which the court applied in the appearance of fairness doctrine context in Buell v. City of Bremerton, 80 Wash. 2d at 523, 495 P.2d at 1362.
Any appearance of fairness challenge must now also present at least some evidence of "actual or potential bias" in order even to get into court.90 The significance of the Post threshold test for the viability and application of the appearance of fairness doctrine is not yet clear, but the subject is examined in considerable depth in the following sections.

III. THE PHANTOM DOCTRINE: NOW YOU SEE IT, 
     NOW YOU DON'T

The appearance of fairness doctrine as developed judicially and legislatively is still good law in Washington state. Despite being continually confronted with appearance of fairness issues, the court has declined the Legislature's invitation for "restriction or elimination" of the doctrine.91 The court has not expressly overruled any significant parts of the doctrine,92 but it also has not found a single violation of the doctrine in a land use case since the Legislature acted in 1982.93 The terse OPAL opinion in 1996 by a unanimous court suggests a judicial attempt to back away from the grand pronouncements on philosophy and policy which it had articulated as it was formulating the doctrine a quarter century earlier.

But the appearance of fairness doctrine remains a powerful potential force in local land use decision making, if not in the broader realm of administrative actions.94 The status of the doctrine and its application by the courts remains of considerable importance to local government decision makers and attorneys throughout Washington. The primary problem after the OPAL decision is whether the courts are enforcing the doctrine any more, to any set of facts. If not, then why not? What about the important policy purposes for which the courts originally developed the doctrine? If the doctrine is still potentially enforceable, then what exactly is the scope and substance of the doctrine today that decision makers and challengers can rely on?

91. See WASH. REV. CODE § 42.36.100 (1996).
92. A possible exception is the residual overruling of a Fleming holding in Raynes v. City of Leavenworth, 118 Wash. 2d at 247, 821 P.2d at 1209.
94. See SETTLE, supra note 30, Chap. 6; see also MSRC REPORT, supra note 77.
A. Enforcement by the Courts

In OPAL, the court applied the current appearance of fairness doctrine to a set of facts that included numerous undisclosed ex parte communications between a legislative decision maker and project proponents, as well as statements and actions strongly suggesting bias and prejudgment of the issue by a decision maker, all during the pendency of a quasi-judicial proceeding.\(^{95}\) The fact that the court never even hinted at an appearance of fairness violation calls into question the validity of assumptions about the court’s readiness and willingness to enforce the doctrine in land use decisions. The factual situations in OPAL may not be as egregious as in the earliest cases of aluminum plants on Guemes Island\(^ {96}\) or oil refineries at Kayak Point,\(^ {97}\) but there certainly are similarities in decision-maker behavior.

The court’s reluctance to enforce the doctrine suggests a possible shift in the court’s application of its doctrinal creation, even as modified by the statutory limitations. There are several possible explanations for this enforcement gap. One is that the court is willing to enforce the doctrine, but is attempting more narrowing or clarification in its applicability, especially with respect to legislative decision makers. Under this theory, the problem with appearance of fairness as applied is with the nature of legislators, no matter whether they are undertaking legislative or quasi-judicial actions. The natural role of the legislator is to talk to people who have public business, to have opinions on issues, and to speak out on policy. This role and orientation is incompatible with the strictures of appearance of fairness in quasi-judicial proceedings.\(^ {98}\) Given the numerous procedural protections in place for most significant land use project decisions, recent decisions, such as in Raynes and OPAL, may be indicating a court more likely to define actions of legislators as “legislative” and thus exempt from the doctrine, and softening its enforcement of activities “typical” of legislators, whether or not they could be seen as crossing the line.\(^ {99}\)

A second possible explanation is that the court is really applying a due process standard to public decision making, and therefore is not enforcing the more stringent appearance of fairness. The OPAL court

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95. OPAL, 128 Wash. 2d at 884-90, 913 P.2d at 802-05. See also supra note 64.
98. Van Noy, supra note 7, at 556.
99. See Raynes, 118 Wash. 2d at 248-49, 821 P.2d at 1210 (1992); OPAL, 128 Wash. 2d at 887, 913 P.2d at 803-04.
reaffirmed the appearance of fairness doctrine that "quasi-judicial hearings . . . must be conducted so as to give the appearance of fairness and impartiality." But the court also reiterated its Post qualification that "[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed." If evidence of actual or potential bias on the part of decision makers is a threshold for even obtaining judicial review, then it can be argued that the inquiry shifts to more traditional due process concerns that have underlain quasi-judicial decision making all along. Commentators have asserted that most of the cases in which the court built the appearance of fairness doctrine were actually decided on due process grounds, with appearance of fairness as dictum.

If the appearance of fairness doctrine, including the Post test, essentially reduces to traditional due process, then the disinterested observer fades away, and the focus is on decision-maker behavior as the condition for a fair hearing. Due process not only involves a concern for whether actual wrongs occurred; "due process also concerns protecting against even 'the probability of unfairness.'" Due process analysis, as Justice Utter maintained, is deeply and consistently rooted constitutionally and jurisprudentially, and is supported by numerous statutory frameworks for administrative decisions.

The problem, then, under this theory, is that the appearance of fairness doctrine has a name and a history, but with the Post test it is virtually a due process standard. This would help to explain the strongly stated result in OPAL, and leads to a third explanation of the court's lack of enforcement of appearance of fairness challenges—which may be the primary motivation underlying the court's revision of the doctrine's scope and substance.

Since the court's first announcement of the appearance of fairness doctrine in 1969, the statutory landscape for local land use decisions in Washington has literally been transformed. The Washington Environmental Policy Act (SEPA) and the Shoreline Management

100. OPAL, 128 Wash. 2d at 889, 913 P.2d at 805.
102. Washington Med. Disciplinary Bd., 99 Wash. 2d at 484, 663 P.2d at 467 (Utter, J., concurring). The majority concluded that "no actual prejudice has been demonstrated in the present case." Id. at 481, 663 P.2d at 465.
103. Vache, supra note 13, at 480.
105. Harris, 98 Wash. 2d at 668, 658 P.2d at 1230 (Utter, J., concurring).
106. WASH. REV. CODE § 43.21C (1996).
Act (SMA),\textsuperscript{107} along with the more recent Growth Management Act (GMA)\textsuperscript{108} and its 1995 amendments,\textsuperscript{109} have added a great deal of information and process to local land use project review and decision making. The process contains protections for the public in the form of opportunities to participate, due process guarantees, project compliance with statutory mandates, and judicial review of compliance. Meanwhile, the uninhibited role of planning commissions and legislative bodies in the decision-making process has become constrained by statutory mandates and overshadowed by administrative staff and hearing examiner roles.\textsuperscript{110}

Under this third explanation, then, the court's lack of enforcement of the doctrine is based on deference to these statutory processes enacted by the legislature to protect the public interest and public confidence in government. The appearance of fairness doctrine stands ready to be applied, but the court is reluctant because a more direct and reliable legal scheme is available and is consistently functioning.\textsuperscript{111} The existence of the statutory processes would then also explain the court's progressive restriction of the scope and substance of the doctrine for any potential application within the statutory scheme.

\textbf{B. Effects of Doctrinal Ambiguity}

If the appearance of fairness doctrine is still good law in Washington, but its current parameters and its enforcement by the courts have become clouded and uncertain, local government decision makers are left without clear guidelines and expectations on which to rely in carrying out their duties. Their uncertainty lies in the questions of whether the doctrine applies to the specific action they are undertaking, and, if so, how close must a relationship, an interest, or a prior statement be to the issue at hand in order to mandate disqualification.

\begin{footnotesize}
\begin{enumerate}
\item[107] \textit{Wash. Rev. Code} § 90.58.
\item[108] \textit{Wash. Rev. Code} § 36.70A.
\item[110] The 1995 GMA amendments even offer the option for a jurisdiction to make hearing examiner decisions either final (no legislative body decision) or reviewable by the legislative body as an closed-record administrative appeal. 1995 Wash. Laws 347, §§ 423-425, 428-429 (codified at \textit{Wash. Rev. Code} § 36.70B.060(6)).
\item[111] Recent courts have tended to reverse local land use decisions on grounds of statutory violations and not even to address the connected appearance of fairness challenges. See, e.g., Washington State Dept. of Corrections v. City of Kennewick, 86 Wash. App. 521, 937 P.2d 1119 (1997). This is a complete turnabout from early appearance of fairness cases, where courts highlighted violations of the doctrine essentially as dictum, while reversing on statutory zoning grounds. See, e.g., Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832 (1969).
\end{enumerate}
\end{footnotesize}
The consequences for a false positive determination are removal of a
competent decision maker and disruption of the jurisdiction's decision
process. The consequences for a false negative may be endless
litigation and ultimate invalidation of the decision.

The 1982 statute clarifies when the appearance of fairness doctrine
applies, but the determination is far from clear. Whenever a legislative
or administrative body, acting in a quasi-judicial capacity, "conducts
a public hearing, required by law, to decide the rights of individual
parties to engage in or refrain from some activity, the appearance of
fairness doctrine should apply." Prudence (and counsel from
attorneys) may dictate erring toward the assumption that the doctrine
does apply, but there is an associated cost in terms of efficiency in the
decision process and in fairness and representation to the public who
elected the decision maker.

The statute and its case law have not clearly spelled out for
decision makers what constitutes a violation of the appearance of
fairness doctrine. The applicable test has been: "would a disinterested
person, having been apprised of the totality of a board member's
personal interest in a matter being acted upon, be reasonably justified
in thinking that partiality may exist?" The problem is that this
test leads to "a speculative and conjectural fairness inquiry," the
outcome of which many decision makers have no basis to predict at the
time of the proceedings. There is confusion even among attorneys
concerning this "obscure doctrine." Judges too are "at best
uncertain as to its jurisprudential roots and how it should be
applied." If this is so, how can local decision makers be expected to
react correctly to its demands?

Moreover, recent decisions, such as in Raynes, Post, and OPAL,
have added further confusion by redefining the scope and substance of
the doctrine. The Raynes court continued to narrow the definition of
what constitutes quasi-judicial action on the part of legislative decision
makers. The Post court added the threshold test requiring at least
some evidence of actual or potential bias before the doctrine could be

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112. Zehring I, 99 Wash. 2d at 500, 663 P.2d at 829 (Utter, J., dissenting), vacated in
113. 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39, 44 (Or. 1987).
115. Harris, 98 Wash. 2d at 668, 658 P.2d at 1229 (Utter, J., concurring).
116. Zehring I, 99 Wash. 2d at 500, 663 P.2d at 830.
117. Id.
118. Raynes, 118 Wash. 2d at 247-48, 821 P.2d at 1209.
applied. 119 The OPAL court definitively placed a set of clear, unreported ex parte contacts by a decision maker beyond the reach of the doctrine as applied. 120 With these ongoing restrictions of the doctrine's applicability, even if its standard has evolved away from the disinterested person inquiry and toward traditional due process, the appearance of fairness doctrine may be no clearer for attorneys, judges, or decision makers than in its wide-open past.

C. Why the Phantom Doctrine Will Rarely Be Seen

Lack of enforcement by the courts and ambiguity in doctrinal scope and substance suggest that the appearance of fairness doctrine may not be just waiting in the wings to reappear.

The flavor of the early appearance of fairness decisions was that local land use decision makers were grossly flouting the public interest they were sworn to uphold. Project proponents ensured successful action by conspiring with, and perhaps benefiting, the local decision makers, while the public at large and project opponents were shut out. The courts in response defended the public's interest against this cabal. Today, the public is certainly more protected with the multilayered procedures of statutory compliance, as well as through the better established standards of constitutional due process in administrative actions. Yet, with or without active judicial enforcement, the appearance of fairness doctrine still exists to snare unwary decision makers and to invalidate actions that may have been in fact both correct and fair, at heavy cost to both project proponent and government agency. 121

The next section will address the questions of (1) whether the emergent statutory framework governing local land use decisions has effectively superseded the judicial usefulness of the appearance of fairness doctrine, and (2) whether as a consequence the doctrine has in fact dwindled to the point of equivalence with procedural due process. The argument throughout is that the statutory and doctrinal changes since SEPA and SMA were enacted 1971 have rendered the appearance of fairness doctrine of little utility to the goal of fairness and public confidence in government, thus making it increasingly irrelevant to modern land use decision making.

119. Post, 118 Wash. 2d at 619, 826 P.2d at 185.
120. OPAL, 128 Wash. 2d at 886, 913 P.2d at 803.
121. As the OPAL v. Adams County facts indicated, local decision makers may not yet be complete innocents, but it is the presumption that any decision maker contacts will pollute fairness which is a vestige from the formative years of the doctrine.
IV. THE ASCENDANCY OF STATUTORY PROTECTIONS AND DUE PROCESS

The lack of enforcement and doctrinal ambiguity problems identified in the previous section assume that the appearance of fairness doctrine is still a distinct and applicable feature of the legal landscape on which local government decisions are made. If it is a distinct feature, then the existence of those problems might call for additional modifications even beyond the current statutory limitations. But the OPAL decision, along with the complete absence of violations found by courts since 1982, suggest that it is not. If it is not distinct and applicable, then what has happened to it?

The most obvious explanation is that the court believes the many environmental statutes which now govern land use decision making require sufficient procedural protections and offer enough access points for citizen input and appeal so that the original goals of fairness and public confidence are met. In addition, given this belief, the court, following Justice Utter's earlier arguments, then introduced the Post test to make the appearance of fairness doctrine the functional equivalent of procedural due process. As a result, the appearance of fairness doctrine, while still good law, has been relegated to an essentially inactive status, a relic of the needs of a previous generation.

A. Emergence of a Statutory Framework

The appearance of fairness doctrine was born in an era when local land use decisions consisted of comprehensive plans, plat approvals, and rezonings. Since that time, the statutory landscape for local land use decisions has been transformed rather completely. In 1971, the Washington Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA) were first enacted. Not only did the Legislature in these statutes declare a clear public interest in ensuring

124. Post, 118 Wash. 2d at 619, 826 P.2d at 185. Due process focuses the inquiry on the actual fairness of the decision process rather than on the disinterested person viewing the process and its participants.
125. WASH. REV. CODE § 43.21C (1996).
126. WASH. REV. CODE § 90.58.
environmental quality and protecting the state’s shorelines, but it also established procedures for reviewing proposed developments and for enforcing adherence to the stated policies through the courts. In other words, SEPA and SMA created a set of statutory rights, along with an enforcement process, through which citizens could act to promote accountability in local land use decisions.

Meanwhile, throughout most of the 1970s, while the perimeters and the procedures under these statutes were being determined by the courts, it was business as usual for local land use decisions, a situation which led to the continuous expansion of the appearance of fairness doctrine described above. By the early 1980s, when the legislature limited the scope and application of the appearance of fairness doctrine, SEPA and SMA had become deeply institutionalized in local land use decision making. The major cases had answered the statutory uncertainties, and administrative regulations detailed the resulting rules for all participants. Developers, citizen groups, and local governments all had learned and internalized the new game and its rules. The SEPA and SMA rules required a considerable amount of project information and process, including environmental impact statements, public involvement, and shoreline plans and permits if

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127. For example, in SEPA: "The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." WASH. REV. CODE § 43.21C.020(3) (1996). Also, in the SMA: "It is the policy of the state...to insure the development [of shorelines of the state] in a manner which...will promote and enhance the public interest." WASH. REV. CODE § 90.58.020 (1996). As for the "action-forcing" procedures of SEPA, the court insisted from the start that the procedural duties be performed with maximum diligence because the statute was "an attempt by the people to shape their future environment by deliberation, not default." Stempel v. Department of Water Resources, 82 Wash. 2d 109, 118, 508 P.2d 166, 172 (1973).


129. See discussion supra Part II.B.

130. For SEPA rules, see generally WASH. ADMIN. CODE Ch. 197-11 (SEPA rules), plus rules for SEPA compliance published by individual state agencies and local governments; for SMA rules, see generally WASH. ADMIN. CODE Ch. 173-16 (shoreline master programs) and 173-27 (shoreline permits) (1996).
complying with the local shoreline master program. 131 There were many points on which any proposed project could be challenged, much information to utilize in any challenge, many opportunities for input or opposition through the lengthy processes required under the statutes, and at least several administrative and judicial channels through which to launch challenges.

With the advent of the Growth Management Act (GMA) in 1990,132 and especially its subsequent amendments in 1995,133 the statutory landscape for land use decisions has nearly completed its major transformation. The original growth management planning process bolstered the traditional comprehensive planning for counties and cities and introduced substantial citizen involvement in determining the local planned futures. The 1995 amendments consolidated and restructured the local land use review and permit procedures from SEPA and SMA, as well as zoning and other local requirements, along with their appeals, both administrative and judicial.134 Particularly important is the integration of land use and environmental review for land use project applications, mandatory for jurisdictions planning under the GMA, otherwise elective, along with broad public notice requirements and strict timelines for public hearings and final decision on any project.135 All jurisdictions are authorized and encouraged to use hearing examiners in the project reviews, and may even allow hearing examiners instead of legislative bodies to make the final decisions on all but rezone decisions.136

131. For specific SEPA rules, see WASH. ADMIN. CODE §§ 197-11-305-390 (threshold determination requirements); WASH. ADMIN. CODE §§ 197-11-400-460 (environmental impact statement process and contents); WASH. ADMIN. CODE §§ 197-11-408-410, 500-570, 960-990 (public involvement). For specific SMA rules, see WASH. ADMIN. CODE § 173-16-040 (shoreline master programs); WASH. ADMIN. CODE § 173-27-110 (shoreline permit notice requirements); § 173-27-180 (shoreline permit application requirements). These rules define minimum requirements: local government SEPA and SMA rules may set forth additional process and information.


133. 1995 Wash. Laws ch. 347, 382; these are referred to collectively as ESHB 1724.

134. Consolidated land use review, along with administrative appeals, known as the Local Project Review Act, is codified at WASH. REV. CODE § 36.70B (1996); the restructured judicial review process is called the Land Use Petition Act and is codified at WASH. REV. CODE § 36.70C (1996).


136. Hearing examiners may conduct the single public hearing on the consolidated permit application in jurisdictions subject to the GMA. WASH. REV. CODE § 36.70B.110(7). GMA local governments may provide for a local closed-record administrative appeal of the project decision, either to a hearing examiner or to the legislative body, which then is the final decision of the local government. WASH. REV. CODE § 36.70B.110(9), .120(2). Other jurisdictions are
It is almost inconceivable that the large shoreline industrial complexes proposed in Smith and Chrobuck would ever have been applied for if faced with even the pre-GMA statutory process. If they had been, the role of citizen groups would have been much greater under SEPA and SMA processes, while the role of the planning and county commissioners in actual decision making would have been far smaller and probably based in statutory compliance with SEPA and a shoreline master program. The question then is whether the opportunity for prejudgment or personal interest to affect the decision (or appear to do so) would consequently be lessened. After all, SEPA compliance did not stop the approval, or the challenge on appearance of fairness grounds, in the OPAL case.

In the early appearance of fairness cases, the violating actors were appointed members of planning commissions and elected county commissioners and city council members. They operated quite legally in an environment of independence, back-room discussions and deals, and minimal necessity of public involvement or scrutiny. SEPA, for all project proposals, and SMA, for those on shorelines of the state, introduced at least a minimum structure of environmental review, consistency with plans, public declaration on environmental significance, and citizen notice and opportunity to be heard. On appeal, the Shorelines Hearings Board always, and the courts sometimes (under SEPA), review the local project decision de novo, thus with an open invitation to substitute its judgment for that of the local decision maker.

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137. The aluminum plant on the Guemes Island shoreline and the oil refinery on the Snohomish County shoreline would certainly require at least a shoreline substantial development permit (if consistent with the local shoreline master program—unlikely), instead probably a shoreline variance along with a rezone, plus an environmental impact statement (if determined to be environmentally significant—highly likely), all of which together would produce reams of information and numerous public meetings and hearings before any local government decision.

138. OPAL, 128 Wash. 2d at 875, 913 P.2d at 798.

139. The Shorelines Hearings Board is a state agency that hears any appeal of local decisions on shoreline permits. WASH. REV. CODE §§ 90.58.170, .180. It reviews the facts of each case de novo with respect to the applicable law. San Juan County v. Department of Natural Resources, 28 Wash. App. 796, 798-99, 626 P.2d 995, 996 (1981). If the SEPA threshold determination is also appealed, the Board reviews both decisions jointly under a de novo standard. Courts review SEPA determinations de novo on questions of law, and under a more deferential clearly erroneous standard on other issues. Leschi Improvement Council et al. v. Washington State Highway Comm’n, 84 Wash. 2d 271, 285-86, 525 P.2d 774, 784-85 (1974); see also Norway Hill Preservation & Protection Ass’n v. King County Council, 87 Wash. 2d 267, 271-72, 552 P.2d 674, 677 (1976). Judicial review of EIS adequacy under SEPA, however, is de novo, because the court has interpreted that issue as a question of law, though based in facts. Leschi Improvement Council, 84 Wash. 2d at 285, 525 P.2d at 784; see also Barrie v. Kitsap County, 93 Wash. 2d 843, 854, 613 P.2d 1148, 1155 (1980).
While the commissioners and council members still make the significant final local decisions, they find a lot less independence and a lot more scrutiny. Instead of merely an application for a rezone or plat approval, the local government is inundated with environmental checklists and impact statements, public comments on the impacts, and a mass of technical material on specific identification and mitigation of all types of environmental (and social) harms. Professional planning directors control much of this flow of information. Staff committees may decide whether to issue permits. Attorneys advise staff and elected officials about compliance with the various statutes. Hearing examiners may conduct administrative appeals concerning what the elected officials decided. Thus, the statutes significantly increased the roles for many new actors in the land use decision process, thereby diminishing the independence and authority for the decisions finally made by the commissioners and council members.

To be sure, despite all the information flow and the involvement of new actors, nothing introduced by SEPA and SMA prevents a local elected official from personal interest in or prejudgment of the proposal on which he or she would decide. But the stated objectives of the court in articulating the appearance of fairness doctrine were fairness in governmental decision making and public confidence in that process. Fairness consisted of (1) actual fairness, i.e., no actual personal interest or prejudgment, which is guaranteed by due process at least in quasi-judicial proceedings and is discussed further in the following section, and (2) apparent fairness, judged by the “disinterested observer” on the proceedings taken as a whole. Public confidence involved the perceptions of citizens that governmental decision making was accountable to the broader public interest. Regardless of the judicial standard, the information, process, and actors brought by SEPA and SMA transformed the awareness, involvement, and power of citizens concerning land use project proposals in their communities. The statutes required notice, information, public hearings, and opportunities to comment and be heard, as well as offering potent tools for opposition, delay, and review of decisions.

140. See supra note 131.
142. Smith, 75 Wash. 2d at 739-40, 453 P.2d at 846.
143. Swift, 87 Wash. 2d at 361, 552 P.2d at 183; Chrobuck, 78 Wash. 2d at 868, 480 P.2d at 495.
144. For SMA, see WASH. REV. CODE § 90.58.140(4) (notice, comment, and hearing), WASH. REV. CODE § 90.58.180(1) (right of appeal of any permit). For SEPA, see WASH. REV.
In these ways, the SEPA and SMA statutes, as interpreted by the courts, achieved much of what the courts had intended in developing the appearance of fairness doctrine.

The promise of the 1995 GMA amendments for further ameliorating the conditions addressed by the appearance of fairness doctrine is even brighter. The local land use project review and decision-making process will probably become ever more dominated by administrative staff and hearing examiners, while the role of planning commissions and legislative bodies becomes more perfunctory, or even nonexistent. The consolidated permit review and its strict timetable will make staff review and recommendations more visible and technical. More substantive complexity and less review time will make the use of hearing examiners more necessary. Hearing examiners may be given final, or administrative final, decision-making authority. In the former case, the legislative body would not have any role; in the latter, it would have an appellate role, limited to review standards on the closed hearing record. Even if the county or city chooses a traditional role, the rigid review timetable is very restrictive for a legislative body to conduct required predecisional hearings.

While none of these statutory changes removes the applicability of the appearance of fairness doctrine to land use decisions, the changes seem certain to reduce its impact. Virtually every person found in violation of the doctrine was a member of a city council, a board of county commissioners, or a planning commission. No violation has ever been held for a hearing examiner, though they are clearly within the reach of the doctrine. To the extent that the role of hearing examiners in local land use decisions is enhanced, the roles of local elected officials and their appointed commissioners is likely to be diminished. To the extent that the roles of such elected officials and

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CODE § 43.21C.030(2)(c) (information), WASH. REV. CODE §§ 43.21C.030(2)(d), .080(1) (notice and comments), WASH. REV. CODE § 43.21C.075 (appeals).


146. Consolidated project review, including SEPA environmental review, is mandated in title 36, chapter 70B, section 120, subsection (1) of the Washington Revised Code. A strict timetable is laid out in title 36, chapter 70B, section 110 of the Washington Revised Code, (1996), totaling no more than 120 days. WASH. REV. CODE § 36.70B.090(1). Administrative staff, such as the planning director, may act as a hearing examiner in developing the record and making the final decision on land use project proposals, subject to administrative appeal to the planning commission and/or the legislative body. Courts reviewing the decision on appeal will then review the hearing examiner's decision, not the legislative body's. See Washington State Dept. of Corrections v. City of Kennewick. 86 Wash. App. 521, 937 P.2d 1119 (1997).


148. SETTLE, supra note 30, at 209.
commissioners become less important, the probability of violations of the appearance of fairness doctrine is thereby reduced.

Administrative staff who do not make final decisions on project reviews have been held not subject to the appearance of fairness doctrine. The role of such staff grew substantially under SEPA and SMA and will apparently increase further under the consolidated land use project review statute. Ironically, bias and partiality may become more of a problem in this realm as well, and, if so, they can infect the decision-making process under a hearing examiner or a legislative body through advice and control of information. The court has held such staff partiality operating through ex parte communication with decision makers not to be a violation of the appearance of fairness doctrine, unless the staff member has a "personal" stake in the decision through his/her agency.

Ex parte communications are regulated under the Appearance of Fairness Statute. In local land use decisions, the ex parte contact problem has been most acute with politicians on legislative bodies or planning commissions. The statute provided some slack for political activities of legislators, but the facts from the OPAL case suggest a continuing problem, one that is perhaps endemic to politicians. Once again, to the extent that the role of such political people in decision making is reduced, the ex parte contact problem will certainly recede. Professional hearing examiners are much less prone to have the type of contacts that politicians do. But administrative staff contacts with parties and with decision makers are likely to become more necessary and influential in the course of expedited project review. The potential for the introduction of bias into the overall process thus remains.

Of course, other statutory protections against public decision-maker bias and abuse do exist. Statutes regulate public official disclosure of finances and campaign contributions, conflict of interest concerning public contracts, employment, and use of public office, and openness of public meetings. While these do not directly affect bias in public decision making, they do constrain the

152. WASH. REV. CODE § 42.36.060 (1996).
153. WASH. REV. CODE §§ 42.36.040, .050.
154. WASH. REV. CODE § 42.17.
155. WASH. REV. CODE § 42.23.
156. WASH. REV. CODE § 42.30.
behavior of public officials with respect to outside parties in favor of the public at large.\footnote{157}

\section*{B. A Functional Equivalent of the Due Process Standard}

If the statutory framework has come to predominate in local land use decision making, then the question still remains whether the court stopped strictly enforcing the appearance of fairness doctrine because the public was already protected or because it finally viewed the doctrine as nothing more than a named variant of the constitutional due process standard.

The appearance of fairness doctrine in Washington has operated on top of a foundation of constitutional due process protections in governmental actions. Due process existed before the appearance of fairness doctrine was announced, due process continued to apply while the Washington court refined the appearance of fairness doctrine and after the statute limited it,\footnote{158} and due process forms the core of individual protections in most other states.\footnote{159} Due process is certainly the fundamental goal. But the question remains whether that goal concerns only the actual fairness of a governmental decision or whether that goal additionally concerns the appearance to the public that the action was fair.\footnote{160} Would a due process standard have produced the same results in the early appearance of fairness cases? Did the recent addition of the Post test to the doctrine functionally eliminate the appearance of fairness doctrine by merging it with the due process standard?

In the early 1980s, Justice Utter argued in several opinions that there were few differences between the appearance of fairness doctrine and the requirements of due process,\footnote{161} and that it was a mistake to

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\item The legislature could develop a statute similar to that on ethics in public contracting found in title 42, chapter 23, of the Washington Revised Code, which specifies unacceptable behavior by public decision makers in situations to which the appearance of fairness doctrine applies. \textit{See} WASH. REV. CODE § 42.23 (1996). Although such a statute would be somewhat duplicative of the Administrative Procedures Act (APA), the APA does not apply to most local decisions. \textit{See} Chaussee v. Snohomish County Council, 38 Wash. App. 630, 689 P.2d 1084 (1984). Such a statute probably would also improperly invade the prerogative of legislative officials. Moreover, in light of the preceding discussion, it would probably be increasingly irrelevant.
\item The continued foundation of due process is explicitly acknowledged in the Appearance of Fairness Statute, WASH. REV. CODE § 42.36.110 (1996).
\item \textit{See}, e.g., Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23 (Or. 1973).
\item 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39, 44 (Or. 1987).
\item \textit{Washington State Med. Disciplinary Bd.}, 99 Wash. 2d at 484, 663 P.2d at 467 (Utter, J., concurring).
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"clothe [due process] in the vague language of the 'appearance of fairness.'"162 Another court viewed appearance of fairness as a "desirable further step toward the same goal" of curbing bias and self-interest, but serving interests different from those served by standards of actual fairness, such as the public's confidence in the process above and beyond the parties' interests in a fair process, and exacting a significant price in doing so.163

Procedural due process is a constitutional doctrine resulting from the application of the Fourteenth Amendment to actions of state and local governments that affect "life, liberty, and property" rights of individuals. Due process issues traditionally concern (1) whether process is due, (2) when the process should occur, and (3) what type of process is required. In state and local land use decision making, the first two questions are now mostly determined by statute.164 However, two early U.S. Supreme Court cases on zoning set the basic framework for whether a process was due, and if so what type of opportunity or hearing was necessary. Londoner v. City of Denver is widely cited as requiring an adjudicative type of hearing for landowners affected by a property rezoning,165 while Bi-Metallic Investment Co. v. State Board of Equalization stands for the independence of the legislative body from due process requirements when enacting an areawide change in zoning classification, considered a legislative function.166

This legislative/adjudicative distinction is perpetuated today in important statutes. The Administrative Procedure Act (APA) distinguishes between notice-and-comment rule-making by agencies, considered a legislative function,167 and orders from adjudicatory proceedings, considered a quasi-judicial function requiring due process.168 Similarly, the Appearance of Fairness Statute expressly exempts legislative functions such as areawide rezoning and comprehensive plan adoptions.169 Under the statute, however, the court has struggled with where exactly to draw the line between legislative and quasi-judicial actions.170

162. Harris, 98 Wash. 2d at 667, 658 P.2d at 1229 (Utter, J., concurring).
163. 1000 Friends of Oregon, 742 P.2d at 44.
164. These are, however, the subject of numerous U.S. Supreme Court decisions concerning deprivation of entitlements, starting with Goldberg v. Kelly, 397 U.S. 254 (1970).
167. WASH. REV. CODE § 34.05.325(5).
168. WASH. REV. CODE § 34.05.410 et seq.
169. WASH. REV. CODE § 42.36.010 (following Fleming v. City of Tacoma, 81 Wash. 2d 292, 298-99, 502 P.2d 327, 331 (1972)).
170. See discussion supra, section II.D.
Beyond issues of this basic distinction, many additional questions arise concerning the third prong, namely, what type of process is required.\(^\text{171}\) If the required process is adjudicatory in nature, then quasi-judicial standards apply, through both constitutional and statutory authority. Quasi-judicial standards are derived from judicial standards, which mandate judicial impartiality through avoidance of impropriety and extra-judicial contacts and comments, thus a standard of actual and apparent fairness (i.e., to a disinterested observer).\(^\text{172}\) The appearance of fairness doctrine itself is arguably an attempt by the Washington court to import the judicial standard on appearances to supplement the due process actual fairness protections in quasi-judicial proceedings.\(^\text{173}\)

The court has wrestled, however, with how completely this judicial standard on appearances translates to the quasi-judicial context. Traditional due process fairness of the decision maker concerns two types of bias—prejudgment of the issues and personal interest in the outcome.\(^\text{174}\) Prejudgment is difficult to prove, both because it requires express statements by the decision maker and because courts give great deference to legislators as politicians and to administrators as delegates of politicians.\(^\text{175}\) Even among the Washington appearance of fairness cases, only Chrobuck v. Snohomish County\(^\text{176}\) and Anderson v. Island County\(^\text{177}\) can be said to have been decided on prejudgment grounds.

Personal interest bias, however, is a more easily demonstrable form of actual unfairness, and the courts have often encountered challenges to local land use decisions on these grounds. A series of U.S. Supreme Court decisions defined the parameters of constitutional due process based on personal interest of the decision maker.\(^\text{178}\)

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\(^{171}\) Fairness also applies to the hearing procedures to ensure adequate notice, the right to be heard, the right to cross-examine witnesses, and a hearing record; these were important fairness elements in Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832 (1969).

\(^{172}\) WASHINGTON STATE CODE OF JUDICIAL CONDUCT, Canons 2 and 3(D) (1994).


\(^{174}\) As it described in Buell v. City of Bremerton, 80 Wash. 2d 518, 524, 495 P.2d 1358, 1362 (1972). A third element of bias is personal favoritism or hostility, which can be both personal interest and prejudgment. \textit{Id.} See discussion supra, section II.B.


\(^{176}\) 78 Wash. 2d 858, 866-67, 480 P.2d 489, 494-95 (1971).

\(^{177}\) 81 Wash. 2d 312, 326, 501 P.2d 594 (1972).

Another court has usefully summarized the rules from these cases as a three-variable continuum:179 (1) the degree to which the officer or agency purports to act as a court,180 (2) the degree to which the issues and interests at stake resemble formal adjudications (more judicial and less quasi);181 and (3) the directness of the personal interest involved, ranging from a remotely possible temptation and purely generic self-interest182 to an actual personal interest in the outcome of the decision.183 On facts at the high end of the continuum, the court would find a clear need for disqualification of the decision maker in order to protect constitutional due process.

Applied to Washington cases, the first question is whether the same results would have been reached under a due process standard of actual unfairness as actually occurred under the Washington appearance of unfairness doctrine. Most of the major Washington land use cases involved decision makers on county boards of commissioners or city councils or planning commissions approving project applications or rezones. In no case were they purporting to act as a court or were the processes similar to formal adjudications.

The appearance of fairness doctrine was the court's blunt instrument invalidating any decision tinged with any sort of personal interest, regardless of the context or the degree of the interest, factors which the U.S. Supreme Court has also considered in applying the constitutional due process standard. In two early cases, the seminal Smith case and again in the Chrobuck case, the court invalidated decisions on the grounds of illegal spot zoning, while developing its appearance of fairness doctrine and finding violations of it as well.184 In Buell, there was personal interest because of nearby land ownership.185 In Fleming, the personal interest in future employment was flagrant, clearly at the high end of the scale.186 A more indirect employment interest in SAVE v. City of Bothell still violated the

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179. 1000 Friends of Oregon, 742 P.2d at 46.
180. Id. (citing Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927)).
182. Id. (citing Gibson v. Berryhill, 411 U.S. 564 (1973)).
183. Id. (citing Tumey v. Ohio, 273 U.S. 510 (1927)).
184. Chrobuck, 78 Wash. 2d at 871-72, 480 P.2d at 497-98; Smith, 75 Wash. 2d at 745, 453 P.2d at 849.
185. Buell, 80 Wash. 2d at 525, 495 P.2d at 1362-63.
186. Fleming, 81 Wash. 2d at 299-300, 502 P.2d at 331-32. The personal interest in future employment with a party was similar in Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wash. 2d 802, 557 P.2d 303 (1976), but the court decided the case on other grounds.
appearance of fairness doctrine. The personal interests in Swift and Narrowsview were indirect, probably more like generic self-interest, but the decisions were still invalidated on appearance grounds.

Had the constitutional due process standard been applied instead, it is arguable that only the Fleming case would have exhibited the level of personal interest sufficient to violate the actual fairness requirement for the decision proceeding. In the other cases, indirect connections, such as employment by an organization that only possibly might benefit financially from the decision, are more like the generic self-interest that falls at the low end of the personal interest scale. Thus, in the heyday of the Washington court’s invalidation of local land use decisions under the appearance of fairness doctrine, a due process standard probably would not have resulted in the same holdings in most cases.

A second question is whether the addition of the Post test changes the appearance of fairness doctrine sufficiently to reduce it from standing on mere appearances alone to virtual congruity with actual unfairness. According to the Post court, “without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” It is curious that a major amendment to this doctrine would first appear in a criminal appeal, albeit on a challenge of bias in the presentencing report writer. The actual doctrinal change was pure dictum, but was fully reaffirmed in OPAL. In Post, the court noted that

[our decision here does not overrule [the Smith] line of decisions, but reformulates the threshold that must be met before the doctrine will be applied: evidence of a judge’s or decisionmaker’s actual or potential bias. This enhanced threshold requirement is more closely related to the evil which the doctrine is designed to prevent.

Evidence of actual or potential bias, whether or not convincing enough to win on the merits, shifts the focus away from the reasonable,

188. Swift, 87 Wash. 2d at 361-62, 552 P.2d at 183-84; see also Narrowsview Preservation Ass’n v. City of Tacoma, 84 Wash. 2d 416, 420-21, 526 P.2d 897, 900-01 (1974). Perhaps the broadest interpretation of personal interest was the invalidation of a decision by a county quasi-judicial board solely because two members were married to each other; Fleck v. King County, 16 Wash. App. 668, 672-73, 558 P.2d 254, 257-58 (1977).
190. Id. at 617-18, 826 P.2d at 184-85.
191. OPAL, 128 Wash. 2d at 890, 913 P.2d at 805.
192. Post, 118 Wash. 2d at 619 n.9, 826 P.2d at 185 n.9.
disinterested observer to the behavior of the decision maker. If such evidence can be produced to get into and stay in court, the challenge will not be based on appearances alone. Precisely the same threshold test must be satisfied for a claim of bias under a due process standard. It might be possible to pass the threshold test with evidence of actual or potential bias that was weak enough to necessitate winning only on appearance of fairness grounds, but such an admixture would certainly be the exception. In theory, then, the court has redefined the doctrine without renouncing or renaming it.

In OPAL, the court applied the Post test to questions of a decision maker's prejudgment bias. This threshold inquiry is helpful on prejudgment questions because it requires objective evidence indicating such bias through actions or statements. The appearance standard rarely succeeded in striking a decision on prejudgment grounds. It is unclear as yet whether the Post court also meant to tighten the threshold for personal interest bias challenges. If it did, the Post test would presumably require some evidence of actual or potential benefit to the decision maker, not just the appearance of a connection.

Applied to Washington cases in which the court found appearance of fairness violations, the Post test would probably have changed the outcomes where employment connections or ownership proximity to the property at issue were indirect or low-level, because evidence of actual or potential benefit would be attenuated. Clear employment conflicts like Fleming would probably still be caught in this tightened doctrine. Thus, the addition of the Post test could well have transformed the appearance of fairness doctrine from a blunt instrument crushing any bud of personal interest into one with more accuracy in striking only the true problems.

Many other states apply the actual due process standard to local land use decisions. Oregon, for example, developed its due process doctrine for land use decisions almost concurrently with

193. OPAL, 128 Wash. 2d at 890, 913 P.2d at 805; see also discussion supra, at note 62.
194. Anderson v. Island County, 81 Wash. 2d 312, 501 P.2d 594 (1972), is the only strong statement on prejudgment. Under the appearance of fairness standard, the court was protective of legislative independence, which was clarified in title 42, chapter 36, section 040, of the Washington Revised Code. See WASH. REV. CODE § 42.36.040 (1996).
Washington's appearance of fairness doctrine, but its court clearly rejected the apparent fairness standard in its leading case.\textsuperscript{198} The Oregon approach begins with a case-by-case determination of whether the action was legislative or quasi-judicial,\textsuperscript{199} based on the same criteria of area-wide or individual property rights as defined in the Washington statute.\textsuperscript{200} If legislative, the court will grant considerable deference to the decision-making process.\textsuperscript{201} If quasi-judicial, the decision making must meet due process standards, including "a tribunal which is impartial in the matter."\textsuperscript{202} The Oregon court later clarified that the standard was actual fairness of a proceeding,\textsuperscript{203} and expressly rejected the apparent fairness standard, saying, "we find no basis in Oregon law for imposing the test of 'appearance' stated by the Washington court in Swift."\textsuperscript{204}

Thus, there is more than one way of achieving the goal of fairness and public confidence in government decision making. The Washington court chose to address unacceptable local land use decision making with the apparent fairness standard. The legislature has responded to the need for better land use decisions with a variety of new statutes containing many procedures and standards with which local land use proposals must comply. The clear effect of the statutory processes thus introduced is to make review of and decisions on proposals more technical, more professional, and less political, and thereby less in need of the appearance of fairness doctrine. The court has consequently backed off from its aggressive application of the doctrine, modifying its threshold in such a way as to align it quite closely with the constitutional due process standard. Washington's courts still play an important role in local land use decisions, but the role mostly revolves around ensuring compliance with the broad statutory scheme created by the legislature in the period since 1971.

\textsuperscript{198} Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 30 (Or. 1973).
\textsuperscript{199} Id. at 25-26.
\textsuperscript{200} WASH. REV. CODE § 42.36.010 (1996).
\textsuperscript{201} Fasano, 507 P.2d at 26.
\textsuperscript{202} Id. at 30.
\textsuperscript{203} Neuberger v. City of Portland (Neuberger II), 607 P.2d 722, 725 (Or. 1980), denying rehearing for Neuberger v. City of Portland (Neuberger I), 603 P.2d 771 (Or. 1979).
\textsuperscript{204} 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39, 44 (Or. 1987). The court declared that "the price of such invalidation [on appearance standards] is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently successful proponent as well as to the agency." Id. at 44.
V. CONCLUSION

After the OPAL decision, Washington's appearance of fairness doctrine could be characterized as a kind of legal phantom: known to exist, but of uncertain form or visibility. The doctrine certainly exists and is widely acknowledged and invoked. But there remains significant ambiguity in its scope and substance, especially with continued narrowing of its application. And there is increasing uncertainty about whether the courts will enforce the doctrine on any conceivable set of facts on local government decision making.

Two major explanations were offered for the current problematic status of the doctrine. One was the introduction, since the first announcement of the appearance of fairness doctrine, of several new statutes which now apply to virtually all local land use decision making. The effect of these statutes has been to create more objective standards for review of land use proposals, more opportunities for the public to participate in the review, and more power for professional administrative staff and hearing examiners relative to the planning commissions and legislative bodies which produced most of the appearance of fairness violations. The second explanation was a consequence of the first: the quiet judicial transformation of the doctrine into what is in effect a due process standard for public officials' decision making. Due process of course had always underlain public decision making and the appearance of fairness doctrine, but the court modified the doctrine with the Post test to focus more attention on actual behavior of the public decision maker, thus aligning it more closely with the due process standard. The due process standard would not, however, have produced the same results in early cases where appearance of fairness violations were found,205 attesting to the unique value of the doctrine.

But has this transformation been salutary for the public decision-making process? Several criteria can be identified as primary objectives for a procedural framework for decision making. First, and foremost, the legal framework should aim to protect parties' rights in any governmental action involving those parties, by affording them a "fair, impartial and neutral hearing."206 This is the due process guarantee of the Fourteenth Amendment applied to state actions, aiming "to

206. Id. at 484, 663 P.2d at 467.
prevent even the probability of unfairness.”

Second, a procedural framework should be legally consistent and well-rooted jurisprudentially, implying either a constitutional basis or statutory requirements. Third, the framework should inspire “the highest public confidence in those governmental processes.”

This is the original rationale for development of the appearance of fairness doctrine. Finally, the procedural framework should offer clear guidelines to decision makers for their participation in an action. The legislative/adjudicative distinction and the specification of bias factors attempt to address such guidelines, but no such prior checklist could be exhaustive.

The statutory framework that may have supplanted the appearance of fairness doctrine does not in and of itself support a due process guarantee different from Fourteenth Amendment rights with respect to any public action. Such a statutory framework is, however, by definition well-rooted in statutory authority, and with the 1995 GMA amendments has become more legally consistent. As for inspiring public confidence, the statutory framework cannot in one sense match the appearance standard of the original doctrine, but in another sense it far surpasses the doctrine because of its greater reliance on information gathering, public access, and professional staff in place of the free-wheeling judgments of politicians. And in creating clear signals to decision makers for their behavior, no judicial doctrine can match a consistent statutory framework of actions, timelines, and criteria that constrain the discretion of political and professional decision makers alike.

The appearance of fairness doctrine as modified by the Post test has become a close approximation of the due process standard; it contains the due process guarantee and is certainly well-rooted jurisprudentially. It cannot match the original doctrine in the latter’s appeal to the high moral ground of public confidence, since only an appearance standard from a disinterested observer’s perspective could do so (as with judicial standards). And the due process approximation

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211. Westside Hilltop Survival Comm. v. King County, 96 Wash. 2d 171, 634 P.2d 862 (1981); WASH. REV. CODE § 42.36.010.

is probably not significantly different from appearance of fairness in providing clear signals to decision makers: neither does so clearly. However, since due process is the APA standard for review of administrative decisions, the due process approximation for local land use decisions creates an appealing and understandable consistency.

In the final analysis, the question of whether or not the appearance of fairness doctrine has been displaced by statutes and due process seems almost moot because of the rapidly diminishing role for the politician decision makers at whose free-wheeling actions the doctrine was targeted. The flagrant facts in OPAL may never be replicated, as hearing examiners proliferate even in small counties. In the future, there will be many fruitful grounds for challenges to land use decisions, but appearance of fairness is unlikely to be one of them.