CITY OF BLACK DIAMOND

July 8, 2014 Special Meeting Agenda

25510 Lawson Street, Black Diamond, Washington

7:00 P.M. – CALL TO ORDER, FLAG SALUTE, ROLL CALL

JOINT COUNCIL/PLANNING COMMISSION WORK SESSION:

1) Training Session – Land Use Decision Making Ms. Morris

No Final Action

ADJOURNMENT:

Land Use Decision Making

An AWC RMSA Training

Protecting your assets, managing your risk

AWC RMSA Land Use Hotline: 1-877-284-9870
One hour free, per issue, to current members of the RMSA.

This session will cover:

- The drafting and adoption of development regulations and the comprehensive plan
- Open and closed record public meetings
- Appearance of Fairness issues and remedies
- Conditioning development permits
- Practical advice and tips for elected officials

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This session is sponsored by the Association of Washington Cities Risk Management Service Agency. The AWC RMSA is the property and liability risk management insurance pool for many cities and towns in the State of Washington.

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Laws governing actions, permits/approvals.

	Administrative	**Quasi-Judicial**	**Legislative**
Examples of permits/approvals:	Building permit, boundary line adjustment, short plat	Conditional use permits, variance, preliminary plat, site-specific rezone.	Comp plan, development regulations, area-wide rezone
Hearing and limit on number of hearings?	No.	Yes.	Yes, no limit on number of hearings.
Appearance of Fairness applies?	No. See, Zehring v. Bellevue, 103 Wn.2d 588 (1985).	Yes, RCW 42.36.010.	No. RCW 42.36.010.
Can it be consolidated?	Yes with quasi-judicial type permit/approval.	Yes, with administrative-type permit/approval.	No, see, RCW 36.70B.120(2).
Deadline for issuance of final decision:	Usually 120 days, RCW 36.70B.080.	Usually 120 days, RCW 36.70B.080.	None.
Open Public Meeting Act applies?	No, there is no hearing.	No. RCW 42.30.140(2).	Yes. RCW 42.30.030.
Appeal and standard of review:	Court (Shoreline Hearings Board); RCW 36.70C.130, not deferential.	Court (Shoreline Hearings Board); RCW 36.70C.130, Not deferential.	GMA Board, court (Shorelines Hearings Board). Deferential.
Liability:	Municipality and municipal officials may have liability or officials may have qualified immunity.	Municipality and municipal officials may have liability or officials may have qualified immunity.	Municipal and municipal officials generally immune from liability.

I. Legislative Action -- Adoption and Amendment of Comprehensive Plans and Development Regulations.

A. Mandatory Elements of Comprehensive Plans. Cities planning under the Growth Management Act (chapter 36.70A RCW) are required to adopt comprehensive plans with land use, housing, capital facilities plan, utilities, rural, transportation, economic development and park/recreation elements. [1]

B. Development Regulations to be Consistent with Comprehensive Plan. All development regulations (and amendments thereto) must be consistent with the comprehensive plan.[2] However, the comprehensive plan is just a "guide" and is not a document designed for making specific land use decisions.[3] To the extent a comprehensive plan prohibits a use that the zoning code permits, the use is permitted.[4]

C. Continuing Review of Comprehensive Plans and Development Regulations. Once adopted, the comprehensive plan and development regulations are subject to continuing review by the city to ensure that they comply with GMA, according to the deadlines in GMA.[5]

D. Annual Consideration. Amendments to comprehensive plans may not be considered more frequently than once a year, with certain limited exceptions.[6] Suggested amendments must be docketed and considered on at least an annual basis.[7]

1. Permit fees. Permit fees should be re-examined every year to determine whether they reflects the cost of permit administration and meets the requirements of RCW 82.02.020. Permit fees can be adopted by resolution.

2. Impact fees. Impact fees must be re-evaluated every year to determine if any adjustment in the fee needs to be made, and for changes in the list of projects for which the impact fees are collected.

E. Draft ordinance. When adopting development regulations, keep the city's authority (police power, constitution, RCW 82.02.020) in mind.[8] As for procedure, cities planning under GMA are required to submit comprehensive plan and development regulation amendments to the State Department of Commerce sixty days prior to adoption.[9] Ten days after adoption, the final ordinance must be sent to the Department.[10]

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1 RCW 36.70A.070.
2 RCW 36.70A.130(1)(d).
3 *Citizens for Mount Vernon v. City of Mount Vernon,* 133 Wn.2d 861, 947 P.2d 1208 (1997).
4 *Lakeside Industries v. Thurston County,* 119 Wn. App. 886, 895, 83 P.3d 433 (2004).
5 RCW 36.70A.130(1)(a).
6 RCW 36.70A.130(2)(a).
7 RCW 36.70A.470(2).
8 *See also, Citizens' Alliance for Property Rights v. Sims,* 145 Wn. App. 649, 187 P.3d 786 (2008).
9 RCW 36.70A.106(1).
10 RCW 36.70A.106(2).

F. Public Participation. GMA cities are required to ensure early and continuous public participation in the adoption and amendment of comprehensive plan and development regulations.[11] The public must be provided "effective notice" of the amendments, but individual notice is not required."[12]

G. Legislative Action/Processing.

1. Adoption of amendments to the comprehensive plan and development regulations is a legislative process (exception: site specific rezone).[13]

2. The appearance of fairness doctrine does not apply to the legislative process.[14]

3. The process for amendment to the comprehensive plan and development regulations is subject to conflict of interest laws.[15]

4. There is no limit on the number of hearings that may be held on legislative action.

5. There is no deadline for issuance of a final decision on legislative action (other than any deadlines in GMA for adoption of specific regulations/comp plan updates).

6. The Open Public Meetings Act (chapter 42.30 RCW) applies, and the meeting/hearing must be open and public.[16]

7. The requirement for consolidation of project permit applications[17] does not apply to legislative action such as comprehensive plan amendments.

8. Appeals of legislative action, such as a comp plan amendment or development regulations in a GMA city would first go to the GMA board and then to court. The standard of review a court uses in appeals of legislative action is deferential. Legislative decision-making is reviewed "for illegal acts or arbitrary and capricious conduct, *i.e.,* an unreasoning decision made without consideration and in disregard of facts."[18]

9. City and City officials are generally immune from liability when acting in their legislative capacities.[19]

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[11] RCW 36.70A.035, 36.70A.140, WAC 365-190-040.
[12] *Holbrook v. Clark County,* 112 Wn. App. 354, 49 P.3d 142 (2002).
[13] RCW 36.70A.130(1)(a).
[14] RCW 42.36.010.
[15] RCW 42.23.070, chapter 42.23 RCW.
[16] RCW 42.30.030.
[17] RCW 36.70B.120(2).
[18] *Leavitt v. Jefferson County,* 74 Wn. App. 668, 687, 875 P.2d 681 (1994).
[19] *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998).

H. Processing of Legislative Actions Should Not Be Combined With Quasi-Judicial Applications.

The processing of a legislative application (or action) should not be combined with a quasi-judicial application because it usually results in the processing of both under the rules for quasi-judicial action. Usually, cities will process a comprehensive plan amendment and the site specific rezone (that implements the comprehensive plan amendment) together because they are submitted at the same time. The applicant may also request that processing be consolidated because the comprehensive plan amendment (legislative) cannot be implemented without the site specific rezone (quasi-judicial). However, the requirement for consolidating the processing of project permit applications like site specific rezones, does not apply to non-project permit actions (like comprehensive plan amendments).[20]

Consequences for processing comp plan amendment with site-specific rezone.

1. There is a deadline for the final decision to issue on the site-specific rezone (usually 120 days) but no deadline for a final decision on a comprehensive plan amendment. Because the comprehensive plan amendment process may take longer than 120 days (the city can't amend the comprehensive plan more than once a year, except in certain limited circumstances[21]), the delay associated with consolidated processing could expose the city to a lawsuit for delay damages.[22]

2. A city may hold an unlimited number of hearings on a comprehensive plan amendment. However, because a site-specific rezone is a project permit application, the city may not hold more than one open record hearing and one closed record hearing/appeal hearing during the processing.[23] If the two are processed together, the city must limit itself to one hearing on both the comprehensive plan amendment and site specific rezone. Otherwise, the city could risk an appeal requesting reversal of the decision on the grounds that the city "engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless."[24]

3. The appearance of fairness doctrine applies to the quasi-judicial application, but not to the comprehensive plan amendment. If the city processes the comprehensive plan amendment with the site specific rezone, an argument could be made that the city must observe the appearance of fairness doctrine when processing both. This could mean that the decision-makers are precluded from discussing the comprehensive plan amendment outside the public hearing.

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[20] RCW 36.70B.120. The distinction to be made here is between a site specific rezone that is authorized by the comprehensive plan and a site specific rezone that implements a comprehensive plan amendment is that the latter rezone cannot be approved unless a comprehensive plan amendment is first approved. Or, as the Washington courts recently explained, "to be authorized within the meaning of RCW 36.70B.020(4), the rezone had to be allowed by an existing comprehensive plan." *Kittitas County v. Kittitas County Conservation,* 308 P.3d 745, 750 (2013).

[21] RCW 36.70A.130(2)(a).

[22] *See,*chapter 64.40 RCW.

[23] RCW 36.70B.060(3).

[24] RCW 36.70C.130(1)(a).

4. Finally, if the city processes the comprehensive plan amendment and the site specific rezone together, two separate appeals could be filed in two separate forums. An appeal of the comprehensive plan amendment must be filed with the Growth Board.[25] An appeal of the site specific rezone must be filed with the superior court.[26] These appeals not only would proceed before two different appeal bodies – there are also two different standards of legal review.

How to process comp plan amendment and site-specific rezone.

a) If a comp plan amendment request is submitted with a site specific rezone application,[27] the city should notify the property owner (in writing) that the site specific rezone cannot be processed unless the comprehensive plan amendment is approved and all appeals exhausted. The notification should state that if the property owner insists that the city process the site specific rezone at this time, it would result in a denial (because it is contingent on the comprehensive plan amendment that has not been approved, and the city is required to process it within 120 days after the application has been determined complete).

b. Once the property owner receives this notice, the property owner will likely ask the city to hold the site specific rezone in abeyance until the comprehensive plan amendment is approved and all appeals exhausted. All of this should be in writing, so that it can be inserted into the file for later reference.

c. Next, the city should process only the comprehensive plan amendment. The city council should be informed that they may communicate with the public and the applicant about the comprehensive plan amendment. As many hearings as necessary may be held on the comprehensive plan amendment. If the comprehensive plan amendment is approved, the city council should not make a final decision on the site specific rezone until the expiration of the statute of limitations for an appeal to the GMA Board (60 days). Then, if there are no appeals, the city may issue the final decision on the rezone within 120 days after the application is determined complete.

II. Moratoria and Interim Zoning.

A. Moratoria. A moratorium is an emergency measure adopted without notice to the public or public hearings, designed to preserve the status quo.[28] A moratorium suspends the right of property owners to submit development applications and obtain development approvals, while the city considers drafts and adopts new comprehensive plans, plan amendments, or development regulations to respond to new or changing circumstances. A public facility moratorium may be adopted on an emergency basis without notice to the public or public hearings, when a community faces a utility-related shortage (such as sewer or water).

[25] RCW 70A.280.
[26] RCW 36.70C.040.
[27] Review footnote 20 – this discussion applies to a rezone that is not authorized by the ***existing*** comprehensive plan. It accompanies a comprehensive plan amendment that must be approved first before the rezone can be approved.
[28] *See,* RCW 35.63.200, 35A.63.220, RCW 36.70A.390.

B. Interim Zoning. Interim zoning is a process whereby the local government, in response to an emergency situation, temporarily adopts an ordinance to establish new regulations pending either revision of the existing zoning code or adoption of amendments to the comprehensive plan.[29] Usually, the interim zoning limits use of the property to be compatible with a zoning proposal under consideration by the local government.

C. **Authority**. Cities and counties have statutory authority to impose permit moratoria and interim zoning for specific purposes.[30]

D. Challenges. The United States Supreme Court has held that a moratorium is an acceptable planning technique.[31] However, this does not mean that all moratoria will sustain a legal challenge or that a local government will escape liability for damages related to delays associated with a valid moratorium. Therefore, cities must be extremely careful in the adoption of moratoria or interim zoning ordinances and observe all required procedures. A moratorium may be adopted for 6 months (or one year if a work plan is adopted), but it is more likely to be challenged if it is renewed over and over again.[32]

III. Administrative and Quasi-Judicial Application Processing.

A. Administrative Processing.

1. Examples: building permit, boundary line adjustment, short plat.

2. No public hearing.

3. Appearance of Fairness doctrine doesn't apply.[33]

4. Administrative and Quasi-Judicial applications can be consolidated.

5. The deadline for issuance of a final decision varies.[34]

6. The Open Public Meeting Act doesn't apply (no hearing).

7. Appeals are generally to superior court, with non-deferential review.[35]

8. Both the city and city officials may have liability (qualified immunity available).

B. Quasi-Judicial Processing.

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[29] *Smith v. Skagit County,* 75 Wn.2d 715, 453 P.2d 832 (1969); *Mayer Built Homes, Inc. v. Town of Steilacoom,* 17 Wn. App. 558, 564 P.2d 1170 (1977); *Byers v. Board of Clallam County Commissioners,* 84 Wn.2d 796, 529 P.2d 823 (1974).

[30] RCW 35.63.200, 35A.63.220, RCW 36.70A.390 (*see also,* RCW 90.58.590 for shoreline master program moratoria).

[31] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[32] *Biggers v. Bainbridge Island,* 162 Wn.2d 683, 169 P.3d 14, 25 (2007).

[33] *Zehring v. Bellevue,* 103 Wn.2d 588, 694 P.2d 638 (1985).

[34] For example, the final decision on short plats must issue within 30 days after the application is determined complete. RCW 58.17.140.

[35] RCW 36.70C.130.

1. Examples: conditional use permit, variance, preliminary plat.

2. There is a public hearing.

3. Appearance of Fairness Doctrine applies.[36]

4. Quasi-Judicial and administrative applications can be consolidated.

5. The deadline for issuance of a final decision varies, usually 120 days.[37]

6. The Open Public Meeting Act doesn't apply.[38]

7. Appeals go to generally to superior court, with non-deferential review.[39]

8. Both the city and city officials may have liability (qualified immunity available).

IV. Permit application review.

A. Statement of Restrictions. A property owner may request that the city provide him or her with the following information in writing: (1) the zoning applicable to certain real property; (2) identification of any pending zoning changes currently advertised for public hearing for the property; (3) designations for the property made by the city under GMA for agricultural, forest, mineral resource, wetland, etc.; (4) if this info is not readily available, the city must inform the property owner about the procedure to get it.[40] The city must provide this information within 30 days, or the property owner may recover his/her attorney's fees incurred in a successful action brought to compel production.[41]

B. Application requirements. The city's development regulations must include a list of all materials required to make each type of project permit application complete.[42]

C. Pre-application conference. The code should allow applicants to submit applications at any time, before or after a pre-application conference. If a series of permits must be obtained in sequence, the city's code should still allow the applicant to submit all applications together, if the applicant chooses. However, the code should state that any permit contingent on another will not be approved until the prerequisite permit is also approved.[43]

D. Determination of Complete Application. Within 28 days of receipt of a project permit application, the city must determine if the application is complete by comparing it to the

[36] RCW 42.36.010.
[37] RCW 36.70B.080.
[38] RCW 42.30.140(2).
[39] RCW 36.70C.130.
[40] RCW 35A.21.280, 35.21.475.
[41] RCW 35A.21.280(4), 35.21.475(4).
[42] RCW 36.70B.080.
[43] *West Main v. Bellevue,* 106 Wn.2d 47, 420 P.2d 782 (1986).

list of the elements of a complete application for that type of permit in the city's code.[44] Then, the city sends out written notice to the applicant, stating either that the application is complete, or, if it is not complete, the city must identify what information is needed to make the application complete.

E. Deadline for Applicant's Submittal of Additional Materials. If a city issues a notice of incomplete application, there is no deadline for the applicant to respond or provide the additional information to the city. However, some cities have included a deadline in their codes, together with an admonition that if the materials are not received by this deadline, the city will make a determination that the application has "lapsed." This procedure is typically used so that the city is not required to store many incomplete applications for long periods of time.

F. Submission of Application Materials to Make the Application Complete. If an applicant submits additional materials to make the application complete, the city has 14 days to determine whether the application is now complete.[45] The city must then send out written notice within this time period to the applicant, informing his/her that the application is complete, or if not, what is needed to make the application complete. This process continues until the application is complete.

G. Failure to Send Notice of Incomplete Application. If the application is incomplete and the city does not timely follow the procedures in RCW 36.70B.070 to notify the applicant that the application is incomplete, then the application is "deemed" to be complete.[46] However, this does not mean that the application is "automatically approved."[47]

H. City's Requests for Additional Information After Application Has Been Determined Complete.[29] The city is not precluded from requesting additional information even if the notice of complete application has issued.[48]

I. Determining the Procedure for Processing the Application. Cities must adopt codes that allow only one consolidated open record hearing and one closed record appeal (or hearing) on a project permit application (except for an open record hearing on a determination of significance (DS).[49] Cities are required to combine environmental review with project permit application review.[50]

J. Notice of Application. The city is required to issue a notice of application within 14 days after the project permit application has been determined complete.[51] If a permit application is for a permit that requires an open record hearing, the notice of application must

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[44] RCW 36.70B.070.
[45] RCW 36.70B.070.
[46] RCW 36.70B.070(4).
[47] *Schultz v. Snohomish County,* 101 Wn.App. 693, 700, 5 P.3d 767 (200).
[48] RCW 36.70B.070(2).
[49] RCW 36.70B..060.
[50] RCW 36.70B.060.
[51] RCW 36.70B.110.

be sent at least 15 days prior to the open record hearing. This notice of application is sent to the public (as provided below) and the departments and agencies with jurisdiction.

K. State Environmental Policy Act (SEPA), chapter 43.21C RCW.

1. SEPA is not a separate approval. All cities must integrate project permit review with SEPA.[52]

2. SEPA threshold decision must be made within 90 days. Actions may be categorically exempt under SEPA.[53] For non-exempt actions, a threshold determination must be made within 90 days after the application and supporting documents are determined to be complete.[54]

3. Conditioning under SEPA. Conditions imposed on a project must be: (a)(related to specific, adverse environmental impacts clearly identified in an environmental document; (b) based on policies identified by the city and incorporated into the city's plans, regulations or codes; (c) be reasonable and capable of being accomplished.[55]

4. Denial under SEPA. To deny a project under SEPA, the city must find that (1) the project would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.[56]

L. Determination of Consistency. A complete project permit application is reviewed for consistency with the city's development regulations by consideration of:

1. the type of land use;

2. the level of development (such as density);

3. infrastructure, including public facilities needed to serve the development;

4. consistency with development standards.[57]

M. Implementing the Comprehensive Plan. According to the Washington courts, GMA is a comprehensive planning framework under which local governments are required to plan according to the general mandates established by the legislature, and does not have site specific effect at the project level.[58] The comprehensive plan is a "blueprint" and if there is a conflict between the comprehensive plan and

[52] RCW 36.70B.060.
[53] WAC 197-11-305.
[54] WAC 197-11-310(3).
[55] WAC 197-11-660.
[56] WAC 197.11-660.
[57] RCW 36.70B.040.
[58] *Timberlake Christian Fellowship v. King County,* 114 Wn. App. 174, 61 P.3d 332 (2002).

the development regulations, the development regulations must prevail.[59] To the extent the comprehensive plan prohibits a use that the code permits, the use is permitted.[60] But where the code expressly requires compliance with the comprehensive plan for approval of a project permit, the proposed use must satisfy both the comprehensive plan and the zoning code.[61]

N. Vesting. Under the Washington vested rights doctrine, once a developer submits a complete application for a permit (of the type that is subject to the vested rights doctrine), the city cannot frustrate the development by enacting new regulations.[62] A vested right does not guarantee a developer the right to build. A vested right merely establishes the ordinances to which the permit and subsequent development must comply. The application is then "vested" to the building and land use control ordinances in place at the time a complete application is submitted, as long as that permit is subject to the doctrine, the application is consistent with the applicable development regulations and the permit issues.[63] The vested rights doctrine "vests no right in previous favorable decisions on other applications.[64]

1. Are all development applications are subject to the doctrine? No. Here is a partial list of permits that vest under state law and court decisions:

   a. Building permits.[65]
   b. Preliminary plats.[66]
   c. Short plats.[67]
   d. Shoreline substantial development permits;[68] and
   e. Conditional use permits.[69]

2. Which applications are not subject to the vested rights doctrine? Impact fees do not vest.[70] Water and sewer connection fees do not vest,[71] but codes can be adopted to establish vesting for such fees.[72] Cities can also adopt land use control ordinances that extinguish vested rights to a permit, if enacted in furtherance of public health and safety, such as fire codes.[73]

3. Can a city adopt its own vested rights rule? Yes. The city can also adopt code provisions to allow other types of permits to vest.[74] For example, some jurisdictions allow site plans to vest and others do not.[75]

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59 *Lakeside Industries v. Thurston County,* 119 Wn. App. 886, 83 P.3d 433 (2004).
60 *Id.*
61 *Id.*
62 *West Main v. Bellevue,* 106 Wn.2d 47, 420 P.2d 782 (1986).
63 *Allenbach v. Tukwila,* 101 Wn.2d 193, 676 P.2d 473 (1984).
64 *Mercer Enterprises, Inc. v. Bremerton,* 93 Wn.2d 624, 611 P.2d 1237 (1980).
65 RCW 19.27.095(1).
66 RCW 58.17.033(1).
67 *Noble Manor v. Pierce County,* 133 Wn.2d 269, 943 P.2d 1378 (1997).
68 *Tabot v. Grey,* 11 Wn. App. 807, 525 P.2d 801 (1974).
69 *Beach v. Board of Adjustment,* 73 Wn.2d 343, 438 P.2d 617 (1968).
70 *New Castle Investments v. LaCenter,* 98 Wn. App. 224, 989 P.2d 569 (1999).
71 *Irvin Water District No. 6 v. Jackson Partnership,* 109 Wn. App. 113, 34 P.3d 840 (2001).
72 *Wellington River Hollow v. King County,* 121 Wn.App. 224, 54 P.3d 213 (2002).
73 *Hass v. Kirkland,* 78 Wn.2d 929, 481 P.2d 481 (1971).
74 *Erickson v. McLerran,*123 Wn.2d 864, 872 P.2d 1090 (1994).
75 *Abbey Road v. City of Bonney Lake,* 167 P.3d 1213 (2007).

Some jurisdictions have adopted codes which provide that an application vests when the notice of complete application issues. This is an extremely broad interpretation of the vested rights doctrine and may cause problems in permit processing because it renders a decision on vesting before one of the prerequisites of vesting has been established – whether the application is consistent with the city's codes. For example, an application for a commercial use in residential zone, where commercial uses are prohibited, can't vest because it doesn't comply with the codes and the permit can't issue.

4. What happens when vested applications are consolidated in processing? If an applicant submits one application for a permit that does not vest, together with an application for a permit that is subject to the vested rights doctrine, how should the applications be processed? If the two applications are inextricably linked, and one application cannot go forward without the other, the city should consider both to be vested.[76]

5. Which ordinances are considered in the vesting decision? The complete application is vested to the zoning and building ordinances in place at the time of submission of the complete application. In one case, the court held that the applicant had the right to have the application considered for the use disclosed in the application, under the laws existing on the date the complete application was submitted.[77] "What is vested is what is shown on the application for a short plat."[78] A developer's verbal communication to the local government of the use of the development may also "vest" the use and prevent the enforcement of subsequently enacted land use control ordinances.[79] The courts have held that an applicant may not "cherry-pick" which development regulations to be used for processing the application.[80]

6. Can vested rights be extended for a multi-phase project? If an application is approved by the city, the vested rights available to the original application may be extended to the phases of the project through a development agreement.[81] The development agreement should be clear that it applies to the build-out of the project only (as provided in RCW 36.70B.180), and enforcement of the terms to the structures/uses identified in the development agreement. Development agreements should not be interpreted to allow property owners to construct structures, demolish the structures 30 years later, and then construct a totally new development under the terms of the development agreement to enjoy "perpetual zoning."

O. Consolidated Permit Processing – for cities planning under GMA and Regulatory Reform. The city should process the same category of permits together after

[76] *Schneider Homes v. Kent,* 87 Wn. App. 774, 942 P.2d 1096 (1997).
[77] *Noble Manor v. Pierce County,*133 Wn.2d 269, 943 P.2d 1378 (1997).
[78] *Id.*
[79] *See, Westside Business Park v. Pierce County,* 100 Wn. App. 599, 5 P.3d 713 (2000).
[80] *East County Reclamation District v. Bjornson,* 125 Wn. App. 432, 105 P.3d 94 (2005).
[81] RCW 36.70B.170(3)(i).

identifying the particular process associated with each type of permit application.[82] These permits are processed through a ministerial or quasi-judicial procedure, as outlined in chapter 36.70B RCW. Approvals/permits that are processed legislatively (such as comprehensive plan amendments) should not be processed together with "project permit applications").

VI. Open Record Hearing.

A. Appearance of Fairness Doctrine.[83]

1. Does the Act apply? It applies to quasi-judicial land use permits and approvals for which a hearing is required. It does not apply to legislative approvals/actions.[84]

2. How are ex parte communications handled? Ex parte communications with proponents or opponents of a quasi-judicial land use permit are prohibited except as provided in RCW 42.36.070 (disclosure of all contacts and opportunity for rebuttal). Opponents or proponents are not staff members, unless the city is the applicant for the permit. At the outset of each hearing (open or closed record, including the continued hearings), the chair should perform the appearance of fairness "inquiry" asking the necessary questions of the decision makers to glean information regarding ex parte contacts or conflict of interest issues. Once the ex parte contacts or conflict of interest issues have been identified, the city attorney can make the necessary recommendation on procedure.

3. When can an appearance of fairness issue be raised? It must be raised as soon as the basis for disqualification is made known to the individual.[85]

4. What is the test for an appearance of fairness violation? Quasi-judicial hearings involving land use matters must be fair in fact and must appear to be fair. Before participating in a hearing on a quasi-judicial application, each member of the decision-making body should ask themselves: "would a disinterested person, with knowledge of the totality of my personal interest or involvement, be reasonably justified in thinking that my involvement might affect my judgment?"[86]

5. What about bias? At least three types of bias have been recognized as grounds for disqualification of persons performing quasi-judicial functions:

   a. Prejudgment concerning issues of fact about parties in a particular case;

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[82] RCW 36.70B.120(2).
[83] Chapter 42.36 RCW.
[84] RCW 42.36.010.
[85] RCW 42.36.070.
[86] *See, Chrobuck v. Snohomish County,* 78 Wn.2d 858, 480 P.2d 489 (1971).

b. Partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and

c. An interest whereby one stands to gain or lose by a decision either way.[87]

6. What must be shown for a successful challenge? Prejudgment and bias are to be distinguished from ideological or policy leanings of the decision maker and the challenger must present evidence of actual or potential bias to support the appearance of fairness claim.[88]

7. What if the disqualifications result in a lack of a quorum? If there is a lack of a quorum after disqualifications, then the challenged members shall be permitted to fully participate in the proceeding and vote as though the challenge had not occurred, as long as they publicly disclose the reason for the disqualification.

8. What is the remedy for the violation? Invalidation of the action.[89]

B. **Record of the hearing.** Ensure that there is a complete, verbatim record. The open record public hearing must be recorded so that a verbatim transcript can be made.[90]

C. Only one open record hearing and one closed record hearing (or appeal).[91]

D. Evidence presented at the closed record hearing. A closed record hearing is one in which no new evidence or limited new evidence is presented.[92] Review the city's code on the procedures to be used at the closed record hearing to determine whether or not new evidence may be presented.[93]

E. Imposing Conditions.

1. SEPA and SEPA mitigation fees. The city must follow RCW 82.02.020 and make findings on the "direct impact" of the development.[94] The condition must be based on policies identified by the city and incorporated into regulations, plans or codes formally designated by the city as possible bases for the exercise of authority. Action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under SEPA. Conditions must be in writing and be capable of being accomplished.[95] In some instances, no additional mitigation can be imposed –

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87 *Save a Valuable Environment v. Bothell,* 89 Wn.2d 862, 576 p.2d 401 (1978).
88 *Organization to Preserve Agricultural Lands v. Adams County,* 128 Wn.2d 869, 913 P.2d 793 (1996).
89 *Alger v. Mukilteo,* 107 Wn.2d 541, 730 P.2d 1333 (1987).
90 *Beach v. Board of Adjustment,* 73 Wn.2d 343, 438 P.2d 617 (1968); *Byers v. Clallam County Commissioners,* 84 Wn.2d 796, 529 P.2d 823 (1974).
91 RCW 36.70B.070.
92 RCW 36.70B.010(1).
93 *City of Mercer Island v. Citizens to Preserve Pioneer Park,* 106 Wn. App. 461, 24 P.3d 10 (2001).
94 *Benchmark v. Battleground,* 146 Wn.2d 685, 49 P.3d 826 (2002).
95 RCW 43.21C.060.

for example, if the environmental impacts are adequately addressed by the development regulations or comprehensive plan.[96]

2. Impact fees. Look to the authorizing statute. For GMA impact fees, review RCW 82.02.050 through 82.02.100.

3. Subdivisions and short plats. Review the language in RCW 58.17.110; RCW 82.02.020.[97]

4. Discretionary decision-making: Authority for conditions appears in RCW 82.02.020, constitution. When conditioning a land use permit, local government must:

   (i). Identify the public problem that the condition is designed to address;

   (ii) Show that the development for which the permit is sought will create or exacerbate the identified public problem;

   (iii) Show that the proposed condition tends to solve, or at least to alleviate, the identified public problem; and

   (iv) Demonstrate that the proposed solution to the identified public problem is roughly proportional to that part of the problem that is created or exacerbated by the development.[98]

VII. Final Decision.

A. Timeliness. What is the time limit for issuance of the final decision and the Notice of Decision? Preliminary plat (no EIS): 90 days after submission of complete application, RCW 58.17.140. Short plat: 30 days. RCW 58.17.140. Final plat: 30 days. RCW 58.17.140. Project permit applications: generally 120 days, see RCW 36.70B.080. (Threshold decision – 90 days after complete application submitted.[99]

B. What are the consequences for failure to timely issue a Decision? Damages under RCW 64.40.020 and negligence.[100]

C. Is a written decision required? Yes.[101] The final decision must include findings and conclusions.

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[96] RCW 43.21C.420 and WAC 197-11-158.
[97] *Isla Verde International v. Camus,*146 Wn.2d 740, 49 P.3d 867 (2002).
[98] *Burton v. Clark County,* 91 Wn.App. 505, 958 P.2d 343 (1998).
[99] *Westmark v. City of Burien,* 140 Wn. App. 540, 166 P.3d 813 (2007).
[100] *Id.*
[101] RCW 36.70B.130; *Parkridge v. Seattle,* 89 Wn.2d 454, 573 P.2d 359 (1978); for code cities RCW 35A.63.110, RCW 35A.63.170(3); subdivisions RCW 58.17.100.

D. **Standards of adequacy.** Can the minutes of the public hearing be adopted as the written decision? Not if you plan to rely upon them in an appeal. "Findings of fact by an administrative agency are subject to the same requirements as findings of fact drawn by a trial court."[102] Written decisions may include more detail than the wording of the motion actually adopted.[103]

VIII. Submission of Revised Application after a Denial.

A. Change in Circumstances? A second application may be submitted if there is a substantial change in circumstances or a substantial change in the application itself.[104]

B. **Attempt to Remove Condition?** A developer may not request a modification to a final decision on a permit or remove a condition, after failing to appeal the condition.[105]

PREVENTION OF DISPUTES AND LITIGATION

1. Follow the Code. During project permit application review, the city cannot reexamine alternatives to or hear appeals on what is allowed in the development standards (such as uses allowed, density, etc.), except for code interpretation.[106] If you find a problem with your code, docket a code amendment for later adoption.

2. Adopt a Process for Code Interpretations. This is required for most cities.[107]

3. Purchase Software that Allows Tracking of Applications. Because the city could be sued for damages for failure to timely process project permit applications, each application must be closely tracked so that the final decision timely issues.

4. Document, Document, Document. If the city asks the applicant for additional information to process the application, do so in a letter. Add notes in the file to document communications with the applicant, especially relating to time delays. If an application is not timely processed and there is a lawsuit for damages, the city will need to explain the delay.

5. Do Not Hold Off Processing of Applications at the Request of Property Owners. A property owner may be aware that the city is considering code amendments that are more restrictive, but the property owner isn't interested in building in the near future. The property owners may then submit a complete applications in order to vest under the existing development regulations, and ask the City staff to hold off processing of the application until the property owner is ready to build. Do not agree to hold off processing any applications because this provides a benefit to the property owners who submit such advance applications -

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[102] *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 873 P.2d 498 (1994); requirement for findings and conclusions in SEPA decisions, *Levine v. Jefferson County,* 116 Wn.2d 575, 807 P.2d 363 (1991).
[103] *Improvement Alliance v. Snohomish County,* 61 Wn. App. 64, 808 P.2d 781 (1991).
[104] *Hilltop Terrace Ass'n. v. Island County,* 126 Wn.2d 22, 891 P.2d 29 (1995).
[105] *West Coast v. Snohomish County,* 104 Wn. App. 735, 16 P.3d 30 (2001).
[106] RCW 36.70B.040(3).
[107] RCW 36.70B.040(3) and RCW 36.70B.110.

- the ability to vest under the old regulations. Again, there are no code provisions allowing this procedure (because it could allow indefinite vesting to old codes) and it is important to follow the code.

6. Contact the City Attorney with Questions. If the city attorney isn't available, call the Land Use Hotline at 1-877-284-9870. Don't wait until the problem gets bigger.

7. Separate Legislative and Quasi-Judicial Decision-making. Legislative decision-making involves the political process. Quasi-judicial decision-making is not. The final decisions on quasi-judicial and administrative project permit applications must be supported with substantial evidence, and the city must follow the processes identified in the code.

8. Final Decision-makers Should Not Talk to the Public or Reporters About Applications Until the Final Decision Issues and All Appeal Periods Have Expired. Some applications are controversial, and members of the public may appear at the City Council meeting, interested to discuss the application with the Council before the Council's hearing (open record or closed record) on the application. The Council should interrupt any comments of this nature, and explain that the way to ensure that their comments on the application are meaningfully acted upon at the earliest stage in the process is either by (a) submission of written comments to the Planning Department or (2) attendance and commenting at the open public hearing. The Council should let the public know that the administrative record for the application must include their comments, so the comments must be presented at the appropriate time and place.