

THE APPEARANCE OF FAIRNESS DOCTRINE

*JOHN E. PHILLIPS**

A wise man once observed that the typical zoning hearing frequently resembles a cross between a New England town meeting and a hog-calling contest. Most land use attorneys will recognize the truth of that characterization. Public hearings on zoning matters often are replete with rabid emotional outbursts, a neglect of substantive issues, and a robust spirit of chaos.

Despite the judiciary's reluctance to interfere with local governmental procedures,¹ courts gradually have imposed more stringent due process safeguards on local zoning hearings. Through increased intervention in local processes, courts have sought to prevent the figurative "lynchings" of rezone applicants or opponents which often occur at the hands of an angry audience and a complaisant zoning board. As a result, judicial review of zoning decisions has extended beyond the traditional search for "substantial evidence" supporting the local government's determinations.

Due process in zoning actions has evolved incrementally. First, courts invalidated zoning actions solely on the common-law procedural ground of the decisionmaker's direct pecuniary interest in the subject matter of the dispute.² Courts then began to overturn actions

* Principal of Hillis, Phillips, Cairncross, Clark & Martin, P.S., Seattle, Washington. This article was prepared with the assistance of Richard R. Wilson, associate of the firm, and Sandra L. Cohen, summer associate.

1. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* 2d § 4.01 (1976) [hereinafter cited as ANDERSON]. Anderson notes that the courts are usually reluctant to review legislative procedures. He also states, however, that judicial inquiry exists and is justified when such procedures may result in a denial of due process of law. *Id.*

2. See generally 1 ANDERSON, *supra* note 1, at § 4.18-20. Anderson discusses the

because of demonstrated bias.³ Today, some courts require only an *appearance* of unfairness in zoning proceedings to overturn the decisions.⁴

What is "the appearance of fairness"? What makes some interests or actions permissible while others appear unfair? This article first presents an overview of the appearance of fairness doctrine's emergence in the state of Washington, whose courts have decided most of the leading cases discussing the doctrine. This overview will convey a sense of the kinds of impropriety which have sufficiently offended judicial notions of fairness to prompt invalidation of local land use decisions.

Second, this article analyzes the development of the appearance of fairness doctrine in other states. Each state court alluding to the doctrine has taken a somewhat different approach based on local zoning law.⁵

I. EVOLUTION OF THE APPEARANCE OF FAIRNESS DOCTRINE

Historically, courts viewed local zoning procedures as legislative in nature, and therefore presumptively valid.⁶ The "legislative" label for zoning matters, including rezoning, precluded searching judicial review of zoning decisions. Under the doctrine of separation of powers,⁷ courts refused to inquire into the motives of zoning board members acting in their legislative capacities.⁸ Thus, a party aggrieved by

historical basis for disqualifying legislators because of their various personal interests. He notes that examining a legislature's motives is exceptional and against the general rule of judicial restraint in legislative areas.

3. *See id.*

4. *See, e.g.*, notes 31-37 and accompanying text *infra*.

5. *See* notes 38-56 and accompanying text *infra*.

6. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Zoning is a legislative act, classifying land and creating boundaries. As an exercise of legislative judgment, zoning decisions should not be disturbed by courts unless the governing body has exceeded its authority or acted arbitrarily and unreasonably. *Bishop v. Town of Houghton*, 69 Wash. 2d 786, 420 P.2d 368 (1966). *See generally* 1 ANDERSON, *supra* note 1, at § 3.14.

7. Generally speaking, the separation of powers doctrine provides that the legislative, executive, and judicial branches of government operate independently of one another. The doctrine preserves the integrity of each governmental branch, protecting the systems of checks and balances, and insuring against domination by any one branch. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15 (1978).

8. *See, e.g.*, *South Gwynnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) (holding adoption of a zoning ordinance or an amend-

a rezone had a nearly insurmountable burden to convince a court to inspect the basis of the decision.

Until 1969, Washington courts followed the traditional approach. Public hearings prior to approval of a rezone were part of the legislative process and thus subject to limited judicial review.⁹ In *Smith v. Skagit County*,¹⁰ the Washington Supreme Court reanalyzed that approach and established an "appearance of fairness" requirement as the criterion for a broader judicial review of some zoning proceedings. In subsequent cases, the Washington courts have more fully developed the appearance of fairness doctrine, emphatically rejecting the purely legislative characterization of zoning matters.

In *Smith*, an aluminum processing corporation sought to rezone an area from residential to industrial.¹¹ Both the county planning commission and the board of county commissioners held hearings on the requested zoning change.¹² The county commissioners granted the rezone petition.¹³ On appeal, the Washington Supreme Court voided the action, not only holding the rezone illegal as a spot zone,¹⁴ but also invalidating the rezone because of the lack of an appearance of fairness at the public hearings. The planning commission invited only advocates of the rezone to a closed session, deliberately excluding opponents.¹⁵

The *Smith* majority¹⁶ declared that a public hearing on a rezoning matter "is a situation where appearances are quite as important as substance."¹⁷ The court proposed a two-part fairness test governing zoning proceedings: first, whether a reasonable person attending all of the meetings on a given issue could conclude that everyone entitled to a hearing obtained one; and second, whether the commissions

ment to a zoning ordinance a state or local quasi-legislative act, and thus not subject to review unless arbitrary).

9. *E.g.*, *Lillions v. Gibbs*, 47 Wash. 2d 629, 289 P.2d 203 (1955), *overruled in Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

10. 75 Wash. 2d 715, 453 P.2d 832 (1969).

11. *Id.* at 717, 453 P.2d at 834.

12. *Id.* at 741, 453 P.2d at 847.

13. *Id.* at 737, 453 P.2d at 844.

14. *Id.* at 719, 453 P.2d at 835.

15. *Id.*

16. The court overruled prior case law insulating zoning proceedings from searching procedural review by a five-to-four margin. *Id.* at 758, 453 P.2d at 856.

17. *Id.* at 733, 453 P.2d at 842.

holding the hearings gave due weight to the matters presented.¹⁸ In *Smith*, the county commission failed to meet either part of this test.¹⁹

Smith cautiously departed from precedent, continuing to characterize rezoning hearings as legislative in nature.²⁰ The court, however, distinguished these proceedings from other legislative hearings which do not mandate public participation. Implicit in this distinction was the court's recognition that rezones are quasi-judicial in character. In the next appearance of fairness case, *Chrobuck v. Snohomish County*,²¹ the Washington Supreme Court explicitly acknowledged the adjudicatory nature of rezoning hearings.

In *Chrobuck*, the court applied the appearance of fairness doctrine to invalidate an individual rezoning for an oil refinery. The rezoning applicant improperly influenced several planning commission members by soliciting their support through a series of pre-hearing contacts.²² These encounters resulted in the court's finding an appearance of unfairness which prejudiced the proceedings.²³ Basing its decision on the prehearing improprieties, and a denial of cross-examination to rezoning opponents at the public hearing,²⁴ the *Chrobuck* court indicated its willingness to examine the entire decisionmaking process for

18. *Id.* at 741, 453 P.2d at 847.

19. *Id.*

20. In proposing the fairness test, the court clearly retained the legislative characterization. The court stated its test as:

[w]hether a fair-minded person in attendance at all of the meetings on a given issue, could, at the conclusion thereof, in good conscience say that everyone had been heard who, in all fairness, should have been heard and that the legislative body required by law to hold the hearings gave reasonable faith and credit to all matters presented, according to the weight and force they were in reason entitled to receive.

Id.

21. 78 Wash. 2d 858, 480 P.2d 489 (1971).

22. *Id.* at 863, 480 P.2d at 494. The pre-hearing contacts included trips to Los Angeles paid for by the applicant and various other social contacts with board members.

23. *Id.* at 867, 480 P.2d at 494.

24. *Id.* at 870, 480 P.2d at 496. The court held that there was no absolute cross-examination requirement in zoning matters. Nevertheless, it found that:

[w]here the hearing assumes distinctly adversary proportions, the opponents and proponents are represented by counsel, expert witnesses are called, and complex technical and disputed factors . . . are involved, it would appear particularly pertinent to an objective factual evaluation of the testimony presented to permit cross-examination in a reasonable degree.

Id.

evidence of procedural abuses.²⁵

In *Buell v. City of Bremerton*,²⁶ the Washington Supreme Court further expanded the appearance of fairness doctrine by strengthening the impartiality requirement for zoning proceedings. The *Buell* court invalidated a planning commission rezone vote because of one member's possible self-interest even though his vote had no effect on the result.²⁷ The court held that a showing of interest which might affect a commission member infected the entire proceeding, requiring no proof whatsoever of actual influence.²⁸ The court went on to define three alternative grounds for disqualifying a planning commission member for appearance of fairness reasons: 1) prejudging issues of fact; 2) partiality evidencing personal bias or prejudice for or against a party, as opposed to favoring or disfavoring issues or facts; and 3) interest in the outcome of a decision.²⁹ Having established these criteria, the state court applied them, upsetting the commission vote. The court reversed the rezone even though the city council, not the planning commission, was ultimately responsible for final action in the matter.³⁰

25. *Id.* at 871, 480 P.2d at 497.

26. 80 Wash. 2d 518, 495 P.2d 1358 (1972).

27. "Even if Mr. Beard, in his role as chairman, did not vote, he was found by the court to have a possibility of interest by virtue of the appreciation in his property values from the 1971 rezonings." *Id.* at 525, 495 P.2d at 1362. *But see* King County Water Dist. v. King County Boundary Rev. Bd., 87 Wash. 2d 536, 554 P.2d 1060 (1976). In *King County Water Dist.*, the City of Des Moines assumed jurisdiction over the facilities and assets of King County Water District No. 54. In accordance with Washington law, the city submitted a proposal to the King County Boundary Review Board. The Board subsequently approved the proposal. An opponent challenged the Board decision, alleging that a board member's conversations with others associated with other water systems constituted unfairness. The court rejected his claim, finding that the alleged *ex parte* contacts did not appear on the record. Further, there was an absence of any evidence of self-interest on the part of the member. *Id.* at 542, 554 P.2d at 1064.

28. 80 Wash. 2d at 524, 495 P.2d at 1362.

29. *Id.* at 523, 495 P.2d at 1361-62.

The importance of the appearance of fairness has resulted in the recognition that it is necessary only to show an interest which might have influenced a member of the commission and not that it actually so affected him.

Id.

30. *Id.* at 524, 495 P.2d at 1363. The court found partiality in the rezone hearing. *Id.* at 523, 495 P.2d at 1362. Partiality was later more clearly defined in *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976), where the Washington Supreme Court stated the following test for partiality:

Would a disinterested person, having been apprised of the totality of a board

Although arguably the *Buell* limitations affected only appointive planning commission decisions, the Washington Supreme Court soon imposed similar criteria upon elective bodies. In *Fleming v. City of Tacoma*,³¹ the court found the procedural differences between rezoning hearings before appointive and elective bodies were insignificant. An inference of bias had arisen when a city councilman accepted employment with a successful rezoning applicant shortly after the rezoning decision. The *Fleming* court overturned the rezoning although, as in *Buell*, the councilman's vote was not necessary for passage. The court held that regardless of actual facts, the inescapable inference in the public mind was that the councilman arranged his employment before the vote.³²

Fleming represents both a logical extension of previous appearance of fairness cases and a significant departure from the judiciary's long-established rule against examining legislative motives.³³ The *Fleming* court distinguished between an elective zoning board's consideration of a rezoning and its initial adoption of a comprehensive plan or zoning code.³⁴ The court considered rezoning proceedings quasi-judicial in nature, while it termed adoption of a plan or zoning code a legislative process insulated from substantial judicial review.³⁵

member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? If answered in the affirmative, such deliberations, and any course of conduct reached thereon, should be voided.

Id. at 361, 552 P.2d at 183.

In *Swift*, the court found that the chairman of the Board of County Commissioners had not acted impartially. The chairman was also a stockholder and chairman of the board of the mortgagee of the affected development. The court therefore invoked the appearance of fairness doctrine to invalidate the commission decision, even though the chairman had ceased to be a commission member before the final vote. The court concluded that "it is the appearance [of fairness] however, that is determinative." *Id.* at 362, 552 P.2d at 184.

31. 81 Wash. 2d 292, 502 P.2d 327 (1972).

32. *Id.* at 300, 502 P.2d at 332. See *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (Stevens, J., dissenting). In *Eastlake*, Justice Stevens cited *Fleming* with approval to support his position that the opportunity to apply for a zoning code amendment is protected by the due process clause of the fourteenth amendment. A zoning applicant deserves fair consideration during the proceedings. *Id.*

33. See 3 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 52 (1980) [hereinafter cited as RATHKOPF]. But see *Byers v. Board of Clallam County Comm'rs*, 84 Wash. 2d 796, 529 P.2d 823 (1974) (court hinted in dicta that even the legislative process of initial zoning, as distinguished from rezoning, may be subject to an appearance of fairness attack). *Id.* at 803, 529 P.2d at 829.

34. 81 Wash. 2d at 298, 502 P.2d at 330-31.

35. *Id.*

Further, *Fleming* refined the quasi-judicial/legislative distinctions. The court identified three factors differentiating quasi-judicial rezoning actions from the legislative actions of a zoning board. First, rezones are adjudicatory in nature; the decisionmaker must decide between proponents and opponents. Second, a rezone has localized applicability, usually affecting only the immediate area being rezoned. Finally, statutes, charters, or ordinances generally require mandatory rezone hearings. Most legislative hearings, on the other hand, are largely discretionary.³⁶

Fleming, in effect, is the landmark case on the appearance of fairness doctrine. It expressly rejects the legislative label for rezones. As noted above, the court drew strong distinctions between legislative and quasi-judicial zoning proceedings.³⁷ These distinctions provide a rationale for other jurisdictions to consider adopting an appearance of fairness requirement. If other states recognize that rezones and other individual-oriented land use procedures are different than general zoning decisions, they will better protect all parties affected.

II. WHEN DOES THE DOCTRINE APPLY?

A. *The Quasi-Judicial Consideration and Due Process Roots*

Outside Washington, no other state has explicitly recognized the appearance of fairness doctrine.³⁸ Some state courts, however, have implicitly used the doctrine through a growing concern over the quasi-judicial nature of zoning proceedings.

Many state courts acknowledge that rezone hearings are basically quasi-judicial and apply a test of judicial review similar to the appearance of fairness.³⁹ The adjudicatory nature of rezone proceedings entitles participants to certain due process protections, either regarding the disinterestedness of the decisionmaker or the conduct of the hearing itself. Nevertheless, absent a quasi-judicial characterization, most courts do not impose an appearance of fairness requirement; rather, they retain the traditional, more limited scope of

36. *Id.* at 299, 502 P.2d at 331.

37. See note 35 and accompanying text *supra*.

38. While no state expressly has adopted this doctrine, at least one state, California, has required an appearance of impartiality in planning commission decisionmaking. See *Kimura v. Roberts*, 89 Cal. App. 3d 871, 152 Cal. Rptr. 569 (1979).

39. See note 47 *infra*.

review.⁴⁰

The United States Supreme Court recently considered the problem of due process requirements for zoning proceedings. In *Withrow v. Larkin*,⁴¹ the Court observed that a board's performance of both investigative and adjudicative functions is not a violation of due process.⁴² Although the Constitution requires *actual* fairness in an administrative adjudicatory tribunal, a board may base its procedures upon "local realities."⁴³ The Court concluded that given the necessity of implementing a conflict-resolving machinery, only when the risk of unfairness becomes unacceptably high should a court invalidate the adjudication.⁴⁴

Significantly, the Court in *Withrow* also recognized in dicta that a board must attend the administrative hearing with every element of complete fairness. It indicated that under proper facts, a hearing may be unconstitutional on unfairness grounds.⁴⁵ The Supreme Court and some state courts express concern not only for the participating parties, but also in the maintenance of public confidence.⁴⁶ Thus, the *Withrow* due process concerns can be seen as a basis for an appearance of fairness requirement.

40. For a representative, though not inclusive list of jurisdictions retaining the traditional legislative approach, see *Mueller v. City of Phoenix*, 102 Ariz. 575, 435 P.2d 472 (1967); *Ruppert v. City of Washington*, 366 F. Supp. 686 (D.D.C. 1973); *City of Miami Beach v. Schauer*, 104 So. 2d 129 (Fla. Ct. App. 1958), cert. discharged, 112 So. 2d 838 (Fla. 1958); *Rutland Environ. Prot. Ass'n v. Kane County*, 31 Ill. App. 3d 82, 334 N.E.2d 215 (1975); *Bryant v. Lake County Trust Co.*, 334 N.E.2d 730 (Ind. Ct. App. 1975); *Puryear v. City of Greenville*, 432 S.W.2d 437 (Ky. Ct. App. 1968); *Crall v. City of Leominster*, 362 Mass. 95, 284 N.E.2d 610 (1972); *Leavitt v. Incorporated Village of Sand Point*, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959); *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968); *O'Rourke v. City of Tulsa*, 457 P.2d 782 (Okla. 1969). But see *Jarrott v. Scrivener*, 225 F. Supp. 827 (D.D.C. 1964) (granting a special exception to zoning ordinance subject to appearance of fairness doctrine); *Fail v. La Porte County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976).

41. 421 U.S. 35 (1975).

42. *Id.* at 58.

43. *Id.* at 59.

44. *Id.* at 57.

45. *Id.* at 47.

46. Maintenance of public confidence in decisionmaking processes is a goal of many courts in evaluating zoning decisions. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975); *Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956); *Barbara Realty Co. v. Zoning Bd. of Rev.*, 85 R.I. 152, 128 A.2d 342 (1952); *Smith v. Skagit County*, 75 Wash. 2d 715, 453 P.2d 832 (1969).

A number of state courts recognize the quasi-judicial nature of zoning proceedings, or at least a quasi-judicial aspect to such proceedings which requires an appearance of fairness.⁴⁷ Other state courts have compromised, taking a position midway between the quasi-judicial and traditional legislative views.⁴⁸ These courts acknowledge the necessity of procedural fairness while retaining the legislative label.⁴⁹

Although there is a trend toward characterizing rezoning proceedings as quasi-judicial, most states still regard them as legislative.⁵⁰ In designating a proceeding legislative, a court will not reverse a decision unless it is clearly "arbitrary or capricious."⁵¹ Under this view, courts have denied any imposition of strict procedural safeguards, including the appearance of fairness doctrine.⁵² In those states which reject the legislative label, however, the quasi-judicial characterization can extend beyond rezoning proceedings. Amending a comprehensive plan, granting a variance or special exception, and approving a conditional use permit can all be described as quasi-judicial, and thus subject to an appearance of fairness requirement.⁵³

47. The following states recognize a quasi-judicial aspect to zoning proceedings, requiring an appearance of fairness. *See Snyder v. City of Lockwood*, 189 Colo. 421, 542 P.2d 371 (1975) (dictum); *Low v. Town of Madison*, 135 Conn. 1, 60 A.2d 774 (1948); *Brown v. District of Colum. Bd. of Zoning Adjustment*, 413 A.2d 1276 (D.C. Ct. App. 1980); *Acierno v. Folsom*, 337 A.2d 309 (Del. 1975); *Town v. Land Use Comm'n*, 55 Hawaii 538, 524 P.2d 84 (1974); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 503 (1974); *Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1978); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

48. Three states have adopted an approach which incorporates or at least recognizes aspects of both the quasi-judicial and legislative characterizations. *See Olley Valley Estates, Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 801 (1974); *Ford v. Baltimore County*, 268 Md. 172, 300 A.2d 204 (1973); *Golden Gate Corp. v. Town of Narragansett*, 116 R.I. 552, 359 A.2d 321 (1976).

49. *See note 40 supra. See generally Sullivan, Arabi Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50 (1975); Note, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

50. *See generally* 1 RATHKOPF, *supra* note 33, at ch. 4 (1980).

51. *See note 40 and accompanying text supra.*

52. *E.g., Auckland v. Board of County Comm'rs*, 536 P.2d 444 (Or. Ct. App. 1975).

53. In *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 480 P.2d 489 (1971), the Washington Supreme Court defined its concept of a fair hearing:

Certainly, in its role as a hearing and fact-finding tribunal, the planning commis-

Most courts base application of the appearance of fairness doctrine on due process considerations fundamental to adjudicatory proceedings.⁵⁴ The Washington Supreme Court, however, has noted that its due process grounds for the appearance of fairness doctrine are *not* constitutionally based.⁵⁵ Instead, the Washington court grounds the doctrine's application on its own notion of what constitutes a truly fair "hearing."⁵⁶

B. *Statutory Bases: Conflict of Interest Statutes or Public Hearing Requirements*

Some courts avoid common law due process problems by invalidating zoning decisions on statutory grounds. These statutes disqualify a member of a body who has a particularly defined conflict of interest.⁵⁷ Other courts go beyond express statutory language to void actions for the appearance of a conflict of interest. Additionally, some courts extend this statutory disqualification to members of bodies not named in the statute.⁵⁸

Washington courts invoke the appearance of fairness doctrine in land use matters only when a given statute requires a public hearing. In that instance, the doctrine applies whether or not the decisionmaking body is elective⁵⁹ or appointive.⁶⁰ The courts, however, will not

sion's function more nearly than not partakes of the nature of an administrative, quasi-judicial proceeding, implicit in which is the basic due process requirement that the hearing and fact-finding process must be fair and impartial. *Id.* at 869, 480 P.2d at 495-96. *Accord*, *Pizzola v. Planning and Zoning Comm'n*, 167 Conn. 202, 355 A.2d 21 (1974).

54. *E.g.*, *Arnel Dev. Co. v. City of Costa Mesa*, 98 Cal. App. 3d 567, 159 Cal. Rptr. 592 (1979), *reversed*, 620 P.2d 569, 169 Cal. Rptr. 904 (1980); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

55. *City of Bellevue v. King County Boundary Rev. Bd.*, 90 Wash. 2d 856, 586 P.2d 470 (1978).

56. *Id.* at 863, 586 P.2d at 475.

57. These statutes vary from state to state. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 8-11, 8-21 (1980); N.J. STAT. ANN. 40:55-1.4 (West 1980); MASS. GEN. LAWS ANN. ch. 268A, §§ 19(a), 21(a) (Michie/Law. Co-op 1980); N.H. REV. STAT. ANN. 31:73 (1979).

58. *See, e.g.*, *Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956) (entire borough council proceeding invalidated although interested member's vote not needed for passage and conflict statute applied only to planning board members). *Accord*, *Lage v. Zoning Bd. of Appeals*, 148 Conn. 597, 172 A.2d 911 (1961); *Fail v. La Porte County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976) (dictum).

59. *E.g.*, *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

60. *E.g.*, *Buell v. City of Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972).

apply the doctrine to discretionary administrative actions which do not require a prior public hearing.⁶¹

Not all states draw the same distinction. For example, in New Jersey, the public hearing requirement is not dispositive with regard to the imposition of an appearance of fairness standard.⁶² In general, courts must examine the statutory requirements to determine whether either a conflict of interest statute or a public hearing requirement supplies a basis for application of an appearance of fairness doctrine.

C. *Other Administrative Procedures*

The appearance of fairness doctrine, though originating in the judicial review of rezoning actions, has spread to other zoning and non-zoning matters. Courts in Washington have applied the doctrine to adjudications as disparate as permit applications to install gasoline storage tanks on residential property,⁶³ hearings before the State Human Rights Commission on a landlord's refusal to rent an apartment,⁶⁴ and municipal takeover of a water district.⁶⁵ In other states, courts have applied some form of an appearance of fairness doctrine in disbarment proceedings⁶⁶ and civil service commission hearings on a policeman's appeal of his suspension.⁶⁷ Imaginative practitioners may thus employ the appearance of fairness doctrine in a wide range of factual situations.

III. WHAT APPEARS UNFAIR?

The apparent unfairness which has compelled courts to overturn the actions of municipal decisionmaking bodies may relate either to

61. *See, e.g.*, *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 579 P.2d 1309 (1978) (denial of building permit not impeachable on grounds of appearance of fairness violation because Uniform Building Code does not require a public hearing).

62. *See Wilson v. City of Long Beach*, 27 N.J. 360, 142 A.2d 837 (1958) (state supreme court ruled that legislative hearing held under blighted areas statute was not subject to full due process requirements and the full reach of statutory disqualification for personal interest). *See also Acierno v. Folsom*, 337 A.2d 309 (Del. 1975).

63. *Fleck v. King County*, 16 Wash. App. 668, 558 P.2d 254 (1977).

64. *Loveland v. Leslie*, 21 Wash. App. 84, 583 P.2d 664 (1978).

65. *King County Water Dist. v. King County Boundary Rev. Bd.*, 87 Wash. 2d 536, 554 P.2d 1060 (1976).

66. *E.g., In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825 (1957); *In re Schlesinger*, 404 Pa. 584, 172 A.2d 835 (1961).

67. *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969).

potential bias or interest on the part of the decisionmaker, or to impropriety in the way a hearing was conducted or a decision reached.⁶⁸

A. *Potential Bias or Interest of Decisionmaker*

Stringent standards have evolved in Washington governing the impartiality of members of a decisionmaking body. The state courts have indicated that the motives of decisionmakers should be beyond reproach. Thus, they have invalidated rezones upon findings of unfairness in fact, through a bias rationale.

In *Chrobuck v. Snohomish County*,⁶⁹ the Washington Supreme Court invalidated a rezone, in part because the applicant improperly lobbied for and obtained a planning commission member's public support for a proposed refinery.⁷⁰ The court also noted that another commission member had signed a newspaper advertisement and appeared as a witness in favor of the refinery.⁷¹ These are examples of *prejudgment* of the issue before the commission.

Similarly, prejudgment was a factor in the court's remand of a rezone in *Anderson v. Island County*.⁷² In *Anderson*, the chairman of the board of county commissioners moved to grant the rezone before presentation of the opposing testimony was complete. At the hearing, he persisted in trying to bypass the opposition, telling them they were "just wasting [their] time" by testifying.⁷³

68. The test is perhaps best summarized in a recent Washington case: There is an appearance of fairness violation when "a disinterested person, having been appraised of the totality of a board member's personal interest in a matter being acted upon, [would] be reasonably justified in thinking that partiality may exist." *Swift v. Island County*, 87 Wash. 2d 348, 361, 552 P.2d 175, 183 (1976).

69. 78 Wash. 2d 858, 480 P.2d 489 (1971).

70. *Id.* at 868, 480 P.2d at 495.

71. *Id.* at 865-67, 480 P.2d at 494. Whether the advertisement was signed before or after the commissioner's appointment was not made clear in the record.

For a contrary view to the court's holding in *Chrobuck*, see the dissenting opinion of Neill, J., who felt that signing the advertisement and appearing as a witness were insufficient to overturn the commission's decision. 78 Wash. 2d at 881-82, 480 P.2d at 503. Justice Neill, however, later acquiesced in the majority's view. See *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972).

72. 81 Wash. 2d 312, 501 P.2d 594 (1972).

73. *Id.* at 326, 501 P.2d at 602. *Accord*, *Barbara Realty Co. v. Zoning Bd. of Rev.*, 85 R.I. 152, 128 A.2d 342 (1957) (board of review member's pre-hearing statements, indicating he favored the proposed rezone, showed sufficient prejudgment to overturn the board's decision). *But see* *Zimarino v. Zoning Bd. of Rev.*, 610 R.I. 383, 187 A.2d 259 (1963) (remarks "suggestive of some impatience or petulance" on a member's part, do not rise to the level of creating a "reasonable inference of prejudice").

Another source of potential bias noted in *Chrobuck*, and a common thread in many cases, is *partiality* resulting from previous business dealings. In *Chrobuck*, for example, one of the planning commissioners had represented the petitioner in legal matters ten years earlier.⁷⁴

Perhaps the most common reason for judicial intervention in appearance of fairness cases is that a member of the decisionmaking tribunal has a *direct or indirect interest in the outcome whereby he or she stands to gain or lose*. In *Buell v. City of Bremerton*,⁷⁵ the chairman of the planning commission owned commercial property near an area which was under consideration for a rezone to commercial use. The court found his potential benefit from the rezone sufficient to trigger the appearance of fairness doctrine.⁷⁶

The Washington Supreme Court is sensitive to even the slightest appearance of unfairness in rezone matters. *Narrowsview Preservation Association v. City of Tacoma*⁷⁷ evidences this sensitivity by striking down a rezone because of a hint of pecuniary interest. In *Narrowsview*, a bank employing a planning commissioner was the mortgagee of rezoned property which had more than doubled in value after the rezone. At the time of rezoning, the mortgage was overdue and the property owner close to bankruptcy. Although the planning commissioner was a minor loan officer at the bank with only minimal knowledge of the property owner's business with it, the court held that it appeared unfair to have a bank employee participating in a decision which would greatly increase the value of the bank's collateral.⁷⁸ The court did not require actual bias, but merely

74. 78 Wash. 2d at 866, 480 P.2d at 494. Similarly, in *Anderson v. Island County*, 81 Wash. 2d 312, 326, 501 P.2d 594, 602 (1972). The chairman of the board of commissioners was the former owner of the applicant company. See also note 30 and accompanying text *supra*.

75. 80 Wash. 2d 518, 495 P.2d 1358 (1972).

76. *Id.* at 525, 495 P.2d at 1361-62. Compare *Buell with Byers v. Board of Clallam County Comm'rs*, 84 Wash. 2d 796, 529 P.2d 823 (1974). The court in *Byers* observed that even if the appearance of fairness doctrine applied to an *initial*, as contrasted with an *amendatory*, zoning of property, there was no violation where members of a planning commission owned property ten and fifteen miles away from the zoned area, and received no benefit from the zoning.

77. 84 Wash. 2d 416, 526 P.2d 897 (1974).

78. *Id.* at 420-21, 526 P.2d at 900-01. But see *Anderson v. Zoning Comm'n*, 157 Conn. 285, 253 A.2d 16 (1968) (no violation of Connecticut conflict statute where resigning chairman nominated a commission alternate from his own company, since chairman had no interest in the outcome, but merely recommended the alternate's

the suggestion of unfairness, to trigger the doctrine.

Not only does pecuniary interest demonstrate bias, but *associational ties* do, as well. In *SAVE v. City of Bothell*,⁷⁹ a violation of the appearance of fairness occurred in connection with a planning commission's affirmative recommendation to rezone a large parcel for a regional shopping center. Two of the city's planning commissioners had ties with the local chamber of commerce, one as a member of its board of directors, the other as its paid executive director. Because members of the chamber stood to benefit from the proposed shopping center, the court struck down the rezone. It contended there were enough "entangling influences" to raise the appearance of partiality, regardless of its actual existence.⁸⁰

The court in *SAVE* rejected arguments that finding associational ties in violation of the appearance of fairness doctrine would unduly hamper membership in community and civic organizations such as the chamber of commerce. Although recognizing that the first amendment protects membership in a community organization, the court ruled that protecting the appearance of fairness would not burden the right of association.⁸¹ Such a rule does not prohibit membership; rather, it limits participation in proceedings "when such participation demonstrates the existence of an interest which might substantially influence the individual's judgment."⁸² Does this analysis beg the question of whether such a holding will have a "chilling" effect?

name; no violation where another commission member was vice-president of a company represented by the law firm handling the application for a rezone); *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837 (1958) (no violation of state conflict statute where chairman of planning board was president of bank holding mortgages in area under consideration; interest too remote and contingent).

79. 89 Wash. 2d 862, 576 P.2d 401 (1978).

80. *Id.* at 873, 576 P.2d at 407. *But see* *King City Water Dist. v. King County Boundary Rev. Bd.*, 87 Wash. 2d 536, 554 P.2d 1060 (1976). In *King*, the City of Des Moines took over a water district. The county boundary review board upheld the action, despite a complaint that a board member breached the appearance of fairness doctrine by conversing with persons associated with certain water systems. The record contained no reference either to the content of the conversations or the conversations themselves, nor was there a suggestion of an interest which might benefit by the city's takeover. Since there was no more than a "mere acquaintance with, or casual business dealing in a minimal sense" with the outsiders, the court held that no violation occurred. 87 Wash. 2d at 542, 554 P.2d at 1064, citing *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974).

81. 89 Wash. 2d at 874, 576 P.2d at 407-08.

82. *Id.*

These judicially-created standards in Washington for disqualification of a decisionmaker on the ground of possible bias are stringent but indefinite. One would expect to find more definite standards in states with conflict of interest statutes which prohibit persons with certain enumerated personal or financial interests from participating in particular proceedings.⁸³

Connecticut, for example, has a well-developed body of case law interpreting a statutory conflict of interest provision.⁸⁴ The legislature enacted the law following the state supreme court's decision in *Low v. Town of Madison*.⁸⁵ In *Low*, the court overturned a rezone to business of a residential area because a member of the zoning commission was the applicant's spouse.⁸⁶ A subsequent decision interpreted the statute, in light of *Low*, as applying to an interested zoning commissioner who participated in deliberations, but did not vote on rezone applications.⁸⁷ More recently, the statute has served to invalidate zoning commission proceedings in which a potentially interested commissioner, or one having at least a clearly preconceived opinion, participated in hearings and deliberations.⁸⁸ The court has extended

83. See, e.g., CONN. GEN. STAT. § 8-11 (1980); N.J. STAT. ANN. § 40:55D-23(b) (West 1980).

84. CONN. GEN. STAT. § 8-11 (1980) provides in part: "No member of any zoning commission or board and no member or any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense."

85. 135 Conn. 1, 60 A.2d 774 (1948).

86. *Id.* at 10, 60 A.2d at 777-78. Even in 1948, the court anticipated a doctrine based upon apparent improprieties: "Anything which tends to weaken [public] confidence and to undermine the sense of security for individual rights which the citizen is entitled to feel is against public policy." *Id.* at 9, 60 A.2d at 778.

87. *Mills v. Town Plan and Zoning Comm'n*, 144 Conn. 493, 134 A.2d 250 (1957).

88. See, e.g., *Kovalik v. Planning and Zoning Comm'n*, 155 Conn. 497, 234 A.2d 838 (1967) (commission chairman owned about 8% of the rezoned land); *Lake Garda Improvement Ass'n v. Town Plan and Zoning Comm'n*, 151 Conn. 476, 199 A.2d 162 (1964) (commission member demonstrated longstanding opposition to appellants and friendship with rival improvement group seeking the rezone); *Daly v. Town Plan and Zoning Comm'n*, 150 Conn. 495, 191 A.2d 250 (1963) (commission member was officer of association which contracted to sell land to broadcasting company if condition precedent of a rezone was satisfied); *Lage v. Zoning Bd. of Appeals*, 148 Conn. 597, 172 A.2d 911 (1961) (zoning commission member had preconceived notion about the desirability of a rezone). *But see* *Schwartz v. Town of Hamden*, 168 Conn. 8, 357 A.2d 488 (1975) (although commission member was in law practice with town attorney, court found no unlawful behavior because neither the member nor the town attorney took part in proceedings; thus, no interest could be inferred).

this rationale to apply to members of both a planning board⁸⁹ and a city council.⁹⁰

New Jersey cases invalidating zoning proceedings on grounds of apparent bias rely in part upon a statute providing that no member of a planning board may act on any matter in which he or she has a direct or indirect personal or financial interest.⁹¹ In *Zell v. Borough of Roseland*,⁹² two members of the planning board belonged to a church which sought to sell property to a bank, conditioning the transfer upon obtaining a rezone from the planning commission and borough council. The court held that a disqualifying interest existed, even though the two members did not individually stand to benefit in any way which would violate the apparent intent of the statute.⁹³

Many New Jersey cases do not rely on the statute. *Aldom v. Borough of Roseland*,⁹⁴ for example, involved a borough council member who had worked for twenty-three years for the company requesting a rezone. No statute required his disqualification, but the court expanded the common law doctrine of disqualification for pecuniary interest to void the entire proceeding. The court ruled the disqualifying interest need not be pecuniary; it need only be a private interest different from that held in common with the public.⁹⁵ The court added that the standard for disqualification should be the same either at

89. *Josephson v. Planning Bd.*, 151 Conn. 489, 199 A.2d 690 (1964). *But see Dana-Robin Corp. v. Common Council of Danbury*, 166 Conn. 207, 348 A.2d 560 (1974) (finding no disqualification regarding planning commission member who, although an owner of family corporation stock in the affected property, voted on advisory report for zoning approval).

90. *R.K. Dev. v. City of Norwalk*, 156 Conn. 369, 242 A.2d 781 (1968) (treating common council as an administrative body for purposes of deciding propriety of actions, court held that council member who had interest in property adjoining applicant's, and who openly opposed application, was disqualified).

91. N.J. STAT. ANN. § 40:55D-23(b) (West 1980).

92. 42 N.J. Super. 75, 125 A.2d 890 (App. Div. 1956).

93. *Id.* at 81-82, 125 A.2d at 893-94. Compare *Zell* with the cases decided under Connecticut's conflict provision, discussed in notes 84-90 and accompanying text *supra*. See also *Ferguson v. Zoning Bd. of Appeals*, 29 Conn. Supp. 31, 269 A.2d 857 (Com. Pl. 1970) (chairman of zoning commission held, under Connecticut statute, as unlawfully representing opponents of a variance by his personal contacts and association with them).

94. 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956).

95. *Id.* at 507, 127 A.2d at 196. *Accord*, *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978). The court in *Aldom* added that it would not examine the degree of personal interest involved, since any "private interest," once so categorized, would be sufficient to disqualify. 42 N.J. Super. at 502, 127 A.2d at 194.

common law or under a conflict of interest statute. The standard should not be whether the decisionmaker is in fact influenced by personal interest, but *whether any suspicion of a conscious or unconscious influence on his integrity might result.*⁹⁶

An interesting twist in the New Jersey cases is *Wollen v. Borough of Fort Lee*,⁹⁷ wherein the state supreme court upheld a rezone even though three legislators, who had made campaign promises to approve it, cast votes essential to its passage. The court distinguished between comment on issues involved in the legislators' "sworn legislative duty" and the self-interest disapproved in *Aldom*.⁹⁸ The *Wollen* court established a standard for invalidation based upon whether the councilmen's minds were open to conviction in the just fulfillment of their "solemn obligation to the community."⁹⁹

Other states have statutory conflict of interest provisions which can invalidate proceedings that tend to weaken public confidence in the zoning process, even though the plaintiff cannot show actual partiality.¹⁰⁰ Courts interpreting some state statutes, however, have found they prohibit only interests which have either "substantially influenced" a decision,¹⁰¹ or clearly produced bias, not merely its *appearance*.¹⁰²

96. 42 N.J. Super. at 502, 127 A.2d at 194. Another case decided before *Aldom* states the reason for adopting such an approach: "The concurrence of an interested member in the action taken by the body taints it with illegality." *Piggott v. Borough of Hopewell*, 22 N.J. Super. 106, 91 A.2d 667 (App. Div. 1952).

97. 27 N.J. 408, 142 A.2d 881 (1958).

98. *Id.* at 421, 142 A.2d at 888-89.

99. *Id. Accord*, *City of Fairfield v. Superior Ct.*, 44 CA 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1976); *Fiser v. City of Knoxville*, 584 S.W.2d 659 (Tenn. App. 1979) (both cases recognize right and responsibility of elected officials to express views on important issues). *But see* notes 18-21 and accompanying text *supra*.

100. *See, e.g.*, IND. CODE § 18-7-5-1 (1971). In *Fail v. La Porte County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976), the court ruled that a finding of conflict under this statutory provision may be based wholly upon the fact that circumstances tend to weaken public confidence.

101. *See Crall v. City of Leominster*, 284 N.E.2d 610 (Mass. 1972) (acknowledging "substantially influenced" language of MASS. ANN. LAWS ch. 268A, § 21(a) (Michie/Law Co-op 1980), but withholding decision on basis of that provision).

102. *See Sherman v. Town of Brentwood*, 112 N.H. 122, 290 A.2d 47 (1972) (although member of zoning board of adjustment worked in county surplus food program, decision to grant variance for county hospital addition was not unfair). *See generally* Annot., 10 A.L.R.3d 694 (1966) (concerning disqualification for bias or interest of officers participating in zoning proceedings).

B. Conduct of Hearing

Courts may also invalidate municipal zoning decisions because of improperly conducted hearings. Washington courts have ruled that all interested parties at a public hearing for a rezone deserve fair consideration. Both *Smith v. Skagit County*¹⁰³ and *Chrobuck v. Snohomish County*¹⁰⁴ involved irregularities in the conduct of public hearings on rezones. In *Chrobuck*, although the planning commissioners' possible bias was the controlling factor, the court also considered the denial of cross-examination at the hearing as significant.¹⁰⁵ Similarly, in *Pizzola v. Planning and Zoning Commission*,¹⁰⁶ an invalidation resulted because the zoning commission considered traffic studies submitted by the applicant's expert in a closed executive session, denying opponents an opportunity to inspect the studies, cross-examine the expert, or present rebuttal.¹⁰⁷

Courts in other states have reached similar results. In *Pendley v. Lake Harbin Civic Association*,¹⁰⁸ the Georgia Supreme Court effectively ruled that a public hearing means an opportunity to be heard. The court upheld the granting of an injunction *pendente lite* in a suit to overturn a rezone.¹⁰⁹ While over one thousand people stood outside, the city held a public hearing on the rezone in a small room accommodating fifty people. The court observed that the rezone would be void if plaintiffs could prove at trial that the lack of suffi-

103. 75 Wash. 2d 715, 453 P.2d 832 (1969).

104. 78 Wash. 2d 858, 480 P.2d 489 (1971).

105. *Id.* at 870, 480 P.2d at 496. The court did not recognize a comprehensive right to cross-examine in zoning hearings; rather, under the facts the court found the proceeding was particularly adversary, as both sides employed counsel and experts, leading to the conclusion that denial of cross-examination undermined the appearance of fairness. *Id.*

106. 167 Conn. 202, 355 A.2d 21 (1974).

107. *Id.* at 207, 355 A.2d at 24-25. The court acknowledged that zoning proceedings do not follow strict evidentiary rules, but stated that due process requires the opportunity to cross-examine and rebut. *Id.* Cf. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974) (zoning board of adjustment or board of aldermen holding quasi-judicial hearing must retain essential elements of fair trial); *Wasicki v. Zoning Bd.*, 163 Conn. 166, 302 A.2d 276 (1972) (at executive session, zoning board allowed parties interested in passing of amendment to explain statements opposing homeowners made at public hearing, but board did not give homeowners chance to cross-examine or rebut). See generally 3 RATHKOPF, *supra* note 33, at § 37:85-93.

108. 230 Ga. 631, 198 S.E.2d 503 (1973).

109. *Id.* at 635, 198 S.E.2d at 507.

cient space deprived a party materially affected of the opportunity to be heard, provided that the party's views did not merely overlap those actually presented.¹¹⁰

A "Catch-22" public hearing led the Pennsylvania Supreme Court to reverse denial of a rezoning variance for a quarry in *Horn v. Township of Hilltown*.¹¹¹ The township's representative at the public hearing not only conducted it, but also ruled on evidence and objections, including his own. Though there was no factual showing of harm to the applicant, the court prohibited this procedure since it gave the proceedings an appearance of possible prejudice.¹¹²

C. *Time of Impropriety*

The appearance of entangling interests or bias developing prior to a zoning hearing may cause invalidation of a rezoning decision on appearance of fairness grounds.¹¹³ Less obvious is the willingness of some courts to invalidate actions where subsequent interests or biases emerge, usually on a "relation-back" theory.

In *Fleming v. City of Tacoma*,¹¹⁴ the city council's determination to enact a zoning change was made without question of impropriety. Within forty-eight hours of the decision, however, developers of the property at issue retained one of the councilmen as their attorney. The court assumed the arrangement predated the council vote; thus the entangling interests "related back" to impeach the official proceeding.¹¹⁵

110. *Id.* at 637, 198 S.E.2d at 507. *But see* *Miner v. Yonkers*, 19 Misc. 2d 321, 189 N.Y.S.2d 762 (Sup. Ct. 1959), *aff'd*, 9 App. Div. 2d 907, 195 N.Y.S.2d 242 (1959) (inadequately-sized hearing room, leading to overflow crowd, not ground for invalidating zoning action).

111. 461 Pa. 745, 337 A.2d 858 (1975).

112. *Id.* at —, 337 A.2d at 859-60. The language the court relied on was especially relevant: "Any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Cas.*, 393 U.S. 145, 150 (1968). *See generally* 1 ANDERSON, *supra* note 1, at § 4.16.

113. *See* notes 69-78 and accompanying text *supra*.

114. 81 Wash. 2d 292, 502 P.2d 327 (1972).

115. *Id.* at 300, 502 P.2d at 331-32. Although the councilman voted in favor of the change, his vote was not necessary for passage. Nevertheless, the court held that the appearance of unfairness rendered the amendment invalid. *Accord*, *Chicago, Milw., St. P. & P.R.R. Co. v. State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976) (decision of tribunal appointed by human rights commission to hear discrimination case was tainted by membership on tribunal of person whose applica-

D. *Is the Violation Curable?*

There is a fair degree of unanimity among the cases that an appearance of unfairness by one board member infects the entire board's decision, and that merely disregarding the apparently unfair vote will not cure the defect. The courts vary, however, on whether a municipality may cure an appearance of fairness violation by holding a subsequent fair hearing before another board or council.

In *Buell v. City of Bremerton*,¹¹⁶ the Washington Supreme Court voided a rezone adopted by the city council because the chairman of the planning commission recommending the change stood to benefit from it. In invalidating the entire proceeding, the court rejected the argument that the commission would have made the same recommendation even without the chairman's vote. The recommendation of the commission could have impacted both the council and the public regardless of the actual situation.¹¹⁷ Two dissenting justices argued that independent review by the city council cured any apparent unfairness in the previous commission proceedings.¹¹⁸ The court subsequently followed *Buell* in both *Narrowsview Preservation Association v. City of Tacoma*¹¹⁹ and *SAVE v. City of Bothell*.¹²⁰ In each case, the court invalidated a rezoning decision made by a city council acting on a tainted recommendation of the planning commission.¹²¹

In other jurisdictions, courts have struck down rezone decisions on similar grounds. The Connecticut Supreme Court invalidated a rezone in *Daly v. Town Plan and Zoning Commission*,¹²² though a biased commissioner's vote was unnecessary for its passage. An improper vote by one member, the court said, invalidates the votes of all.¹²³

tion for employment with the commission was pending, and who was employed by commission within a month after tribunal reached a decision). *But see* *Bell v. City of Corvallis*, 25 Or. App. 821, 551 P.2d 125 (1976) (limiting examination of any apparent unfairness to acts done *during* decisionmaking process rather than after).

116. 80 Wash. 2d 518, 495 P.2d 1358 (1972).

117. *Id.* at 525, 495 P.2d at 1362-63.

118. *Id.* at 527-30, 495 P.2d at 1363-65.

119. 84 Wash. 2d 416, 526 P.2d 897 (1974).

120. 89 Wash. 2d 862, 576 P.2d 401 (1978).

121. Neither decision overtly addresses the issue of whether independent review may negate the effects of tainted proceedings.

122. 150 Conn. 495, 191 A.2d 250 (1963).

123. *Id.* at 500, 191 A.2d at 252. The court, however, did not discuss the curative or noncurative effects of subsequent action. *See also* *Mills v. Town Plan and Zoning*

New Jersey courts have been similarly strict in nullifying entire proceedings upon a fairness violation, rather than looking for curative circumstances. In *Hochberg v. Borough of Freehold*,¹²⁴ the New Jersey court held the self-interest of one planning board member sufficient to infect the entire board's vote on a rezone. Finding that later approval by the borough council did not cure the defect in the earlier proceedings, the court declared the ordinance at issue void.¹²⁵ Similarly, in *Aldom v. Borough of Roseland*,¹²⁶ a borough council member who had long worked for the company requesting the rezone refused to disqualify himself, voting in favor of the change. That his vote was unnecessary for passage would not cure the defect; the taint affected all the members.¹²⁷

Since *Aldom*, New Jersey courts have expanded their impartiality requirement to encompass situations where a councilman initially votes to consider a change which would benefit him in a non-pecuniary way but abstains from the final council vote approving the measure. In *Neluch v. Mayor and Council of Borough of West Paterson*,¹²⁸ the court held that such a tainted vote, even for initial consideration of the ordinance, infected its actual passage and rendered the rezone void.¹²⁹ Thus, as in Washington, New Jersey courts recognize that some form of an appearance of unfairness will incurably taint zoning decisions.

It is evident, then, that the appearance of fairness doctrine can have dramatic effects in certain states. A single episode of questionable conduct at an initial hearing may void all later proceedings. Yet this is not the invariable result. Though a number of state courts have refused to hold that a later de novo hearing can cure prior appearance of fairness defects, some cases hold that procedural due process defects may be cured by later hearings¹³⁰ or other means.¹³¹

Comm'n, 144 Conn. 493, 134 A.2d 250 (1957) (holding commission action invalidated by member acting as strawman for purchase of property near rezone site).

124. 40 N.J. Super. 276, 123 A.2d 46 (App. Div. 1956).

125. *Id.* at 283, 123 A.2d at 49. *Hochberg* was cited favorably in *Buell v. City of Bremerton*, 80 Wash. 2d 518, 495 P.2d 1358 (1972). See notes 26-30 and accompanying text *supra*.

126. 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956).

127. *Id.* at 507-08, 127 A.2d at 197.

128. 130 N.J. Super. 104, 325 A.2d 517 (Law Div. 1974).

129. *Id.* at 109, 325 A.2d at 519-20. The court proceeded on a causation theory; that is, if not for the introduction, the ordinance could not have passed.

130. See *Nees v. SEC*, 414 F.2d 211 (9th Cir. 1969) (reopening earlier proceeding,

IV. THE JUDICIAL ROLE ON REVIEW

A. *Review Only on the Record or Accept New Evidence Concerning Improprieties?*

Often a potential bias or interest will be unknown to parties in a land use decision until after an unfavorable outcome has triggered a lawsuit. The question then arises whether a reviewing court should consider other evidence not in the record. There is no single answer. Some jurisdictions, including Washington, admit evidence outside the record where the appearance of fairness is at issue; otherwise, a litigant could not prove the violation.¹³² A trial court may receive evidence of alleged unfairness to supplement the record in a certiorari proceeding.¹³³ Washington courts permit the use of interrogatories to uncover apparent unfairness, but are sensitive to their misuse for "fishing expeditions."¹³⁴ The courts will, however, draw some limits on supplementing the record. If a litigant knows of an appearance of fairness violation during the administrative hearing, he must raise a timely objection, or he will have waived the opportunity to

rather than retrying case, was sufficient to satisfy due process where securities salesman who did not appear at first proceeding had opportunity to review earlier testimony and cross-examine previous witnesses); *Gerend v. Railroad Retirement Bd.*, 248 F.2d 357 (9th Cir. 1957) (no unfair hearing where board kept petitioner informed of proceedings and allowed him to submit any evidence and arguments); *Bistrick v. University of S.C.*, 324 F. Supp. 942 (D. S.C. 1971) (student afforded due process when given opportunity to cross-examine witnesses, examine written statements, and present evidence at de novo hearing following finding of guilty by special university committee); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968) (full de novo evidentiary hearing in front of board of education afforded students due process after college had attempted to expel them).

131. *See Jarrott v. Scrivener*, 225 F. Supp. 827 (D. D.C. 1964) (where there is a question as to integrity of zoning board's decision, court may go outside board's record and receive independent evidence); *Lage v. Zoning Bd. of Appeals*, 148 Conn. 597, 172 A.2d 911 (1961) (admitting evidence of witness who had not previously testified to establish aggravement at prior hearing); *Fail v. La Potre County Bd. of Zoning Appeals*, 355 N.E.2d 455 (Ind. Ct. App. 1976) (external evidence is admissible to support or challenge findings of county zoning board's decision). *But see Abrahamson v. Wendell*, 72 Mich. App. 80, 249 N.W.2d 302 (1976) (holding trial court restricted to a de novo review on the record and precluded from going outside it).

132. *See, e.g., City of Bellevue v. King County Boundary Rev. Bd.*, 90 Wash. 2d 856, 586 P.2d 470 (1978).

133. *Id.* at 861, 586 P.2d at 475.

134. *Id.*

supplement the record by raising it later.¹³⁵

B. Remedies

The typical remedy for an appearance of fairness violation is invalidation of the challenged zoning decision.¹³⁶ Additionally, some courts, after detailing proper procedures and indicating which board members should be disqualified,¹³⁷ will remand the matter to the offending decisionmaking body for reconsideration.¹³⁸ In light of these remedies, plaintiffs seeking to halt development find the appearance of fairness doctrine particularly attractive.

Courts may fashion more drastic remedies. In *Jarrott v. Scrivener*,¹³⁹ after finding a local board of zoning adjustment subject to potentially improper influence, the court ordered creation of an entirely new board to rehear the matter.¹⁴⁰ Another remedy is disregard of the tainted vote. The Supreme Court of Delaware adopted this remedy in *Acierno v. Folsom*,¹⁴¹ overturning a planning department's disapproval of subdivision plans. The court discounted the vote of a city councilman who was also a planning board member with an outspoken and hostile antagonism against the subdivision plans. Despite this willingness of courts to fashion special remedies under favorable circumstances, remand to the decisionmaker is the common approach.

V. FUTURE OF THE DOCTRINE

A. Potential for Growth

As judges and attorneys recognize that rezoning and other land use decisions take place in adjudicatory settings, procedural safeguards such as the appearance of fairness doctrine may emerge in other jurisdictions. A number of state courts, including many which apply the "legislative" label to rezoning, have already held that zoning

135. *E.g.*, *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wash. 2d 416, 526 P.2d 897 (1974).

136. *See, e.g.*, *Josephson v. Planning Bd.*, 151 Conn. 489, 199 A.2d 690 (1964).

137. *See* notes 128-29 and accompanying text *infra*.

138. *E.g.*, *Deal Garden, Inc. v. Board of Trustees*, 48 N.J. 492, 226 A.2d 607 (1967); *Hallenborg v. Town Clerk*, 360 Mass. 513, 215 N.E.2d 525 (1971).

139. 225 F. Supp. 827 (D. D.C. 1964).

140. *Id.* at 836.

141. 337 A.2d 309 (Del. 1975).

amendments are not legislative acts subject to initiative or referendum.¹⁴² Many of these states have either implicitly or explicitly acknowledged the quasi-judicial nature of rezoning procedures.¹⁴³ Other states, while viewing variances as quasi-judicial, still consider zoning amendments as legislative. These states can easily recognize the underlying similarity of the two processes and therefore may begin to apply stricter procedural standards to rezoning decisions.

Conflict of interest statutes provide another basis for development of the doctrine. As courts view an increasing number of situations as potentially detrimental to fair, disinterested decisionmaking, the pressure for closer judicial scrutiny of casual zoning proceedings will increase.¹⁴⁴ An example is the recent California decision regarding campaign contributions by an applicant for subdivision approval and the influence of such contributions on the decisionmakers' impartiality.¹⁴⁵

B. *Potential Limitations*

Washington courts have limited the application of the appearance of fairness doctrine to administrative or quasi-judicial actions. Although there have been suggestions of extending its application, the doctrine does not apply to the procedure for issuing building permits¹⁴⁶ or to administrative actions in connection with eminent do-

142. *Id.* at 316.

143. *See, e.g.,* Andover Dev. Corp. v. City of New Smyrna Beach, 328 So. 2d 231 (Fla. Ct. App. 1976) (zoning ordinances enacted through initiative and referendum do not have the effect of accomplishing a rezoning); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974) (amendments to zoning ordinances changing the zoning of particular property are not subject to referendum vote); Forman v. Eagle Thrifty Drugs and Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973) (once zoning has been determined, changing the classification of an area is not subject to referendum); Leonard v. City of Bothell, 87 Wash. 2d 847, 557 P.2d 1306 (1976) (ordinances are not legislative policy decisions and thus are not subject to referendum elections). *But see* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (upholding city ordinance requiring referendum for rezones). *See generally* Note, *The Proper Use of Referendum in Rezoning*, 29 STAN. L. REV. 819 (1977).

144. *See* note 47 *supra*.

145. *See* Peterson and McCarthy, *Small-Tract Rezoning: Toward Expanded Procedural Safeguards*, 31 LAND USE L. AND ZONING DIG. No. 4 (April 1979), at 3.

146. *Woodlawn Hills Residents v. City Council*, 90 Cal. App. 3d 678, 694-95, 153 Cal. Rptr. 651, 659 (1979), *rev'd*, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980). Although the California Court of Appeals expressly adopted the appearance of fairness doctrine, the state supreme court reversed the decision as to political contributions on first

main proceedings.¹⁴⁷ Additionally, there are procedural limitations within the doctrine itself. A party to a quasi-judicial proceeding waives an appearance of fairness claim if he or she knows at the time of the hearing that an apparent entangling interest, bias or other irregularity exists, but fails to request disqualification of the affected board member.¹⁴⁸

Other states considering the appearance of fairness doctrine may embrace it less fervently than Washington. Some may demand a higher threshold of forbidden contacts or possible unfairness before invalidating a proceeding. Still, courts in these states have become more conscious of the necessity for an appearance of fairness in quasi-judicial proceedings. Thus, other states may well impose similar limitations.¹⁴⁹

VI. CONCLUSION

In Washington, as in other states employing concepts analogous to the appearance of fairness doctrine, attorneys now approach land use matters differently from the free and easy days of the old zoning board. Courts no longer tolerate private lobbying by city council members in order to influence a rezone. In addition, they will no longer overlook irregularities at the planning commission level simply because the city council makes the final decision. Protection for the interested party and the public increases by preserving the integrity of the entire process.¹⁵⁰

amendment grounds. In doing so, however, the court neither accepted nor rejected the appearance of fairness doctrine generally.

147. *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

148. *City of Seattle v. Loutsis Investment Co., Inc.*, 16 Wash. App. 158, 554 P.2d 379 (1976).

149. *Hill v. Department of Labor and Indus.*, 90 Wash. 2d 276, 580 P.2d 636 (1978) (claimant's council was aware of board member's conflicting interests but failed to assert a claim, resulting in a waiver of the claimant's right to raise the issue subsequently). See *City of Bellevue v. King County Boundary Rev. Bd.*, 90 Wash. 2d 856, 586 P.2d 470 (1978) (litigants may not raise a claim of conflict of interest without having raised the issue earlier if they had information forming the basis of their bias challenge).

150. Another possible inroad on the appearance of fairness doctrine is the common law rule of necessity. This rule provides that one exercising judicial or quasi-judicial functions must act in a proceeding where his jurisdiction is exclusive and where, if disqualified, there is no legal provision for calling in a substitute. In that case, a refusal to act would absolutely prevent a determination of the proceeding. Annot., 39 A.L.R. 1476 (1925); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.04

The appearance of fairness doctrine can be a wide-ranging weapon which interested persons can effectively use to invalidate rezoning proceedings. Developers, landowners, and municipal bodies must all be careful to comply with its dictates or risk costly delays and reversals. Nevertheless, predicting the doctrine's application in any given factual situation is difficult. The vague standards of what may or may not "appear" fair can frustrate predictions of which actions, attitudes, or interests may be in violation of it. There is thus a high potential for mistakes, oversights, and inadvertent improprieties.

Local planning commissioners, city council members, and community residents often have little grasp of the doctrine's ramifications. Thus, the conscientious attorney must ensure that his client, the city attorney, and the municipal decisionmakers understand it. An inadequate explanation early on might result in the ultimate overturning of a favorable land use decision because of a procedural appearance of unfairness.

(1958). If more than a majority of a board is vulnerable on appearance of fairness grounds, this rule may be applied to validate otherwise questionable zoning actions. *See, e.g.,* *Gonsalves v. City of Dairy Valley*, 265 Cal. App. 2d 400, 71 Cal. Rptr. 255 (1968) (upholding a city council's grant of a use permit by invoking the rule of necessity where a majority of the councilmen owned a total of 4.1% of the outstanding stock of the dairy cooperative seeking the permit).

For other quasi-judicial, but non-zoning, applications of the rule of necessity, see *Yamada v. Natural Disaster Claims Comm'n*, 54 Hawaii 621, 513 P.2d 1001, *reaff'd*, 55 Hawaii 126, 516 P.2d 336 (1973) (upholding proceedings before defendant commission); *Borough of Fanwood v. Rocco*, 33 N.J. 404, 165 A.2d 183 (1960) (upholding city council denial of liquor license transfer); *First Am. Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D. 1974), *cert. denied*, 419 U.S. 1026 (1974) (upholding banking board adjudication declaring bank insolvent).