LAND USE & DEVELOPMENT—The Basis for Regulation

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• History of Zoning

- In the early 1900’s communities began, pursuant to statute, to create zoning regulations to control the use of land. The first Washington zoning laws were passed in 1935. See Remington Revised Statute § 9322-5.
An early Washington Supreme Court case discussed the exercise of the Constitutional grant of policy power to regulate land as follows:

*It is well established that every person has the right to use his property in his own way and for his purposes, subject only to the restraints necessary to secure that common welfare. In the case of State Bank & Trust Co. v Village of Wilmette 358 Ill. 311, at page 316, 193 N.E. 131, at page 133, 96 A.L.R. 1327, the court said: ‘The privilege of every citizen to use his property according to his own will is both a liberty and a property right. Liberty includes not only freedom from servitude and restraint, but also the right of every man to be free in the use of his powers and facilities to pursue such occupation or business as he many chose and to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare.’* (Emphasis added)

*Hauser v. Arness, 44 Wn.2d 358 (1954)*
An earlier U.S. Supreme Court case also established the same basic principles:

- *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), wherein the Court discussed the fact that while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract in response to new conditions.
Constitutional Authority (Police Power)

“Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” Wa. Const. art. XI, § 11.
Constitutional Restrictions:

- Takings:

  “Nor shall private property be taken for public use, without just compensation.” *U.S. Const. 5th Amendment*; and

  “No private property shall be taken or denied for public or private use without just compensation having been first made, or paid into court for the owner . . .” *Wa. Const. art. I, § 16.*
Freedom of Religion:

“Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual . . . but . . . shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state.” Wa. Const. art. I, § 11.

- Found to be constitutional:
  - Requiring a church to apply for a conditional use permit.
  - Denying a permit for an administrative office in an agricultural zone.

- Found to be unconstitutional:
  - Landmark designation reducing value of property by half.
  - Historical preservation ordinance which could result in a 14-month delay in the demolition of a church building.
  - Enforcement of zoning and building code without balancing government intent with churches right to free exercise of religion.
  - Where moratorium preventing the creation of a tent city on church property was found unconstitutional.
• Federal Regulations

• Religious Land Use and Institutionalized Persons ACT (RLUIPA), 42 U.S.C.A § 2000cc provides:

  ▫ No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest. [Emphasis added]

  ▫ See International Church of the Fourscore Gospel v. City of San Leandro, 673 F.3d 1059 (2011)—City’s decision to deny local church’s application for rezone and conditional use permit to allow church in an industrial zone created a substantial burden under RLUIPA and City’s cited need to maintain industrial property was found to not be in furtherance of a compelling governmental interest.

Gift of Public Funds

- Prohibition of a City or a County from giving “any money, or property, or [loaning] its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm . . .” *Wa. Const. art. VIII, § 7.*

- Relocation of a building from a floodplain onto city property was found to not be an unconstitutional gift of public property. *Citizens Protecting Resources v. Yakima County, 152 Wn. App. 914 (2009).*
Equal Protection

- U.S. Const. 14th Amend. – “No State shall . . . deny to any person within its jurisdiction the equal protection of laws.”

- Wa. Const. art. I, § 12 – “No law shall be passed granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

- In regards to zoning the Court has said “The first step in equal protection analysis is to determine the standard of review . . . Generally, the rational basis or minimal scrutiny test applies to zoning, planning, and building regulations.”

  Thurston County Rental Owners Ass’n v Thuston County, 85 Wn. App. 171 (1997)
Due Process – Procedural and Substantive

- U.S. Const. 14th Amend. – “... nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”

- Wa. Const. art. I, § 3 – “No person shall be deprived of life, liberty, or property, without due process of law.”

- Procedural Due Process deals with timing and manner of hearings while substantive due process deals generally with whether powers in excess of authorized police powers were used.
• Procedural due process means at least a meaningful opportunity to be heard in a meaningful time.

  *Mathews v Eldrige, 424 U.S. 319 (1979)*

• Substantive Due Process considers whether there is a legitimate public purpose behind the legislation, whether the legislation uses reasonable means necessary to achieve the state purposes, and whether the legislation is “unduly burdensome on the property-owner.

  *Presbytery of Seattle v. King County, 114 Wn.2d 320 (1990)*
Specific Statutory Authority and Restrictions Governing the Regulation of Land:

**CONSTRUCTION**

- Chapter 18.08 RCW – Regulation of architects, See also Chapter 308-12, 13 WAC.
- Chapter 18.27 RCW – Regulation of contractors.
- Chapter 18.43 RCW – Regulation of engineers and land surveyors. See also chapter 196-23 WAC
- Chapter 19.27 RCW – Building codes. See also chapters 51-04, -16, -50, -51, -52, -54, -56, and -57 WAC.
- Chapter 19.27A RCW – Energy related building standards. See also Chapter 51-11 WAC.
ZONING

- **RCW 35.22.280(7)** – First class cities’ authority to establish, alter, improve or regulate the use of land.

- **RCW 35.63.080** – Authorizes development of codes to regulate and restrict location and use of buildings, etc. However, cities may not discriminate against:
  
  - Manufactured homes on single family lots, older manufactured homes in manufactured home parks, or recreational vehicles in manufactured home parks. RCW 35.21.684, RCW 35A.21.312 and RCW 36.01.225.
  
  - Daycare. RCW 35.21.688, RCW 35.63.185, 35A.63.215 and RCW 36.70A.450; family day care provider is defined in RCW 43.215.010.
  
  - Group homes. RCW 35A.63.220, 240. RCW 36.70A.410, and RCW 43.185B.005(2)(e) – which adopted the Washington Housing Policy Act (WHPA). See also Title 42 USC §§ 3602 (k), children with familial status, 3602 (h) persons with handicaps, 3604, prohibitions; RCW 70.128.140 (2), adult family home considered a residential use; RCW 36.70A.200, as an essential public facility.
  
  - Accessory apartments in single family zones. RCWs 35.63.210, 35A.63.230, 36.70A.400, 43.63A.215. See also the Fair Housing Act, 42 U.S.C. Section 3602.
  
  - Temporary Encampments for the homeless, RCWs 35.21.915, 35A.21.360, 36.01.290.
  
  - Communication Act, 47 USCA Section 332.
- RCW 35.63.090 – Sets forth the purpose of restrictions and regulations described in RCW 35.63.080.
- RCW 35.63.110 – Authorizes the council or board to divide a municipality or any portion thereof into districts.
- RCW 35A.63.100 – Confirms the same authority for code cities.
- RCW 36.70.010 *et seq.* – Provides similar authority to counties.
- RCW 36.70.547 – Requires [formal consultation] with aviation interest when plans or conditions include siting development adjacent to airports. See also RCW 35.63.250.
GROWTH MANAGEMENT ACT

- Chapter 36.70A RCW – The Growth Management Act requires coordinated and planned growth through prescribed comprehensive plans and consistent development regulations. See also chapters 365-190 and 365-195 WAC.

- Chapter 36.70B RCW – Provides specific direction for project review.

- Chapter 36.70C RCW – Establishes procedures for judicial review of land use decisions.
Chapter 43.21C RCW - Allows the denial of a project where significant adverse impacts cannot be mitigated; provides authority for mitigation of identified adverse environmental impact.
SCENIC VISTAS

- RCW 46.80.130(2) – Requires that vehicle wrecking yards be screened.

- RCW 47.42.030 – Limits property owners’ ability to erect signs in view of certain areas of the public highway system.

- RCW 47.42.040 – Classifies types of signs.
LIMITED ACCESS FACILITIES

- Chapter 47.52 RCW – Limited Access Facilities Authority - sets forth circumstances where compensation is or is not required. See also RCW 47.50.041 and RCW 47.52.080.
SUBDIVISIONS

- RCW 58.17.020(1), (6) - Definition of subdivision, short subdivision
- RCW 58.17.030, 060 – Authorizes short subdivisions.
- RCW 58.17.033 – Defines vested rights.
- RCW 58.17.035 – Authorizes binding site plans.
- RCW 58.17.040 - Exemptions
- RCW 58.17.110 – Authority to impose conditions.
- RCW 58.17.140 – Deadlines
- RCW 58.17.170 and 58.17.150(1), (3) – Divesting
- RCW 58.17.210 - Prohibitions
- Chapter 59.20 RCW – Manufactured Home Landlord Act.
- Chapter 64.32 RCW – Horizontal Properties Regimes Act (Condominiums).
- Chapter 64.34 RCW – Condominium Act.
Chapter 64.40 RCW – Authorizes damage for placing conditions upon the use of real property in excess of those allowed by applicable regulations or failing to act within time limits established by law in response to a property owner’s application for a permit.
TAXES

RCW 82.02.020

- Any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land is prohibited, except:

  - Dedications of land or easements within the proposed development or plat which are reasonably necessary as a direct result of the proposed development; and

  - This section allows voluntary agreements that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development; but the mitigation must be reasonably necessary as a direct result of the proposed development or plat. [Emphasis added]

- Reasonable fees to cover the cost of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW is permitted.
IMPACT FEES

- **RCW 82.02.050-090**

  Allows impact fees by local ordinances if established pursuant to the conditions set forth therein. [Can be used for public streets and roads; public parks; open spaces; recreational facilities; school functions; and fire protection facilities, if not part of a fire district.]
FLOOD MANAGEMENT

- Chapter 86.16 RCW

  - Establishes the D.O.E. as the administrator of the National Flood Insurance Program; provides authority for local flood plain ordinances; and prohibits construction within a floodway.

  - Requires adoption of a local Floodplain Management Ordinance.
Chapter 90.58 RCW regulates development and planning, which impacts the shorelines of the State of Washington. See WAC 173-26-080, master programs required, WAC 173-26-090 – 160, approval and amendment process. 

RCW 90.58.020 – “Interest of all of the people shall be paramount . . .” Establishes preference to uses in the following order:

- Recognize and protect the structural interest over local interest.
- Preserve the natural character of the shoreline.
- Result in long term over short term benefit.
- Protect the resources and ecology of the shoreline.
- Increase recreational opportunities for the public in the shorelines.
- Provide for any other element as defined in RCW 90.58.100.
The Open Public Meetings Act

The Open Public Meetings Act (the “OPMA”) is set forth in chapter 42.30 RCW. It provides that “[a]ll meetings of the governing body of a public agency shall be open and public and persons shall be permitted to attend any meeting of the governing body of a public agency . . .” RCW 42.30.030.

RCW 42.30.020 defines Meetings, Public agency, Action and Governing Body as they pertain to the OPMA.
A. The following actions were found to not violate the OPMA or were not subject to the OPMA:

- Where quorum is gathered, no violation if no “action” takes place; no action when there is no official business of the agency transacted. *In re Recall of Estey*, 104 Wn. 2d 597 (1985); see also *In re Recall of Roberts*, 115 Wn. 2d 551 (1990).


- Telephone lobbying between commissioners would violate the OPMA; however in this case superior court found no telephone lobbying occurred and regardless of whether it occurred, such action would not invalidate subsequent final vote taken in proper public meeting. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn. 2d 869 (1996).

- The presence of a quorum of members of a city or county council found not to be subject to the OPMA where meeting called by a third party and no “action” was taken. AGO 2006 No. 6.
• Candid discussion between city council, legal counsel and city manager as to manager’s decision to join litigation regarding state initiative in executive session was proper; no vote was taken when councilmembers did not block city manager’s decision to join lawsuit, and manager had authority but wanted to discuss advantages and disadvantages with council members and legal counsel. *In re Recall of Lakewood City Council Members, 144 Wn. 2d 583, 587 (2001).*

• Meetings or gatherings between legislative members-elect that occur prior to being sworn in. *Wood v. Battleground School District, 107 Wn. App. 550, 561 (2001).*
• No “meeting” occurs where less than a majority of the governing body meets. *Wood.*

• “Mere use” or “passive receipt” of email is not violation, nor are email communications unrelated to the governing body’s business. *Wood.*

B. The following actions were found to violate the OPMA or be subject to the OPMA:

• Balloting to arrive at consensus candidate during executive session constituted “final action” prohibited during executive session; final action could occur without formal motion. *Miller v. City of Tacoma, 138 Wn. 2d 318 (1999).*

• Non-public meetings held by Adult Entertainment Task Force; task force was created as committee of Planning Advisory Board and took testimony and public comments, conducted hearings and acted on behalf of the Planning Advisory Board and the City Council (both the Board and Council were determined to be “governing bodies” of a “public agency”). *Clark v. City of Lakewood, 259 F. 3d 996 (9th Cir. 2001).*

• When a quorum of the city council takes action at a standing committee meeting.  2010 AGO No.9
• Email messages that include a quorum of the legislative body in which discussions or information is communicated that is intended to transact the governing body’s official business. *Wood*, (A meeting does not require the contemporaneous physical presence of the members).

• City council approval of settlement in executive session by “collective positive decision”. *Feature Realty, Inc. v. city of Spokane*, 331 F. 3d 1082 (9th Cir. 2003).

INTEREST IN CONTRACTS

- 42.23.030:
  - “No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer... or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein....”
C. ETHICS, CONFLICTS OF INTEREST AND CONFIDENTIALITY:

• RCW 42.23.070 provides general ethics and conflicts rules:

  (1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

  (2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer’s services as such an officer unless otherwise provided for by law.

  (3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his office position to disclose confidential information acquired by reason of his or her official position.
An officer violating the provisions of chapter 42.23 RCW is also subject to a penalty in the amount of $500 in addition to other liability or penalty that may be imposed by law and such violation may be grounds for forfeiture of office. See RCW 42.23.050.
APPEARANCE OF FAIRNESS

- **RCW 42.36.010** – Limited to quasi-judicial actions: Those actions which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.
- **RCW 42.36.060** – No ex-parte communications. Duty to disclose.
- Prohibits the appearance of prejudgment or bias. Would a person be reasonably justified in thinking that partiality may exist?
PUBLIC RECORDS ACT

A. WHAT IS A PUBLIC RECORD?

• A public record includes: “(1) any writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function (3) prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. *Tiberino v. Spokane County, 103 Wn. App. 680 (2000).* *(Breaking down three requirements)*; see RCW 42.56.010(2).

• With regard to the third test, courts have explained that a document will be “used” by an agency when information in the document is “either: (1) employed for; (2) applied to; or (3) made instrumental to a governmental end or purpose.” *Concerned Ratepayers Ass’n v. PUD No. 1 of Clark County, 138 Wn. 2d 950 (1999).*
B. EMAIL RECORDS.

Courts have found that personal emails, personal email addresses and information on personal hard drives can be public records subject to disclosure.

Below is a list of court cases that address email specifically:

1. Personal emails sent by employee while at work that gave rise to her dismissal were public records. See Tiberino;

2. Emails between city council-members sent and received from both city and private computers that contained any information regarding government conduct were public records. Mechling v. City of Monroe, 152 Wn. App. 830 (2009); and

3. Metadata from email was public record and City was given opportunity to search deputy mayor’s home computer hard drive for necessary information in order to provide record. O’Neill v. City of Shoreline, 170 Wn. 2d 138 (2010).
C. EXEMPTIONS.

There are numerous exemptions under the PRA. They include:

1. Documents where disclosure would invade a person’s right to privacy (RCW 42.56.050);

2. Personal information (RCW 42.56.230);

3. Certain investigative, law enforcement, and crime victims records (RCW 42.56.240);

4. Employment and licensing (RCW 42.56.250);

5. Employment and licensing (RCW 42.56.250);

4. Real Estate Appraisals RCW (42.56.260);

4. Attorney-client privileged information (RCW 42.56.510; RCW 5.60.060(2));

5. Attorney work-product (RCW 42.56.290); and

6. Preliminary drafts, notes and memoranda (RCW 42.56.280).