

*Everything You Always Wanted to Know about Planning Law
In Sixty Minutes*

*A Special Presentation to Jefferson County
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by

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I. Washington Planning Statutes – Chronological

Subdivision Codes (1857, 1937, 1969)
The Planning Enabling Act (1935)
The Appearance of Fairness Doctrine (1969, 1982)
The Open Public Meetings Act (1971)
The State Environmental Policy Act (1971)
The Shoreline Management Act (1971)
"64.40" (1982)
The Growth Management Act (1990)
The Regulatory Reform Act (1995)
The Land Use Petition Act (1995)

II. Planning and the Constitution

The basic rule in land use law is still that, absent more, an individual should be able to utilize his land as he sees fit. Norco Construction v. King County, 97 Wn.2d 680, 685 (1982)

A. Takings

- Thou shalt not take property without just compensation.
- Regulatory takings – \$\$\$ if regulations deprive all use.
- Exactions – nexus and proportionality.
- Reasonable use exceptions.

B. Substantive and Procedural Due Process

- Reasonable, reasonable, reasonable
- Void for vagueness

- C. Equal Protection
 - Protected Classes.
- D. Freedom of Expression/Religion
 - Churches and strip clubs.

III. The Open Public Meetings Act, Chapter 42.30 RCW.

A. Purpose (RCW 42.30.010)

“The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

B. Open Meetings Required:

1. RCW 42.30.030: "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter."
2. Definitions (RCW 42.30.020)
 - a. Meeting - includes any gathering of the governing body at which action is taken.
 - b. Action - Action means the transaction of the official business of the governing body, including, but not limited to, receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations and formal actions.
 - c. Governing Body means the multi-member board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing

body, conducts hearings, or takes testimony or public comment. This definition covers city councils, planning commissions, library boards, and park boards.

C. Executive Sessions (RCW 42.30.110). Relevant municipal examples:

1. Selection of a site or acquisition of real estate by lease or purchase when public knowledge could cause likelihood of increased price.
2. To consider the minimum price at which real estate will be offered for sale or lease when public knowledge would cause a likelihood of decreased price. Final action of selling must be taken in an open meeting.
3. Review of negotiations of publicly bid contracts when public knowledge of such negotiations would cause a likelihood of increased costs.
4. To receive and evaluate complaints or charges brought against a public officer or employee. Note: The public officer or employee can also demand that the matter be held in an open meeting.
5. To evaluate the qualifications of an applicant for public employment. The final action of hiring, setting the salary or discharging or disciplining will be at an open meeting.
6. To evaluate the qualifications of a candidate for appointment to elective office, although the final action of appointment must take place in an open meeting.
7. To discuss with legal counsel representing the agency the matters relating to agency enforcement actions or to discuss with legal counsel litigation to which the agency, the governing body or member acting in an official capacity is or is likely to become a party when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

NOTE: Before convening in an executive session, the presiding officer of the governing body shall publicly announce the purpose for excluding the public from the meeting place and the time when the executive session will be concluded. The executive session may be extended to a stated later time by an announcement of the presiding officer. RCW 42.30. 1 10. See also RCW 42.30.140 for matters the Act does not apply to.

D. Expulsion of Meeting Participants.

May expel disruptive persons and may relocate the meeting, but may not exclude "non-offending members of the media." (RCW 42.30.050)

E. Basic Requirements for Meetings.

1. Date, time and place of regular meetings to be established by ordinance, resolution. (RCW 42.30.070).
2. Special meetings - may be called by presiding officer or majority of members on 24 hours written notice to each council member. Must notify media with requests for notice on file. Notice must state time, place and business to be transacted. Cannot take final action on any item not on agenda. (RCW 42.30.080)
3. Adjourned/continued meetings - written notice required, including posting at door. (RCW 42.30.090 and .100). Less than a quorum may adjourn. Process also typically used for cancellation of meetings.

F. Penalties.

1. Under RCW 42.30.060(1) and (2) no ordinances, resolutions, rules, etc. shall be adopted except in a meeting open to the public. Any action taken at meetings failing to comply with this provision shall be null and void. No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void.
2. Civil fine for violations in an amount of \$100. Person bringing enforcement suit may be entitled to attorney's fees if prevails. RCW 42.30.120. However, if the court finds the suit was frivolous, it may award attorney's fees to the city or county.

G. Exemptions.

The Act does not apply to:

1. The proceedings concerned with the formal issuance of an order granting, suspending, revoking or denying any license, permit or certificate to engage in any business, occupation or profession or to any disciplinary proceedings involving a member of such business, occupation or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or
2. That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or
3. Matters governed by Chapter 34.05 RCW, the Administrative Procedure Act; or
4. Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or that portion of a meeting during which the

governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress. (RCW 42.30.130)

IV. Appearance of Fairness Doctrine.

A. Origins

The Appearance of Fairness doctrine is a judicially based doctrine loosely based upon procedural due process. It was first formulated by the state supreme court in 1969 in Smith v. Skagit County, 75 Wn.2d 715, 739, 453 P.2d 832 (1969). Smith involved a controversial rezone to enable the construction of an aluminum reduction plant on 470 waterfront acres of Guimes Island. After years of study and public hearings, the area has been initially zoned residential. After taking testimony from the public on the rezone, the planning commission held a closed meeting exclusively with some project proponents. The proponents met with the planning commission members for more than an hour, whereupon the commission recommended that the Skagit County Board of Commissioners approve the rezone without taking any further public comment. The Board of Commissioners then summarily approved the rezone, also without taking public comment.

At the time of the rezone hearing, there was no law, including the Open Public Meetings Act, that placed any restrictions on closed door meetings, ex parte contacts, or other matters related to the appearance of fair decision making. Apparently (although not that clearly) basing its authority on procedural due process, the Court made the first enunciation of the Appearance of Fairness doctrine as follows:

It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.

Smith v. Skagit County, 75 Wn.2d 715, 739, 453 P.2d 832 (1969).

This generalization was later clarified, a little, in 1976 as follows:

Would a disinterested person, apprised of the totality of a member's personal interest or involvement be reasonably justified in thinking that the involvement might affect the member's judgment?

(Emphasis added.) Swift v. Island County, 87 Wn.2d 348, 361, 552 P.2d 175 (1976).

B. Limited to Quasi-Judicial Actions.

Case law and chapter 42.36 RCW both limit the appearance of fairness doctrine to quasi-judicial actions. Quasi-judicial actions are specified in RCW 42.36.010 as being "...those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment,

or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding."

Quasi-judicial actions do not include the legislative actions adopting, amending or revising comprehensive, community or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance. RCW 42.36.010.

In other words, just about any development permit application involving a public hearing is subject to the appearance of fairness doctrine. The exception for comprehensive plan amendments is sometimes difficult to reconcile and for the public to understand. If a city or county process a site-specific rezone along with a site-specific comprehensive plan amendment, the rezone is considered to be quasi-judicial and the comprehensive plan amendment is not. This leads to some interesting and often times confusing problems in public testimony. Another problem in differentiating between quasi-judicial and legislative actions is finding the dividing point between "site-specific" and "area-wide" rezones. Surprisingly, there is no case law that clarifies this distinction, although the issue arises fairly often at the local government level. It is usually simply prudent to take the conservative approach and treat every permit application as quasi-judicial if there is any ambiguity, since there is rarely a legal down side for doing so.

C. Ex Parte Contacts.

RCW 42.36.060 prohibits ex parte contacts during the pendency of a quasi-judicial hearing with opponents or proponents unless the substance of the communication is placed on the record and the public has the opportunity to rebut the substance. This is probably the most disliked Appearance of Fairness requirement, at least from the perspective of local constituencies and their elected representatives. Local citizens find it difficult to understand why they are not allowed to consult with their elected representatives on controversial development permit applications.

As discussed above, RCW 42.36.060 essentially allows for the "correction" of ex parte violations by full disclosure, but it is not recommended that elected officials engage in a practice of ex parte contacts in reliance on subsequent disclosure. Ex parte contacts are dangerous because an official could forget to disclose the substance of a contact or could express an opinion in the contact that would constitute prejudgment bias. Prejudgment bias cannot be corrected by disclosure.

D. Waiver

RCW 42.36.080 requires that an individual raise an objection as soon as the individual is made aware of a potential violation.

The waiver requirement of RCW 42.36.080 has served as a powerful tool for cities and counties to avoid Appearance of Fairness challenges. RCW 36.70C.060 requires petitioners under the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW, to exhaust their administrative remedies prior to filing a LUPA action. The state supreme court has interpreted this exhaustion

requirement as requiring participation in the public hearing process. Citizens for Mount Vernon v. Mount Vernon, 133 Wn.2d 861, 868-70 (1997). Consequently, cities and counties will typically commence a public hearing by disclosing any possible Appearance of Fairness violation. If no one objects, the city or county is most likely immunized from any disclosed Appearance challenge. Those not in attendance will have no standing to challenge the land use decision¹, and those in attendance will have waived their right to later contest the asserted Appearance violation.

E. Doctrine of Necessity

If disqualification results in the loss of a quorum, the entire decision making body may participate, so long as each potential violation is disclosed.

F. Regular Business Exception. (RCW 42.36.020)

RCW 42.36.020 provides that no member of a local decision-making body may be disqualified by the appearance of fairness doctrine for conducting the business of his or her office with any constituent on any matter other than a quasi-judicial action then pending before the local legislative body.

H. Campaign Statements and Contributions (42.36.040 and 42.36.050)

RCW 42.36.040 provides that prior to declaring as a candidate for public office or while campaigning, no public discussion or opinion by a person subsequently elected to public office on any pending or proposed quasi-judicial actions shall be a violation of the appearance of fairness doctrine. RCW 42.36.050 provides that acceptance of campaign contributions doesn't violate the appearance of fairness doctrine.

These exceptions, as with all other Appearance exceptions, should be treated with caution. The Appearance of Fairness doctrine, as its name expresses, applies to appearances of unfair hearings. Hearings are also subject to an actual fairness requirement, arising from constitutional due process requirements. See State ex. rel. Beam v. Fulwiler, 76 Wn.2d 313, 316 (1969). Consequently, campaign statements evidencing a bias impermeable to contrary evidence could still lead to the invalidation of a land use decision as a violation of procedural due process requirements.

I. Applications

As previously mentioned, the vagaries of the Appearance of Fairness doctrine has resulted in extensive litigation. The cases below serve as some examples.

1. **Prejudgment**

¹ One potential exception may be someone who has submitted written testimony but failed to attend the hearing. This issue has not yet been addressed by any Washington appellate court.

Bjarnson v. Kitsap County, 78 Wn. App. 840 (1995) – Challenge to Kitsap County approval of rezone and planned unit development. One county commissioner allegedly assured project applicants before they purchased the project property that the project would be approved. The commissioner also detailed the contents of the decision on the project months before it was issued. Finally, the commissioner also promised a project opponent that he would delay the project for five years. To remove the taint of the commissioner's alleged violation of the appearance of fairness, the Kitsap County Board of Commissioners reheard the rezone and pud application without the participation of the offending commissioner. The appeals court found that the rehearing of the application corrected any of the alleged appearance of fairness violations caused by the nonparticipating commissioner.

Anderson v. Island County, 81 Wn.2d. 312 (1972) - Rezone held invalid because the chairman of the planning commission was the former owner of the applicant's company, expressed views in favor of the application prior to the conclusion of public testimony, and told an opposition member "that you are just wasting your time talking."

Chrobuck v. Snohomish County, 78 Wn.2d 858 (1971) - Prior to comprehensive plan amendment and rezone hearings, the chairman of planning commission and the chairman of board of county commissioners embarked in an all expenses paid trip to view the applicant's facilities in California. An attorney member of the planning commission assisted the applicant in the selection of local counsel. Another member of the planning commission signed an advertisement supporting the application and appeared as a witness on behalf of the applicant. A combination of circumstances and cumulative impact cast an "aura of improper influence, partiality and prejudice".

Trepanier v. Everett, 64 Wn. App. 380 (1992) - Challenge to the City of Everett zoning ordinance and SEPA DNS determination. Challenge was based upon the appearance of fairness of the City reviewing its own actions. The court held that absent a showing of bias, the Council's consideration of its own proposed code does not violate the doctrine.

Belcher v. Kitsap County, 60 Wn. App. 949 (1991) Challenge to County Commissioner for making motion to approve rezone of property in his district. Appellant found that over the past 3.5 years, one of the commissioners always made the motion for approval or denial of a land use project within his district. Court found no violation.

2. **Business Relationships**

Narrowview Association v. Tacoma, 84 Wn.2d 416 (1974) Planning Commission and Council adopted an ordinance rezoning an 89-acre tract. A

member of the Planning Commission was employed by the bank, which held a security interest on the property. The rezone more than doubled the value of the property. The Commission member was not an officer of the bank, not in a policy making decision, not involved in the loan account and not aware that his employer held the mortgage. Doctrine violated. Even though the bank employee would not personally benefit from the rezone decision, the court found an undeniable major benefit to his employer

Swift v. Island County, 87 Wn.2d 348 (1976) – Plat approval. Commissioner was chairman of the board and stockholder of a bank having an interest in the property. Doctrine violated even though the commissioner was no longer on the bank board when the final vote was taken.

Fleming v. Tacoma, 81 Wn.2d 292 (1972), overruled on other grounds, Raynes v. Leavenworth, 118 Wn.2d 237 (1992) - Less than 48 hours after final vote approving rezone, member of the City Council acting as attorney for applicant began incorporation process for the project. Doctrine violated.

3. **Social/marital relationships**

Fleck v. King County, 16 Wn. App. 668 (1977) - Husband and wife on same board - reasonable person would question whether the reaction of one spouse on an issue was fully independent of the action taken by the other. Appearance of Fairness violated.

King County Water District v. Review Board, 87 Wn.2d 536 (1976) - Mere acquaintance with, or casual business dealings in a minimal sense not violation.

4. **Membership of organizations**

Save v. Bothell, 89 Wn.2d 862 (1978) - Planning commission member was a director of an organization which voted to support proposed rezone. Doctrine violated.

5. **Personal Benefit/Detriment**

Buell v. Bremerton, 80 Wn.2d 518 (1972) - Rezone. Chairman of planning commission owned property within a few hundred feet and was indirectly benefited. Self-interest of one member infects the action of other members of the Commission, even though matter would have passed without the chairman's vote.

Byers v. Board of Clallam County Commissioners, 84 Wn.2d 796, (1974) - Interim zoning ordinance adopted by Board. Two members owned property in the commission districts where zoning was occurring. Too remote (10 - 15 miles from the zoned areas) and no indication of direct or indirect benefit.

6. Ex parte Contacts

Chrobuck v. Snohomish County, 78 Wn.2d 858 (1971) - All expense paid trip to view applicant's similar facilities violation.

West Main Associates v. Bellevue, 49 Wn. App. 513 (1987) Councilmember attended meeting of a community organization opposed to development two weeks prior to administrative decision. Matter was not pending before the legislative body at the time of the alleged contacts, therefore no violation.

OPAL v. Adams County, 128 Wn.2d 869 (1996) – Prior to the approval of a county permit for a regional landfill, records established that one of the County Commissioners had received 63 long distance phone calls from the permit applicant at his home. During this same period of time, the county commissioners were also adopting a solid waste management plan. At the hearing on the landfill permit application, the commissioner that had engaged in the long distance phone calls disclosed that he had engaged in a few phone conversations with people on the application. No one objected to the disclosure when it was made. The same Commissioner also had a couple of phone conversations with the applicant after he made his disclosure. The court found no appearance violation. The litigant failed to establish that subject matter of the 63 phone calls pertained to the landfill permit as opposed to the solid waste management plan, the latter not quasi-judicial and not subject to the appearance doctrine. Conversations made after disclosure didn't violate the appearance doctrine because the subject matter of the phone calls had been discussed during the hearing.

King County v. Central Puget Sound Growth Management Hearings Board, 91 Wn. App. 1 (1998). Organization opposed to King County approval of 812-lot subdivision filed a court action that in part sought to void the approval on alleged inadequate disclosure of ex parte contacts. The organization did object several times to the King County Council on alleged lack of full disclosure of ex parte contacts by the councilmembers. At one meeting, an organization representative agreed with a councilmember that the representative was not seeking recusal of councilmembers who allegedly failed to make full disclosure of the contacts. The appeals court found the representative's agreement to serve as a waiver of the ex parte appearance challenges.

J. Effect of violation.

A land use decision in violation of the Appearance of Fairness doctrine is subject to invalidation, if the violation is not harmless. See RCW 36.70C.130(1)(a); RCW 36.70C.140. The State Supreme Court has held that damages are not available for an Appearance violation. See Algier v. Mukilteo, 107 Wn.2d 541, 547, 730 P.2d 1333 (1987). However, the Court did not specifically address the applicability of RCW 64.40.020(a), which provides as follows:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

K. What to do if a violation exists?

1. Step down;
2. Do not participate and leave room; and
3. If discover part way through proceedings, go back and start over.

V. **Conduct of Hearings.**

- A. Must be fair in fact - notice and opportunity to be heard.
- B. Must appear fair.
- C. Procedures.

1. Must have ability to produce a verbatim transcript.

The requirement for a verbatim transcript for rezones has been ruled to arise in part from requirements that courts limit their review to the administrative record. See Capitol Neighborhood Assn. v. Olympia, 23 Wn. App. 260, 595 P.2d 58 (1979).

2. Assign a number or letter to each exhibit and refer to those numbers or letters thereafter.
3. Have each speaker identify himself/herself.
4. Have the Chairman recognize each speaker so you know who is speaking.
5. Be sure to have each speaker speak into the microphone.
6. Do not verbally step on each other; no side bar conversations; do not rattle papers by the microphone.
7. Be sure to have the Clerk or Secretary monitor that the machine is recording.
8. You may impose reasonable time limits.

9. You may encourage speakers not to be repetitive.
10. In imposing time limits, be aware of potential unfairness if multiple speakers request time on one side of the issue.

D. Suggested order of presentation.

1. Inquiry by Chairman if any committee members have any conflict of interest or appearance of fairness problems.
2. Challenges from the audience on the basis of appearance of fairness.
3. May ask legal counsel to review criteria.
4. Open hearing.
5. Staff presentation and Commission questions.
6. Applicant presentation and Commission questions.
7. Speakers who have signed up indicating a desire to speak.
8. Persons in the audience who have not signed up to speak, but desire to speak.
9. Applicant's response/rebuttal.
10. Staff's response/rebuttal.
11. Close hearing.

E. Deliberation.

1. Discussion - why supporting approval or disapproval.
2. Base reasons on criteria and ordinances or State law.
3. Point out how proposal does or does not meet criteria. Base reasons on written and oral record.
4. Motion to approve or disapprove should instruct the staff to prepare draft findings and conclusions in line with the discussion to be presented at the next regular meeting for final approval and passage by the Board.

VI. Decision

- A. Must be in writing.
- B. Must Address Review Criteria.
- C. Must be based on evidence deduced from the record.

VII. Regulatory Reform

A. Purpose.

Provide for efficient, nonduplicative processing of land use permits while providing a meaningful opportunity for public participation.

B. Applicability

- 1. Applies to "Project Permit Applications", defined by RCW 36.70B.020 as any land use or environmental permit or license required by local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, etc. Includes site-specific rezones but doesn't include comprehensive plan amendments or amendment of development regulations.
- 2. RCW 36.70B.140 permits local jurisdictions to exempt by ordinance or resolution certain types of project permit applications from specified regulatory reform requirements. The exemptions are generally authorized for permits in which the local jurisdiction has determined present special circumstances that warrant a different review process or permits that are exempt from environmental review. One significant regulatory reform provision that cannot be waived is the one open public hearing/one closed record appeal per permit requirement.

C. Review Process

- 1. Preapplication conference not required, but recommended.
- 2. Preapplication Decisions.
 - a. Consolidated or separate permit applications?

RCW 36.70B.120 provides the applicant the option of consolidated review, where all permits for one project are subject to a total of one public hearing and one closed record appeal.

b. Joint hearings with other jurisdictions?

RCW 36.70B.110(7) gives the applicant the option of having its hearing combined with the land use hearing of another jurisdiction if the hearing can be held in the local jurisdiction and the hearing can be held within the time limits required by the Regulatory Reform Act.

3. Determination of Completeness

- a. RCW 36.70B.070 requires a city to issue notice to an applicant within 28 days of application on whether an application is complete.
- b. RCW 36.70B.070(2) provides that an application is complete when it meets the procedural submission requirements of local government and is sufficient for continued processing. Additional information may still be subsequently required. The primary procedural impact of a determination of completeness is that the deadlines for project decision making commence accruing.
- c. An application is deemed complete if no notice is issued by the local jurisdiction within 28 days of application.
- d. If the local jurisdiction finds that the application is incomplete, it so notifies the applicant and identifies what is necessary for a complete application. Upon the resubmission of the application the local jurisdiction is then given 14 days to determine if the application is complete.

4. Notice of Application

- a. RCW 36.70B.110 requires that a notice of application must be issued within 14 days of the issuance of a notice of completeness.
- b. The notice of application must be sent to the public and other agencies with jurisdiction. Local jurisdictions are given some flexibility as to how the notice of application is distributed -- can vary depending on type of permit application. Subdivisions, PUD's and conditional use permits typically involve mailed notice to property owners within 300 feet of the project.
- c. The notice of application must include a project description, contain the public hearing date, if any, identify other permits related to the project, identify existing environmental documents related to the project and provide for a 14-30 day public comment period. No decision or recommendation on the project, other than a SEPA threshold determination, may be issued during this comment period.

5. One Public Hearing

- a. RCW 36.70B.050 only permits one open public hearing and one closed record appeal per project permit application.
- b. No restrictions on public meetings. RCW 36.70B.020(5) defines a public meeting as an informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the local government's decision.

6. Notice of Decision

RCW 36.70B.080 requires that a Notice of Final Decision be issued within 120 days of the issuance of a Notice of Application, unless the local government makes written findings that a specified amount of additional time is needed for processing of specific complete project permit applications or permit types.

7. Appeal

- a. RCW 36.70B.110(9) provides that local jurisdictions do not have to provide for an administrative appeal, but if one is provided it must be filed within 14 days of a Notice of Decision or other notice that the decision has been made.
- b. An appeal generally must be based on a closed record -- no new evidence is permitted. RCW 36.70B.020(3) provides that an open record hearing can be held on an appeal if no open record hearing was held on the project permit application prior to a final decision.