

NO. 62167-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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PHOENIX DEVELOPMENT, INC., a Washington Corporation and  
G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a  
Washington limited partnership,

Appellants,

v.

CITY OF WOODINVILLE, a Washington Municipal Corporation,  
and CONCERNED NEIGHBORS OF WELLINGTON, a  
Washington nonprofit corporation,

Respondents.

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CONCERNED NEIGHBORS OF WELLINGTON'S  
MOTION/REQUEST FOR DISQUALIFICATION OF JUDGE  
SUSAN G. AGID

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J. Richard Aramburu, WSBA 466  
Aramburu & Eustis LLP  
720 Third Avenue, Suite 2112  
Seattle WA 98104  
206/625-9515  
Fax 206/682-1376  
Attorneys for Respondent Concerned  
Neighbors of Wellington

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**I. IDENTITY OF MOVING PARTY.**

Concerned Citizens of Wellington (CNW), Respondent, ask for the relief designated in Part 2.

**II. STATEMENT OF RELIEF SOUGHT.**

CNW requests that Judge Susan G. Agid disqualify herself from participating in this appeal.

**III. FACTS RELEVANT TO MOTION.**

3.1 According to the docket published by the Court, the Honorable Susan G. Agid has been assigned to this pending appeal.

3.2 Judge Agid is married to Robert D. Johns, a practicing and licensed attorney in the state of Washington, who specializes in land use and environmental law in Bellevue, Washington. Mr. Johns is a member of the firm of Johns, Monroe, Mitsunaga, with offices in Bellevue.

3.3 In August, 2008, Mr. Johns was nominated and elected to serve on the Board of Directors of the Master Builders Association of King and Snohomish County (MBA). See Attachment 1 to the Declaration of J. Richard Aramburu Regarding Concerned Neighbors of Wellington's Motion/ for Disqualification of Judge Susan G. Agid (Aramburu Dec.). At the same time an

attorney in Mr. Johns' law firm, Duana Kolouskova, was also elected to the MBA Board. *Id.*

3.4 According to the website for the MBA, Mr. Johns is the 2009 Chair of the "King County Builders Council" a committee of the MBA. See Attachment 2 to Aramburu Dec. He was also the Chair of the Council in 2006. See Attachment 3 to Aramburu Dec. According to the MBA website, in both 2006 and 2009 the King County Builders Council has the following responsibility:

The King County Council addresses regulatory issues occurring at the local level in King County and its municipalities. The council lobbies local governments on issues such as development standards, impact fees, permit processing and environmental regulations.

*Id.* Mr. Johns' advertisement in the Martindale-Hubbell Law Directory, 2004 Edition (Attachment 4 to Aramburu Dec) says he is a member of "Master Builders Association of King and Snohomish County (Executive Committee, 1997 - -)."

3.5 Mr. Johns and his firm have frequently represented the MBA in legal proceeding directly or in an amicus curiae capacity. Reported decisions from the appellate court or the Growth Management Hearings Boards include the following:

a) *Master Builders Association of King and Snohomish Counties v. City of Arlington*, Central Puget Sound Growth

Management Hearings Board, Case No. 04-3-0001 (Final Decision and Order July 14, 2004).

b) *Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington v. Central Puget Sound Growth Management Hearings Board et. al.*, Court of Appeals, Division I, No. 58433-2-I.

c) *1000 Friends of Washington v. McFarland*, 159 Wn. 2d 165, 149 P.3d 616 (2006) (as *amicus curiae*).

d) *City of Seattle and Master Builders Association of King and Snohomish Counties v. Yes for Seattle*, 122 Wn. App. 382, 385, 93 P.3d 176, 177 (2004).

e) *Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development, Petitioners and Livable Communities Coalition, Intervenor v. City of Kent, Respondent Central Puget Sound Growth Management Hearings Board Case No. 05-3-0034* (Final Decision and Order April 19, 2006) (Representing MBA as Intervenor).

3.6 Phoenix Development Inc. is the appellant in this matter. The Appellant's opening brief expressly points to the ownership interest of Phoenix though a citation to the verbatim

record:

Portions of the Wood Trails property have been in the family of Phoenix Development's principal owner, Larry Sundquist, for many, many, many years. . . . At this time his aunt and uncle who own the property - who are in their 80s - would like to realize the value from the property and would like to see it developed.

Phoenix Opening Brief at page 9. Phoenix Development Inc. is one of the "Sundquist Family of Companies" according to its website.

See Attachment 5 to Aramburu Dec. One of the companies owned by the Sundquist Family of Companies is "Sundquist Homes." *Id.*

Larry Sundquist is the owner of Sundquist Homes Inc. See Attachment 6 to Aramburu Dec.

3.7 According to Mr. Sundquist's bio on the Snohomish County website, he is also a past president of the MBA. Attachment 7 to Aramburu Dec. This bio also indicates that Mr. Sundquist "spent four years as the Legislative Chairman for the Building Industry Association of Washington. . . ."

3.8 According to the MBA website, Sundquist Homes has provided financial support to the MBA through a contribution of refunds from industrial insurance premiums. See Attachment 8 to J. Richard Aramburu Decl. According to the MBA website, such funds are to be used as follows:

The following companies donated a portion of their

Return on Industrial Insurance (ROI) program refund to the Master Builders Association of King and Snohomish Counties to further its efforts to create an economy and environment that are conducive and beneficial to the housing industry.

*Id.*

3.9 In the pending case before the Court, the appellant challenges a decision of the City of Woodinville which declined to adopt Phoenix's application for a rezone from R-1 to R-4. See Appellant's opening brief at page 3:

Accordingly, in reliance on the decision in *Hensley*, Phoenix applied for a zoning map amendment to redesignate the Wood Trails and Montevallo sites from "Low Density Residential R-1 to "Low Density Residential R-4."

The Appellant's brief also relies on a decision of the Central Puget Sound Growth Management Hearings Board in *Hensley v. City of Woodinville*, Case No. 96-3-0031 (February 25, 1997). See Appellant's Reply Brief at 9. In its opening brief at page 44, Phoenix argued that:

In *Hensley v. Woodinville*, *supra*, the Board held unequivocally that the City could not perpetuate low-density one-acre zoning. Instead, GMA requires urban densities of at least R-4 in this area.

3.10 During 2007, the City Council was also considering its "Sustainable Development Study. See Phoenix Opening Brief at 17. As Phoenix describes in its brief:

This study was to determine what future zoning densities would be appropriate in the City's current R-1 zoned neighborhoods and consistent with GMA requirements. That study was ultimately published on February 20, 2007, and became part of the Wood Trails and Montevallo administrative record.

Phoenix Opening Brief at 17-18. At page 18-19 of its brief, Phoenix refers to the Sustainable Development Study as follows:

As to capital facilities, the "Study" concluded that fire and police services "response time" would not be affected; that increasing density "would not create an effect on schools", and that increasing density would "have no major impact on the current capacity of [water] supply or facilities."

3.11 When the Sustainable Development Study came before the Woodinville Planning Commission, MBA wrote a letter of comment dated October 3, 2007. See Attachment 9 to the Aramburu Decl. In that letter, MBA requested that the "Planning Commission to recommend the City Council rezone the Residential-1 (R-1) to a density of Residential-4 (R-4), or four units per acre." The letter went on to argue that the maintaining the R-1 zoning "could severely obstruct the City of Woodinville's ability to maintain a reliable quantity of buildable land beyond the current 2020 threshold."

MBA's letter also cited to the *Hensley* case for the proposition establishing a "standard that considered only R-4 or

greater as appropriate urban density" and that the decisions of the Growth Board "established a minimum figure of four units per acre as meeting the threshold of urban density." The letter also stated that:

According to the staff report, city services including fire and life safety and police, as well as Leota Junior High, and Willington (*sic*), would not be affected negatively by increased zoning. Woodinville Water District currently plans to accommodate "densities in the study area at R-4 levels, and there is no insufficient capacity in supply at those service levels. As new construction appears, developers pay for new facilities and service extensions."

These arguments are substantially identical to the arguments made by Phoenix in its brief as described in Paragraph 3.9 above.

3.12 The author of MBA's October 3, 2007 to the City is David Hoffman, the "Staff Liaison" to the King County Builders Council which is chaired by Robert Johns, Judge Agid's husband. See Attachment 2 to Aramburu Decl.

3.13 On March 18, 2007, the Building Industry Association of Washington (BIAW) filed its "motion to File Brief of Amicus Curiae Building Industry Association of Washington." In that brief, BIAW asserted that its "interest is to insure individuals working in the building industry have predictability in the land development process." Motion, p. 1. At page 2, the BIAW motion asserted that

its requested motion "will assist the Court with an industry perspective by the home building industry, which is most affected by the decision in this case." The MBA is a member of the BIAW. See Attachment 10 to Aramburu Dec.

#### **IV. GROUNDS FOR RELIEF AND ARGUMENT.**

CNW believes that the foregoing establishes a sufficient basis for the disqualification of Judge Agid from this case. CNW respectfully requests Judge Agid recuse herself.

Under the terms of Canon 3 of the Code of Judicial Conduct (CJC):

(D)(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, . . .

Canon 3(D)(1) also lists specific, but nonexclusive, instances in which the general rule applies, including the following:

(C) the judge knows that . . . the judge's spouse . . . has any other interest that could be substantially affected by the outcome of the proceeding . . . .

The standard applied by the Court of Appeals to questions of whether a trial court judge should have disqualified herself or himself is as follows:

"Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned." *Wolfkill [Feed & Fertilizer Corp v. Martin]*,

103 Wn. App. at 841, 14 P.3d 877 (citing *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996)). The test to determine whether a judge's impartiality might reasonably be questioned is an objective one that "assumes that 'a reasonable person knows and understands all the relevant facts.' " *Sherman v. State*, 128 Wash.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988)).

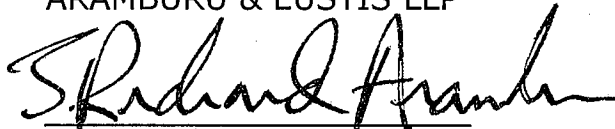
*Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340-341, 54 P.3d 665, 683 - 684 (2002).

In the instant case, the spouse of Judge Agid is a member of the Board of Directors and a lobbyist for the MBA. The principal of appellant Phoenix Development is a former president of the MBA and current financial contributor to the MBA. MBA has taken a position on the merits identical to that of Phoenix that the City of Woodinville should modify its zoning to provide greater density in areas currently zoned R-1. Based on the substance of this letter, and the position of BIAW in its amicus curiae motion, the interests of the various members of the MBA, including Mr. Johns, "will be substantially affected by the outcome of [this] proceeding." These factors indicate that it is appropriate under these

circumstances that Judge Agid disqualify herself from participating in this appeal.<sup>1</sup>

DATED this 24<sup>th</sup> day of March 2009.

Respectfully submitted,  
ARAMBURU & EUSTIS LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is fluid and cursive, with the first name "J. Richard" and last name "Aramburu" clearly distinguishable.

J. Richard Aramburu, WSBA 466  
Attorney for Concerned Citizens  
of Wellington

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<sup>1</sup> Though no decision has been made by the Court on the pending application of the Business Industry Association of Washington (BIAW) to file an *amicus curiae* brief in this appeal, there are concerns here as well. The MBA is a member of the BIAW. See Attachment 10 to Aramburu Dec. hereto. In addition, Mr. Johns has also represented both the MBA and the BIAW in the same proceeding. See *Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development, Petitioners and Livable Communities Coalition, Intervenor v. City of Kent, Respondent*, Central Puget Sound Growth Management Hearings Board Case No. 05-3-0054 (Final Decision and Order, April 19, 2006) where he represented both the MBA and BIAW as intervenors.