

**ORIGINAL**

**NO. 40146-1-II**

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**Patricia L. Ambrose,  
Appellant (Petitioner)**

**v.**

**City of Montesano and Steven Hyde,  
Respondents**

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**APPELLANT'S OPENING BRIEF**

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2. *The Hearing Examiner erred in concluding that the 2006 Variance on the Ambrose property was “extinguished” by the BLA approval in 2007 (Conclusion Nos. 5 and 6 of the Examiner’s March 3, 2009 Decision, CP at 14), which in turn he cited as support for his decision to revoke Ms. Ambrose’s building permit.*
3. *The Hearing Examiner erred by failing to give full force and effect to the 2006 variance, which had already granted reduced yard setbacks for the purpose of constructing a new house, when deciding in favor of Mr. Hyde’s appeal to revoke Ms. Ambrose’s 2008 building permit.*
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5. *The Hearing Examiner erred by basing his revocation of Ms. Ambrose’s 2008 building permit on an allegedly erroneous variance that had been granted in 2006, but which had never been appealed, and was not the matter on appeal before him.*

6. *The Hearing Examiner erred in concluding that no construction had commenced on Ms. Ambrose's lot prior to Mr. Hyde filing his appeal of the building permit).*
7. *Both the City of Montesano and the Hearing Examiner erred in failing to provide Ms. Ambrose her constitutional right of due process prior to the rendering of her 2006 variance – which had granted the necessary setback variances – as “extinguished” and then subsequently revoking her 2008 building permit on the basis that her house-under-construction did not comply with the standard setback requirements.*

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## I. INTRODUCTION

The Appellant Patti Ambrose brings this appeal from a LUPA action in Grays Harbor County Superior Court which upheld the revocation of her building permit by the Montesano Hearing Examiner. The building permit is intrinsically tied to Ms. Ambrose's earlier variance approval and boundary line adjustment on the subject lot. This Court reviews the issues of law de novo<sup>1</sup>.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

1. The trial court erred in affirming the decision of the Hearing Examiner and concluding it was proper and correct (CP at 78). The trial court failed to find the Hearing Examiner's Decision violated RCW 36.70C.130(1)(a) – (f).

2. The Hearing Examiner erred in concluding that the 2006 Variance on the Ambrose property was "extinguished" by the BLA approval in 2007 (Conclusion Nos. 5 and 6 of the Examiner's March 3,

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<sup>1</sup> "We stand in the shoes of the superior court and review the hearing examiner's action de novo on the basis of the administrative record. We review alleged errors of law de novo [citations omitted]." *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).

2009 Decision, CP at 14), which in turn he cited as support for his decision to revoke Ms. Ambrose's building permit.

3. The Hearing Examiner erred by failing to give full force and effect to the 2006 variance, which had already granted reduced yard setbacks for the purpose of constructing a new house, when deciding in favor of Mr. Hyde's appeal to revoke Ms. Ambrose's 2008 building permit.

4. The Hearing Examiner erred in determining he had jurisdiction or authority to effect a rescission of Ms. Ambrose's 2006 variance during the 2009 proceedings concerning the appeal of Ms. Ambrose's building permit.

5. The Hearing Examiner erred by basing his revocation of Ms. Ambrose's 2008 building permit on an allegedly erroneous variance that had been granted in 2006, but which had never been appealed, and was not the matter on appeal before him.

6. The Hearing Examiner erred in concluding that no construction had commenced on Ms. Ambrose's lot prior to Mr. Hyde filing his appeal of the building permit (Conclusion No. 8 of the Examiner's March 3, 2009 Decision, CP at 2-3, 14).

7. Both the City of Montesano and the Hearing Examiner erred in failing to provide Ms. Ambrose her constitutional right of due

process prior to the rendering of her 2006 variance – which had granted the necessary setback variances – as “extinguished” and then subsequently revoking her 2008 building permit on the basis that her house-under-construction did not comply with the standard setback requirements.

***Issues Pertaining to Assignments of Error***

1. May a building permit be revoked on the basis that the building-under-construction does not meet required City Code setback standards, even though setback variance and lot boundary adjustment approvals were granted which enabled the setback requirements to be fulfilled? (Assignment of Errors 1, 2, 3, 5, 7.)
2. Does a faulty or illegal land use decision become valid once the opportunity to challenge it has passed? If so, what is the time period for making such a challenge? (Assignment of Errors 1, 2, 3, 5, 7.)
3. Does a Hearing Examiner have the authority or jurisdiction to revoke a land use decision which is not the matter of appeal before him? (Assignment of Error 1, 4.)
4. Was the Hearing Examiner’s Decision revoking Ms. Ambrose’s building permit arbitrary and capricious? (Assignment of Errors 1, 2, 3, 5, 6, 7.)

5. May a previously-granted land use approval be rescinded without allowing the permit-holder an opportunity to contest the rescission? (Assignment of Error 1, 7.)

6. Did the Hearing Examiner's Decision revoking Ms. Ambrose's building permit violate her constitutional rights? (Assignment of Errors 1, 6, 7.)

### **III. STATEMENT OF THE CASE**

Patti Ambrose had been the owner of two contiguous lots located within the City limits of Montesano. The property is bounded on the north by unopened Kennaston St, and on the west by unopened Calder St. To the east is Respondent Hyde's residence and the terminus of the opened portion of Kennaston St. To the south is the terminus of the opened portion of Calder St.

Due to a divorce and financial reasons, the family home needed to be sold, but Patti also needed to find another place to reside with her children. She believed the best solution was to sell the existing home on one of her two lots, and build another small house on the remaining lot for herself and her two boys. In order to accomplish that, she needed both a variance to reduce one of the yard setbacks next to the unopened Kennaston right-of-way, and a boundary line adjustment. (No reduced

setbacks were proposed for the side of Ms. Ambrose's property that borders Mr. Hyde's property in this 2006 variance, although in 2007, she did seek a second variance on that side for a garage, to which Mr. Hyde objected and prevailed). Only after both the variance in 2006 was approved and the BLA was recorded 2007, did Ms. Ambrose sell the old family home, and begin the process to build on the adjacent newly-reconfigured lot (and the purchasers were fully informed of the plans to place a new house right next to them).

Although both Mr. Hyde and the Hearing Examiner suggest the variance in 2006 was faulty because it was granted prior to the recording of the BLA, no actual error was identified. In reality, the situation oftentimes is a "chicken or the egg" conundrum as to which comes first. A BLA lot is supposed to be buildable site at the completion of the BLA, and a setback variance is a perfectly legal and acceptable way to make an under-sized lot buildable. The BLA subdivision exemption only requires that the adjusted lots "meet minimum requirements for width and area for a building site." RCW 58.17.040(6). Under such a scenario, it makes sense to approve the variance prior to the Boundary Line Adjustment.

In this specific case, it is not clear what exactly happened when. We know that the Examiner approved the setback variance on August 27, 2006 for the stated purpose of constructing a house, and did so based on

maps that showed changes in the boundary between the two Ambrose lots running east/west, *including an assessor's map showing this configuration*. Yet we also know that the BLA map depicting the changed lot orientation from a north/south orientation to east/west, was recorded on February 23, 2007 (CP at 64-65). In the Examiner's March 3, 2009 Decision, he explains how in reviewing the building permit appeal, he realized his prior belief as to the orientation of the lots in 2006 may not have been correct, and states that after asking City staff for more documentation and clarification, the confusion still remained unresolved. Nonetheless he made a conclusion that the site drawing for the 2006 variance was not the legal configuration at the time of that approval (see Finding No. 14 and Conclusion No. 4 at CP at 13-14). Notwithstanding the Examiner's confusion, the 2006 variance approval<sup>2</sup> and 2007 BLA are consistent with each other (CP at 3; also compare maps at CP 65 and Appendix I, p.I-4).

While boundary line adjustments and building permits are ministerial, variances are not. Patti Ambrose's 2006 variance went through a full public process. Public notice was published in the local

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<sup>2</sup> Attached for aid of reference, as Appendix I, is a copy of the Examiner's August 27, 2006 Decision approving setback variances on the Ambrose property, along with accompanying maps and notices.

paper on July 6, 2006, and the City also certified that it sent the Notice of Public Hearing to property owners within 300 feet, as well as posting notices at the City office and library. Therefore, Mr. Hyde had the opportunity to participate in the hearing and/or appeal its outcome<sup>3</sup>. No objection to the variance was made during the hearing; no claims of irregularity in the proceeding were asserted; and no appeal was filed of the Examiner's August 27, 2006 variance approval.

Mr. Hyde instead appealed Ms. Ambrose's re-issued 2008 building permit to the Hearing Examiner on allegations that the 2006 variance and/or 2007 BLA were improper; whereby the 2006 variance became "extinguished" by the 2007 BLA. No support was provided by Mr. Hyde to sustain the assertion that a variance granted in 2006 can be "extinguished by law" (CP at 61). He nevertheless hit a home run with the Examiner on that novel concept, who adopted the unsupported legal theory as a conclusion (CP at 14), and agreed with Mr. Hyde that Ms. Ambrose's 2008 building permit should therefore be revoked.

The City of Montesano put the building permit revocation into immediate effect, which in turn froze Patti Ambrose's construction financing, leaving unpaid contractors in the wake, as well as causing

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<sup>3</sup> Indeed, Mr. Hyde testified at his appeal hearing on Ms. Ambrose's building permit that he has lived at his present address [next door to the Ambrose property] for the past 20 years (CP at 9).

complete upheaval in living arrangements for her children, who had been expecting to soon move to their new, permanent home. Patti has since had to declare bankruptcy, and has had her financial and social reputation ruined in a small town where everyone knows everyone else's business. The result of the Hearing Examiner's decision (upheld by the trial court (who provided even less rationale for its decision – see CP at 73-79) has created living nightmare for Ms. Ambrose. Believing she had gone through all proper channels to acquire the setback variance and BLA in 2006-2007, she then secured her financing and committed herself to construct the house per the construction-loan requirements, obtained the building permit, and commenced construction. To be told by the Examiner – *nearly three years after the fact, and as an outcome from an appeal matter which wasn't even before him* – that the prior variance she had been granted inexplicably had become extinguished, yet was allowed no opportunity to contest the variance rescission, violates her constitutional rights.

The City immediately enforced the revocation of Ms. Ambrose's building permit and issued a stop work order based on the Examiner's unsupported conclusion that her 2006 variance no longer existed, thereby rendering her house-under-construction in violation of code standards. There was no opportunity afforded to appeal the Examiner's de facto

voiding of the 2006 variance. This is a violation of due process, and is especially egregious when looked at in the context of what has happened here: Patti has been financially destroyed and put into emotional turmoil. She has effectively lost her home, reputation, and custodial functions in caring for her children, all so there can be a 15-foot wide, instead of a 6-foot wide, setback next to an unopened right-of-way that has no prospect for public use.

#### IV. ARGUMENT

2. There is no provision in either the Montesano Code or state law allowing a previously-granted land use approval to become extinguished by law and thus form the basis for revoking a building permit.

*a. It was an established fact that Ms Ambrose's lot was eligible for issuance of a building permit.*

Mr. Hyde appealed Ms. Ambrose's building permit, but the arguments he used to support his appeal were claims that the previously-granted variance and/or Boundary Line Adjustment were erroneously approved, and therefore the variance had somehow been "extinguished by law" (CP at 61.) In actuality, there was nothing improper with the building permit itself, since its issuance was predicated on these previously-approved land use authorizations. In his brief to the Examiner, Mr. Hyde focused not on any error concerning the building permit, but

instead resurrected issues that were either already decided, irrelevant, or moot, such as whether the lot was legal and buildable, its nonconforming status, and the timing and sequencing of the variance and BLA (CP at 57-58).

The time for questioning those issues had long passed: (a) The lot was previously established as a legal lot of record in the Plat of Carr's Addition in 1908; (b) in 1995 the lot was determined under the Montezano Municipal Code (MMC) 17.45.030<sup>4</sup> to also be a legal building site (the discussion concerning whether the unopened Kennaston Street fulfilled the frontage requirement was one item decided in Patti's favor in the Examiner's March 3, 2009 Decision – see Finding No. 12 and Conclusion No. 3, CP at 13-14); (c) under MMC 17.45.030 which rendered the nonconforming lot a legal building site, it was therefore eligible to undergo a variance process and boundary line adjustment; and (d) on August 27, 2006, and the Examiner made all necessary findings to support the City's variance criteria identified at MMC 17.46.090 [Code quoted *infra* at pp. 11-12]. We agree the lot is nonconforming, but there is no

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<sup>4</sup> 17.45.030 Nonconforming lots. A lot which existed prior to the effective date of the ordinance codified in this title and which is nonconforming as to area or dimension, as required by the district where such lot is located, *shall be considered a legal building site*; provided that: (1) Such lot has at least twenty feet of frontage on a public street; (2) All other regulations for the district, and other rules and regulations of the city, shall be satisfied. (Ord. 1366 (part), 1995). (Emphasis added.)

prohibition against granting variances and BLAs to nonconforming lots that have been established as legal lots and legal building sites.

- b. *There is no provision in the Montesano Municipal Code for a previously-granted approval to become “extinguished”.*

At the time the building permit was issued, the variance and BLA were in effect. Setback variances had been granted for the lot that Ms. Ambrose wanted to build on, and new owners now resided in the old Ambrose house on the other BLA lot. Although Mr. Hyde was persuasive in getting the Examiner to believe there had been some flaw with the sequencing of the variance and BLA, the leap to how a 2007 BLA can extinguish a 2006 variance has never been explained, by anyone. The only authority cited in his attempt is MMC 17.46.090 (CP at 61) which discusses the variance criteria, but nothing in any of the seven subparts to 17.46.090 even remotely suggests a method whereby the variance becomes extinguished if, after approval of the variance, an irregularity is later discovered:

17.46.090 Variance decision criteria.

The examiner may approve or approve with conditions or modifications an application for a variance if each of the following criteria are met:

- (1) The variance will not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and the zoning district in which the property on behalf of which the application was filed is located.

- (2) The variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property to provide it with use rights and privileges allowed to other properties in the vicinity and the zoning district in which the subject property is located.
- (3) The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and in the zoning district in which the subject property is located.
- (4) The special circumstances of the subject property made the strict enforcement of the provisions of the zoning regulations an unnecessary hardship to the property owner or lessee.
- (5) The variance is the minimum necessary to fulfill the purpose of the variance and the need of the applicant.
- (6) The variance is consistent with the purpose and intent of the zoning regulations.
- (7) The variance is in accord with the Montesano comprehensive plan. (Ord. 1366 (part), 1995).

MMC 17.46.090.

Mr. Hyde was successful in advancing his logic that if the variance didn't exist, then that meant the building permit was not proper, and therefore should be revoked. But as shown above, the City Code makes no provision whereby a variance can automatically become extinguished. Similarly, there is no case law to support the "extinguished by law" theory offered by either Mr. Hyde or the Hearing Examiner. Such absence is glaring!

Despite the improper citation of authority, the Examiner adopted

Mr. Hyde's theories as conclusions:

5. The appellant maintains that the variance granted in 2006 was extinguished by the approval of the BLA in 2007. The appellant cites the standard in the MCC and in state law: "...the variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property..." The appellant argues that if the variance is based on the "unique special circumstances relating to the size, shape, topography, location or surroundings of the subject", when those criteria change the basis for the variance longer exists. The Examiner concurs with this position and believes *absent a variance legally in effect*, any new construction must comply with the setbacks in the zoning ordinance.
6. The appellant submitted a drawing showing measurements of the new house from each of the property lines. The measurements on the south (side yard) and east (rear yard) of the house conform to zoning requirements; it is unclear from these measurements whether the west side (front yard) complies since the drawing shows 19 feet with a question mark. *Since the 2006 variance was extinguished* by the 2007 BLA, the measurement of 6 feet on the north side (the side yard) does not conform to the setback requirement of 15 feet (for the side yard abutting a street for a corner lot).

Hearing Examiner's March 3, 2009 Decision, Conclusions 5 and 6

(emphasis added) (CP at 14).

c. *The Examiner's Decision was Arbitrary and Capricious.*

The Examiner's decision to revoke Ms. Ambrose's building permit was based on an unsubstantiated interpretation that her earlier variance

permit had somehow become extinguished. The Examiner knew or should have known that such a development right cannot be taken away without a specific act or ruling to put it into effect. His rationale is so unreasoned that it seems to have been concocted to arrive at a result (the building permit revocation) that otherwise would have had no basis in fact.

An act is arbitrary or capricious if it is “ “wilful and unreasonable action, without consideration and regard for facts or circumstances.” ’ ’ *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (quoting *Teter v. Clark County*, 104 Wn.2d 227, 237, 704 P.2d 1171 (1985) (quoting *Miller v. City of Tacoma*, 61 Wn.2d 374, 390, 378 P.2d 464 (1963))).

*Isla Verde Intern. Holdings v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).

d. *The Examiner side-stepped Patti Ambrose’s Vested Rights.*

A previously-granted land use approval is a vested right.<sup>5</sup> By basing his conclusion on the unproven theory that the 2006 variance had already been extinguished by the 2007 BLA, the Examiner could put aside Ms. Ambrose’s rights and revoke her building permit on the pretense that the setback variance from 15 feet to 6 feet had never been obtained. His

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<sup>5</sup> *In Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975), the Washington Supreme Court set forth the definition of a vested right: A vested right, entitled to protection from legislation, must be something more than mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or legal exemption from demand by another.

*O’Rourke v. Dept. of Labor and Industries*, 57 Wn. Ap. 374, 788 P.2d 17 (1990).

conclusion is contrary to law. Washington State courts, even more so than other states, recognize an individual's protected development rights:

Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions.... Our cases ... embrac[e] a vesting principle which places greater emphasis on certainty and predictability in land use regulations.... In 1987, the legislature codified these judicially recognized principles in RCW 19.27.095(1) ... reads:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

The goal of the statute is to strike a balance between the public's interest in controlling development and the developers' interest in being able to plan their conduct with reasonable certainty.

*Abbey Road Group v. City of Bonney Lake*, 167 Wn.2d 242, 250-251, 218 P.3d 180 (2009).

See also the similar rationale from the holdings of *Conom*, quoting

*Nykreim* and *Skamania*, *infra* at pp. 18-19,

Once Ms. Ambrose obtained her 2006 variance permit and its 21-day appeal period passed, it became a vested right. There is no process by which it self-extinguishes. It was an error of law for the Examiner to conclude the 2006 variance had been extinguished, particularly in the absence of any correct authority on that point. It was an error of law for

the Examiner to have based his revocation of Ms. Ambrose's building permit on the assumption that the previously-approved variance had not vested and instead had become extinguished.

2. Even an illegal land use decision not appealed within 21 days becomes valid.

It is not necessary for this Court to factually decide if Ms. Ambrose's 2006 variance met the City's Code criteria, because the Washington Supreme Court has ruled that even land use approvals found to have been illegal, but not appealed within 21 days, become valid:

Under LUPA “[a] land use petition is barred, and the court may not grant review unless the petition is timely filed....” The petition is timely filed if it is filed with 21 days of the issuance of the land use decision.... Because RCW 36.70C.040(2) prevents a court from reviewing a petition that is untimely, approval of the rezone *became valid* once the opportunity to challenge it passed. It was too late for [Wenatchee Sportsmen Association] to challenge approval of the rezone in a LUPA petition filed in 1998 .... If there is no challenge to the decision, the *decision is valid*, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable.... [Quoting from *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d, 169, 180-82, 4 P.3d 123 (2000)].

Under *Wenatchee Sportsmen Association*, approval of the BLA in this case, despite its questionable legality, “became valid once the opportunity to challenge it passed.” [*Id.* at 181.]

*Chelan County v. Nykreim*, 146 Wn.2d 904, 925-926, 52 P.3d 1 (2002)

(emphasis in original).

We are not suggesting that Ms. Ambrose's variance was illegal, but because it was never appealed, based on *Nykreim* authority alone, her 2006 variance should be held in full force and effect. The Examiner made an error of law in concluding it was anything less than fully valid. Because there are no facts necessary to decide, these issues before this Court are solely legal issues.

3. The Hearing Examiner had neither authority nor jurisdiction to revoke a land use decision which is not the matter on appeal.

The Montesano Hearing Examiner's March 3, 2009 decision effectively revokes Patti Ambrose's 2006 variance approval as much as it revokes her 2008 building permit. However, the only matter before him was whether the 2008 building permit should be revoked. Indeed, the Examiner even acknowledges in his Finding No. 2 and Conclusion No. 9 (CP at 11, 14), the City Code criteria by which he is to review appeals; however, his Conclusions 5 and 6 belie those parameters:

9. MCC Section 17.47.080 provides the following appeal decision criterion: "In deciding appeals, the examiner shall consider only the merits of the appeal as it relates to the specific terms, phrases, or sections of the zoning ordinance in question and shall not consider the merits of the proposal or the property affected by the decision." The Examiner believes that this criterion has been met.

Hearing Examiner's March 3, 2009 Decision, Conclusion 9 (CP at 14).

Although we are thankful the Examiner did not additionally conclude that the BLA was extinguished too, we cannot help but notice the incongruent analyses, where in Conclusion No. 7 he restrains himself from rendering a conclusion on the BLA because “that matter is not before the Examiner” (CP at 14). Yet the variance was not before him either, and he made conclusions which effectively revoked it. Under the explicit parameters of the City’s Code, the Examiner did not have authority to extend his conclusions to other matters not before him, and he made an error of law in doing so through his Conclusions 5 and 6.

Since the enactment of the Land Use Petition Act, LUPA has become the “exclusive means of judicial review of land use decisions” *Chelan County v. Nykreim*, 146 Wn.2d 904, 940, 52 P.3d 1 (2002) [quoting RCW 36.70C.030(1)]. Further, the requirement that land use decisions be appealed to Superior Court within 21 days of the decision has been strictly interpreted:

[W]e have repeatedly required parties to strictly adhere to the statutory procedures provided under LUPA for filing and serving a land use petition. In *Nykreim*, for example, we held that the challenge to a boundary line adjustment was time-barred under LUPA because the petitioner failed to appeal the land use decision with 21 days. We found this strict adherence to statutory time limits consistent with the “**strong public policy supporting administrative finality in land use decisions.**” *Nykreim*, 146 Wn.2d at 931, 52 P.3d 1 (quoting *Skamania County v. Columbia*

*River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001)).

*Conom v. Snohomish County*, 155 Wn.2d 154, 159, 118 P.3d 344 (2005) (emphasis in original).

Because no appeal was filed against the 2006 variance within 21 days of its issuance, the Hearing Examiner cannot, in 2009, create a backdoor approach to reach a conclusion that summarily revokes it long after the time to appeal has passed. It is outside the scope of his jurisdiction, and he made an error of law in doing so through his Conclusions 5 and 6.

4. Effecting a rescission of Ms. Ambrose's 2006 variance permit, without affording her an opportunity to contest that action, deprived her of a constitutional right without due process.

The Supreme Court's holding in *Mission Springs v. City of Spokane* concerning violations of 42 U.S.C.sec.1983 in land use cases are instructive in this matter, since it identifies that ministerial permits and development rights are property rights; a cause of action depriving property without due process is ripe for immediate action; improper interference with the process to issue building permits is arbitrary and violates substantive due process; and that Appellants may recover costs and attorneys fees under 42 U.S.C.sec.1988.

The ultimate issue is whether a municipality may withhold a ministerial land use permit for reasons extraneous to the satisfaction of lawful ordinance and/or statutory criteria.

We hold it may not and recognize RCW 64.40 and 42 U.S.C.sec.1983 provide a remedy.

\*\*\*

A prima facie case under 42 U.S.C.sec.1983 requires the plaintiff to show that a person, acting under color of state law, deprived the plaintiff of a federal constitutional or state-created property right without due process of law.... (“ ‘ Although less than a fee interest, development rights are beyond question a valuable right in property.’ ”) [citations omitted] ...

Moreover, procedural rights respecting permit issuance create property rights when they impose significant substantive restrictions on decision-making. *Bateson v. Geisse*, 857 F.2d 1300, 1304-05 (9<sup>th</sup> Cir. 1988) (“[A] statutory scheme which placed ‘significant substantive restrictions’ on the decision to grant a permit or license would be sufficient to confer due process rights.”) *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9<sup>th</sup> Cir. 1994) ....

The Fourteenth Amendment provides “nor shall any state deprive any person of life, liberty or property without due provides of law.” ...

\*\*\*

Thus we follow that overwhelming body of authority which applies Due Process principles to similar factual situations.

A cause of action for deprivation of property without due process is ripe immediately because the harm occurs at the time of the violation as does the cause of action. See *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct.957, 983, 108 L.Ed.2d 100 (1990) ....

\*\*\*

*Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.) (improper interference with the process by which municipality issues building permit is arbitrary and violates substantive due process), *cert. denied*, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988) ....

Had the City Council repealed the earlier ordinance approving the PUD upon an appropriate finding of changed circumstance, we might have a different situation. But it did not .... Rather this claim puts at issue a purposeful

abrogation of mandatory process which would otherwise result in permit issuance.

The City Council's action was the moving force of the constitutional violation, the official policy of the municipality, and the proximate cause of the City Manager's decision to suspend processing of the permit. Compare *Bateson*, 867 F.2d at 1303 (those who are "the moving force of constitutional violation" are liable under sec.1983)....

*Mission Springs v. City of Spokane*, 134 Wn.2d 947, 952, 962-966, 954 P.2d 250 (1998)

While the circumstances which led to the violation of due process in *Mission Springs* (Appellant not notified of a city meeting in which the City Council directed staff to not issue the developer's building permit), are different than the instant case, the holdings are no less analogous. In Patti Ambrose's case, the City Hearing Examiner improperly took her "property right"(i.e., both her 2006 variance permit and her 2008 building permit) by: (a) interfering with the City staff's issuance of her building permit, as demonstrated through his arbitrary and capricious Conclusions 5 and 6 which rendered her 2006 variance void; and (b) without providing any mechanism to challenge his conclusion that her 2006 variance permit was considered to have extinguished, she was deprived of this property right without due process; and (c) because the City immediately enforced the revocation of her building permit without allowing due process concerning the extinguished 2006 variance permit, and did so in complete

disregard to the scope of damages it caused to Ms. Ambrose as compared to the *de minimus* effect to an abutting unopened right-of-way, meant the City committed a “purposeful abrogation of mandatory process which would otherwise result in permit issuance” and was “the moving force of the constitutional violation, the official policy of the municipality, and the proximate cause” *Id.*, at 966). The tests to prove a cause of action for deprivation of property without due process are met. Ms. Ambrose should be awarded her appellate costs and reasonable attorney fees pursuant to 42 U.S.C.sec.1988.

## V. CONCLUSION

Appellant has met her burden of proof in establishing that the Montesano Hearing Examiner’s land use decision violates RCW 36.70C.130. An appellant needs only to prove *one* of the six enumerated errors to establish burden of proof, but in this case, she has demonstrated that all six were violated by the Examiner:

- 36.70C.120(a) – *The Examiner engaged in unlawful procedure, failed to follow a prescribed process, and that error has harmed the Appellant.* The Examiner violated MMC 17.47.080 in exceeding its scope by considering and deciding matters not part of the appeal before him (see Conclusion No. 9, CP 14). Ms.

Ambrose's previously-granted variance was not the matter before him, yet he adopted as conclusions Mr. Hyde's arguments that her 2006 variance had been "extinguished". The effect of an "extinguished" variance meant that Ms. Ambrose had no approval for the setback reduction she needed for her new house, and that was the basis upon which the Examiner revoked her building permit. Because her house construction was already well under way, including the financial commitments relating to the construction loan payment and building schedule, the Examiner's revocation of her building permit has caused disastrous consequences to Ms. Ambrose, and has also harmed all those involved in the lending and construction of her house.

- 36.70C.130(b) *The Examiner's decision is an erroneous interpretation of the law, after allowing such deference as is due the construction of a law by a local jurisdiction with expertise.*

The Examiner's reliance on MMC 17.47.090 – Variance Decision Criteria (Conclusion 5 at CP 14 and corresponding reference at CP 61) was improperly used as a basis to revoke Ms. Ambrose's building permit. There is nothing contained in MMC 17.47.090 that enables a variance to self-extinguish. Further, no State statutes

or case law was cited to support the theory that the variance had been “extinguished by law”.

- 36.70C.130(c) *The Examiner’s decision is not supported by evidence that is substantial when viewed in light of the whole record.* MMC 17.45.030 makes specific provision for lots that are nonconforming in area or dimension to become building legal building sites. This provision therefore excludes such lots from the minimum lot size requirement, and enables them to be eligible for consideration for variances and BLAs. Even if the 2006 variance could have legally been reconsidered as part of the 2009 building permit appeal proceedings, there was no showing made that the variance was improper. The variance that was granted in 2006 is consistent with the BLA recorded in 2007, and correctly reflects what the Examiner approved in 2006. Even though these facts support Ms. Ambrose, they are not germane, because under *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) the 2006 variance was not appealed and the variance approval is established as valid.
- 36.70C.130(d). *The Examiner’s decision is a clearly erroneous application of the law to the facts.* The leap from how a 2006 variance can be extinguished by a 2007 BLA was never explained,

much less supported. What is worse is that the extinguished variance theory was used as a pretense to say that the setback variance had not been obtained, and thus served as the basis for revoking Ms. Ambrose's building permit. Faulty facts plus faulty legal analysis equal clearly erroneous.

- 36.70C.130(e). *The Examiner's decision is outside his authority or jurisdiction.* The only matter that was supposed to be before the Examiner was Mr. Hyde's appeal of Ms. Ambrose's 2008 building permit. Mr. Hyde never appealed Ms. Ambrose's 2006 variance approval, and under 36.70C.040(2) once the time for appeal has passed, it is barred from review. Additionally, under the City's Code at MMC 17.47.080, matters outside the "sections of the zoning code in question" shall not be considered by the Examiner. The Examiner clearly reached outside his jurisdiction and authority to first determine Ms. Ambrose's 2006 variance had been extinguished, and then apply that as the foundation for revoking her building permit.
- 36.70C.130(f) *The Examiner's Decision violates Ms. Ambrose's constitutional rights.* Ms. Ambrose was afforded no opportunity to challenge the Examiner's interpretation that her 2006 variance had been extinguished, but the Examiner used that unsupported

interpretation as a premised fact upon which to base his arbitrary and capricious conclusions to support his revocation of the building permit. The Examiner took away Ms. Ambrose's 2006 variance as much as her took away her 2008 building permit. The series of errors committed by the Examiner improperly interfered with what had been a properly-issued building permit.

As established holdings of *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), a development right (the 2006 variance) and ministerial permits (the building permit) are property rights. Under 42 U.S.C. sec. 1983, property rights deprived without due process are ripe for corrective action. The City further deprived Ms. Ambrose's constitutional rights by immediately enforcing the building permit revocation without providing Ms. Ambrose an opportunity to challenge the Examiner's de facto – and without notice – revocation of her 2006 variance permit.

This due process violation was especially egregious when weighing the potential for harm. There was great potential for significant and immediate damage to Ms. Ambrose through the loss of her variance approval and building permit, yet no potential for any immediate harm to a setback buffer next to an unopened

street. Both the Examiner and the City are the moving forces of this constitutional violation. Appellants may recover costs and attorneys fees under 42 U.S.C.sec.1988.

Patricia Ambrose respectfully requests this Court enter an Order reversing the Examiner's decision and direct the City to reinstate her building permit; and find that her 2006 variance setback approval is valid and in full force; and award Ms. Ambrose her appellate costs and reasonable attorney fees, to be issued against the City of Montesano.

SUBMITTED this 26<sup>th</sup> day of April, 2010.

CUSHMAN LAW OFFICES, P.S.

  
Ben D. Cushman, WSBA #26358  
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel as indicated below:

**Attorney for Respondent City of Montesano:**

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FILED  
COURT OF APPEALS  
DEPARTMENT  
10 APR 27 PM 1:50  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

DATED this 26 day of April 2010.

*Doreen Milward*  
Doreen Milward, Paralegal

Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501  
360/534-9183

**City of Montesano  
Report and Decision**

Application No.      VAR #2006-06  
Applicant:            Patti L. Ambrose  
                              620 N. Calder  
                              Montesano, WA 98563

**FILE COPY**

**Summary of Decision:** The variance is approved with one condition.

**Summary of Request:** The request is for a variance of the side yard setback requirements from fifteen feet to six feet on the north property line (side yard adjoining a street). The stated purpose is to construct a house. The property is located at 620 N. Calder and is zoned R-1 (Low-Density Residential).

**Public Hearing:** A public hearing was conducted regarding the application on Wednesday, August 16, 2006 at Montesano City Hall. Present for the city were Neil Aaland, Hearing Examiner, Mike Wincewicz, Community Development Director, and Kim Irwin-Morey, Building Department. The staff comments were summarized for the record. One letter was received from the public in support of the proposal. Those in attendance wishing to testify were asked to take an oath that the testimony they would give was the truth. The oath was administered en masse by the Hearing Examiner.

Patti Ambrose, 620 North Calder Street, Montesano, spoke as the applicant. She wants to place another home next to her existing one. This would help her financially. She has tried to pick a home that will fit the neighborhood. The entrance would face Calder, but access would be from Kennaston.

The Examiner tried to visit the site prior to the public hearing but could not find it. He said he would go out to the site with Mike Wincewicz following the hearing tonight to better understand the site constraints. Mike said the topography constraints will be evident, and although it is a corner lot neither street exists.

Nobody else spoke regarding this proposal.

**SITE VISIT:** The Hearing Examiner made a site visit following the hearing on August 16, 2006 and viewed the subject property.

**Findings:**

1. The Hearing Examiner has the responsibility and authority to render a decision on variance applications. The Examiner has the authority to approve, deny, or approve with conditions or modifications.
2. Patti L. Ambrose has made application for variance on property located at 620 N.

Appendix I

Calder within the City of Montesano. The request is for a variance of the side yard setback requirements from fifteen feet to six feet on the north property line. All required fees were paid.

3. The subject property is zoned R-1, Low Density Residential. The purpose of the low-density residential zone is "...to provide suitable areas for family neighborhoods with adequate play areas and open space amenities while assuring protection from hazards, objectionable influences, and building congestion which might result in the lack of air, light, and privacy." (Section 17.20.010.)
4. Single-family dwellings and accessory buildings are allowed uses in the R-1 district. The required setbacks are:
  - A. Front yard: twenty feet
  - B. Rear yard: twenty-five feet
  - C. Side yard: fifteen feet (for the side yard of corner lots adjoining a residential street per section 17.44.027 of the zoning ordinance)
5. The parcel is level and borders a gully on the west side. The parcel is approximately 40 feet in width.
6. Uses in the vicinity are primarily residential.
7. The comprehensive plan designation for the site is "Low-Density Residential." According to page 25 of the comprehensive plan, "The purpose of the low density designation is to provide and reserve areas for family neighborhoods with adequate play areas and open space amenities insured. It should provide housing opportunities for people desiring this type of housing within the diversity of the total range of housing proposed in this plan."
8. Chapter 17.46.090 of the Montesano City Code provides that the Examiner may approve, or approve with conditions or modifications, a variance if each of the following criteria is met:
  - (1) The variance will not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and the zoning district in which the property on behalf of which the application was filed is located.
  - (2) The variance is necessary because of special circumstances relating to the size, shape, topography, location, or surroundings of the subject property to provide it with use rights and privileges allowed to other properties in the vicinity and the zoning district in which the subject property is located.
  - (3) The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and in the zoning district in which the subject property is located.
  - (4) The special circumstances of the subject property made the strict enforcement of the provisions of the zoning regulations an unnecessary hardship to the property owner or lessee.
  - (5) The variance is the minimum necessary to fulfill the purpose of the variance and

the need of the applicant.

- (6) The variance is consistent with the purpose and intent of the zoning regulations.
- (7) The variance is in accord with the Montesano Comprehensive Plan.
9. The fire chief has expressed concern about the small size of the lot and limited access. He indicates that primary access would need to be from Kennaston Street in order to make this feasible.
10. The public works department says that the new construction will require street construction, including sidewalks.
11. Other city departments indicate no concern with the proposal.

**Conclusions:**

1. The 40-foot width of the lot makes it difficult to meet required setbacks and site an ordinary-size residential structure.
2. The location of the gully makes it unlikely that the streets bordering the corner lot will ever be constructed as through streets.
3. The fire department's concerns will be alleviated by requiring access to be from Kennaston Street rather than North Calder Street.
4. Relief from the side yard setback requirements is warranted to allow the property to be used as allowed by the R-1 zoning classification, and meets all of the criteria required by section 17.46.090 to grant a variance.

**Decision:** Variance 2006-06 is approved to allow the side yard setback along the north property lines to be reduced from fifteen feet to six feet, with the condition that the primary access to the house must be provided from Kennaston Street.

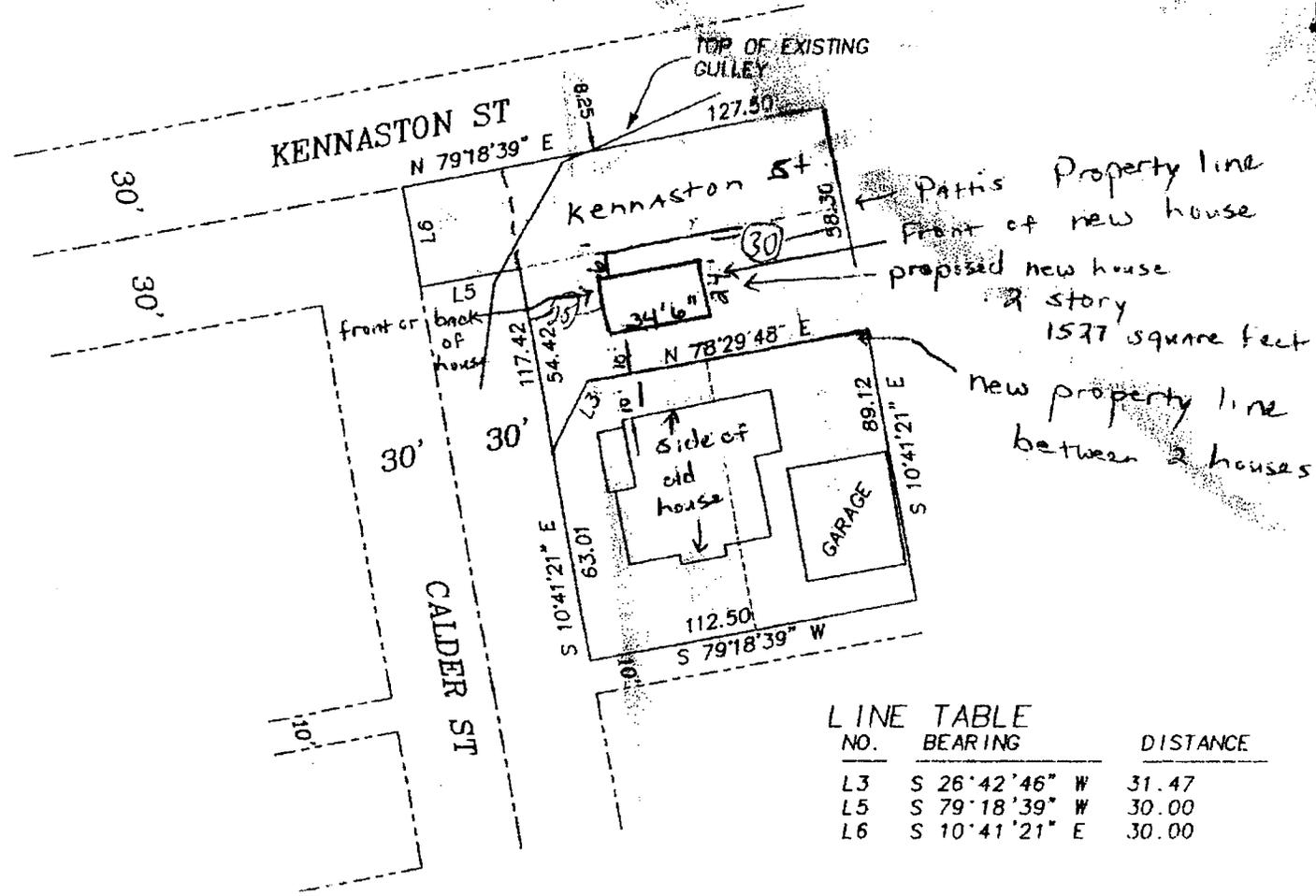
**NOTICE TO APPLICANTS AND INTERESTED PARTIES**

Montesano Municipal Code Section 17.46 provides that the decision of the hearing examiner is a final decision of the City. The Examiner's decision shall not be reconsidered except in the form of a new application. The decision of the Examiner may be appealed to the Superior Court as provided in Section 17.46.

Dated this 27<sup>th</sup> day of August, 2006

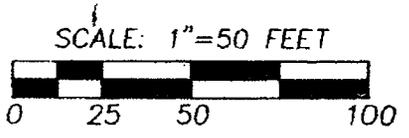
Neil L. Aaland  
Neil L. Aaland, AICP  
Hearing Examiner

Dimensions of new house:  
 24' x 34'6"  
 2 story



LINE TABLE

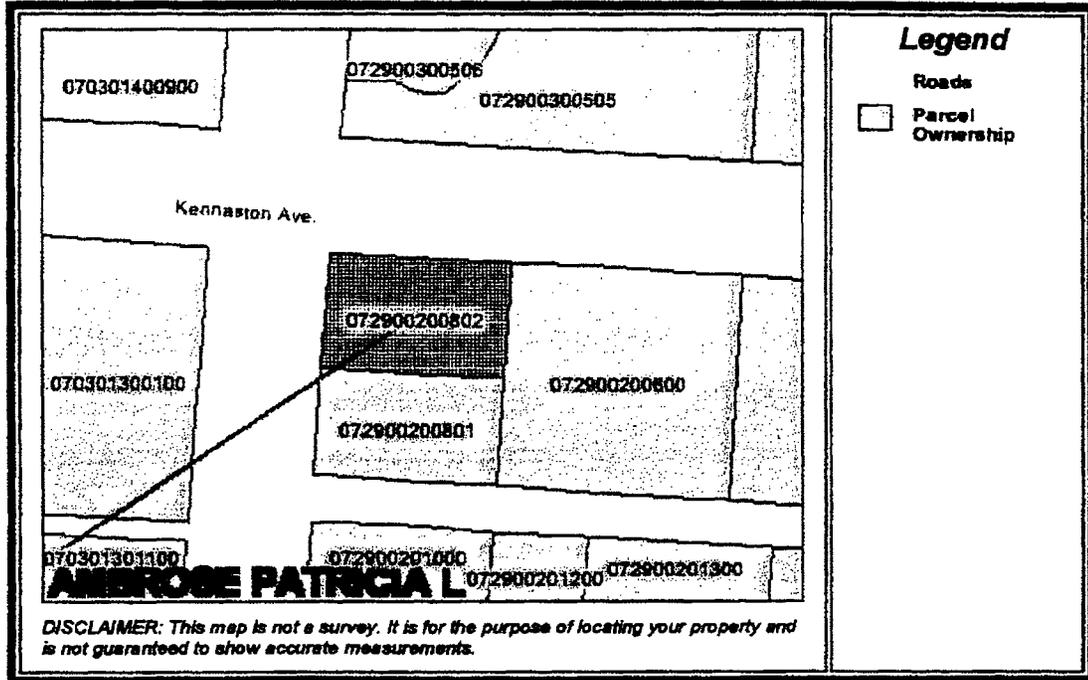
NO.	BEARING	DISTANCE
L3	S 26°42'46" W	31.47
L5	S 79°18'39" W	30.00
L6	S 10°41'21" E	30.00



DATE: 4/6/06	LENHERR SURVEYING PLLC	
DWN: APR:	PROPOSED SITE PLAN FOR PATTI AMBROSE	
SCALE: 1"=50'		SHEET 1 C

AI-4

# Grays Harbor County GIS - Parcel Search



[Click here to Print]



# City of Montesano

*Home of the Tree Farm*

112 North Main Street  
Montesano, Washington 98563

TEL (360) 249-3021  
FAX (360) 249-3690

Applicant Name: Patti Ambrose

Hearing No.: VA 2006-06

Hearing Date: August 16, 2006

I certify that on this 7<sup>th</sup> day of July 2006  
a Notice of Public Hearing was sent to:

- Hearing Examiner Neil Aaland
- Property owners within 300' - list submitted by applicant
- Police Chief Ray Sowers
- Fire Chief Ken Walkington
- Public Works Director Mike Wincewicz
- Clerk-Controller Sharon Morgan
- City Attorney Glenn
- Applicant
- Library bulletin board
- City bulletin board
- Vidette
- 

Kim Morey

Kim Morey, Building Permit Technician

✓

**Affidavit of Publication**  
**The Vidette**  
Montesano, Washington

STATE OF WASHINGTON     )  
  )ss  
County of Grays Harbor     )

Dannie Lee King, being first duly sworn on oath, deposes and says: That she is the legal clerk of THE VIDETTE, a weekly newspaper, which has been established, published in the English language, and circulated continuously as a weekly newspaper in the City of Montesano, and in said County and State, and of general circulation in said county for more than six (6) months prior to the date of the first publication of the Notice hereto attached, and that the said Vidette was on the 23rd day of June, 1941, approved as a legal newspaper by the Superior Court of said Grays Harbor County, and that the annexed is a true copy of

**CofM- AMBROSE Variance**

as it appeared in the regular and entire issue of said paper itself and not in a supplement thereof, for a period of 1 week commencing on the 6th day of July, 2006, and ending on the 6th day of July, 2006, and that said newspaper was regularly distributed to its subscribers during all of this period. That the amount of \$53.25 is the total cost for publication of this notice.

Dannie Lee King

Subscribed and sworn to me before  
this 6th day of July, 2006.

Joyce A. Powers  
Notary Public in and for the State of Washington,  
Residing at Aberdeen

**JOYCE A. POWERS**  
**NOTARY PUBLIC**  
**STATE OF WASHINGTON**  
My Commission Expires March 14, 2010

**CITY OF MONTESANO**  
**NOTICE OF PUBLIC HEARING**  
ALL MEMBERS OF THE PUBLIC are hereby given notice that the Hearing Examiner of the City of Montesano will hold a hearing open to the public for purposes of receiving comments, suggestions, recommendations and other material from the public at large and from all interested persons in relation to the matter specified below. The hearing is set for Wednesday, August 16, 2006 and will commence at 7:00 o'clock p.m. or as soon thereafter as the hearing may be called to order in the Council Chambers of the City of Montesano, 112 N. Main Street, Montesano, Washington. The matters subject to the hearing are as follows:  
Patti L. Ambrose, 820 N. Calder, Montesano, WA, has applied for approximately a nine foot variance on the north property line for the purpose of Single Family Dwelling. The zoning is R-1 Low Density Residential. The property is Grays Harbor County Parcel # 072909200802, Containing N 1/2 of lots 2 & 3, BLK 2, of the City of Montesano.  
The Hearing Examiner reserves the right to take such action on the matter including the adoption or the making of final recommendations thereon as may be allowed by law upon completion of the hearing.  
**DATED June 30, 2006**  
**CITY OF MONTESANO**  
Sharon Morgan,  
Clerk/Controller  
**PUBLISHED: July 06, 2006**  
**CITY OF MONTESANO**  
112 N. Main Street  
Montesano, WA 98563  
7/6 11