

FILED
COURT OF APPEALS
DIVISION II

10 SEP 13 PM 1:22

STATE OF WASHINGTON

BY
DEPUTY

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

PATRICIA L. AMBROSE,

NO. 40146-1-11

Appellant,

vs.

CITY OF MONTESANO &
STEVEN HYDE,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

Respondent City of Montesano's Brief

TABLE OF CONTENTS

I. Introduction 4
II. Statement of Case 5
III. Argument 8
IV. Conclusion 18

TABLE OF AUTHORITIES

Cases

Dev. Servs. of Am., Inc. v. City of Seattle, 138 Wn.2d 107, 115, 979 P.2d 387 (1999) 12

Habitat Watch v Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005) 10, 13

Pierce v. King County, 62 Wn.2d 324, 334, 382 P.2d 628 (1963) 11

Samuel's Furniture v The Department of Ecology, 147 Wn.2d 440, 54 P.3rd 1194 (2002) 10, 11

Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995) 12

Wenatchee Sportsmen, Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002) 11

West Hill, LLC v City of Olympia, 115 Wn. App. 444, 63 P.3d 160 (2003) 17

Statutes

RCW 7.16 12

RCW 36.70C 9, 12

RCW 36.70C.010 10

RCW 36.70C.030(1) 12

RCW 36.70C.040(2)-(4)	12
RCW 36.70C.040(4)(a)	12
RCW 36.70C.040(4)(b)	13
RCW 36.70C.040(4)(c)	13
RCW 36.70C.100	15
RCW 36.70C.130	18
RCW 36.70C.130(1)	14
RCW 36.70C.130(1)(a), (e)	11

Respondent City of Montesano's Brief

I. INTRODUCTION

This LUPA case comes before the Court after the Superior Court affirmed the Montesano Hearing Examiner's decision invalidating a residential building permit issued by the City to Appellant, Patti Ambrose. The challenge to that permit had been commenced by Respondent, Steven Hyde. The Hearing Examiner considered the evidence and arguments submitted by all interested parties, and had issued a written decision on the Hyde challenge, ruling that Ms. Ambrose's building permit was invalid. After Ms. Ambrose commenced this LUPA action to challenge the Hearing Examiner's decision, the Superior Court made its decision sua sponte, before the administrative record was prepared and filed with the Court, and without a dispositive motion having been filed by any party. Indeed, the Superior Court made its decision following a hearing noted on for and conducted only to determine a schedule for the

preparation and filing of that administrative record, and to consider a motion by Ms. Ambrose to dismiss a separate LUPA appeal which had been consolidated with the building permit appeal.

The record material which had not yet been filed with the Superior Court at the time of the decision to affirm the Hearing Examiner included documentary evidence submitted to the Hearing Examiner, the transcript of the Hearing Examiner's proceedings, and briefing material submitted to the Hearing Examiner on behalf of Steven Hyde and Patti Ambrose. Moreover, at the time of the Superior Court's decision, the parties had not briefed the issues to the Court related to whether the Hearing Examiner's decision should be affirmed, reversed, or modified.

II. STATEMENT OF THE CASE

Due to the absence of the administrative record and the unsupported nature of many of the statements of fact in the Brief of the Appellant, the City must object to almost all of them. The

first exception to the objection is to the essential truth of Paragraph 3.3 of the Petition for Review. In sum, it alleges the Hearing Examiner erred by determining the variance was extinguished or otherwise terminated by the BLA. Both Ambrose and the City agree that such an extinguishment could not have occurred under the applicable law, discussed below.

The second exception to the City's objection to the Appellant's statement of the case concerns the accuracy of the drawing presented to the Hearing Examiner in 2006 as representing the boundaries of the lot in question. That drawing, produced by Ms. Ambrose or her surveyor, depicted the results of a boundary line adjustment which had not been completed at the time it was presented to the Hearing Examiner in support of Ms. Ambrose's building set-back variance application. Therefore, it was not a correct depiction of the lot to which the variance application applied.

In the proceeding that was held before the Hearing Examiner on Mr. Hyde's challenge to the Ambrose building permit, no issue was raised about the constitutionality of the City's conduct relative to Ms. Ambrose's various permits and applications. Therefore, the appellant's claims of a due process violation and/or of a taking of property for public use without just compensation, are not properly before the Court of Appeals.

Additionally, Ms. Ambrose fails to note she was informed by a letter dated November 12, 2008, to Mr. Morean, her then lead counsel, by Mr. Hyde's counsel, that commencing or continuing building while an administrative appeal of the issuance of her then applicable building permit was ongoing, the original one having been allowed to lapse due to inaction, was at her own risk. (Appendix #1) That she made the decision to go forth was a conscious decision made by no one other than herself.

III. ARGUMENT

A. The Trial Court's Decision Affirming the Hearing Examiner's Decision Should be Reversed.

Given that the City is designated a Respondent and has articulated and will continue to articulate the various points of disagreement with the Appellant's position, it may be viewed as somewhat ironic that the City does agree with the Appellant on one fundamental point. Both the Hearing Examiner and the Trial Court, for each of whom the undersigned has a great deal of respect, erred in revoking the building permit at issue. There were no timely challenges to the granting of the initial variance, the boundary line adjustment, nor the initial building permit. That, for whatever reason, Ms. Ambrose failed to take action which would have kept the initial building permit valid does not affect the fact that the situation on the ground was the same at the time of the issuance of the second permit as existed at the time of the issuance of the original permit.

When the variance was sought and granted in 2006, the lot configuration shown was the same configuration present when the initial building permit was issued in 2007. There is no indication there was a misrepresentation that the BLA had been completed. An implicit condition of the granting of the variance was that the variance from the normal standards which was granted would only be applicable to a lot legally so configured. As presented to the City's Director of Community Development (the DCD) at the time of the application for the first building permit, the appropriate confirmations as to the granting and filing of the BLA were present on the documents. The variance, which was granted only after public hearing and notice, the boundary line adjustment, and the issuance of the first building permit were each actions subject to challenge under the provisions of RCW 36.70C. No challenges were filed. Thus, when the application for the second permit, required only as a result of the absence of

any construction action under the provisions of the first permit, the DCD was required to review the application under the constraints of the granted variance and BLA.

The position set forth in the prior sentence is based upon the holdings in a series of appellate decisions interpreting LUPA based challenges, one of the first of which was *Samuel's Furniture v The Department of Ecology*, 147 Wn.2d 440, 54 P.3rd 1194 (2002). There, the Supreme Court issued a ruling that DOE could not effectively "trump" grading and building permits issued by the City if it had not challenged them within the time frame established by LUPA.

Habitat Watch v Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005) sets forth clearly the legal rationale of that position commencing at Page 406.

LUPA's stated purpose is "timely judicial review." RCW 36.70C.010. It establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process. As we have

recently interpreted LUPA in *Wenatchee Sportsmen, Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), and *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194, 63 P.3d 764 (2002), once a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline. See, e.g., *Wenatchee Sportsmen*, 141 Wn.2d at 181 ("Because [LUPA] prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed."); *Nykreim*, 146 Wn.2d at 925, 940.

LUPA embodies the same idea expressed by this court in pre-LUPA decisions--that even illegal decisions must be challenged in a timely, appropriate manner. See *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963) (holding that even though a county resolution constituted illegal spot zoning and was therefore void ab initio, the applicable limitations period "begins with acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law"). Under LUPA, relief may be granted where "[t]he body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process" and where "[t]he land use decision is outside the authority or jurisdiction of the body or officer making the decision." RCW 36.70C.130(1)(a), (e). Thus, defects in land use determinations that could have

resulted in decisions that were void ab initio under pre-LUPA cases fall within LUPA, with its express 21-day limitation period. Moreover, the act quite clearly declares legislative intent that chapter 36.70C RCW is to be "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1).

LUPA specifically applies to the particular type of decision at issue here. This court held that a challenge to a special use permit decision made before enactment of LUPA was appropriately brought by way of a petition for writ of certiorari under chapter 7.16 RCW. *Dev. Servs. of Am., Inc. v. City of Seattle*, 138 Wn.2d 107, 115, 979 P.2d 387 (1999); *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). When enacting LUPA, the legislature expressly provided that the act "replaces the writ of certiorari for appeal of land use decisions." RCW 36.70C.030(1). There should be no question that a challenge to a special use permit decision lies within LUPA--even where the decision is allegedly void.

LUPA's statute of limitations begins to run on the date a land use decision is issued. RCW 36.70C.040(2)-(4). The statute designates the exact date a land use decision is "issued," based on whether the decision is written, made by ordinance or resolution, or in some other fashion. RCW 36.70C.040(4)(a). When a land use decision is written, it is issued either three days after it is mailed or on the date that the local jurisdiction provides notice that the

decision is publicly available. Id. The statute does not indicate to whom the decision should be mailed (or other notice provided), and appears to presume that this specification is indicated elsewhere. When a decision is made by ordinance or resolution, the decision is issued on the date the legislative body passes such ordinance or resolution. RCW 36.70C.040(4)(b). Finally, the statute provides that if neither of the above categories apply, a land use decision is issued on the date it is entered into the public record. RCW 36.70C.040(4)(c).

Thus, applying the legal principals set forth in *Habitat*, the decision cancelling the building permit should be reversed.

B. There is no evidence before this Court that the Hearing Examiner considered issues not before him in making his decision.

The contention by the Appellant that the Hearing Examiner considered issues not before him is simply incorrect, although it is difficult to show one way or the other since the full record considered by him is not before this Court. As was set out in the motion previously filed by the City in this matter seeking remand, the Trial Court did not have before it at the time of the issuance of its decision the record of the proceedings before

the Hearing Examiner. Thus, it did not have the opportunity to "review the record" as directed by RCW 36.70C.130(1) That being the situation present, it is clear from the decision issued by the Examiner that Mr. Hyde raised issues relating to the 2006 variance and to the 2007 BLA. (See Findings of Fact #s 5 & 7) If the full record was before this Court, the Court would have the filings of Mr. Hyde, which raised the issues and the responses, if any, by Ms. Ambrose's then counsel in relation to these issues. As Finding of Fact #7 makes clear, the Hearing Examiner did not conduct a new review of whether or not the BLA created an unlawful lot.

C. There is no basis to support a contention the Appellant's constitutional rights were violated.

In making this argument, the sole basis appears to be that, upon issuance of the decision of the Hearing Examiner cancelling the building permit, the DCD revoked the building permit. There is certain irony in the argument made by the

Appellant in this area that the Appellant "was allowed no opportunity to contest the variance rescission..." (Appellants Brief, P 8-9 & P. 26) In the LUPA petition filed by the second firm which has represented Ms. Ambrose through the course of these proceedings, Sections 3.2 through 3.4 inclusive specifically sought review of that decision. Thus, then Counsel clearly recognized Ms. Ambrose had a means to challenge what they thought was an incorrect decision. That Appellant's then Counsel did not seek from the Court the stay of action pending review authorized under certain conditions by RCW 36.70C.100 is something not spoken to in the Appellant's Brief. What is clear is they did not and the City is not responsible for any consequence of such a tactical decision.

D. The Hearing Examiner was acting within the jurisdiction to the office granted by the Municipal Code.

As to this contention, this again is an area in which the absence of the entire record will make

it difficult for the Court to deal with the contention since it does not have before it the record before the Examiner. However, it should be noted that Appellant's counsel's citation to the chapter of the City's Municipal Code relating to zoning does not recognize the chapter of that Code specifically establishing the office and other matters related to the Hearing Examiner. As set out in Section 2.38.130 of the Municipal Code which is entitled "Matters to be decided", the Hearing Examiner

"shall hear and decide matters assigned to the examiner by the council, including, but not limited to the following land use matters:

(A) such matters as may be prescribed by the zoning code, including, but not limited to ...variances and conditional uses.

That the Examiner's decision was erroneous, in the view of both the City and the Appellant, does not mean that it was not with his decision to make.

E. As a result of the Trial Court's affirming the decision of the Hearing Examiner without having the entire record before it and without analyzing the claims made in the Petition based upon that

record, there is insufficient record for review of those claims which are subject to the clearly erroneous standard.

The Appellant has raised a wide range of issues. To an extent, the issues raised by the Appellant at the appellate court level are different than those raised by her then counsel at the Trial Court level in the LUPA petition filed upon her behalf. Most of these issues relate to the Examiner's application of facts presented to him during the hearing process to the applicable law. As the courts have made clear, a de novo review of an issue in a LUPA proceeding is only as to matters of statutory construction and application. If it is a matter of a Hearing Examiner's application of law to facts, the decision on review is to be overturned only if found to be clearly erroneous. *West Hill, LLC v City of Olympia*, 115 Wn. App. 444, 63 P.3d 160 (2003) As the City has indicated previously in this brief, as to any issue of the latter type, it is the City's position that neither the Trial Court

nor this Court would have adequate record before it to make such a decision. Thus, the attempt of the Appellant to have the Court make many decisions on a variety of issues is inappropriate.

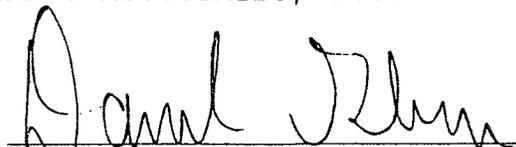
IV. CONCLUSION

The decision of the Trial Court affirming the revocation of the building permit should be reversed upon the bases set forth above. Fundamentally, it was the result of an erroneous interpretation of the law as related to the effect of the BLA on the variance. The other issues raised by the Appellant need not and should not be reached in light of the absence of the ability of either the Trial Court or this Court to review the record in the manner set forth by RCW 36.70C.130.

DATED this 17th day of September, 2010.

GLENN & ASSOCIATES, P.S.

By



DANIEL O. GLENN, of
Attorneys for Respondent
City of Montesano
WSBA #4800

FILED
COURT OF APPEALS
DIVISION II

10 SEP 13 PM 1:23

STATE OF WASHINGTON

BY C DEPUTY

***DECLARATION OF MAILING ***

The undersigned declares:

That on this day I deposited with Legal Messengers directed to Ben Cushman and Barnett Kalikow a copy of the document to which this declaration is attached. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of September, 2010.

Jolene Erickson

Olympia, WA 98502

Phone (360) 705-3342

Fax (360) 705-0175

November 12, 2008

Mr. Gary A. Morean, Attorney
Ingram Zelasko & Goodwin LLP
P.O. Box 1106
Aberdeen, WA 98520

RE: Hyde v. Montesano / (Your client: P. Ambrose)

Dear Mr. Morean:

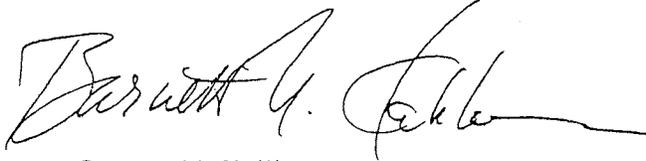
As you are probably aware by now, I have filed both an administrative appeal, and in perhaps an excess of caution, a LUPA action in the above referenced matter, in case the city determines that the building permit for your client was not appealable under MMC 17.47.

I am writing to let you know that since these actions were taken, your client has commenced building; has poured a foundation and continues to progress on her structure even though her permit is under appeal.

I understand that as long we have not actually received a stay, she may have the right to do this, but we wish to impress on you (and her) that if it is finally determined that her permit was issued unlawfully and contrary to city and state ordinances and laws, we will actively pursue abatement of this structure. Far from being unusual in such circumstances, abatement would be the rule. *Eastlake Community Council v. Roanoke Associates Inc.*, 82 Wn. 2d 475, 513 P.2d 36 (1973), *Department of Ecology v. Pacesetter Construction Co.*, 89 Wn. 2d 203, 571 P.2d 196 (1977).

We would be happy to work with you to get an early hearing date for the administrative appeal, but in the interim we hope and expect that you will impress on your client the risks and gravity of going forward pursuant to a permit that is under appeal.

Sincerely,
KALIKOW & GUSA, PLLC



Barnett N. Kalikow
Attorney for Steve Hyde

GLENN & Associates

MAR 20 2009

cc: client

RECEIVED

Appendix #1