

No. 40146-1-II

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

PATRICIA L. AMBROSE

*Appellant,*

v.

CITY OF MONTESANO & STEVEN HYDE

*Respondents.*

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DIVISION II  
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STATE OF WASHINGTON  
BY   
DEPUTY

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Respondent Steven Hyde's Response Brief

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## I INTRODUCTION:

The short answer to this appeal is that Ms. Ambrose never had a setback variance on anything and could not build without one; the form of a variance she got was procured by fraud; and the actual property on which she got a form of variance was completely reoriented after she got it. Because variances are unique to the size, shape, topography and surroundings of the property on which they are received, [fn. 4,5, and 6, infra] when all those things changed with a radical boundary line adjustment, the variance, if it ever existed, was no longer valid.

## II FACTUAL BACKGROUND

Once the court understands what Ms. Ambrose and the city's representative did, and when, the multiplicity of reasons why the hearing examiner who heard the case was correct in revoking her building permit will be apparent.

The facts of this case are the now-unchallenged findings of facts set forth in the decision of the hearing examiner. Given that these facts were unchallenged even before the superior court, it is perhaps understandable that the superior court did not wait for the

hearing record and the actual LUPA hearing on the merits, because what the hearings examiner describes is nothing short of a species of fraud perpetrated by Ms. Ambrose with the assistance of the City building department.<sup>1</sup>

1. In 2006, Ms Ambrose owned two lots, lots 8 & 9, Block 2, Carrs addition, City of Montesano, CP 64, and 65, that were both slightly smaller in area than the 6000 Square feet required by current R-1 zoning (MCC 17.20.050) FF 9 at CP 11, but they were non-conforming lots having been created before the zoning code went into effect. (MCC 17.45.030<sup>2</sup>) She and her

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Note: we have used the abbreviations FF for the examiner's Findings of Fact and CL for Conclusions of Law. The examiner's decision is found at CP 8 through CP16. CP 64 and CP 65 show the two Ambrose lots (one since sold) before and after (respectively) the Ambrose boundary line adjustment that Ambrose received after she received a variance. CP 64 shows the properties in what we have called an east west orientation and CP 65 in the north south orientation. They are referenced as Exhibit G in the Examiner's decision (CP16). We have included these excerpts from the record as appendix 1 herein for the court's convenience.

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MCC 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).

predecessors in title had built a large house and a garage, CP 64, 65, that together with their required setbacks, covered considerably more than one-half of the two lots at their southern end, and the house was built on the property line between the two lots. CP 64.

2. Sometime in 2006, Ms. Ambrose decided to seek permits to build on the remaining fractional portion of the north ends of both lots 8 and 9, which had an east-west orientation<sup>3</sup>, but she did not change the orientation with a boundary line adjustment at that time. FF 13, 14, CP 12-13.
3. Instead, in 2006, she presented the hearings examiner with a new lot plan showing the two lots already in a north south orientation. It is not clear how close the lot she eventually created with the BLA was to the diagram she went to the hearings examiner with. FF 13, 14, CP 12-13.

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The hearing examiner refers to this as a north/south orientation because the line running between them ran north/south, but it is difficult to visualize what happened using this verbal description. Reference should be had to appendix 1 rather than reliance on either verbal description. See fn1 hereinabove.

4. We do not have a record of what the public knew by way of a public notice of the variance proposal before the hearing examiner (the same examiner who heard the challenge to the building permit herein) but no one showed up to challenge.
5. In 2007 After the variance was granted, Ms. Ambrose then received a boundary line adjustment (BLA) administratively (i.e. without public notice) to create a legal description that reconfigured the lots in a north south orientation to match something similar to the diagram on which she had previously gone to hearing. FF 13, 14, CP 12-13
6. The size of the parcel upon which she wanted to build was reduced by the BLA from over 5800 sq. ft. (in a 6000 sq ft minimum zone; i.e. slightly nonconforming) to 3800 sq ft. CP 64, 65. The hearings examiner found that this was probably unlawful but concluded that he lacked the jurisdiction to do anything about it. CL 7. CP 14.

7. At some point Ms. Ambrose received a building permit dependent on the variance received in 2006. It lapsed without building, and a second one was eventually received. FF 13, CP12. At that time Mr. Hyde discovered the existence of the building permit on the property and filed a timely challenge to it. CL 2, CP 13. At the time of the appeal, no building had taken place. CL 8, CP 14.
8. Ms. Ambrose built her house, which is now mostly completed entirely during the pendency of the appeal, even after she received notice through counsel that this was at risk. The city did not restrain her from doing so. Not until after the hearing examiner decided in favor of the appeal did the city issue any stop work. CL 8, CP14.
9. At the conclusion of hearing on the building permit challenge, the hearings examiner left the record open to allow the city to respond to the examiner as to how, why and if, this extraordinary recitation of facts were correct. The city responded that the results of the BLA that was *later* performed

were similar to what was presented at variance hearing but not the same. He did not respond as to why he allowed the applicant to present something that did not exist to the hearings examiner. FF14-15, CP13.

### III ARGUMENT

#### A) Procurement of a Variance by Fraud Confers No Rights

If we end with this exposition of facts, that would be enough to decide this case without further argument. What the hearings examiner has described in these findings is nothing less than a species of fraud.

To fraudulently procure a variance is grounds for its revocation. MCC 17.46.190(b)(1). Although the examiner did not formally revoke the variance (he concluded that it was voided by the Boundary Line Adjustment (BLA) so he did not have to), his power to do so surely carries with it the power to nullify a building permit that constitutes an implementation of the fraud.

In interpreting the term “fraudulent” in the ordinance as conservatively as we can, we recur to the classic elements of civil fraud, which are,

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

*Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)

What the hearings examiner describes meets all these elements except the last, and that is not necessary when the fraud is on the public as a whole and not an individual complainant. The fact is, Ms Ambrose with the aid of a city officer, walked into a variance hearing with a map of a lot that did not meet anything close to the legal description of that lot, and was, in actuality, a complete fiction. That was a plain material misrepresentation with which she approached the hearing and presented to the hearings examiner. She wanted it to be acted on because that was why she was there.

No one appeared to oppose, likely because the advertisement did not create a diagram of the non-existent lot and therefore did not raise any concerns, but we cannot know for sure from this record.

Ms Ambrose and the city's representative certainly knew this lot was a complete fiction at the time, since no boundary line adjustment had yet taken place -- or would for seven months -- and

the only place in which that lot existed in that form was in their own minds. The hearing examiner relied on that representation in written form and had the right and obligation to do so.

In addition, if the proceedings before the examiner were under oath, and we believe they were, it certainly raises serious questions of perjury or false swearing. See Chapter 9A 72 RCW.

Although the examiner did not rely on the fraud to nullify the building permit, he clearly could have.

B) The Variance Was Voided by the BLA in Any Case

The examiner did rely on the fact that a variance is explicitly tied to a parcel's specific "size, shape, topography, location or surroundings," in statute<sup>4</sup> and ordinance<sup>5</sup> and common law.<sup>6</sup> Thus when the applicant changes all these parameters after the variance is granted the variance is perforce voided. CL 5, CP 14.

We can not find any way around this logic and appellant has provided none.

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RCW 36.70.810(2)(a)

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MCC 17.46.090(2)

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E.g., *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 95 P.3d 377 (2004)

We can find no case on point anywhere because in order to test this logic the applicant would almost have to perpetrate something like the fraud perpetrated here, and no one so far has done so and then had the nerve to ask a court ratify it. Equity will not allow a person to benefit from an unlawful act. *Estate of Kissinger v. Hoge*, 166 Wn.2d 120, 130, 206 P.3d 665 (2009). And see, *id* at 125:

The common law has long adhered to the maxim, *nullus commodum capere potest de injuria sua propria*, or, no one should be allowed to profit from his own wrong.

C) Three Paradigms for Review

There are essentially three legal paradigms by which we can view what, if anything, Ms. Ambrose had a variance on, all of which get us to where the Hearing Examiner ended up.

Paradigm 1: The 2006 variance was always an illusion.

Since a hearings examiner does not have the authority to grant variances in the abstract on lots that do not exist now but might someday, there never was a variance.

A variance applies to the characteristics of a specific properly described parcel. *St. Clair v. Skagit County*, 43 Wn. App. 122, 715

P.2d 165 (1986). *St Clair* contains the opposite sequence of events as here but the same principles apply. There, the purchaser of several lots misdescribed the legal status of the property and thereby received a building permit. When the structure was challenged as illegally permitted, he sought a variance, which was granted by the county. The court of appeals reversed, holding that the property as it legally existed at the time of the building permit controlled the legality of that permit and only the characteristics of that property could determine the criteria of the variance.

This view is also buttressed by the principle that a variance is usually unavailable when one's own action has created the need for it or even when one purchases property knowing that building on it will require a variance.

Many variance codes in fact contain an explicit prohibition on granting variances when the special circumstance requiring one was created by the applicant. *Lewis v. City of Medina*, 87 Wn.2d 19, 23, 548 P.2d 1093 (1976). The *Lewis* case is explicit that if you cause or contribute to the special circumstances that are the cause of the need for the variance, it may not be granted:

The situation in which they found themselves, therefore, was

the result of their own action. They had failed, thereby, to meet one of the essential criteria for the granting of a variance. That reason alone is adequate to support the action of the Board of Adjustment.

*Lewis*, loc cit.

Although, unlike *Medina*, *Montesano* has no explicit bar to granting a variance for circumstances created by the applicant, the principle is still a major factor weighing against the granting of one. In *Buechel v. Washington*, 125 Wn.2d 196, 884 P.2d 910 (1994), the court concluded that simply acquiring property with knowledge that it would require a variance for building weighed heavily against permitting a variance. *Buechel* at 209-210. In the course of this holding, the *Buechel* court cited with approval a New York case, *Four M Constr. Corp. v. Fritts*, 151 A.D.2d 938, 543 N.Y.S.2d 213 (1989), specifically and solely for the proposition that a self-created hardship weighs against the granting of *any* variance. *Buechel* at 209, footnote 39.

Appellant's actions here, in presenting a lot that needs the variance as pre-existing before she had even created it, and then waiting until after she got the variance to create the lot that needed it, may be an imaginative solution to the problem posed to her by *Lewis*

and *Buechel*, but it is not a legal one. ***These cases presuppose that there is no such thing as a variance on a fictional lot.***

Paradigm 2 The 2006 variance may have been valid as to the north end of both or either of the lots as they existed in 2006, but since those lots no longer exist in that form, there is no way to apply the variance.

Because the lots were completely re-oriented and resized after the variance, there is no way to coherently apply the variance; it no longer applies to the unique “size, shape, topography, location or surroundings” of the property on which it was granted. When one changes the size, shape, and configuration, the variance cannot, by the laws of man *or physics*, go with the newly configured property. See discussion *supra*, at 8-9.

This is the paradigm the hearings examiner chose. It is unassailable. CL 7, CP 14.

Paradigm 3 The variance as received on the fictional configuration could coherently be applied once the lots were reconfigured if the reconfigured north lot were the same as the variance lot.

This is, of course, Ambrose’s chosen view of the matter, but

cannot be legally applied in this case because,

a) the fictional and the actual configurations were not the same and we do not know how different they were (FF14, 15, CP13 ); and, b) The hearing examiner thereby would have condoned the fraud perpetrated on him at the variance hearing. See discussion, 7-8, supra.

D) Additional Grounds For Upholding The Hearings Examiner.

1. The Reconfigured Lot Had No Variance for Insufficient Size and Therefore a Building Permit Could Not Issue.

The hearing examiner affirmed that it was likely not lawful for the city to allow the BLA because it made a nonconforming lot more non-conforming, CL 7, CP 14. But claimed he had no jurisdiction at that time over the illegality. (It was also unlawful because second because it violated both state statute, RCW 58.17.040(6), and Montesano ordinances requiring that BLA's not result in lots that do not meet zoning requirements. MCC 16.22.060(a)(2). )

The superior court upheld the hearings examiner on the fact that any challenge of the BLA was time barred by LUPA. We agree

in principle with both of these rulings. In fact we never argued with them. We have not appealed that issue and frankly we never raised it.

What no court nor the hearing examiner has yet ruled on, and what forms an alternative basis for this court to uphold the hearing examiner is that, whatever the legal status of the Boundary Line Adjustment, nothing in a BLA, legal or illegal, waives the need for variances for building on lots that do not meet code. This lot is 3800 square foot lot in at 6000 square foot minimum zone CP 65.

Nothing in a BLA changes or can change the underlying requirements of the zoning code. *Stafne v. Snohomish County*, 15 Wn.App.667, at fn 12 and text<sup>7</sup> pertaining thereto. 234 P.3d 225 (2010).

It must be so. Imagine a world where one could go to a local official and he could wave a magic wand, in secret, and thereby waive specified requirements of the code so long as no one found out about

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“Here, unlike in [*Chelan County v. Nykreim*, [146 Wash.2d 904, 52 P.3d 1 (2002)] the County does not challenge the BLA or dispute that the decision to grant Stafne's request for a BLA is a final decision. Because *Nykreim* does not support Stafne's argument that granting the BLA changed the zoning or land use designation, the court did not err in denying his cross motion for summary judgment.”

it within 21 days.

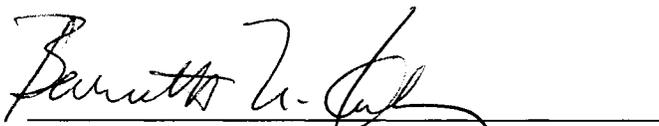
The Ambrose home could not be built upon without a variance for lot size. It had none.

#### IV CONCLUSION

The hearings examiner was clearly correct in voiding the building permit. The multiplicity of reasons he was correct are overwhelming and based as they are on the repeated misbehavior of both the City and Ms. Ambrose, it would be an extraordinary miscarriage of justice to determine this case any other way.

September 8, 2010

KALIKOW LAW OFFICE

A handwritten signature in cursive script, appearing to read "Barnett N. Kalikow", is written over a horizontal line.

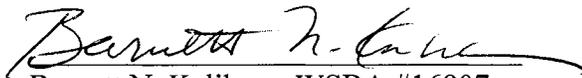
Barnett N. Kalikow, WSBA #16907  
Attorney for Respondent Hyde

CERTIFICATION

I hereby certify under penalty of perjury according to the laws of the state of Washington that I am the attorney in the above entitled cause and that on September 8, 2010, I sent by first class mail, postage prepaid the Motion to Dismiss to which this certification is affixed to:

Benjamin Cushman  
924 Capitol Way S., Suite 203  
Olympia, WA 98501

Daniel O. Glenn  
P.O. Box 49  
Olympia, WA 98507-0049

  
Barnett N. Kalikow, WSBA #16907

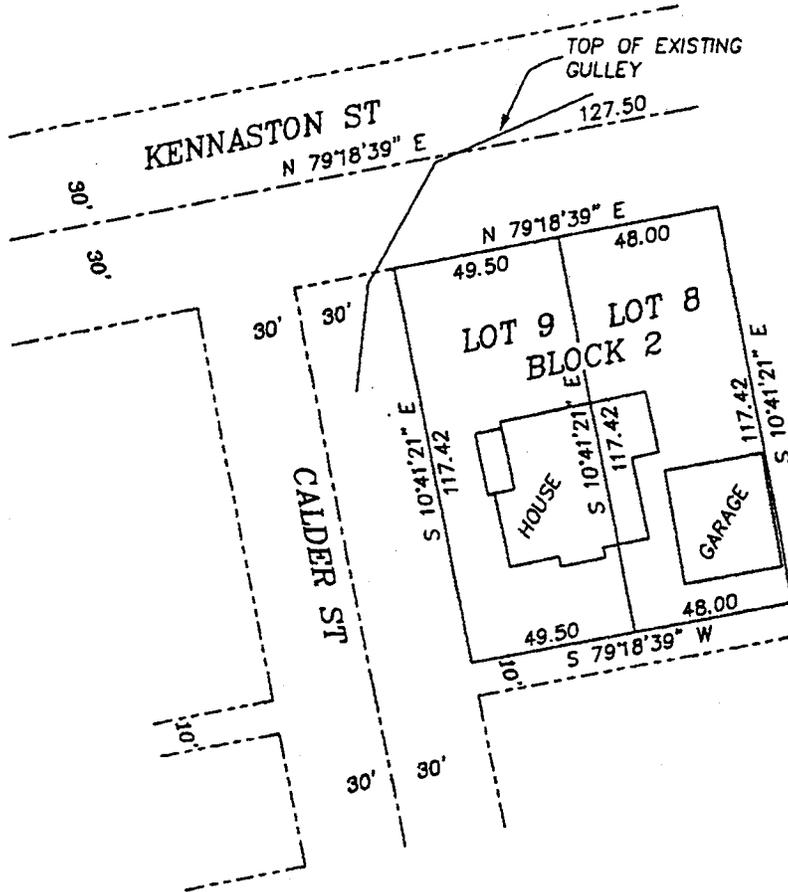
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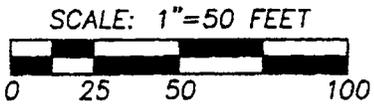
Brief of Respondent Hyde

Appendix 1  
(CP 64, 65)

# EXHIBIT C (ORIGINAL)

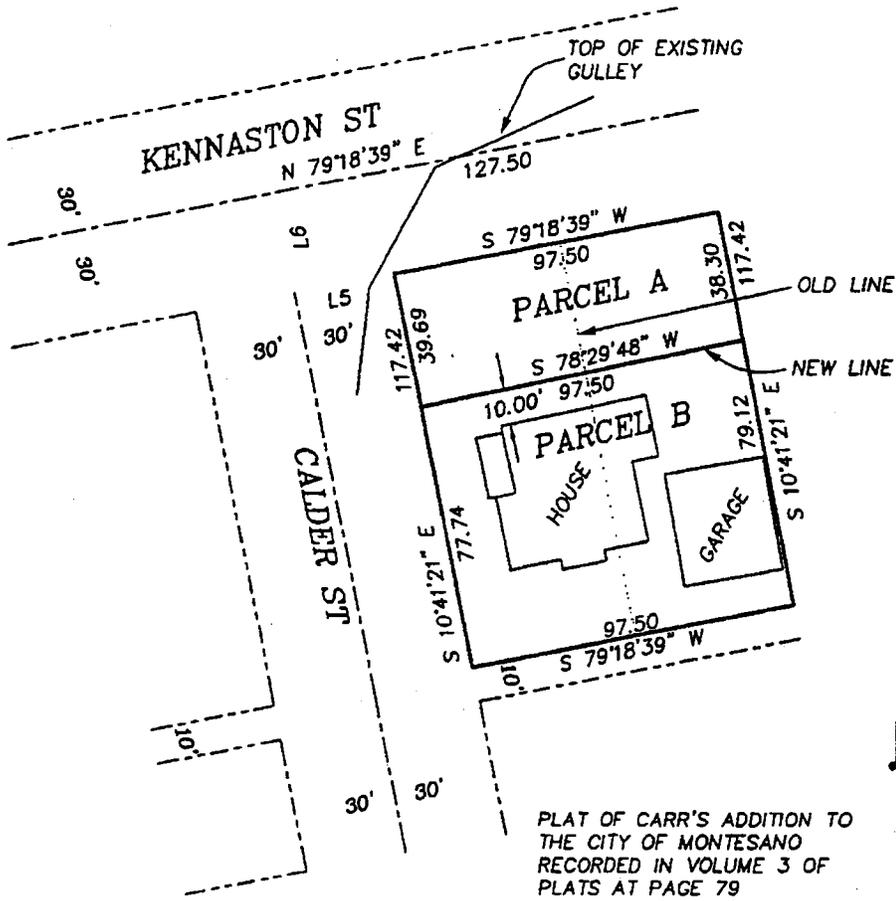


PLAT OF CARR'S ADDITION TO  
THE CITY OF MONTESANO  
RECORDED IN VOLUME 3 OF  
PLATS AT PAGE 79

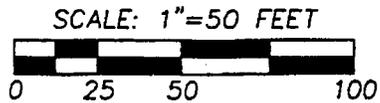


DATE: 10-18-06	LENHERR SURVEYING P.L.L.C.	PATTY'S BLA (ORIGINAL)
DWN: MHA   APR: JUL	PROFESSIONAL LAND SURVEYING P.O. BOX 1155/209 S. 3RD ST. ELMA, WA. 98541 PH.# (360)482-8750	SHEET 1 OF 1
SCALE: 1"=50'		

# EXHIBIT C (NEW)



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: 10-18-06	LENHERR SURVEYING P.L.L.C.	PATTY'S BLA (NEW)
DWN: MHA   APR: JJL	PROFESSIONAL LAND SURVEYING P.O. BOX 1155/209 S. 3RD ST. ELMA, WA. 98541 PH.# (360)482-8750	SHEET 1 OF 1
SCALE: 1"=50'		