

FILED

MAY 11 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 304175

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

FAMILIES OF MANITO, ANN BERGEMAN, TODD STECHER, and SADIE LAKE,

Respondents/Cross-Appellants,

v.

CITY OF SPOKANE and ST. MARK'S LUTHERAN CHURCH

Appellants/Cross-Respondents.

CROSS-APPEAL REPLY BRIEF

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I. INTRODUCTION

At the heart of this case are two competing views of whether the proper procedures were followed and whether there is substantial evidence to support the issuance of a Conditional Use Permit (“CUP”) for the development of a new surface parking lot in the middle of a residential neighborhood on lots formerly occupied by homes. There is little dispute in the record about the facts of this matter. It is without dispute that the City of Spokane’s planning department processed the CUP as a Type II decision, that the decision was signed by a city planner, named David Compton, instead of the Planning Director, JoAnne Wright, and that the city planner afforded the applicant for the CUP, St. Mark’s, ample opportunities to communicate with the decision maker on the matter. As demonstrated in our opening brief, these facts confirm that the City’s actions in this proceeding were not supported by the evidence in the record and that the Hearing Examiner’s decision was an erroneous application and interpretation of the law.

To resist Respondents’ claims in its cross-appeal, the City of Spokane advanced a number of claims. None have merit. The City argues that Respondents failed to present the argument presented in its cross-

appeal to the Superior Court. This claim is belied by a simple read of the briefs in this matter that indicate the contrary.

The City argues that the Planning Department and the Hearing Examiner followed a prescribed procedure. To the contrary, the City code requires that the CUP issued here, be issued by the City's Planning Director rather than a staff person, who was intimately involved in the issuance of the CUP.

Lastly, the City argues that any error was harmless. This ignores the clear language of the City code that requires that the determination be made in a quasi-judicial manner. By definition, a quasi-judicial determination must be fair and impartial. The record indicates extensive contact between St. Mark's and the City, while the one meeting afforded to Respondents was heavily conditioned and was eventually cancelled. Moreover, the Hearing Examiner denied Respondents an opportunity to argue that the process did not meet the requirements of a quasi-judicial proceeding.

All the errors discussed below and in the opening brief, individually or cumulatively, warrant reversal of the City's decision. All these errors demonstrate the City's failure to seriously consider its responsibilities to the community to follow its own procedures to provide

a fair and impartial proceeding. No matter how one looks at it, the City failed to follow proper procedures in adopting this CUP. Accordingly, Respondents request that this Court reverse the decision of the Superior Court and find that the City of Spokane erred by failing to follow the proper procedure in the issuance of the CUP to St. Mark's by allowing a city planner rather than the Planning Director to issue the CUP.

II. ARGUMENT

A. STANDARD OF REVIEW.

This Court may reverse the decision of the Hearing Examiner approving the CUP. The Land Use Petition Act ("LUPA"), RCW 36.70C.130, specifically allows this Court to reverse the decision of the Spokane Hearing Examiner when:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; . . .

RCW 36.70C.130(1).

Here, the Court must review the record before the Hearing Examiner, including findings of fact and conclusions of law to determine

whether error occurred. *N. Pac. Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn.App. 22, 28, 74 P.3d 140 (2003). As is the case here, a decision is clearly erroneous only when the Court is left with the definite and firm conviction that a mistake has been made. *Boehm v. City of Vancouver*, 111 Wn.App. 711, 716, 47 P.3d 137 (2002). As demonstrated in the record and discussed in our opening brief and below, this is the case and the Hearing Examiner's decision must be reversed.

B. RESPONDENTS DID RAISE THE ISSUE REGARDING THE ISSUANCE OF THE CUP BY THE CITY STAFF TO THE SUPERIOR COURT.

The City asserts that Respondents waived the issue on cross-appeal by failing to raise the issue of whether it was proper for plan staff, rather than the Director to sign a CUP decision to either the Hearing Examiner or to the Superior Court. This is hardly the case.

First, Respondents clearly raised this issue in its appeal before the Hearing Examiner. In its Memorandum in Support of Motion to Aside and Remand CUP Decision, Respondents argued:

A decision on a Type II application is made by the Planning Director *See* Table 17G.060-1. Such a decision is "a quasi-judicial decision of a department director." SMC 17A.020.200" T" Definitions, Section K. The significance of a quasi-judicial decision is that it is characterized by fairness, objectivity, and neutrality with respect to the applicant and interested parties. In this instance, even though the staff report on condition use permit, file no. Z2010-022-COT2, begins with the statement, "The

Planning Director approves of this application with conditions,” the “decision” is not signed by the Planning Director. The decision is signed by David B. Compton, City Planner.

AR 1203.

Counsel for Respondents attempted, during the hearing, to question Mr. Compton about his authority and the requirements of a quasi-judicial proceeding, but was stopped by the Hearing Examiner:

Smith: Except, you know, quasi judicial is a legal term, and we use it freely as lawyers, but if you’re asking a lay person if he knows what it means then I, I hesitate to have him – I mean you can quote verbatim from a number of cases as to what it means, but he’s a lay person. And I think what you should ask him about is his decision and planning decisions.

AR 71.

Second, Respondents did argue this issue to the Superior Court. A review of the pleadings in the matter indicates as much:

Here, a decision on a Type II application is made by the Planning Director. *See* Table 17G.060-3. Such a decision is “a quasi-judicial decision of a department director.” SMC 17A.020.200”T” Definitions, Section K; AR 793 (City attorney indicated that Type II decision is made by Planning Director). As stated, the significance of a quasi-judicial decision is that it is characterized by fairness, objectivity and neutrality with respect to the applicant and interested parties.

In this instance, the City appeared confused as to who the decision would be made by, ultimately leaving the decision for staff, rather than the Planning Director to make the decision. The staff report begins with the statement,

“Staff recommends approval of this application with conditions.” AR 178. At one point, staff recognized the quandary of its situation and the inconsistency of its action with the City code, recommending that the language be amended, stating, “The Planning Director approves of this application with conditions.” AR 1236-37. Ultimately, the decision was signed by David B. Compton, City Planner, and not the Planning Director, as required by the City’s code. AR 186.

...

However, the record does contain numerous emails between applicant and the City Planner and clearly demonstrates that not only was there a failure to adhere to “quasi-judicial” principals, but this CUP decision was not made by a department director.

CP 43-44; *see also* CP 141-42 (“The harm to Petitioners stemmed from the City's failure to adhere to mandated quasi-judicial principals, and from a decision made by the improper official (city planner rather than department director).”).

Moreover, this issue was specifically addressed by the Superior Court who discussed this issue in open court and decided against Respondents in this matter. RP 8-12.

Despite arguments to the contrary, Respondents did raise this both before the Hearing Examiner and the Superior Court. Despite the clear language of the code, Respondents were unsuccessful in their efforts to

have the City's decision overturned because of the failure to follow proper procedures. Regardless, it is proper for this Court to consider this matter.

C. THE CITY'S DECISION AMOUNTED TO AN ERRONEOUS INTERPRETATION OF THE LAW AND A FAILURE TO LAWFULLY FOLLOW PROCEDURES AND PROCESS PRESCRIBED BY THE MUNICIPAL CODE BY FAILING TO REQUIRE THAT THE PLANNING DIRECTOR APPROVE THE CUP.

Respondents argue in their cross-appeal that "City's action allowing the staff to make such a decision amounted to an erroneous interpretation of the law and a failure to lawfully follow procedures and process prescribed by the Municipal Code." Opening Brief at 21. A review of the record indicates: (1) that the planning staff, rather than director, issued the decision for the CUP and (2) that the Hearing Examiner rejected Respondents' claims that this was improper.

1. The Hearing Examiner erroneously interpreted the City Code.

Despite this, the City attempts to confuse the issue by alleging that the Hearing Examiner did not engage in unlawful procedure. In so arguing, the City ignores Respondents' allegation that the Hearing Examiner's decision allowing the planning staff rather the planning director to issue the decision amounted to an erroneous interpretation of the law. This fact is illustrated in the record. During the hearing, the Hearing Examiner confused the requirements of the code:

Smith: ... I think his decision was administrative, which is totally difference. I think the Hearing Examiner holds quasi judicial hearings, as does the City Council, but I don't believe the Planning Director holds quasi judicial hearings.

AR. 70. Moreover, the Hearing Examiner stopped questions by

Respondents' attorney on the issue:

Smith: Except, you know, quasi judicial is a legal term, and we use it freely as lawyers, but if you're asking a lay person if he knows what it means then I, I hesitate to have him – I mean you can quote verbatim from a number of cases as to what it means, but he's a lay person. And I think what you should ask him about is his decision and planning decisions.

AR 71.

Finally, the Hearing Examiner's decision contains the very same misinterpretation of the law:

In a decision dated June 21, 2010, Dave Compton, City Planner ... granted an administrative Conditional Use Permit to St. Mark's Lutheran Church ... The Administrative Conditional Use Permit is a Type II permit which can be issued administratively by the Planning Department.

AR 28.

The Hearing Examiner's decision amounts an erroneous interpretation of the law. The decision ignores the plain language of the code that specifically provides that a decision on a Type II application be made by the Planning Director. *See* Table 17G.060-3. Such a decision is

“a quasi-judicial decision of a department director.” SMC 17A.020.200
”T” Definitions, Section K; AR 793 (City attorney indicated that Type II
decision is made by Planning Director). Accordingly, this Court should
find that the Hearing Examiner misinterpreted the law applicable to this
matter.

2. *The Planning Department’s decision amounted to an erroneous interpretation of the law and a failure to lawfully follow procedures and process prescribed by the Code.*

The City also argues that the Planning Department did not commit any reversible errors because the Planning Director, JoAnne Wright, may delegate her responsibility to her staff, David Compton. While this may be the case, this argument fails for two reasons: (1) there is nothing in the record to support that any delegation occurred and (2) such a delegation must still comply with the requirements for a quasi-judicial proceeding.

First, the City raises for the first time in this long proceeding an argument that the Planning Director delegated her authority to her staff. However, there is nothing in the record to support that such a delegation occurred. Washington law is clear that review of LUPA proceedings is limited to the record before the decision maker. *Citizens for Responsible & Organized Planning v. Chelan County*, 105 Wn.App. 753, 758, 21 P.3d 304 (2001); *Kahuna Land Co. v. Spokane County*, 94 Wn.App. 836, 841,

974 P.2d 1249 (1999). However, there is nothing in the record to support this contention and this assertion must be disregarded.

To the contrary, the record is remarkably silent as to the role of the Planning Director. Indeed, in announcing the decision to the City Administrator, the city planner indicated that “staff approves the Condition Use Permit with conditions.” AR 1334. In fact, the Planning Director was not even included in the email. *Id.* In fact, the record indicates that the idea for David Compton, the city planner, to issue the decision appears to have come from another staff member and not the City’s Planning Director. AR 1236 (“I think this should be written as decision rather than a recommendation, don’t you?”).

The record contains specific documentation from City attorneys indicating that a Type II decision is to be made by the Planning Director. AR 927. Early in the process, counsel for Respondents pointed out the flaws in the City’s decision making process, stating:

[I]f the City does continue to process this application as a Type II Permit ..., I request that the City adhere to the Appearance of Fairness Doctrine (RCW Chapter 42.36) and avoid inappropriate ex parte communications with the applicant. If communications are to occur with the decision-maker, I request reasonable advance notice with an opportunity to participate.

AR 1306-06.

At the hearing before the Hearing Examiner, the City's attorney stumbles around the issue of the inconsistency of the City's actions in issuing this CUP with the code requirements arguing that the language in the code is "unfortunate":

Richman: ... I would also add that the Municipal Code does have some, I think, unfortunate language in its definition of Type II applications, and I think that the Type II application may be quasi judicial in the sense that the Planning Department has to exercise a certain amount of, I suppose, judgment in deciding whether or not the application meets certain criteria compared to a pure ministerial-type permit.

AR 71.

The City points to two AR citation to support its arguments –AR 75 and 1260. Neither of these provides any support to its argument. AR 75 contains a statement from the planning staff that he was the decision maker. Respondents do not dispute this. Respondents argue that the planning director was the one, pursuant to the code, to issue the decision. AR 1260 provides no support for the City's argument – the page is a portion of the City's argument to the Hearing Examiner in regards to its position on the standard of review and Type III permits.

There is absolutely no evidence in the record that the planning director delegated her authority to planning staff.

Second, even if such evidence existed, the exercise of that

authority must occur consistent with the remaining provisions of the City code that require that the CUP issuance is a “quasi-judicial decision.”

SMC 17A.020.200”T” Definitions, Section K.

The record indicates that Mr. Compton was not acting in a quasi-judicial manner. A quasi-judicial decision is characterized by fairness, objectivity and neutrality with respect to the St. Mark’s and interested parties, including the Respondents in this matter. *Washington Med. Disciplinary Bd. v. Johnston*, 99 Wash.2d 466, 478, 663 P.2d 457 (1983).

Over and over again, courts have recognized the importance of fairness and objectivity in the quasi-judicial land use matters. “The appearance of fairness doctrine extends the due process requirement that judicial officers be free of any taint of bias to *administrators* acting in a quasi-judicial capacity.” *City of Lake Forest Park v. Shorelines Hearings Bd.*, 76 Wn.App. 212, 217-18, 884 P.2d 614 (1994)(Emphasis added); *see also Alger v. City of Mukilteo*, 107 Wash.2d 541, 547, 730 P.2d 1333 (1987).

The nature of land use permitting, which requires local decisions regulating and restricting the use of property, requires confidence that the processes bringing about such regulation are fair and equitable. *Chrobuck v. Snohomish Cy.*, 78 Wash.2d 858, 480 P.2d 489 (1971); *Hayden v. Port*

Townsend, 28 Wn.App. 192, 622 P.2d 1291 (1981).

“Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Medical Disciplinary Board v. Johnston*, 99 Wash.2d 466, 478, 663 P.2d 457 (1983).

As previously discussed, the record demonstrates that the staff decision maker, Mr. Compton, had extensive contact with St. Mark’s, including numerous private meetings, email, and other contacts which are part of the public record. *See, e.g.*, AR 943-44, 947, 1416-1417, 1433-35, 1456-57, 1463-65. This activity can hardly be characterized as a fair, impartial, and neutral quasi-judicial decision making. The record is clear that Mr. Compton provided extensive assistance to St. Mark’s in the permitting process -- many emails in the record indicate that Mr. Compton provided such assistance, rather than acted as an impartial decision maker. *See, e.g.*, AR 395, 787-88, 797-801, 819-823, 826-828, 910-914. Information was freely exchanged between the City and St. Mark’s. *Id.* Documents in the record indicate that meetings between St. Mark’s and Mr. Compton occurred with the express purpose of discussing the project. *See, e.g.*, AR 393-94. Moreover, emails from Respondents were

forwarded to representatives of St. Mark's. *See, e.g.*, AR 1400-01, 1406-08.

Unlike the casual and frequent communication that occurred between St. Mark's and the City, the City placed extensive conditions on the meeting with Respondents, including a time limitation, requirement that legal counsel be present, that notification be provided to St. Mark's, and that the meeting be limited to presenting written comments and answering the staff's questions. AR 1321-24. Moreover, any information shared would be passed on to St. Mark's. *Id.* To the contrary, Respondents were required to file public records requests to obtain information. *See, e.g.*, AR 917, 923.

In short, while it is possible for the planning director to delegate the authority to issue a CUP to other staff, there is nothing in the record to indicate that a delegation occurred and, even if it did, the exercise of that authority must occur in a quasi-judicial manner. What should have happened here, is that Mr. Compton gather the information necessary to make a decision and, per the code, present that information to the Planning Director for her independent review and consideration absent of the personal emails, visits, and communication that occurred between staff and St. Mark's. Unfortunately, that did not occur and the City erred in

denying the public a fair, quasi-judicial decision required by the City code.

D. THE CITY'S ACTIONS DID NOT AMOUNT TO HARMLESS ERROR.

The City alleges that the failure to comply with Code requirements amount to harmless error. However, the City's actions were not harmless. The City's actions amount to a violation of the right of the public to a fair and impartial process.

First, the City cites RCW 36.70C.130(1)(a) to support that the Court may disregard harmless error. While the error here is not harmless, Respondents allege that the decisions of the City amounted to be an erroneous interpretation of the law and a failure to lawfully follow procedures and process prescribed by the code. LUPA does not restrict the ability of the Court to reverse a decision amount to a misinterpretation of the law even if allegedly harmless error. RCW 36.70C.130(1)(b).

More importantly, courts have stated that "proceedings before a quasi-judicial tribunal **are valid** only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *Matter of Johnston*, 99 Wash.2d 466, 478, 663 P.2d 457 (1983)(emphasis added). Consistent with this the remedy for an action taken in violation of the appearance of fairness doctrine is to void it. *Swift v. Island Cy.*, 87 Wash.2d 348, 552 P.2d 175 (1976). In

other words, the City's failure to comply with the requirements for a quasi-judicial proceeding renders the action void.

Regardless and as discussed above, the harm to Respondents from the City's action stemmed from the City's failure to adhere to mandated quasi-judicial principals, and from a decision made by the improper official (city planner rather than department director). Respondents were not afforded the same access to the decision maker, Dave Compton, as was St. Mark's. A myriad of conditions were placed on the efforts of Petitioners to meet, including conditions such as (1) limitation in the time; (2) limitation on how material could be presented; (3) limitations in discussions; and (4) notification provided to St. Mark's about the meeting. AR 1323. No similar conditions were placed on St. Mark's in its extensive communications with the City. Information was freely exchanged between the City and St. Mark's. *See, e.g.*, AR 395, 787-88, 797-801, 819-823, 826-828, 910-914. Documents in the record indicate that meetings between St. Mark's and Mr. Compton occurred with the express purpose of discussing the project. *See, e.g.*, AR 393-94. Moreover, emails from the Petitioners were forwarded to representatives of St. Marks. *See, e.g.*, AR 1400-01, 1406-08.

To the contrary, Respondents were not afforded returned calls and were informed to monitor the progress via the internet. AR 1423. Rather than sharing documents and information, Respondents were required to file public records requests to obtain information. *See, e.g.*, AR 917, 919. It is apparent that the City's actions were designed to assist and benefit St. Mark's, while providing roadblocks and limit information to Respondents. As a result, Respondents were unable to provide equal time to the decision maker to present their concerns and objections to the project.

Moreover, Respondents had the burden of demonstrating that the staff's decision was erroneous when appealed to the Hearing Examiner.

SMC 17G.050.320(c) states:

The original decision being appealed is presumptively correct. The burden of persuasion is upon the appellant to show that the original decision was in error and relief sought in the appeal should be granted.

This placed a double burden on the Respondents – first, they were at the disadvantage throughout the application process and second, they had the burden to demonstrate that the very same decision was erroneous. This is hardly harmless error. The Hearing Examiner erred in not recognizing the flaw in the decision making process. This amounted to a misinterpretation of the law.

The City also argues that it “routinely interprets its development regulations to require *administrative* processing of Type II applications.” City Response Brief at 18. However, other than a vague statement by the Hearing Examiner, there is no example in the record to support this statement. As discussed above, review of this matter is limited to the record. See *Citizens for Responsible & Organized Planning v.*, 105 Wn.App. at 758. There is nothing in the record to support the City’s contention and this assertion must be disregarded. This is particularly the case in light of the plain language of the code that indicates that such decisions are quasi-judicial.

The City also argues that the appearance of fairness doctrine has never been applied to administrative proceeding. City Response Brief at 18-19. While that may generally be the case, it is well-settled law in Washington that local jurisdictions must follow their own rules and regulations. *Samson v. City of Bainbridge Island*, 149 Wn.App. 33, 44, 202 P.3d 334 (2009), citing, *Skamania County v. Woodall*, 104 Wn.App. 525, 539, 16 P.3d 701, review denied, 144 Wash.2d 1021, 34 P.3d 1232 (2001), cert. denied, 535 U.S. 980, 122 S.Ct. 1459, 152 L.Ed.2d 399 (2002). While local rules may be preempted if they conflict with a state requirement, *Weden v. San Juan County*, 135 Wash.2d 678, 692, 958 P.2d

273 (1998), that is not the situation here. The City's code does not require something prohibited by the state rule. At best, the City's code simply adds another layer of procedure beyond the minimum required by the state. There is no conflict and no preemption in this case. Absent some conflict, the City must comply with its requirement to have the Planning Director issue the decision.

The City points to short plat applications and argues that state law provides for "summary *administrative* approval of these applications." City Response Brief at 17. While that may be the case, that is not the fact before this Court and the City has not nor could not point to a requirement of State law that would: (1) prohibit the planning director from issuing the CUP or (2) doing it in a quasi-judicial manner. The City further argues that requiring the Planning Director to make the decision runs afoul of hearing requirements – it is important to note that Respondents have never argued that a separate and additional hearing occurred. We simply argue that the Planning Director was the proper decision maker and that the decision must abide by the City's own requirement that it occur in a quasi-judicial manner.

Lastly, the City diminishes the impact of its failure to comply with these requirements. As extensively discussed, St. Mark's was afforded

access and opportunities throughout the procedure that were not afforded to the rest of the public, including the free exchange of documents not subject to a public records request. St. Mark's CUP was issued by the very same person with whom they had that level of interaction and not the development director, which the code requires to make the decision. Lastly, the Hearing Examiner disregarded and misapplied the law by denying this claim and stopping Respondents' attorney from fully exploring this matter on the record. All of this amounts to a misinterpretation of the law and failure to follow procedure that warrants reversal by this Court.

III. CONCLUSION

For the reasons set forth above, Respondents/Cross-Appellants request that this Court reverse the findings of the Superior Court and find that the failure of the City to follow its Municipal Code in allowing the Application to be approved by staff rather than the planning director amounted to an erroneous interpretation of the law and a failure to lawfully follow prescribed procedures and process.

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DATED this 11th day of May, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "RICK EICHSTAEDT", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 11 day of May, 2012, I caused the foregoing *Cross Appeal Reply Brief*, to be served via USPS, postage prepaid, on the following:

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