IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY CONNELL and JOELLEN CONNELL, husband and wife,	)	No. 70141-0-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
CITY OF BOTHELL, a Washington municipality,	)	FILED: June 16, 2014
Respondent.	)	

TRICKEY, J. — Jeffrey and JoEllen Connell appeal the superior court's denial of their petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, affirming the decision of the city of Bothell's (City) Board of Appeals denying them a building permit. They contend (1) the decision was not supported by substantial evidence and constituted an erroneous application of the law to the facts; and (2) the City building official's participation in the hearing violated the appearance of fairness doctrine. We affirm and award the City attorney fees on appeal.

FACTS

The Connells are the owners of the Glen Grove Apartments in Bothell.[1] In 2008, they hired Northwest Primeline Exteriors to replace the building's existing single-pane aluminum-framed windows and sliding glass doors with new vinyl-framed windows and doors.[2] It is undisputed that the Connells did not apply for a

[1] Administrative Record (AR) at 2.
[2] AR at 38; Clerk's Papers (CP) at 3.

building permit for the work and that a permit was required by Bothell Municipal Code (BMC) 20.02.095.[3]

After receiving a complaint regarding mold and water damage at the apartments, the City investigated and discovered the work had been performed without a permit.[4] The Connells submitted an application for an after-the-fact permit. The City reviewed the application, concluded that the installation method was inconsistent with City building code requirements, and issued a "determination of inconsistency."[5] Though the Connells appealed the City's decision to the City's Board of Appeals, they ultimately abandoned the appeal and the permit application lapsed.[6]

In 2011, the Connells submitted a second permit application.[7] The Connells sought an exemption under BMC 20.02.090(K) and (L), which provide that the City may approve a permit for work that does not conform to code if strict compliance is impractical or the installation method is equivalent to that prescribed in the code.[8] Along with the application the Connells provided a copy

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[3] Though the Connells' LUPA petition challenged the City's determination that a building permit was required, the superior court dismissed this claim of error in a separate order, which the Connells did not appeal. CP at 98-99.
[4] AR at 2.
[5] AR at 11.
[6] AR at 11-12.
[7] AR at 53.
[8] BMC 20.02.090(K) states, in relevant part:

> Wherever there are practical difficulties involved in carrying out the provisions of this code, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or owner's representative; provided, the building official shall first find that special individual reason makes the strict letter of this code impractical

of the manufacturer's installation instructions as well as results of water leakage testing performed on four of the new windows. The results showed that one of the four windows failed the testing because water leaked through the area where the interlock and sill met.[9]

Michael DeLack, the City's building official, denied the application.[10] He noted that

> [t]he existing window and door assemblies were removed and the new assemblies were altered (nailing flanges removed) and set into the exiting [sic] framed openings without flashing. The applicant is claiming this to be a typical "finless" or "collapse" type of installation. However the non-permitted installations are relying solely on sealant (caulk) placed between the framed opening and the window and door assemblies to prevent moisture intrusion into the building.[11]

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and the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

BMC 20.02.090(L) states, in relevant part:

> The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code; provided, that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the building official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety.

[9] AR at 59.
[10] AR at 79-82.
[11] AR at 80.

DeLack concluded that the work did not comply with the requirements of the International Building Code (IBC),[12] which requires: (1) exterior windows and doors be installed per the manufacturer's instructions; (2) exterior walls provide the building with a weather-resistant envelope; and (3) flashing be installed to prevent moisture from entering the wall.[13] He also concluded that the Connells had not established grounds for an exemption under BMC 20.02.090(K) and (L) because they had not demonstrated that compliance with the code was

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[12] At the time of the hearing, the City had adopted the 2009 version of the IBC as its building code. BMC 20.04.015.

[13] IBC section 1403.2 (2009) provides, in relevant part:

> Exterior walls shall provide the building with a weather-resistant *exterior wall envelope*. The *exterior wall envelope* shall include flashing, as described in Section 1405.4. The *exterior wall envelope* shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a *water-resistive barrier* behind the exterior veneer, as described in Section 1404.2, and a means for draining water that enters the assembly to the exterior. Protection against condensation in the *exterior wall* assembly shall be provided in accordance with Section 1405.3.

Section 1405.4 (2009) provides:

> Flashing shall be installed in such a manner so as to prevent moisture from entering the wall or to redirect it to the exterior. Flashing shall be installed at the perimeters of exterior door and window assemblies, penetrations and terminations of *exterior wall* assemblies, *exterior wall* intersections with roofs, chimneys, porches, decks, balconies and similar projections and at built-in gutters and similar locations where moisture could enter the wall. Flashing with projecting flanges shall be installed on both sides and the ends of copings, under sills and continuously above projecting *trim*.

Section 1405.13.1 (2009) provides:

> Windows and doors shall be installed in accordance with *approved* manufacturer's instructions. Fastener size and spacing shall be provided in such instructions and shall be calculated based on maximum loads and spacing used in the tests.

impractical and because their proposal to prevent moisture intrusion by merely applying sealant was unrealistic and ineffective.[14]

The Connells again appealed to the Board. On April 17, 2012, at the start of the Board hearing, DeLack outlined the procedural history of the case.[15] He also noted for the record that pursuant to BMC 20.02.225,[16] he was an ex officio member of the Board but could not vote on any matter before the Board.[17] At one point, while the parties were arguing over whether the work constituted a repair or new construction, DeLack interjected, offering to explain the relevant code provisions to the Board because he had authored them.[18] The Board swore DeLack in to provide testimony on that issue.[19] DeLack later questioned one of the Connells' witnesses. Counsel for the Connells objected, stating, "The rules specifically provide what a building official is required and authorized to do during this procedure. And interrogating the witness is not one of those rules."[20] The Board overruled the objection.[21]

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[14] AR at 81-82.
[15] Board of Appeals Report of Proceedings (RP) at 3.
[16] At the time of the hearing, BMC 20.02.225(A) provided: "The building official shall be an ex officio member of and shall act as secretary to the board but shall have no vote on any matter before the board." BMC 20.02.225(A) was amended in 2013 to read: "The building official may assist as staff for the board and may participate fully in proceedings before the board but shall have no vote on any matter before the board."
[17] RP at 3.
[18] RP at 19.
[19] RP at 20.
[20] RP at 52-53.
[21] DeLack proceeded to question two other witnesses and made a closing argument to the Board. The City was represented by the City Attorney, who also made a closing argument.

Mark Lawless, the Connells' building consultant, testified that prior to installing the new vinyl windows, Northwest Primeline Exteriors cut off the windows' nailing fin.[22] Northwest Primeline Exteriors then removed the pre-existing aluminum frames and set the new vinyl windows into the rough opening.[23] However, the manufacturer's instructions made clear that in the case of a retrofit, a finless window must be installed into an existing wood or aluminum window frame.[24] Lawless testified that the manufacturer did allow for installation into a rough opening in the case of new construction. Per the manufacturer's instructions, this method would require the installation of flashing.[25] Lawless acknowledged that flashing was not installed.[26] Lawless ultimately admitted that Northwest Primeline Exteriors had utilized a "hybrid" method utilizing a combination of the retrofit and new construction techniques.[27]

The City introduced the results of the water leakage testing performed by the Connells as well as photographs of a sampling of windows showing mold growth.[28]

The Board affirmed the City's decision. The Board made the following findings:

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[22] RP at 58.
[23] RP at 84.
[24] AR at 70-73.
[25] AR at 75.
[26] RP at 95.
[27] RP at 92-93.
[28] AR at 88-94.

> IBC Section 1405.13.1 states that exterior windows and doors shall be installed per the manufacturer's installation instructions. During his testimony, Mr. Lawless stated that the existing aluminum window and door frames had been removed prior to installation of the new windows and doors.
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> City exhibit #9 includes what has been stated as being the window manufacturer's installation instructions. As part of those instructions, a "finless" window is to be installed within the existing aluminum or wood window frame. Mr. Lawless testified that the existing aluminum frames had been removed and the new windows installed directly into the rough wall opening.
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> When questioned about this method not meeting the installation requirements of the manufacturer, Mr. Lawless testified that there were also manufacturer's installation methods for new construction and that the windows as installed would meet those requirements. Upon further questioning by the Board, Mr. Lawless stated that the flashing and sealants required by the manufacturer for new construction had not been installed, but instead the building's vinyl siding would, in his opinion, accomplish the same task as the prescribed flashing.[29]

The Board concluded:

> The windows and doors, as installed, do not comply with the IBC (sections 1403.2, 1405.4 or 1405.13.1), the manufacturer's installation instructions, or the AAMA Standard 2410-03 that the manufacturer's installation instructions appear to be modeled on.[30]

On May 14, 2012, the Connells filed a LUPA petition challenging the Board's decision. The Connells argued, amongst other things, that (1) DeLack's participation in the Board hearing violated chapter 42.36 RCW, the appearance of fairness doctrine; (2) the Board's decision was not supported by substantial evidence; and (3) the Board's decision was an erroneous application of the law to

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[29] AR at 5.
[30] AR at 6.

the facts.[31] The court denied the petition and the Connells' subsequent motion for reconsideration. The Connells appeal.

ANALYSIS

Standard of Review

LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030(1). We review the decision of the "local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(2). Thus, when reviewing a LUPA decision, we stand in the shoes of the superior court, reviewing the ruling below on the administrative record. King Cnty. Dep't of Dev. and Envtl. Servs. v. King Cnty., 177 Wn.2d 636, 643, 305 P.3d 240 (2013).

This court may grant relief from a land use decision if the party challenging the decision establishes one of the following grounds:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a 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;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;

[31] The Connells' other claims are not at issue in this appeal. CP at 1-9.

> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
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> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Substantial Evidence

When reviewing a challenge to the sufficiency of the evidence, "we view facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828-29, 256 P.3d 1150 (2011). There must be sufficient evidence to "persuade a reasonable person that the declared premise is true." Phoenix Dev., 171 Wn.2d at 829. We "'must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations.'" Durland v. San Juan Cnty., 174 Wn. App. 1, 12, 298 P.3d 757 (2012) (quoting Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wn. App. 408, 415-16, 225 P.3d 448, review denied, 169 Wn.2d 1014 (2010)).

The Connells argue that the Board's decision was not supported by substantial evidence. We disagree.[32] The installation did not conform to the IBC,

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[32] As the City notes, the Connells did not assign error to any of the Board's findings of fact, which would therefore typically be treated as verities on appeal. See, e.g., Hilltop Terrace Homeowner's Ass'n v. Island Cnty., 126 Wn.2d 22, 30, 891 P.2d 29 (1995); see also RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number."). However, because the Board's "findings" are not actually findings of fact but instead a recitation of the evidence presented at the hearing, we review the entire record for substantial evidence to support the Board's decision.

which requires windows and doors to be installed per the manufacturer's instructions. Here, the record is clear that the windows and doors were not installed per the manufacturer's instructions. The installation did not comply with the manufacturer's retrofit instructions because the pre-existing aluminum frames were removed, and did not comply with the instructions for new construction because flashing was not installed.

Nevertheless, the City may approve work that does not conform to code if the installation method is equivalent in quality to that prescribed in the code. The City introduced evidence that a sampling of the new windows failed water leakage testing, as well as photographic evidence of mold growth. Viewed in the light most favorable to the City, the evidence supports the Board's conclusion that the installation method used by the Connells was not sufficient because it allowed water intrusion.

Application of Law to Facts

The application of the law to the facts is clearly erroneous only if we are "left with a definite and firm conviction that a mistake has been committed." Phoenix Dev., 171 Wn.2d at 829. The Connells contend that the Board misapplied the law to the facts when it considered the evidence of water leakage and mold because the only relevant issue was whether the installation conformed to the City's building code. However, the Connells' permit application requested an exemption on the ground that the non-conforming installation method was equivalent to that prescribed in the code. Evidence of leakage and mold

demonstrated that it was not. The Connells fail to demonstrate clear error in the Board's interpretation of the City's building code.

Appearance of Fairness Doctrine

"Application of the appearance of fairness doctrine to local land use decisions is statutory." King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 91 Wn. App. 1, 33, 951 P.2d 1151 (1998), reversed in part on other grounds, 138 Wn.2d 161, 979 P.2d 374 (1999). The doctrine applies to the quasi-judicial actions of local decision-making bodies. RCW 42.36.010. The appearance of fairness is violated only where there is evidence of ex parte communication between a member of the decision-making body and a party to the proceeding. RCW 42.36.060 provides:

> During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:
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> (1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and
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> (2) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.

The Connells contend that DeLack's participation in the Board hearing as a witness, an advocate for the City, and a Board member violated the appearance of fairness doctrine. But there is no evidence that DeLack engaged in the type of ex parte communication prohibited by the statute. Moreover, the remedy available in an appearance of fairness challenge is to "disqualify a member of a decision-making body from participating in a decision." RCW 42.36.080. As an ex officio member of the Board DeLack did not have voting privileges and could not participate in deciding the Connells' appeal.

In support of their claim, the Connells rely on Buell v. City of Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972) and Hayden v. City of Port Townsend, 28 Wn. App. 192, 622 P.2d 1291 (1981), which pre-date the enactment of chapter 42.36 RCW and pertain to the common law appearance of fairness doctrine.[33] Both cases involved the chairman of a planning commission making a rezoning recommendation to the city council from which they would benefit. Buell, 80 Wn.2d at 522-23; Hayden, 28 Wn. App. at 193. The appearance of fairness doctrine was violated by their financial interest. Buell, 80 Wn.2d at 525; Hayden, 28 Wn. App. at 196-97. These cases do not apply here because there is no

[33] The Connells failed to raise the common law appearance of fairness doctrine in their LUPA petition but argued it on reconsideration. The superior court did not reach the merits of this argument, concluding "[t]he issue of appearance of fairness was not adequately preserved and presented in petitioner's brief." CP at 112-13. "But new issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review, where, as here, they are not dependent upon new facts and are closely related to and part of the original theory." Nail v. Consol. Res. Health Care Fund I, 155 Wn. App. 227, 232, 229 P.3d 885 (2010).

evidence that DeLack had any financial interest in denying the Connells' permit application. On the facts before us, DeLack's participation in the Board hearing did not violate the appearance of fairness doctrine.

Attorney Fees

The City requests attorney fees incurred in defending this appeal pursuant to RCW 4.84.370. The prevailing party on appeal of a land use decision is entitled to its attorney fees if that party's decision also prevailed before the administrative agency and in the superior court. RCW 4.84.370(1); Friends of Cedar Park Neighborhood v. City of Seattle, 156 Wn. App. 633, 654-55, 234 P.3d 214 (2010). As the prevailing party, the City is entitled to fees on appeal subject to compliance with RAP 18.1.

Affirmed.

Trickey, J.

WE CONCUR:

Leach, J.

Cox, J.