

66125-6

66125-6

NO. 66125-6-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Patrick A.T. Jones,

Appellant,

vs.

The Town of Hunts Point,

Respondent.

2011 MAR 30 PM 4: 01
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

BRIEF OF RESPONDENT TOWN OF HUNTS POINT

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I. INTRODUCTION

This is a simple case. The Town of Hunts Point (“Town”) properly denied a request by Appellants Marianne and Patrick Jones (collectively “Jones” throughout) to short plat their property -- which is already occupied by a single-family house and located in an already-developed neighborhood - - by dividing it in half. The Town denied Jones’ request because such a division is prohibited by the terms of a recorded restriction on the face of the property’s underlying plat. In order for the Jones’ short plat to be approved, the plat restriction must be removed pursuant to the plat alteration provisions of RCW 58.17.215, which requires the signatures of other lot owners within the plat.

Jones was aware of all of this. The deed by which they acquired title disclosed the plat restriction. Jones requested that the Town join it in a superior court action to invalidate the plat restriction; the Town declined. Jones then requested and received multiple legal opinions from the Town, which opinions stated that the proposed short plat could not be approved, and that a statutory plat alteration was required. Knowing all of this, Jones nonetheless applied for the short plat, which was understandably denied.

After Jones appealed, the Town Hearing Examiner correctly affirmed the Town Engineer’s decision, and the Hon. Laura Inveen correctly denied Jones’ land use petition under Chapter 36.70C RCW.

This Court should likewise affirm. The Town was required to consider and apply the condition of original plat approval set forth on the face of the plat, which bars further division of Jones' lot if a reduced area would result. That plat restriction is neither obsolete nor abandoned; the only instances in which Jones claims it has not been observed resulted in larger lot sizes – not smaller ones as Jones proposes. This Court may properly affirm the Hearing Examiner's decision on the merits. Alternatively, this Court may properly affirm the Examiner's decision without reaching the merits due to Jones' failure to timely name a statutorily-required party within LUPA's 21-day limitations period. By the express terms of LUPA, Jones' failure deprives the Superior Court and this Court of jurisdiction to review the land use petition.

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Jones' opening brief¹ sets forth several claimed assignments of error, and their view of the related legal issues. The Town restates the legal issues as follows:

¹ This brief responds to the brief Jones served electronically on the Town. Jones indicated that the electronic copy differs in pagination and headings from the filed copy, but when asked for a hard copy, Jones stated that one could not be produced because the computer on which the filed brief was prepared had been irreparably damaged. The Court Clerk sent the Court's hard copy to the printer on March 1 and the Town has been unable to obtain a copy from the Court. Thus, the Town submits this Response Brief subject to the reserved right to respond to any substantive differences in Jones' filed brief, or to correct the Town's citations to correspond to the correct pages in Jones' filed brief.

A. Should this Court affirm the Hearing Examiner's decision, where this Court lacks jurisdiction to review the land use petition because it failed to name a person (Marianne Jones) identified in the decision below as both an owner of the property at issue and an applicant for the short plat, and who at the time of the land use petition was identified in King County tax records as a taxpayer, all as required by RCW 36.70C.040(2)(b)(i) and (ii) and (2)(c)?

B. Should the Hearing Examiner's conclusion that, in the absence of a plat alteration, the existing, recorded plat restriction barred Jones' proposed short plat, be affirmed?

1. Does RCW 58.17.170 require a town to apply the terms of a restriction recorded on the face of an approved plat as part of the "terms of approval of the final plat," when the town considers a proposed development or re-subdivision of a lot within the plat?

2. Should this Court affirm the Town Engineer's and Hearing Examiner's conclusion that the language of the plat restriction on the face of the underlying, recorded plat barred Jones from dividing their lot such that the resulting lots would be one-half of the size of the lot shown on the face of that plat?

3. Does RCW 58.17.215 require Jones to seek a plat alteration if they wish to eliminate or avoid the plat restriction and short plat their lot?

C. Should the Town be awarded its attorneys' fees on appeal pursuant to RCW 4.84.370, because it substantially prevailed at every level in this proceeding?

III. STATEMENT OF THE CASE

A. Jones' Proposed Short Plat.

This case concerns the attempt by Appellant Patrick Jones and his wife, Marianne Jones, to subdivide their jointly owned lot, located in the Town of Hunts Point. CP 20-21(Findings, Conclusion and Decision of Hunts Point Hearing Examiner ("H.Ex.Dec.") at Findings 1 and 2).^{2 3} The property, Lot 11 of Block 2 of the Hunts Point Park Addition ("the Plat"), is located at 8301 Hunts Point Circle, southwest of the corner of NE 32nd Street and 84th Avenue NE. *Id.*

The Statutory Warranty Deed by which Jones acquired title expressly states that it is subject to:

² Jones acquired joint title by the Statutory Warranty Deed dated June 12, 2006 to Patrick A.T. and Marianne K. Jones. AR 436-37 (Statutory Warranty Deed); CP 18 (H.Ex.Dec. (listing Deed as Town Ex. A)).

³ The Index to Clerk's Papers does not separately index or paginate the Hearing Examiner's record in this case. The Index instead indicates that Subfile 33, which the Index denominates as the "Certified Appeal Board Record," was "Sent As Original." Like Jones, the Town uses the abbreviated reference "AR" to refer to the Hearing Examiner's record.

ALL COVENANTS, CONDITIONS, RESTRICTIONS
RESERVATIONS, EASEMENTS OR OTHER
SERVITUDES, IF ANY, DISCLOSED BY THE
RECORDED PLAT OF HUNTS POINT PARK
ADDITION.

AR 437 (all caps in original). The capitalized warning in the deed is hardly surprising, given that the face of the Hunts Point Park Addition plat includes an express limitation on further subdivision:

No lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred, whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.

CP 21 (H.Ex.Dec. at 6, Finding No. 1).

Despite the plain wording of this restriction (“Plat Restriction”), Jones nonetheless chose to push forward with subdivision of the property. Correctly recognizing the Plat Restriction as an obstacle, Jones contacted the Town in mid-2008 and proposed elimination of the Plat Restriction by an action that Jones labeled “Joint Petition for Judgment of Agreed Controversy.” After the Town Attorney’s review of Jones’ draft Petition, the Town declined, indicating that the Town “has no authority to override” the Plat Restriction’s prohibition against the proposed subdivision.⁴ Unsatisfied, Jones asked again, requesting a formal opinion from the Town’s legal counsel. A member of the Town Attorney’s firm spoke with

⁴ AR 442 (July 1, 2008 letter from Town Administrator Jack McKenzie to Joneses).

Marianne Jones on a number of occasions, reiterating the Town's position and advising Jones that a statutory plat amendment would be required.

Jones persisted, demanding a written legal opinion. While no legal requirement exists for the Town to provide legal opinions to individual residents, the Town continued to display exemplary customer service to the Jones. At the direction of the Town Administrator, the Town Attorney provided an opinion on March 3, 2009,⁵ again concluding "that the only way to remove the current plat note that restricts further subdivision in the Hunts Point Park Addition, is through the plat amendment process set out in Washington law." That process, set forth in RCW 58.17.215, requires signatures of a majority of the property owners within the subdivision. AR 444. Jones continued to protest, and was again told that they would "need to go through a plat amendment process in order to remove the plat restriction."⁶

Jones persisted. Jones met in June, 2009 with Town Administrator Jack McKenzie and demanded that the Town allow subdivision of Lot 11, then claiming that the plat's limitation of further subdivisions had been abandoned. In continuing the Town's commitment to serve its residents,

⁵ AR 444-47 (Letter from Margaret J. King to Marianne Jones, enclosing legal memorandum); *see also* CP 263-64 (testimony of Town Administrator Jack McKenzie, indicating that even though it was not something the Town would normally do, he directed that a legal opinion be provided to Jones).

⁶ AR 449 (March 13, 2009 e-mail from Margaret King to Marianne Jones).

and as means by which to provide Jones with an appealable decision, Mr. McKenzie informed Jones that they could start the process if they insisted, but that the Town code required Jones to first attend a pre-application conference. Both Patrick and Marianne Jones applied for a pre-application conference to subdivide the property,⁷ and the conference was held in mid-July, 2009.

Following the pre-application conference, the Town Engineer issued letters indicating that the Town would not be able to process Jones' subdivision application because subdivision as proposed was prohibited by the Plat Restriction in the absence of a plat alteration application. Jones did not include a plat alteration application.⁸ The Town Engineer's letters provided Jones with an immediately appealable decision, while also saving them the trouble of fruitlessly spending more time and more money on engineering and other work necessary to perfect their short plat application (fruitless, because the Plat Restriction prohibits approval of the proposed short plat in any event).⁹

Both Patrick and Marianne Jones appealed to the Town Hearing Examiner. AR 472. At their appeal hearing, the Jones spent much effort

⁷ AR 457 (pre-application conference form); AR 464 (July 1, 2009 cover letter from Patrick Jones).

⁸ AR 446-47 (Willis letter dated August 20, 2009); AR 469-70 (Willis letter dated December 3, 2009).

⁹ CP 220 (testimony of Town Engineer Joe Willis).

attempting to offer as evidence their own personalized legal interpretations of the Plat Restriction. *See, e.g.*, CP 55 - 61; 68 - 72, (Patrick Jones testimony; Examiner ruling that testimony must be limited to P. Jones' understanding of plat restriction); at CP 104, and 113 - 115 (M. Jones' summary of her expected testimony); at 121 - 123 (D. Jones personal belief). They went so far as to attempt to qualify Patrick Jones' brother, a land surveyor, as an "expert witness" qualified to "forensically decipher the intent of the platters," despite his lack of formal legal training or education. CP at 143 - 149. The Examiner correctly rejected these attempts (CP 149 - 150), but he did permit all of the Jones' witnesses to testify about their personal *beliefs* regarding the meaning of the Plat Restriction¹⁰ and to present numerous documentary exhibits concerning the history of the Hunts Point Park Addition Plat and subsequent conveyances of individual lots.

The documentary evidence offered by the Jones provides interesting context concerning the Plat Restriction. The evidence demonstrates, for example, that the Plat Restriction had been added as part of the conditions of the Hunts Point Park Addition Plat approval, which occurred in 1951 under the auspices of King County. When public notice

¹⁰ CP 154 (Hearing Examiner Hunter: "It's what he believes. I don't hear that as a professional opinion. . . . it's your belief.")

of the plat application was provided in the fall of 1951, protest was received from the Hunts Point Improvement Club, a group whose leading members were later elected as the first Hunts Point Town Council following incorporation. AR 88 (November 9, 1951 letter from Hunts Point Improvement Club President John Wilton to King County Board of Commissioners). The Improvement Club's letter cited two key concerns: (1) sanitation; and (2) the "size of lots," *i.e.*, density. *Id.* The Club's concern over density arose because, under the property's then-applicable R-1 zoning, the minimum lot size was only 6,000 square feet. AR 36; 45 (King County Ord. 11373 R-1 Regulations). According to the Club:

Residents of Hunts Point (the immediate adjacent lands) feel that our district is a "country residential area", and do not approve of adjacent property being converted to small "city lot size" lots. We feel that a minimum of two families per acre [20,000 square-foot lots] should be insisted upon for the future development of the growing Eastside residential area. All the lots in the proposed plat are smaller than this minimum.

AR 88 (emphasis added). Given this concern, the Club requested that the County disapprove of the plat as presented. *Id.*

The plat application was considered by the King County Board of County Commissioners on November 13, 1951. In the face of the Club's opposition, the Commissioners referred the application to Dean McLean, the King County Commissioner for the Third District (in which the

proposed plat was located), “for further study and report.” AR 90. The Board of County Commissioners took the matter up again a week later. “Owing to the fact that many appeared and protested the approval of the plat,” the Board again “held up” the matter “for further study” until December 3, 1951. AR 92.

Ultimately, the Board approved the plat, but subject to express restrictions set forth on the face of the plat which specifically addressed the concerns raised by the Improvement Club and its members. For example, although the Board declined to require a minimum lot size of 20,000 square feet (the two homes per acre requested by the Club), the Board addressed the substance of the Club’s concern by approving the plat subject to a partially-handwritten, “specially-crafted” Plat Restriction placed on the face of the plat:¹¹

No lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred, whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.

AR 2. In other words, although lots might not be as large as requested by the Improvement Club, lots shown on the face of the plat would be legally

¹¹ At the hearing in this matter, Patrick Jones’ brother/surveyor Darcy Jones pointed out that the last six words of the Plat Restriction were filled in by hand, making it “somewhat of an adaptation” and a “specially-crafted paragraph” used to address land use issues. CP at 151 - 153.

restricted from reductions in size.¹²

In addition to addressing the Improvement Club's lot size concerns, the Board imposed other conditions addressing the Club's sanitation concerns. Those conditions limited issuance of building permits on specified lots until septic approval had been granted by the County's Health Department after notice to the Hunts Point Improvement Club. *Id.*; *see also* AR 94 - 98 (correspondence from Board of Commissioners).

As demonstrated by evidence admitted at the appeal hearing, the Plat Restriction had not been abandoned. Subsequent to the Plat Restriction, lot consolidations and one short plat had occurred. Despite Jones' contentions, however, all of those actions had resulted in the same or larger sized lots.¹³ *See, e.g.*, AR 4; 10. These were consistent with the concerns articulated in 1951 that led to the Plat Restriction regarding lot size (*i.e.*, density), as well as the provision that any division cannot result in a situation in which "ownership of any portion of this plat shall be less than the area shown on the face of this plat." Other evidence (in the form of documents from the chain of title) demonstrated that the owners of

¹² That lot size was, indeed, the Club's concern was highlighted a few years later when the Town of Hunts Point incorporated in 1955, and adopted a regulation prohibiting the sale of any lot of less than 20,000 square feet. AR 153. The Town then adopted a zoning ordinance establishing a minimum lot size of 20,000 square feet. AR 186 and 195.

¹³ Those primarily relied upon by Jones also appear to have been processed prior to the incorporation of the Town. *See*, Appellant's Opening Brief at 37 ("The Town was not incorporated until 1955, . . .), and at 33-34 (citing to conveyances from 1952 and 1954).

those larger lots continued to believe that the Plat Restriction applied to their properties, as deeds conveying title to those properties made the conveyances expressly subject to the Plat Restriction.¹⁴

Following Jones' presentation of the documentary evidence, Town Engineer Joe Willis testified. Mr. Willis has 30 years of experience as a building official and engineer for the cities of Mercer Island, Beaux Arts, Yarrow Point, and Hunts Point, and has been the Hunts Point Town Engineer for the last 7 years. As part of that work, it is common for Mr. Willis to "review and interpret a restriction as part of making a decision either on a building permit or on a subsequent short plat." CP at 190. Mr. Willis testified that, in his professional opinion, Jones' proposed short plat was inconsistent with the Plat Restriction. CP 26 - 27 (H.Ex.Dec. at Findings 15 and 17). Mr. Willis explained:

Because the plat restriction, if you read it, "No lot or portion of a lot in this plat shall be divided and sold or resold or ownership changed or transferred whereby the ownership of any portion of this plat shall be less than the area as shown on the face of this plat." And RCW 58.17.195 says if you alter anything that's been approved at the time of the subdivision, that's an alteration to a plat and requires signatures of all of the owners within, or at least those with interest in the plat to agree to that alteration.

¹⁴ See, e.g., AR 483, 488, 492, 494 (Block 2, Lot 1); AR 502, 507-08, 512, 513, 515, 519, 523, 525, 527, 540-41, 545, 546, 549, 551, 554, 556, 558, 562-63 (Block 2, Lots 1-2 consolidated); AR 573, 575, 583, 585 (Block 1, Lots 10 and 11 consolidated); AR 592 (Block 1, Lots 11 and 12 consolidated); AR 600-02, 605, 607, 612, 613 (Block 1, Lots 12 and 13 consolidated); AR 622 and 623, 627 (Block 1, Lots 13 and 14 consolidated).

CP 194-95. Mr. Willis testified that the area of each of the two lots Jones was proposing to create would be less than the area of Lot 11 shown on the face of the Plat. CP 198-99. Mr. Willis accordingly concluded that the proposed short plat would violate the Plat Restriction, unless Jones proceeded with a plat alteration accompanied by the signatures of all of the owners of lots within the Hunts Point Park Addition Plat, as required by RCW 58.17.195 and the parallel Hunts Point Municipal Code provision in Section 17.50.010. *Id.*; *see also* CP 211-12 and 217-18; and CP 27 (H.Ex.Dec. at Finding 18). When pressed by Jones as to his interpretation of the Plat Restriction's reference to "ownership," Mr. Willis testified that he knows that once a short plat is approved, the lots can be sold, and that in his experience that is the reason that property owners seek to subdivide their property. CP 173-74, 193, and 209-10. Mr. Willis further testified that if a property owner simply wanted to construct an additional house on their property without dividing and selling, the Hunts Point Municipal Code contains provisions to allow an owner of the larger lot to construct an accessory dwelling unit on the same lot. CP 193-94.

Mr. Willis also clarified that his previous decision to approve a different short plat (No. 03-01) also located within the Hunts Point Park Addition Plat did *not* violate the Plat Restriction. Mr. Willis concluded this because the two new lots resulting from Short Plat No. 03-01 were

each larger in area than the previously-existing Lots 3 and 4, Block 1. Therefore, Short Plat 03-01 did not violate the Plat Restriction's ban on a division resulting on lots that were "less than the area shown on the face of this plat."¹⁵ Moreover, the Short Plat 03-01 approval itself carries forward the existing conditions of the Hunts Point Park Addition Plat, including the Plat Restriction.¹⁶

Town Hearing Examiner Ted Hunter issued his Decision on February 9, 2010 affirming the Town Engineer's decision. CP 16 - 30. The Examiner acknowledged that he was required to "accord substantial deference to the Town's interpretation of its own ordinances, especially here where the Town Engineer is the individual charged by the Town Council with interpreting and applying the ordinance on applications for short plats." CP 27 - 28 (H.Ex.Dec., Conclusions on "Standard of Review.").

The Examiner then concluded that the Town Engineer had erred by indicating that he would not accept the short plat application, but indicated that such error was essentially harmless in light of the Town Engineer's testimony that he would have denied the short plat due to the Plat

¹⁵ AR 2 (Hunts Point Park Addition Plat) (emphasis added); CP 26 (H.Ex.Dec. at Finding No. 16); CP 190-91; *see also* AR 477 (Short Plat No. 03-01).

¹⁶ AR 477 at Note 4 ("The lots of this short plat are subject to terms and conditions of . . . restrictions shown on the Plat of Hunts Point Park Addition."); *see also* CP 191.

Restriction even if Jones had submitted a complete short plat application. CP 301-02 (Examiner explanation of ruling); CP 28 (H.Ex.Dec. at Concl. 1). Giving substantial weight to the Town Engineer's decision, the Examiner concluded that the Town Engineer's decision that the Plat Restriction applied, that it barred further division of Jones' property as proposed, and that the Plat Restriction was neither obsolete nor abandoned, was not clearly erroneous and must be affirmed. CP 29 (H.Ex.Dec. at Concl. 2).

B. Procedural History.

Patrick Jones then appealed the Hearing Examiner's decision, filing what he titled a "Petition for Review Under Ch. 36.70C RCW (LUPA) and RCW 58.17 et seq." ("Land Use Petition"). The Town moved to dismiss for failure to name and serve all parties as required by RCW 36.70C.040. CP 437 - 446. Marianne Jones (counsel for Appellants here) was identified in the Hearing Examiner's decision as an owner of the property and an applicant for the short plat at issue, and at the time of the Land Use Petition was also named in County records as a taxpayer on the property at issue.¹⁷ Ms. Jones, however, was not made a party to the Land Use Petition within 21 days of the issuance of the Hearing Examiner's

¹⁷ CP 20 (H.Ex.Dec. at Findings 1 and 2); *see also* AR 457, 464 (Jones' short plat pre-application form and cover letter); CP 507 (County tax records).

decision as required by RCW 36.70C.040(2). CP 1. Ms. Jones did attempt to file what she labeled an “Amended Petition for Review,” in which she named herself as a party, but this not filed until April 7, 2010, well after expiration of 21 days following issuance of the Hearing Examiner’s decision. CP 513, 526 (“Amended Land Use Petition”). The Court denied the motion to dismiss, after finding that Ms. Jones had deeded the property to her husband, had filed a notice of intent to abandon her appeal, and “under the narrow factual circumstances at hand, the requirements of RCW 36.70C.040 have been satisfied” CP 528.

The parties then briefed and argued the case on the merits. Superior Court Judge Laura Inveen denied Jones’ land use petition, concluding that:

1. The Petition for Review Under Ch. 36.70C RCW (LUPA) and RCW 58.17 et seq.” (“Land Use Petition”) and the “Amended Petition for Review Under Ch. 36.70C RCW (LUPA) and RCW 58.17 et seq.” (“Amended Land Use Petition”) fail to meet the standards of review set forth in RCW 36.70C.130(1) for the granting of relief; and
2. The relief requested by the Land Use Petition and Amended Land Use Petition is denied, and the land use decision under review is affirmed.

CP 418-19.

Jones then appealed to this Court. CP 415.

IV. ARGUMENT

A. Standard of Review and Deference.

1. Standard of Review.

The Land Use Petition Act, Chapter 36.70C (“LUPA”), provides the applicable standards of review to be applied in this Court when reviewing the Hearing Examiner’s Decision below. LUPA’s substantive legal standards are set forth in RCW 36.70C.130(1) and authorize a court to grant relief “only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.” Those standards are:

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

RCW 36.70C.130(1). Under LUPA, this Court applies the statutory

standards of review directly to the Hearing Examiner's administrative record.

Jones' opening brief states that subsections (c), (d) and (e) are implicated here, arguing that the Hearing Examiner's decision was not supported by substantial evidence, was a clearly erroneous application of the law to the facts, and was outside the Examiner's authority or jurisdiction. Jones Opening Brief at 9-10. In the Land Use Petition and Amended Petition, however, Jones claimed that he is entitled to relief under RCW 36.70C.130(1)(a) (unlawful process or procedure)¹⁸ and (f) (violation of constitutional rights).¹⁹ Because Jones' assignments of error and issues pertaining to assignments of error do not allege error based on unlawful process or procedure, or violation of constitutional rights, and because the body of Jones' brief does not argue or provide any authority for such claims, those claims have been abandoned and waived.²⁰

2. Deference.

The standards of review set forth in RCW 36.70C.130(1) require

¹⁸ CP 1 - 12 (Petition), esp. CP 5 (¶ 3.5), CP 7 (¶¶ 4.2 and 4.3), CP 8 (¶ 4.5), CP 10 (¶ 4.10), CP 11-12 (¶¶ 4.16 - 4.20); CP 518-525 (Amended Petition), esp. CP 518 (¶ 3.5), CP 519-20 (¶¶ 4.2 and 4.3), CP 520 (¶ 4.5), CP 522 (¶ 4.10), CP 524-25 (¶¶ 4.16 - 4.20).

¹⁹ CP 6 (¶ 4.1) CP 11-12 (¶¶ 4.16-4.20) (Petition); CP 518 (4.1) CP 524-25 (¶¶ 4.16 - 4.20) (Amended Petition).

²⁰ See, e.g., *State v. Olson* 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (appellate court will not consider issue when appellant fails to raise an issue in the assignments of error and fails to present any argument on the issue or provide any legal citation); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignment of error not supported by argument or citation to authority is waived).

deference to the Hearing Examiner's decision. For example, the standard in subsection (a) allows relief to be granted if the Hearing Examiner engaged in an unlawful procedure or failed to follow a prescribed process, but no relief may be granted if the error was harmless. Likewise, the standard in subsection (b) allows reversal if the decision is an "erroneous interpretation of the law," but only "after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise."

Here, the Hearing Examiner correctly deferred to the Town Engineer's expertise, and applicable appellate precedent requires this Court to defer in turn to the Examiner's Decision in light of his expertise in making land use decisions.²¹ Subsection (d) further provides that the Hearing Examiner's application of the law to the facts may not be reversed unless it is "clearly erroneous," which appellate courts have defined as a situation in which the decision maker is "left with the definite and firm conviction that a mistake has been made." *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (Div. II 2006).

As Jones acknowledged in his brief below (CP 362), this standard requires a reviewing court to view the evidence and any reasonable

²¹ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005) ("Local jurisdiction with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA"); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

inferences “in the light most favorable to the party who prevailed in the highest forum exercising fact-finding authority.” *Willapa Grays Harbor Oyster Growers Ass’n. v. Moby Dick Corp.*, 115 Wn. App. 417, 429, 62 P.3d 912 (Div. II 2003). Here, the Town prevailed in the highest forum exercising fact-finding authority, and is accordingly entitled to a review of the facts and the reasonable inferences in the most favorable light.

B. The Hearing Examiner’s Decision Should be Affirmed Because Jones Failed to Timely Name a Necessary Party and, Therefore, There is No Jurisdiction to Review Jones’ Land Use Petition.

The Hearing Examiner’s decision should be affirmed, but this Court need not reach the merits of the Land Use Petition (or Amended Petition) to do so. Instead, relief may be denied solely on the basis of Jones’ failure to timely name a statutorily-required party in the initial Land Use Petition.

LUPA provides a streamlined process for review of local land use decisions by a superior court. As part of that process, LUPA requires strict compliance with its provisions before this Court’s jurisdiction may be invoked. Specifically, RCW 36.70C.040(2) requires that certain persons “shall be parties to the review of a land use petition,” and be timely served with a copy. The list of parties required to be named and timely served includes every owner of the property and every applicant for the permit or

approval at issue, all as shown in the local land use decision. RCW 36.70C.040(2)(b)(i) and (ii). If no person is identified in a written decision as provided in subsection (b), the land use petition must name each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor. RCW 36.70C.040(2)(c).

Here, the Hearing Examiner decision describes Marianne Jones as an owner of the property at issue,²² as one of the applicants for the pre-application conference and for subdivision approval,²³ and as an appellant before the Hearing Examiner.²⁴ Even if that had not been the case, at the time Patrick Jones filed the Land Use Petition, Marianne Jones was also listed in King County Assessor records as one of the taxpayers for the property at issue.²⁵ Under LUPA's plain terms, Marianne Jones is a necessary party to the Land Use Petition, required to have been named and served. Yet, only Patrick Jones is named in the Land Use Petition. CP 1.

The failure to name and serve Marianne Jones is jurisdictional. Under RCW 36.70C.040(2), "A land use petition is barred, and the court may not grant review" in the absence of compliance with its requirements for

²² CP 20-21 (H.Ex.Dec., Findings 1 and 2).

²³ CP 23 (H.Ex.Dec., Finding 6) (describing Marianne and Patrick Joneses' arguments with respect to "their short subdivision application"); *see also* AR 464 (July 1, 2009 letter (stating "Marianne and Patrick Jones want to subdivide their . . . lot into two lots") and AR 457 (Pre-application conference form identifying "applicant" as Pat and Marianne Jones).

²⁴ CP 16 (H.Ex.Dec. at 1, identifying "Marianne Jones, Appellant").

²⁵ CP 507 (Assessor records).

naming and serving parties.

In these cases, Washington courts have not hesitated to dismiss land use petitions for lack of jurisdiction. *See, e.g., Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (Div. I 1998). In *Suquamish Tribe*, Petitioner Tribe failed to name and serve a citizens' group that had been a party to the administrative appeal proceedings below, although the Tribe did provide the group with a copy. The Tribe argued that it was not required to name and serve the citizens' group because the group had filed its own land use petition. This Court rejected that argument and upheld the trial court's dismissal of the Tribe's land use petition, "because [the Tribe] failed to name the NKCC, a required party, within the filing period." *Id.* at 820. Significantly here, the Court also rejected the Tribe's argument that its failure to name the citizens' group was excusable neglect, and accordingly further held that the Tribe's amended complaint could not "relate back" under CR 15(c). *Id.* at 824-25.

Washington courts reach the same result when considering petitions for judicial review challenging administrative agency decisions. *See, e.g., Litowitz v. Growth Management Hearings Board*, 93 Wn. App. 66, 68-70, 966 P.2d 422 (Div. I 1998). In *Litowitz*, three couples all represented by the same attorney had challenged the City of Federal Way's GMA Comprehensive Plan before the Growth Management Hearings Board. The

Board ruled in favor of the City. The Litowitzes appealed to superior court, but failed to name and serve the other property owners, who apparently had decided not to pursue an appeal. The trial court dismissed the petition, and the Court of Appeals affirmed, ruling that RCW 34.05.542(2)'s requirement that the petition be served on all "parties of record" meant that the petitioners were required to serve *all* of the parties to the administrative appeal proceeding below, not just those they named as parties in the petition for judicial review. *Id.* at 68 - 69. The Court rejected the Litowitzes' argument that they should be excused from this requirement because the non-named parties were represented by the same attorney representing them. *Id.* at 70.

The failure to name Marianne Jones requires dismissal of this Land Use Petition. RCW 36.70C.040(2); *Suquamish Tribe*, 92 Wn. App. at 820. While Marianne Jones is now serving as her husband's attorney, and by definition was aware of his Land Use Petition, knowledge of a land use petition by a party of record does not excuse the petitioner's failure to name that party in the petition. In *Suquamish Tribe*, the Tribe had provided a copy of the land use petition to the citizens' group, but the Tribe's failure to name the group in the petition and timely serve it resulted in dismissal of the Tribe's land use petition. And, in *Litowitz*, the Court rejected the Litowitzes' argument that they need not have named and served the other property owners represented by the same attorney. *Litowitz*, 93 Wn. App. at 70.

Jones can be expected to reprise the arguments from below in opposition to the notion that the Land Use Petition was required to name Marianne Jones. First, Jones may argue Marianne Jones was not a required party because she is no longer an owner of the property. RCW 36.70C.040(2)(b)(i) and (ii) unequivocally state, however, that a land use petition must include as “parties to the review of the land use petition” “each person *identified . . . in the local jurisdiction's written decision as an owner of the property at issue.*” (Italics added.) No exception is made for property transfers that occur after the conclusion of the land use hearing. Even if such an exception were in the statute, RCW 36.70C.040(2)(b)(i) also requires that a land use petition name “Each person *identified in the local jurisdiction's written decision as an applicant* for the permit or approval at issue.” (Emphasis added.) Marianne Jones was an applicant for the pre-application conference and short plat at issue, and her post-hearing conveyance of her interest in the property to her husband did not alter that fact. As such, she was required to name herself in the Land Use Petition within the filing period.

Jones may also repeat the argument below that Marianne Jones was not required to be named because she has stated her intention to abandon her appeal. The exception provided when a party states an intention to abandon an appeal, however, applies only for those parties required to be named

because they were appellants. RCW 36.70C.040(2)(d). The exception does not apply when a person is also required to be named because that person was identified in the land use decision as an applicant for the approval at issue. In that instance, RCW 36.70C.040(2)(b)(i) requires them to be “parties to the review of the land use petition,” and that provision of the statute does not excuse a party due to any stated intent to abandon. Even if it did, Marianne Jones has neither revoked her application nor disclaimed her interest in the short plat at issue -- nor practically could she, given Washington’s community property law regime.

Finally, Marianne Jones may claim that she was entitled to amend the Land Use Petition to name herself, even after expiration of LUPA’s 21-day limitations period. LUPA expressly addresses this situation, and this argument also fails. Under RCW 36.70C.050, tardy joinder can be permitted of persons who may be needed for just adjudication but who are not named in the records referred to in RCW 36.70C.040(2)(b) or (c). That section (.050) does not operate to excuse tardy joinder of those required in the first instance to be named and served by RCW 36.70C.040(2)(b) and (c). If it did, no land use petition could ever be dismissed for failure to timely name and serve parties, because a petitioner would simply amend the petition after a challenge was raised. If that were possible, this Court could not have decided *Suquamish Tribe* the way that it did. RCW 36.70C.050 did not

authorize the Amended Petition here.²⁶

Jones plainly failed to comply with the statute's express requirement that a land use petition name each person *identified in the local jurisdiction's written decision* as either an owner of the property or "*an applicant* for the permit or approval at issue." As a result, this Court lacks jurisdiction. Under RCW 36.70C.040(2), "A land use petition is barred, and the court may not grant review" under these circumstances.

C. This Court Should Affirm the Hearing Examiner's Decision Upholding the Town Engineer's Determination that the Plat Restriction Bars Jones' Proposed Short Plat.

The Hearing Examiner concluded that the Town Engineer's determination that the Plat Restriction bars Jones' short plat was reasonable and was not clearly erroneous. CP 29 (H.Ex.Dec., Concl. 2). This Court should affirm.

1. RCW Chapter 58.17 required the Town to apply the Plat Restriction as part of the "terms of approval of a final plat," and to require a Plat Alteration if the proposed short plat would result in the violation of a restrictive covenant filed at the time of the plat approval.

Jones contends that the Town should not have considered the Plat Restriction when reviewing the short plat proposal. Jones Opening Brief at

²⁶ In addition, Jones' brief to this Court does not appear to treat Marianne Jones as a party. Jones did not include the Amended Petition in its designation of clerk's papers, and Jones' Opening Brief makes no mention of either the Amended Petition or Marianne Jones. The Opening Brief states only that the property is currently owned by Patrick Jones. Jones Opening Brief at 3.

24 - 29. Jones argues that the Town was permitted to apply only its zoning code and other applicable municipal laws. *Id.* Jones' argument has multiple flaws; each is fatal.

First, it is far too late for Jones to raise this argument. Jones never challenged the Examiner's or Town Engineer's jurisdiction or authority below to interpret or apply the Plat Restriction. To the contrary, Jones conceded the Hearing Examiner's authority to construe and apply the Plat Restriction, stating that "the Hearing Examiner may have jurisdiction on this issue under HPMC 2.35.020(5)," (AR 648-49), and acknowledging that they bore the burden "to prove . . . that there was no violation of the plat restriction . . ." CP 51. Likewise, Jones conceded the Town Engineer's authority to construe the Plat Restriction: "we want a finding that the town engineer does not – I'm sorry, does have the quasi-judicial authority to determine that the plat restriction is obsolete . . ." CP 53.²⁷ Jones waited until their LUPA appeal to affirmatively claim that the Hearing Examiner and Town Engineer lacked jurisdiction to construe or apply the Plat Restriction. Washington law is clear that arguments not pleaded or argued to a trial court (here, the Hearing Examiner) may not be

²⁷ Jones suggests that his pre-trial motions "raised the question whether plat restrictions are private and, therefore, not subject to public enforcement and interpretation by a municipality." Jones Opening Brief at 25. This is a strained characterization of Jones' pre-trial motion, which instead affirmatively asked the Examiner to determine that the Examiner did have jurisdiction under HPMC 2.35.020(5). Jones' pre-trial motion did not question the Examiner's jurisdiction; it attempted to prevent the Town from doing so.

raised for the first time on appeal. *Woodcreek Land Ltd. Partnerships v. Puyallup*, 69 Wn. App. 1, 11, 847 P.2d 501 (Div. II 1993).

Even assuming, *arguendo*, that Jones properly preserved the issue by raising it before the Hearing Examiner, Jones is wrong. The Hearing Examiner and Town Engineer were not only empowered but *required* to construe and apply the Plat Restriction. RCW 58.17.030 requires that “every subdivision shall comply with the provisions of this chapter [RCW 58.17].” In turn, specific provisions of Chapter 58.17 required the Town to consider and apply the Plat Restriction: RCW 58.17.170 required the Town to interpret and apply the Plat Restriction as part of the “terms of approval of a final plat,” and RCW 58.17.215 required a plat alteration if the proposal would result in the violation of a restrictive covenant filed at the time of the plat approval.

RCW 58.17.170 provides, “A subdivision shall be governed by the terms of approval of the final plat” Unlike many private covenants that may be included, for example, only in a deed or a lease, the Plat Restriction is part of the “terms of approval” of the final plat of the Hunts Point Park Addition, in which Jones’ lot is located. The Plat Restriction was hotly contested, and its approval twice delayed due to opposition from the Hunts Point Improvement Club (whose members were later elected to the first Town Council). AR 88, 90, and 92. The Improvement Club objected to the

density of the proposed plat resulting from what the Club called the inappropriately small lot sizes. AR 88. In response, the Plat Restriction was crafted to address the stated concerns and included as a condition of the approved plat. Jones' own witness admitted that the Plat Restriction was "specially crafted" to address land use concerns raised with respect to the plat. CP 151-52. The Plat Restriction was not part of a set of privately recorded covenants (e.g., regulating fence height, or house color),²⁸ but was instead inscribed on the face of the approved, recorded plat. AR 2. As such, the Plat Restriction was part of the "terms of approval" of the Plat. Pursuant to RCW 58.17.170, the Plat Restriction governs future development proposals within the Plat – including Jones' proposed short plat.

RCW 58.17.170 must be read in conjunction with RCW 58.17.215.

This provision requires that, when any person is "interested in" the alteration of any portion of an existing subdivision:

[t]hat person shall submit an application to request the alteration The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to

²⁸ E.g., "CCRs," aka "Conditions, Covenants and Restrictions." Ms. Jones herself elicited testimony on cross-examination that the Plat Restriction is "different than a CC and R." CP 222 (lines 14 - 17).

terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

RCW 58.17.170 (emphasis added).

If restrictions recorded on the face of the plat were not part of the “terms of approval” that govern a subdivision under RCW 58.17.170, the alteration provisions of RCW 58.17.215 would be entirely superfluous. There would have been no need for the Legislature to prescribe a separate land use approval process for a plat alteration that otherwise violates the terms of a restrictive covenant, if the restriction could simply be disregarded by a town reviewing a subsequent short plat application.²⁹

Jones is simply wrong in arguing that the Plat Restriction is merely a “private contractual right” that the Town may not enforce under its municipal regulatory powers (Opening Brief at 28 - 29). Under RCW 58.17.030, .170 and .215, the Town was required to consider and apply the Plat Restriction to Jones’ short plat proposal.

Jones’ argument is further contradicted by the wording of other restrictions appearing on the face of the Hunts Point Park Addition Plat. The

²⁹ The sensible requirement to construe related statutory provisions so as to give effect to both is well-established. For example, in *Lake v. WoodCreek Homeowners Ass’n.*, 169 Wn.2d 694, 229 P.3d 791, 796-97 (2010), Marianne Jones was counsel to Lake, an individual condo owner. Lake’s unit was originally constructed with two stories, but he sought to bar Clousing from constructing an additional story. Various provisions of the Horizontal Property Regimes Act, RCW 64.32, were at issue. The Supreme Court unremarkably held that RCW 64.32.0050(3) must be construed in harmony with RCW 64.32.90(10), and that effect must be given to both sections of the statute. *See also*, *Heinsma v. City of Vancouver*, 114 Wn.2d 556, 564, 29 P.3d 709 (2001).

second restriction requires that all lots are subject to the restrictions of the applicable zoning ordinance, and the third restriction requires written approval from the King County Department of Health for certain specified lots within the plat, before a building permit may be issued. AR 2. If the restrictions on the face of the plat were merely private covenants between lot owners, and not binding on local governmental authorities, these other restrictions, too, would have no meaning.

Further, Jones' argument is not supported by the cases they cite. First, Jones cites *Viking Properties v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005), noting the Court's observation that the City of Shoreline had correctly conceded that it had no authority to enforce or invalidate a restrictive covenant. Jones Opening Brief at 28 - 29.³⁰ But, in *Viking Properties*, the Court construed a covenant attached to private deeds – not a restriction shown on the face of a plat as part of the “terms of approval” required to be applied under RCW 58.17.170.³¹ To the extent *Viking Properties* has meaning here, the *Viking* Court was simply noting that Shoreline had correctly determined that the City could not, by its zoning code, work a *de facto* invalidation of the restrictive covenant by requiring

³⁰ Jones' citation to *Viking Properties* is ironic given that, at the outset of this matter, Jones asked the Town to do exactly what they admit *Viking* says a city may not do: invalidate a restrictive covenant. AR 442, 444-45.

³¹ *Viking Properties*, 155 Wn.2d at 116 (“the grantor sold each lot within the subdivision subject to an identical restrictive covenant”).

density in excess of that permitted by the covenant. *Id.* The Court noted that Shoreline had construed its comprehensive plan and zoning code provisions in such a way as to accommodate the restrictive covenant at issue. *Id.* at 130. Shoreline accounted in its Comprehensive Plan for the effect of restrictive covenants, its City Attorney determined that “the covenant was not in irremediable conflict with city policy,” and Shoreline provided that the City would process building permits on lots subject to the restrictive covenant as nonconforming lots. The Court determined that the density limitation in the covenant did not violate public policy, thereby respecting the substance of the covenant. *Id.* In *Viking Properties*, Shoreline actually did exactly what the Town did here - make permitting decisions that give effect to the restriction.

Other cases cited by Jones are similarly inapplicable. *Martel v. Vancouver*, 35 Wn. App. 250, 666 P.2d 916 (Div. II 1983), involved a “private covenant,” not a plat restriction included in the “terms of approval” of the underlying plat, which was required to be applied under RCW 58.17.170. *Id.* at 257. Notably, the applicant in *Martel* was not seeking a short plat approval, but rather sought additional land use approval (a variance) as a prerequisite to seeking short plat approval. Here, though, Jones has not sought a variance, and objects to the additional land use approval -- a plat alteration -- required in order to short

plat their lot. Similarly, in *Suess v. Volgelsegang*, 151 Ind. App. 631, 281 N.E.2d 536 (1972), an Indiana court considered a restrictive covenant contained in a private deed conveying title, not a condition of approval to a final plat. *Id.* at 641 (“There *as here*, the property in question was *restricted* in use to residential purposes *by deed covenants . . .*”) (emphasis added). *Martel* and *Suess* are inapplicable here because they do not involve conditions of final plat approval.

2. The Hearing Examiner correctly concluded that Jones’ short plat would violate the Plat Restriction.

Having acted properly in considering the Plat Restriction, the Hearing Examiner and Town Engineer also correctly concluded that Jones’ short plat would violate the Plat Restriction. This Court should affirm.

The Plat Restriction states as follows:

No lot or portion of a lot in this plat shall be divided and sold or resold, or ownership changed or transferred, whereby the ownership of any portion of this plat shall be less than the area shown on the face of this plat.

AR 2. Jones’ proposal would divide Lot 11 approximately in half, resulting in two lots of approximately 12,000 square feet, with the subsequent construction of two houses, each on one of the proposed new short plat lots.³² Jones’ ownership of a “portion” of the plat – *e.g.*, the

³² AR 455-56 (Jones’ Short Plat application); AR 464 (July 1, 2009 letter from Patrick Jones announcing intention to subdivide and construct two homes).

new lot 1 – would be less than the area shown on the face of the plat for Lot 11. CP 26 - 27 (H.Ex.Dec. at Finding 17); CP 196 (lines 20 - 23) (Willis testimony).

And, if the short plat were approved, either lot could be freely alienated.³³ RCW 58.17.010(6) and HPMC 17.10.140 specifically define a “short subdivision” as a “division of land . . . for the purpose of sale, lease, or transfer of ownership” Indeed, the Town Engineer testified that, in his experience, the ability to sell the newly-divided lots is precisely the reason why property owners seek to short plat their property in the first place. CP 193 (lines 16 - 20). The Town Engineer correctly determined that the Plat Restriction barred Jones’ proposal.

RCW 58.17.030 requires that “every subdivision shall comply with the provisions of this chapter.” Further, “every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.” *Id.* Under RCW 58.17.215, any proposal to alter a subdivision:

[s]hall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result

³³ RCW 58.17.190 - .210; CP 26 - 27 (H.Ex.Dec. at Finding 17); CP 173-74, at 193 (lines 4 - 7), at 209 (lines 12 - 16) (Willis testimony).

in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

(Emphasis added.) Hunts Point Municipal Code (“HPMC”) Section 17.50.010 is the applicable local regulation, and requires that a request for alteration of a subdivision be processed under RCW 58.17.212 and .215.

Jones’ proposal seeks to alter the subdivision by voiding the Plat Restriction as applied to the short plat, to allow creation of two new lots, both of which are smaller than the Lot 11 shown on the face of the Plat. Jones failed to comply with the mandate of RCW 58.17.215, and did not provide the signatures of all parties subject to the Plat Restriction agreeing to terminate or alter the restriction. Accordingly, Town Engineer Willis correctly determined that Jones’ short plat could not be approved, and therefore should not be accepted without the requisite signatures. CP 210-12; AR 466-67 (Willis Letter dated August 20, 2009).

The Town Engineer’s decisions, as affirmed by the Hearing Examiner, are also consistent with the purpose of the Plat Restriction, which must be construed “in such a way that protects the homeowners’ collective interests and gives effect to the purposes intended by the drafters of those covenants to further the creation and maintenance of the planned community.” *Lakes at Mercer Island Homeowners Ass’n v.*

Witrak, 61 Wn. App. 177, 181, 810 P.2d 27, *rev. denied*, 117 Wn.2d 1013, 16 P.2d 1224 (1991).³⁴ Here, giving the words of the Plat Restriction their plain and ordinary meaning, the obvious purpose of the Plat Restriction was to address the Hunts Point Improvement Club's concern about "size of lots" by prohibiting lots in the Plat from "being converted to small 'city lot size' lots." AR 88.³⁵ The Club requested that lots be of a minimum size of 20,000 square feet, as compared to the smaller lots proposed. As ultimately approved, the Plat Restriction addresses this specific concern, by effectively providing that smaller lots may not be created by division or change of ownership, because doing so would result in ownership of a portion of the plat being "less than the area shown on the face of this plat." The Plat Restriction plainly addresses the stated concern with "size of lots" by ensuring that homes within the Hunts Point Park Addition Plat

³⁴ Because the Plat Restriction was recorded, and the restrictions on the face of the Plat run with the land and bind successive owners of lots, the Plat Restriction is also a restrictive covenant. *See, e.g., Hollis v. Garwall*, 137 Wn.2d 683, 691-92, 974 P.2d 836 (1999) (restriction on face of plat limiting use to residential use was restrictive covenant). A reviewing body's primary task is to determine the intent of the covenant's drafters. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006) (citing *Hollis*). Covenants are not construed strictly, because they "tend to enhance, not inhibit, the efficient use of land." *Viking Props.*, 155 Wn.2d at 120.

³⁵ Jones complains that the Hearing Examiner improperly based his decision upon the Town Attorney's references to "density," and that no document "supports the assertion that density is the purpose of the restriction." Jones Opening Brief at 36. Jones overlooks the Improvement Club's letter and its express request for a minimum lot size and prohibition on conversion to "small city lot size lots." The Examiner correctly used the word "density" as a shorthand to describe the Improvement Club's concerns (CP 290-91), in the same way that the Supreme Court in *Viking Properties* labeled a similar restriction as a "density limitation." *Viking Properties*, 155 Wn.2d at 124.

will be constructed on parcels that are at least as large as the lots shown on the face of the Plat, and that smaller, cut-up parcels will not be created.

The Plat Restriction is similar to the restriction at issue in *Viking Properties*, and should be similarly construed. In *Viking Properties*, the Court considered the meaning and intent of a restrictive covenant that barred the construction of any structure “except a single family, detached private dwelling house on each one-half acre in area.” *Viking Properties*, 155 Wn.2d at 116. The property owner sought to have the restrictive covenant nullified, on the grounds that it was illegal because it was coupled with a racially restrictive covenant, and because it was allegedly contrary to urban density requirements of the Growth Management Act. The Court rejected this argument. It severed the illegal racially-restrictive covenant, and held that “the remainder imposes an enforceable density limitation of one dwelling per one-half acre.” *Id.* at 124. The Court rejected Viking’s strained construction of the covenant offered to justify construction of additional dwelling units, noting that an interpretation limiting construction to one house per half-acre was “[n]ot only . . . the logical, common-sense construction of the covenant’s language, it is also the construction that best guards ‘the homeowners’ collective interests.” *Id.* at 123.

Here, the Plat restriction limits the size of lots (and, likewise,

density), just like the “one home per half acre” limitation in *Viking Properties*. The Town Engineer’s interpretation of the Plat Restriction, as barring a proposal to cut a single platted lot (Lot 11) in half, absent compliance with plat alteration or other procedures, is consistent with the plain language of the restriction as well as its purpose.³⁶

3. Jones’ arguments concerning the Plat Restriction have no merit.

Jones advances a number of arguments attacking the Hearing Examiner’s and Town Engineer’s interpretation of the Plat Restriction. Each should be rejected.

a. The Plat Restriction should not be read literally.

Jones first argues that the Plat Restriction must be interpreted literally, and that there can be no violation unless Jones is proposing to sell one of the lots.³⁷ Focusing on the word “and,” Jones argues that the Plat Restriction prohibits only the actions of a property owner who attempts to “divide and sell,” and that the Town Engineer erred by allegedly stopping

³⁶ Jones argues at length that the Plat Restriction was aimed at septic concerns. Jones Opening Brief at 27 - 28. However, the Hunts Point Improvement Club’s letter describes two separate concerns: lot size and septic. The first paragraph of the Plat Restriction addresses lot size, while the third paragraph addresses septic. AR 2. There is no evidence that the lot size limitation was aimed at septic, other than Jones’ family members’ own self-serving testimony, which the Hearing Examiner allowed only as their personal opinion or belief. *See, e.g.*, CP 154: 11 - 17; 158: 5 - 15. Even Darcy Jones admitted that he could not identify any portion of any exhibit that connected the Plat Restriction’s first paragraph with septic. CP 168: 10 - 28.

³⁷ Jones Opening Brief at 10 - 20, esp. 15 (Plat Restriction doesn’t apply because short plat application “does not include any reference to selling, transferring or changing ownership”); at 17 - 18 (Examiner failed to address a “key concept,” the “change in the ownership portion of the plat”).

at the word “divide.” Jones is wrong.

Whether used in a contract or a statute, the Washington Supreme Court has recognized that the use of the word “and” is “particularly hazardous as a source of ambiguity” *Lake v. WoodCreek Homeowners Ass’n.*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010), quoting E. Farnsworth, *Meaning in the Law of Contracts*, 76 Yale L.J. 939, 955 (1967). “The disjunctive ‘or’ and conjunctive ‘and’ may be interpreted as substitutes.” *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn. App. 165, 174, 936 P.2d 1148 (Div. III 1997), *rev. denied* 133 Wn.2d 1021 (1997) (in RCW 35.21.730, the use of “and” in the list of authorized purposes for a public development authority corporation meant “and/or,” and public development authority created to administer ski concession on Mount Spokane was not required to fulfill all of the listed statutory purposes).³⁸ As Professor Farnsworth explained, the word “and” has two different meanings, “as a conjunctive (only both P and Q),” as well as the meaning “and/or” – “an inclusive disjunctive (P or else Q, or else both).” (Emphasis added.) Put most plainly, “[T]he intended meaning is apparent

³⁸ See also, *CLEAN v. City of Spokane*, 133 Wn.2d 455, 474, 947 P.2d 1169 (1997); *Bullseye Distributing, LLC v. Gambling Commission*, 127 Wn. App. 231, 239-40, 110 P.3d 1162 (Div. II 2005) (despite use of “and” in statutory list of attributes of “gambling device,” Court found statute unambiguous in defining four separate devices, any one of which is a gambling device).

from the surrounding context.” *Lake*, 169 Wn.2d at 528.³⁹

Here, the intended meaning of the word “and” in the Plat Restriction is the latter: an inclusive disjunctive, *i.e.*, “and/or.” Read accordingly, the Plat Restriction prohibits a property owner from dividing or selling his/her property, “whereby the ownership of any portion of this plat shall be less than the area shown on the face of” the Hunts Point Park Addition Plat. And, the Plat Restriction prevents a property owner from doing both (dividing and selling his/her property) so that “the ownership of any portion of this plat shall be less than the area shown on the face” of the plat. Here, Jones seeks to divide Lot 11 so that his ownership of a portion of the plat – either of the two new lots – is less than shown for Lot 11 on the face of the plat. The Plat Restriction is accordingly triggered, and operates to prohibit the short plat absent an approved statutory plat alteration.

This is the only interpretation that places the Plat Restriction in context, as the Supreme Court has instructed. *Lake*, 169 Wn.2d at 528. As discussed above, the Plat Restriction’s genesis lies in the Hunts Point Improvement Club’s opposition to the Hunts Point Park Addition plat, due

³⁹ In *Lake*, Marianne Jones herself argued that “or” in the context of RCW 64.32.090(10) had only one meaning, one or the other, but not both. The Supreme Court rejected this approach, quoted Professor Farnsworth with approval, and noted that the word “or” can have two different meanings: (1) “to indicate an inclusive disjunctive—one or more of the unlike things can be true”; or (2) as an “exclusive disjunctive—one or the other can be true, but not both.” *Lake*, 169 Wn.2d at 528, 530.

to its smaller lot sizes. The Plat Restriction addressed the Club's concerns by prohibiting further division that would result in ownerships with less area than the lots shown on the face of the Plat. And, as Town Engineer Willis explained, once a short plat is approved, a property owner may legally convey the lots. If the Plat Restriction were to be construed as Jones urges, such that the Plat Restriction would be triggered only when a property owner both divided and sold simultaneously, any property owner could easily evade this provision by first dividing, and then waiting some period of time, before selling one or both new lots. If challenged, the property owner could simply declare that he or she was not "dividing and selling." Indeed, that is precisely Jones' argument here, claiming that the Town Engineer and Hearing Examiner were not entitled to consider the likelihood of their future sale(s). Jones Opening Brief at 20 - 23. The Hearing Examiner and Town Engineer's interpretation is the only interpretation that gives meaning to the terms of the Plat Restriction. Jones' opposing interpretation leads to an absurd result.

Citing *Baumann v. Turpen*, 139 Wn. App. 78, 160 P.3d 1060 (Div. I 2007), Jones next argues that the Plat Restriction may not be construed in light of the Subdivision Act, Chapter 58.17 of the RCW, because that statute was adopted in 1969, after the 1951 approval of the Plat. Jones Opening Brief at 26 - 27. That is not what occurred, however. Instead,

the Examiner (and Town Engineer) construed the Plat Restriction to facilitate its purpose of preventing the plat lots from “being converted to small city size lots,” regardless of what the underlying zoning ordinance might otherwise allow. AR 88.

Indeed, *Baumann* supports the decision of the Hearing Examiner here. There, this Court construed a restrictive covenant limiting the height of a single-family house to one story. The underlying building codes did not limit the height of houses, but deferred to the underlying zoning ordinance, which in that case allowed a house that blocked the uphill owners’ view. This Court declined to utilize the building codes, which were not in effect at the time of the drafting of the covenant, but instead relied upon extrinsic evidence in the form of topography and limits the grantor placed on his own house, to determine that the purpose of the covenant was view protection and neighborhood conformity. The Court concluded that “the current building code definition of ‘one story’ would not effectuate the covenant drafter’s intent because it addresses neither of those interests, but instead allowed construction of a 5,000 square-foot house blocking much of the uphill neighbors’ views.” *Baumann*, 139 Wn. App. at 90 - 91. The Court affirmed the trial court’s issuance of an injunction requiring the offending house to be lowered. *Id.* at 93 - 94. Here, Jones argues that the Town’s underlying zoning ordinance on lot

size should control, even though (as in *Baumann*), that would allow construction in violation of the density-limiting purpose of the Plat Restriction. *Baumann* supports the Town's position, not Jones'.

- b. Jones' proposed short plat would violate the second half of the Plat Restriction, by reducing the Jones' ownership of a portion of the plat (i.e., either one of the new lots) below the area of Lot 11 shown on the face of the plat.

Jones next argues that the Hearing Examiner's decision was incorrect because it failed to address the second clause in the Plat Restriction, which prohibits a division "whereby the ownership of any portion of this plat is less than the area shown on the face of this plat."

AR 2; Jones Opening Brief at 15 - 19. Jones is again incorrect.

Jones' proposed short plat would in fact violate the second clause of the Plat Restriction, because the proposed division would make Jones' ownership of a portion of the plat -- *i.e.*, either one of their proposed new lots -- less than the area of Lot 11 that is shown on the face of the plat.

This point is succinctly illustrated by the testimony of Town Engineer Joe

Willis:

Dividing the parcel would result in two parcels that would be less than the area shown as lot 11. The total of them would be lot 11. But each one would be less than the area of lot 11.

CP 196.

Jones tries to fend off this inevitable conclusion by arguing that their total ownership (the two proposed new lots combined) would equal what is shown on the face of the plat (Lot 11). Jones Opening Brief at 15. This argument, though, re-writes the Plat Restriction's second clause to read "whereby the [a person's total] ownership [of all] ~~any~~ portion[s] of this plat is less than the area shown on the fact of this plat." Jones' argument ignores the Plat Restriction's actual language, which looks to the "ownership of *any portion* of this plat." (Italics added). If approved, Jones short plat would create a distinct new "portion of the plat": the two new lots. Each new lot would be registered through recording of the short plat, and would also constitute a separate, distinct tax parcel. CP 193, lines 4 - 7. Jones' short plat would result in a situation in which Jones' ownership of "a portion" of the Plat – *i.e.*, a new lot, would be less than the "area shown on the face of the Plat." As Town Engineer Willis testified, "the area shown on the face of the Plat" means Lot 11, because individual persons' ownerships are not depicted on the Plat – only the lots are. CP 196 - 199. The Hearing Examiner and Town Engineer did not err.

- c. The record contains substantial evidence that Jones would sell one or both lots.

Even assuming, *arguendo*, that Jones' interpretation is correct, and proof of division and sale is required to trigger the Plat Restriction, the

record amply demonstrates that Jones will sell one or both lots. First, as a matter of law, sale of the property is the very purpose of a short plat:

“Short subdivision” is the division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership.

RCW 58.17.010(6) (emphasis added); *see also* HPMC 17.10.140 (same).

Second, both the Town Engineer and Darcy Jones testified that, in their experience, the only reason property owners seek to short plat their property is so that they can sell one or both lots in the future. CP 193: 15 – 20; CP 166: 12 - 16. And, when pressed during cross examination, Ms. Jones herself admitted she had previously told her neighbors that they would be constructing two new houses and selling one or both: “I may have said that we intend to sell in the future. . . .” CP 279 (lines 10 - 12). Finally, Town Administrator Jack McKenzie testified that Jones informed him that the State (via WSDOT) was seeking to buy part of Jones’ property, and that Jones led him to understand that if Jones was not permitted to sell parts of two different lots to the State, Jones would sue the Town. CP 269-70.

In any event, Jones can hardly complain that the Hearing Examiner erred due to a lack of evidence that they would sell the newly short-platted lots; this would be “invited error” because Jones themselves kept such evidence out of the record. For example, the Town sought to introduce

certain correspondence between the Washington State Department of Transportation and Jones, indicating that the State would be purchasing part of Jones' Lot 11 as part of the SR 520 widening project. AR 733 - 743 (correspondence from WSDOT attached to Town Pre-Hearing Brief). The Town further sought to have the Examiner issue subpoenas to certain WSDOT employees, who would testify that Jones told WSDOT that he was going to have two individual lots to sell that would be worth a substantial amount of money for each lot, and that the State needed to be prepared to purchase both of the lots. CP 47 - 48; CP 257-58. Jones, however, opposed issuance of the subpoenas, objected to introduction of the correspondence from WSDOT, and opposed any testimony by WSDOT employees who might verify Jones' prior statements, on the grounds that such testimony was not relevant. CP 47 - 48 (Jones/Examiner colloquy); CP 251 - 255 (Sterbank/Examiner colloquy). Based on Jones' opposition, the Examiner barred testimony from WSDOT employees about what Jones had said regarding selling the newly divided lots. CP 251 - 255. Having utilized a relevancy objection to successfully keep out of the record evidence of his stated intention to sell the short platted lots, Jones cannot now be heard to complain that the Hearing Examiner's Decision is erroneous because there is no evidence that he will

sell; this would be “invited error.”⁴⁰

Jones’ attempts to cite authority are again misplaced; the cited cases simply do not stand for the proposition for which they are offered. Jones cites *Norco v. King County*, 97 Wn.2d, 680, 688, 649 P.2d 103 (1982), but *Norco* involved a situation in which King County attempted to apply a draft comprehensive plan amendment that had not been and might never be adopted. *Norco* did not involve consideration of a proposed short plat, the legal purpose of which was the sale of property in violation of a restriction on the face of the plat. Likewise, *Friends of Cedar Creek Neighborhood v. Seattle*, 156 Wn. App. 633, 234 P.3d 214 (Div. I 2010), fails to help Jones’ case. Rather, *Friends of Cedar Creek* concerned a claim by project opponents that an unusual lot configuration did not serve the public interest, a contention the Court rejected when it found the short plat complied with plat requirements. *Id.* at 653-54.

d. The Plat Restriction was neither obsolete nor abandoned.

Jones also argues that, if the Town’s interpretation of the Plat Restriction is correct, the Restriction must be inapplicable because it was previously violated. Jones Opening Brief at 31 - 34. The circumstances Jones cites, however, were not violations of the Plat Restriction, because in

⁴⁰ *Humbert/Birch Creek Construction v. Walla Walla County*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008), citing *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587, review denied, 87 Wn.2d 1005 (1976).

each instance, while lots may have been divided, the resulting portions were either the same size or larger than shown on the face of the plat, or consolidated so that the ownership was **larger than** the lots shown on the face of the Plat.⁴¹ Even if those previous consolidations were considered violations of the Plat Restriction, these isolated instances are insufficient to result in abandonment. *Mountain Park Homeowners' Association v. Tydings*, 125 Wn.2d 337, 342, 883 P.2d 1383 (1994) (covenant must be “habitually and substantially violated” and so erode the general plan as to result in abandonment).

e. The Hearing Examiner correctly deferred to the Town Engineer's decision.

Jones also argues that the Hearing Examiner should not have deferred to the Town Engineer's decision. Jones Opening Brief at 29 - 30. The Hearing Examiner, however, correctly did so, applying the review standards straight from LUPA. CP 28. While Jones argues he should have applied a *de novo* standard to a legal question, the decision whether the Jones short plat would violate the Plat Restriction required both the interpretation of law by an official with expertise (the Town Engineer), and the application of the law to the facts, subject to the clearly erroneous standard. *Id.*; RCW 36.70C.130(1)(b) and (d). These two standards of

⁴¹ AR 4, 10; CP 190-91, 212 (Willis testimony); CP 239 (D. Jones testimony); *see also e.g.* AR 495-98, 528-531, 564-66, 569-71, 593-96, 615-620, 628-34, 636-39.

review required deference.

D. The Town Should Be Awarded Its Attorneys Fees.

This Court should award the Town its attorneys fees pursuant to RCW 36.70C.370(2), because the Town prevailed before the Hearing Examiner, the superior court, and should prevail before this Court. In addition, the award should also include fees of the Town's contract engineer and planner incurred in proceedings up to and including the Hearing Examiner hearing, pursuant to HPMC Sections 3.05.020, .030 and .110(1). These fees have been billed to Jones, who has refused to pay.

Even if this Court determines that the Town is not the prevailing party, Jones is not entitled to fees under RCW 4.84.370 because Jones did not prevail before either the Hearing Examiner or the superior court. Jones claims to have done so, pointing to the Examiner's ruling that the Town Engineer should have accepted and fully processed Jones' short plat application, before determining it was barred by the Plat Restriction. Jones Opening Brief at 39 - 40. Jones neglects to acknowledge that the Examiner also determined that this error was essentially harmless, because the Town Engineer's decision was the equivalent of a denial of the short plat application on its merits. CP 28 - 29 (H.Ex.Dec. at Concl. 1). The Examiner's conclusion that the error was harmless was implicitly affirmed by Judge Inveen. CP 419 (Concl. 2). Indeed, the Town Engineer testified in

response to the Examiner's questions that processing the short plat application further would have been "fruitless," because the Plat Restriction was a "brick wall" that would have required denial in any event. CP 220-21. Jones cannot claim to be the prevailing party based on a harmless error.

V. CONCLUSION

The Hearing Examiner correctly interpreted and applied the Plat Restriction, and correctly determined that it barred Jones' short plat because the short plat would divide Lot 11, and either resulting lot would result in Jones' ownership of a portion of the Plat being less than that shown on the face of the Plat. The Examiner's decision should be affirmed, and the Town should be awarded its attorneys' and consultants' fees.

RESPECTFULLY SUBMITTED this 30th day of March, 2011.

KENYON DISEND, PLLC

By 

Bob C. Sterbank
WSBA No. 19514
Attorneys for Respondent Town of
Hunts Point

DECLARATION OF SERVICE

I, Mary Eichelberger, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 30th day of March, 2011, I served a true copy of the foregoing *BRIEF OF RESPONDENT TOWN OF HUNTS POINT AND APPENDIX TO BRIEF OF RESPONDENT TOWN OF HUNTS POINT* on the following counsel of record using the method of service indicated below:

- | | | |
|---------------------------|-------------------------------------|---|
| Marianne K. Jones | <input type="checkbox"/> | First Class, U.S. Mail, Postage Prepaid |
| Mona K. McPhee | <input checked="" type="checkbox"/> | Legal Messenger |
| Jones Law Group, P.L.L.C. | <input type="checkbox"/> | Overnight Delivery |
| 11819 NE 34th Street | <input type="checkbox"/> | Facsimile |
| Bellevue, WA 98005 | <input type="checkbox"/> | E-Mail |
| | <input type="checkbox"/> | Court's E-Service |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of March, 2011, at Issaquah, Washington.


Mary Eichelberger

NO. 66125-6-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Patrick A.T. Jones,

Appellant,

vs.

The Town of Hunts Point,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT TOWN OF HUNTS POINT

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APPENDIX

Suess v. Volgelsegang, 151 Ind. App. 631, 281 N.E.2d 536
(1972)..... A-1 – A-9

Hunts Point Municipal Code (“HPMC”) 2.35.020(5) A-10 – A-11

HPMC 3.05.020 A-12

HPMC 3.05.030 A-12

HPMC 3.05.110(1) A-13

HPMC 17.10.140 A-14

HPMC17.50.010 A-15

Westlaw.

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C

Court of Appeals of Indiana, Second District.
 Robert SUESS et al., Defendants-Appellants,
 v.

E. Ross VOGELGESANG, as Executive Director
 of the Metropolitan Planning Department of Marion
 County, Indiana, et al., Plaintiffs-Appellees.

No. 671A119.

April 17, 1972.

Rehearing Denied May 22, 1972.

Proceeding to review decision of the Metropolitan Zoning Board of Appeals to grant a 'use' variance for purpose of utilizing residential premises as a physician's office. The Superior Court Marion County, Addison M. Dowling, J., entered judgment from which the board appealed. The Court of Appeals, Sullivan, J., held, inter alia, that evidence, including disclosure that within immediate neighborhood were an industrial facility, a shopping center, two gasoline stations, several other businesses, and an apartment complex, and that because of small size of residence upon premises in question and amount of traffic on street which fronted premises sale of property for residential purposes was nearly impossible, was sufficient to support zoning board's finding of hardship without regard to use and alteration of premises by petitioners without first having obtained requisite zoning variance.

Reversed and remanded with directions.

West Headnotes

[1] Appeal and Error 30 ↪766

30 Appeal and Error

30XII Briefs

30k766 k. Defects, objections, and amendments. Most Cited Cases

Absence of verbatim statement of judgment from appellant's brief authorized affirmance without consideration of merits, but such affirm-

ance was not mandatory. Rule AP. 8.3(A) (4).

[2] Appeal and Error 30 ↪756

30 Appeal and Error

30XII Briefs

30k756 k. Form and requisites in general. Most Cited Cases

Rule providing that appellant's brief shall contain a verbatim statement of judgment is for purpose of aiding and expediting appellate review and is founded upon reality of appellate case loads and human time limitations. Rule AP. 8.3(A) (4).

[3] Appeal and Error 30 ↪757(1)

30 Appeal and Error

30XII Briefs

30k757 Statement of Case or of Facts

30k757(1) k. In general. Most Cited Cases

Requirement that appellant's brief contain a verbatim statement of the judgment is a convenience to reviewing court and is not jurisdictional. Rule AP. 8.3(A) (4).

[4] Appeal and Error 30 ↪179(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k179 Sufficiency of Presentation of Questions

30k179(1) k. In general. Most Cited Cases

Contention which was not set forth in appellants' motion to correct error was waived. Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[5] Zoning and Planning 414 ↪1475

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

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414k1475 k. Harmony with, or impairment of regulations or plan. Most Cited Cases
 (Formerly 414k489)

Zoning and Planning 414 ↪1544

414 Zoning and Planning

414IX Variances and Exceptions

414IX(B) Proceedings for Variances and Exceptions

414k1539 Notice and Hearing

414k1544 k. Presumptions and burden of proof. Most Cited Cases

(Formerly 414k536)

It is not every interference with comprehensive plan which will preclude granting of a zoning variance; the only burden upon a petitioner for a variance in this respect is that he show that it does not "substantially interfere." Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[6] Zoning and Planning 414 ↪1713

414 Zoning and Planning

414X Judicial Review or Relief

414X(D) Determination

414k1713 k. Affirmance, modification, reversal, vacation, or setting aside. Most Cited Cases
 (Formerly 414k724)

Court's finding that evidence was contrary to zoning board's finding that variance would not interfere with comprehensive metropolitan plan could not properly serve as a basis for reversal of the board's determination to grant a variance. Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[7] Zoning and Planning 414 ↪1612

414 Zoning and Planning

414X Judicial Review or Relief

414X(B) Proceedings

414k1610 Pleading

414k1612 k. Petition, complaint or application. Most Cited Cases

(Formerly 414k590)

Where petition for writ of certiorari filed by demonstrators did not attack zoning board's determination to grant a variance upon basis that variance substantially interfered with comprehensive metropolitan plan, such question was not a proper matter of consideration for reviewing court.

[8] Zoning and Planning 414 ↪1478

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

414k1477 Hardship, Loss, or Injury

414k1478 k. In general. Most Cited Cases

(Formerly 414k493)

Zoning and Planning 414 ↪1480

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

414k1477 Hardship, Loss, or Injury

414k1480 k. What constitutes in general. Most Cited Cases

(Formerly 414k495)

Whether unnecessary hardship exists so as to authorize a variance is a factual question to be determined by zoning board in its discretion; no single fact determines existence of such hardship but all relevant factors taken together must indicate that the property for which variance is sought cannot reasonably be put to conforming use. IC 1971, 18-7-2-71, Burns' Ann.St. § 53-969; Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[9] Zoning and Planning 414 ↪1482

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

414k1477 Hardship, Loss, or Injury

414k1482 k. Self-created hardship; prior knowledge. Most Cited Cases

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(Formerly 414k497)

Hardship for variance purposes cannot be premised upon self-created conditions; if, however, hardship exists independently of, and without regard to, the conditions created by the petitioner himself, such hardship will sustain granting of a variance if the other statutory requirements are met. IC 1971, 18-7-2-71, Burns' Ann.St. § 53-969; Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[10] Zoning and Planning 414 ↪1487

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

414k1487 k. Residential uses in general.

Most Cited Cases

(Formerly 414k539)

Evidence, including disclosures that within immediate neighborhood were an industrial facility, a shopping center, two gasoline stations, several other businesses, and an apartment complex, and that sale of property for residential purposes was nearly impossible, was sufficient to support zoning board's finding of hardship so as to authorize a variance for purposes of utilizing residential premises as a physician's office without regard to use and alteration of premises by petitioners without first having obtained requisite zoning variance. IC 1971, 18-7-2-71, Burns' Ann.St. § 53-969; Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[11] Zoning and Planning 414 ↪1545

414 Zoning and Planning

414IX Variances and Exceptions

414IX(B) Proceedings for Variances and Exceptions

414k1539 Notice and Hearing

414k1545 k. Weight and sufficiency of evidence. Most Cited Cases

(Formerly 414k537.1, 414k537)

Owner who embarks upon extensive remodeling or alteration of premises runs extreme and very

real risk of losing his investment if he is unable to prove each and all of five statutory requirements for variance. IC 1971, 18-7-2-71, Burns' Ann.St. § 53-969; Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[12] Covenants 108 ↪72.1

108 Covenants

108II Construction and Operation

108II(D) Covenants Running with the Land

108k72 Release or Discharge from Liability on Real Covenants

108k72.1 k. In general. Most Cited Cases

(Formerly 108k72)

Zoning ordinances and laws cannot relieve real estate from valid private restrictive covenants.

[13] Zoning and Planning 414 ↪1473

414 Zoning and Planning

414IX Variances and Exceptions

414IX(A) In General

414k1473 k. Grounds for grant or denial in general. Most Cited Cases

(Formerly 414k489)

Issuance of a variance grant is not invalid merely because utilization of grant may be in violation of private restrictive covenants. IC 1971, 18-7-2-71, Burns' Ann.St. § 53-969; Rule TR. 59(G) (Rules of Civil Procedure), IC 1971, 34-5-1-1, Rule 59(g).

[14] Covenants 108 ↪104

108 Covenants

108IV Actions for Breach

108k104 k. Nature and form of remedy. Most Cited Cases

Injunction 212 ↪62(1)

212 Injunction

212II Subjects of Protection and Relief

212II(C) Contracts

212k62 Covenants as to Use of Premises

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212k62(1) k. In general. Most Cited Cases

Appropriate remedy of persons deeming themselves aggrieved by violation of a restrictive covenant is injunctive relief afforded by equity or an action in damages.

*632 **538 Ronald S. Lieber, Eugene W. Lausch, Lieber & Neff, Indianapolis, for defendants-appellants.

Nola A. Allen, John H. Baldwin, Indianapolis, for plaintiffs-appellees.

*633 SULLIVAN, Judge.

The Metropolitan Board of Zoning Appeals of Marion County, Indiana granted a 'Use' variance to appellants (Suesses) sought for the purpose of utilizing residential premises as a physician's office. Certain remonstrators and the Metropolitan Planning Department (appellees herein) opposed such variance. It should be noted that the Planning Department based their opposition not upon violation of the Master Plan but rather upon the fact that Suess, a practicing physician, had razed a garage, had resurfaced the area thus vacated for parking purposes and had commenced remodeling the residential structure before seeking a variance or appropriate building permits.

ABSENCE OF VERBATIM STATEMENT OF JUDGMENT NOT FATAL TO THIS APPEAL

Appellees correctly point out that appellants' brief is defective in that it does not, as required by Rule AP. 8.3(A)(4), set forth a verbatim statement of the judgment below. Said rule reads as follows:

'Arrangement and Contents of Briefs.

(A) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the

court below, including a verbatim statement of the judgment.' (Emphasis supplied)

[1][2][3] To be sure, the directive of the rule concerning the statement of the judgment is unequivocal. While the absence of such statement from an appellant's brief clearly authorizes affirmance without consideration of the merits (**539Hauser v. Markwell (1942) 111 Ind.App. 420, 41 N.E.2d 652), such affirmance is not mandatory. The dictate *634 of Rule 8.3(A)(4) is for the purpose of aiding and expediting appellate review and is founded upon the reality of appellate case loads and human time limitations. The requirement is thus a convenience to the reviewing court and is not jurisdictional. It is often a necessary convenience, however, such as when the precise words of the judgment are in issue or must be scrutinized to determine the exact relief granted or denied; or if multiple litigants are involved in order to determine for whom or against whom the judgment runs. Likewise, in certain actions such as proceedings for injunctive relief or for declaratory judgment, or as in *Hauser v. Markwell*, supra, for reformation of a contract for sale of real estate and for possession of the real estate and damages for wrongful detention, the verbatim statement of the judgment is not a mere formality. In those and similar instances, the precise phrasing of the judgment often times bears direct correlation to the argument of appellant. It is the judgment in such cases which gives meaning to the appellant's argument. Antithetically, where the relief granted or denied is basic and uncomplicated as here, i.e., a one sentence reversal of an administrative determination, the judgment is self-evident and implicit in the mere fact of appeal. Additionally, the judgment below, together with the findings and conclusions tending to support that judgment, are graciously provided by appellees' brief. Accordingly, we need not search the record therefor and thus turn to a consideration of the merits of appellants' contentions.

[4] Only three of the four issues argued by appellants in their brief are properly before us. The

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first issue which concerns the failure of appellees' Petition for Writ of Certiorari to be verified was not set forth in appellants' Motion to Correct Error. Such contention is, therefore, waived. Indiana Rules of Procedure, TR. 59(G), IC 1971, 34-5-1-1.

***635 JUDGMENT OF COURT BELOW CANNOT REST UPON ALLEGED ILLEGALITY IN BOARD'S FINDING THAT VARIANCE DID NOT INTERFERE SUBSTANTIALLY WITH COMPREHENSIVE METROPOLITAN PLAN**

Appellants assert as error the following conclusion made by the reviewing court:

'That said decision is illegal, and was an abuse of the discretionary powers of the Board, as the evidence was contrary to their finding that the variance would not interfere with the Comprehensive Metropolitan Plan.'

[5][6] It must be pointed out that the Board did not, as stated by the reviewing court, find that the variance 'would not interfere with the Comprehensive Metropolitan Plan'. Rather, the Board found that the variance would not substantially interfere. We must thus agree with the contention of Sueses in this regard. It is not every interference with the Comprehensive Plan which will preclude the granting of a zoning variance. The only burden upon a petitioner for a variance in this respect is that he show that it does not 'substantially interfere.' I.C. 1971, 18-7-2-71, Ind. Ann. Stat. s 53-969 (Burns 1971 Supp.)^{FN1} Thus, the court's finding that 'the evidence was contrary to (the Board's) finding that the variance would not interfere with the Comprehensive Metropolitan Plan' cannot properly serve as a basis for reversal of the Board's determination to grant the variance.

FN1. The variance proceeding in question was governed by Acts 1955 Chapter 283, Section 69, as last amended by Acts 1965, Chapter 434, Section 17 and as found in Burns Ind. Stat. Ann., s 53-969 prior to 1970. Subsequent amendments have not changed the 'substantial interference' pro-

vision.

[7] Further, no question with regard to 'substantial interference' was before the Marion Superior Court. The Petition for **540 Writ of Certiorari filed by the remonstrators-appellees did not attack the Board's determination upon that basis. Such question was, therefore, not a proper matter of consideration*636 for the reviewing court (Kessler-Allisonville Civic League, Inc. v. Marion Co. Bd. of Zoning Appeals (1965) 137 Ind.App. 610, 209 N.E.2d 43), and the judgment cannot be affirmed upon a 'substantial interference' finding.

If, therefore, the decision of the reviewing court is to be affirmed, it must be with respect to matters properly before that court. In this respect, the Petition for Writ of Certiorari was confined to two reviewable assertions of illegality.^{FN2}

FN2. The Petition for Writ of Certiorari did contain an additional specification to the effect that the grant of the variance was an abuse of the Board's discretion and was arbitrary and capricious in that the evidence submitted in support of the variance was so meager that the finding of the Board did not rest upon a rational basis and that further the evidence submitted by remonstrators was of such weight as to require, as a matter of law, denial of the variance. Such specification is but a broadly stated conclusion of the petitioners, appellees here, and lacks the definiteness and clarity sufficient to permit intelligent review. Bd. of Zoning Appeals of City of Indianapolis v. Filis (1965) 137 Ind.App. 217, 206 N.E.2d 628; Bd. of Zoning Appeals of City of Indianapolis v. Moyer (1940) 108 Ind.App. 198, 27 N.E.2d 905. It does not set forth or specify the grounds of illegality, at least not as to the very limited question of whether or not the Comprehensive Metropolitan Plan has or has not been substantially impaired.

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EVIDENCE WAS SUFFICIENT TO SUPPORT BOARD'S FINDING OF HARDSHIP WITHOUT REGARD TO ALLEGED SELF-CREATED HARDSHIP, I.E., PREMATURE AND UNAUTHORIZED USE AND ALTERATION OF THE PREMISES BY PETITIONERS

[8] A variance will not be granted unless application of the existing zoning classification will constitute unusual and unnecessary hardship. I.C. 1971, 18-7-2-71 Ind. Ann. Stat. s 53-969 (Burns 1971 Supp.). Whether unnecessary hardship exists so as to authorize a variance, is a factual question to be determined by the Board in its discretion. *Nelson v. Bd. of Zoning Appeals* (1959) 240 Ind. 212, 162 N.E.2d 449. No single fact determines the existence of such hardship but all relevant factors taken together must indicate that the property for which variance is sought cannot reasonably be put to conforming use. *637 *City of E. Chicago, Indiana v. Sinclair Refining Co.* (1953) 232 Ind. 295, 111 N.E.2d 459.

Appellees successfully contended before the reviewing court that Susses created their own hardship in razing the garage, resurfacing for parking the area thus cleared, and commencing remodeling without first having obtained the requisite zoning variance and building permit and without first having apprised himself of the use restrictions imposed by recorded covenants. That contention in effect alleges, and the court below concluded, that the hardship, if any, existent with reference to the premises concerned was created by Susses themselves. As supporting authority for the argument, appellees cite *Bd. of Zoning Appeals of City of Hammond v. Waskelo* (1960) 240 Ind. 594, 168 N.E.2d 72. That decision affirmed a denial of a variance upon the ground that a claim of hardship cannot be based upon a condition created by the owner. That case is clearly distinguishable not only because it was a review of a variance denial as opposed to a variance grant (see *Metropolitan Board of Zoning Appeals of Marion County, Indiana Division 2 v. Standard Life Insurance Co.* (1969) Ind.App., 251 N.E.2d 60) but also because the only claimed hardship in

Waskelo was occasioned by the voluntary act of the petitioner in reducing by sale the size of the area for which variance was sought. The factual situation here presented is quite different.

In the instant case the evidence disclosed that within the immediate neighborhood are Naval Avionics—an industrial **541 facility, a shopping center, two gasoline stations, several other businesses, and an apartment complex. The evidence further indicated that because of the small size of the residence upon the premises in question and the amount of traffic on the street which fronts the premises, sale of the property for residential purposes was nearly impossible and that the house had been offered for sale for a considerable period without success until purchase by the Susses. Such evidence places the instant case more in line with the *Nelson* case, supra, than with *Waskelo*, supra.

*638 As stated in *Devon Civic League, Inc. v. Marion County Board of Zoning Appeals* (1967) 140 Ind.App. 519, 224 N.E.2d 66:

'The review by the Superior Court of Marion County is not a trial de novo and the reviewing Court cannot substitute its decision for that of the Board of Zoning Appeals. * * * The reviewing Court may not weigh the evidence submitted to the Board, nor substitute its judgment or decision for that of the Board, but can only determine whether or not there is any substantial evidence of probative value which is competent as the foundation for the decision of the Board.' 140 Ind.App. 519, 524-525, 224 N.E.2d 66, 69. See also *R. J. Realty, Inc. v. Keith* (1969) Ind.App., 250 N.E.2d 757; *Kessler-Allisonville Civic League, Inc. v. Marion County Board of Zoning Appeals*, supra.

[9] We have readily acknowledged and subscribe to the holding in *Waskelo* to the effect that hardship for variance purposes cannot be premised upon self-created conditions. If, however, hardship exists independently of, and without regard to, the conditions created by the petitioner himself, such hardship will sustain the granting of a variance if

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the other statutory requirements are met.

[10] The evidence of record alluded to above was sufficient to permit the Board to reach a reasonable inference of hardship within the meaning of the statutory requirement. It was error, therefore, for the reviewing court upon Certiorari to ignore such evidence and to substitute its own inferences and conclusions from the extraneous and unrelated, though premature and unlawful, acts of the Sueses.

[11] The grant of the variance here does not, as contended by appellees, tend to encourage intentional and unlawful premature construction activity upon real estate without first obtaining a zoning variance. The owner who embarks upon extensive remodeling or alteration of the premises runs the extreme and very real risk of losing his investment if he is unable to prove each and all of the five statutory requirements for variance. Whether he has commenced remodeling construction*639 or other alteration has no bearing upon his statutory burden of proof. The condition of the land is examined without reference to such alterations as may have been prematurely and unlawfully made. If petitioner can satisfy the five statutory requirements, the variance petition is properly granted. If he cannot do so the variance should be denied.

In keeping with the foregoing, we cannot say, nor could the reviewing court below, that as a matter of law there was not substantial evidence that application of the zoning ordinance to the property in question would constitute an unusual and unnecessary hardship.

ZONING BOARD'S VARIANCE GRANT DID NOT RELIEVE REAL ESTATE FROM PRIVATE RESTRICTIVE COVENANTS

[12] It is quite well established, in Indiana as elsewhere, that zoning ordinances and laws cannot relieve real estate from valid private restrictive covenants. *Capp v. Lindenberg* (1961) 242 Ind. 423, 178 N.E.2d 736. We are not unmindful of an interpretation which has been placed on the *Capp* case to the effect that a zoning board cannot issue a vari-

ance which appears**542 to be contrary to private restrictive covenants. See 2 *Yokley, Zoning Law and Practice* (3rd Ed.) s 20- 5, p. 460. To be sure, there is language in the *Capp* opinion which might prompt such an interpretation. That language, however, must be placed in perspective in the light of the explanatory comment which immediately follows it, and in the light of the otherwise virtually unanimous authority herein set forth. The particular passage from *Capp* is:

* * * the purported variance was prohibited by law, independent of the ordinance.

The general rule upon this proposition has been stated as follows:

*640 '(A) Zoning law cannot constitutionally relieve land within the district covered by it from lawful restrictions affecting its use, imposed by covenants.' 58 *Am.Jur.*, s 4, p. 942.

'Zoning regulations and private restrictions do not affect each other.' *Bassett, Zoning* (1940) p. 185 & n. 3.' 242 Ind. 423, 433, 178 N.E.2d 736, 740.

Thus it is seen that the choice of language in *Capp*, to the effect that the variance was prohibited, was unfortunate and not literally appropriate to the holding in the light of its supporting authority.

The *Capp* case, therefore, stands only for the principle that a variance is invalid in the sense that its implementation cannot be in violation of valid and reasonable plat or deed restrictions. It does not stand for the principle that such restrictions are proper considerations concerning the issuance of a variance.

In this connection it should also be pointed out that the *Capp* case did not concern an appeal from a zoning proceedings, but was, rather, an action to enjoin building construction.

The most recent case found which involved a direct attack upon a zoning variance by way or

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private restrictive covenants of record is *Whiting v. Seavey* (1963) 159 Me. 61, 188 A.2d 276. It is virtually identical on its facts with the matter herein presented.

The stipulated issue in the *Whiting* case was as follows:

'Whether the action of the Board of Appeals in granting an exception to John B. Cochran to operate a boat yard at Hulls Cove in the Town of Bar Harbor is invalid on the sole ground that the restrictive covenants in the deeds under which the Plaintiffs hold title prohibit commercial operations in the area where the boat yard is located unless such restrictions have been removed under the express provisions contained in said deeds or unless such restrictions*641 have been rendered void by operation of law.' 188 A.2d 277.

There as here, the property in question was restricted in use to residential purposes by deed covenants and the area was zoned for residential purposes only. There as here, the property owner unlawfully utilized the premises for commercial business purposes, i.e., building, repairing and storing boats, notwithstanding the zoning classification and the restrictive covenants for approximately 3 years and until ordered to cease by order of the appropriate municipal authority. The owner thereafter petitioned for a variance which was denied. He subsequently reapplied for variance, which variance was granted. The Court held as follows:

'When the conditions or terms of a zoning law are repugnant to those contained in the restrictive covenants in a deed of title the remedy for a breach is not through the prescribed procedure of the zoning law but rather by an action based on a breach of covenant.

In the case at bar the appellants do not contend that the Board of Appeals abused its discretion or was in error factually but only that its decision was invalid because of the existence of the restrictive **543 covenants. The Board of Appeals had the

legal right to grant the exception.' 188 A.2d 280-281.

Similarly, In *Re Michener's Appeal* (1955) 382 Pa. 401, 115 A.2d 367, the Supreme Court of Pennsylvania in consideration of an appeal from a variance denial stated:

'Zoning laws are enacted under the police power in the interest of public health, safety and welfare; they have no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts. If these applicants were to succeed in obtaining a variance relieving them from the restrictions of the zoning ordinance they would still be subject to the restrictions contained in their deeds, but the enforcement of those restrictions could be sought only in proceedings in equity in which the grantors, their representatives, *642 heirs and assigns, would be the moving parties.' 115 A.2d 369.

The court in the *Michener* case continued:

'The fact that there were building restrictions in the deeds was wholly irrelevant in the appeal before the court on the question whether a variance should have been granted by the Board under the zoning ordinance. The private parties who alone possessed the right to enforce those restrictions were not before the court. It might be that they would never seek such enforcement, or that for some reason they had waived or lost their right so to do, or that, because of neighborhood changes or because the restriction had ceased to be of advantage to the covenantees, the restriction would no longer have been enforceable. Accordingly it has been uniformly held that any consideration of building restrictions placed upon the property by private contract has no place in proceedings under the zoning laws for a building permit or a variance.' 115 A.2d 370.

See also *Lorland Civic Assn. v. DiMatteo* (1968) 10 Mich.App. 129, 157 N.E.2d 1.

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The logic of this conclusion is demonstrated by the principle of law which, in proceedings to determine the enforceability of restrictive covenants, permits evidence of a zoning law change to show that the character of the neighborhood has changed so as to render the restrictive covenant no longer logically, practically, or equitably enforceable. See *Bachman v. Colpaert Realty Corp.* (1935) 101 Ind.App. 306 at 319-320, 194 N.E. 783.

These foreign case decisions are in keeping with the views of recognized text writers in the field of Zoning Law. In 2 *Yokley, Zoning Law and Practice*, s 20-3, p. 461, the writer notes:

'In the realm of zoning administration, consideration will not be given to the enforcement of restrictive covenants merely to protect the rights of private property owners. *643 Restrictive covenants, such as those that run with the land, are only enforceable by the parties thereto, or their assigns, and only such parties may claim the benefits of the covenant.'

and a more extensive treatment of the subject which appears in 3 *Rathkopf, The Law of Zoning and Planning*, s 74-1 et seq. is widely quoted as follows:

'The zoning ordinance constitutes the regulation of land use through the exercise of the police power in accordance with a comprehensive plan for the entire community. It is entirely divorced in concept, creation, enforcement and administration from restrictions arising out of agreement between private parties who may, in the exercise of their constitutional right of freedom of contract, impose whatever restrictions upon the use of their lands that they desire, such covenants being enforceable only by those in whose favor they run.

'The zoning restrictions imposed upon a property owner's land are the measure **544 of his obligations to the community; the private covenant is merely an indication of the measure of his obligation to a private party, which may or may not be enforceable but which cannot, in either event, affect

the necessity of conforming to the comprehensive plan set forth in the ordinance.

'It is the duty of an administrative officer charged with the issuance of permits to administer his duties in accordance with the provisions of the zoning ordinance. Consequently, if an application for a permit shows compliance with the requirements of the zoning ordinance and other applicable ordinances, he may not predicate his denial of the permit upon the existence of more restrictive provisions in a deed or covenant.

Nor is it proper for an administrative body to consider the existence of a private covenant upon an application for a variance or a special exception, the only applicable requirements for these being those set forth in the enabling act of ordinance.'

[13][14] We are, therefore, persuaded to hold that issuance of a variance grant is not invalid merely because utilization of the *644 grant may be in violation of private restrictive covenants. The appropriate remedy of persons deeming themselves aggrieved by violation of a restrictive covenant is the injunctive relief afforded by equity or an action in damages. See *Capp v. Lindenberg and Bachman v. Colpaert Realty Corp.*, supra.

For the reasons stated, we hereby reverse the judgment below and remand the cause with instructions to reinstate the decision of the Metropolitan Board of Zoning Appeals.

WHITE, P.J., and BUCHANAN, J., concur.

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END OF DOCUMENT

Chapter 2.30

Chapter 2.35

MILEAGE REIMBURSEMENT

HEARING EXAMINER

Sections:

2.30.010 Amounts.

2.30.010 Amounts.

Employees and/or representatives of the town of Hunts Point shall be reimbursed for the use of personal vehicles while in the course of town business in an amount per mile equal to that allowed by the Internal Revenue Service for business deductions at the time said mileage is reported. [Ord. 168 § 1, 1982]

Sections:

- 2.35.010 Purpose.
- 2.35.020 Office created.
- 2.35.030 Appointment.
- 2.35.040 Qualifications.
- 2.35.050 Freedom from undue influence – Conflict of interest.
- 2.35.060 Rules for hearings.
- 2.35.070 Power of hearing examiner.
- 2.35.080 Report of building official.
- 2.35.090 Public hearings.
- 2.35.100 Decision of hearing examiner.
- 2.35.110 Request for reconsideration.
- 2.35.120 Final decision and order.
- 2.35.130 *Repealed.*
- 2.35.140 *Repealed.*
- 2.35.150 *Repealed.*
- 2.35.160 *Repealed.*
- 2.35.170 Legal counsel.
- 2.35.180 Conduct of hearing.
- 2.35.190 *Repealed.*

2.35.010 Purpose.

The purpose of this chapter is to establish a system of land use regulatory hearings which will satisfy the following basic needs:

- (1) A prompt opportunity for a hearing and decision of alleged violations of land use regulations and such other regulations as may be assigned to the hearing examiner;
- (2) An efficient and effective system for deciding variances, appeals from administrative decisions and other land use issues;
- (3) To insure procedural due process and the appearance of fairness by conducting hearings before a neutral party, competent in the field of land use and procedural requirements. [Ord. 317 § 1, 1996]

2.35.020 Office created.

The office of hearing examiner, referred to in this chapter as examiner, is hereby created. The examiner shall perform the following duties:

- (1) Interpret, review and implement land use regulations;

2.35.030

(2) Hear all applications for variances to HPMC Title 18;

(3) Hear all appeals of the building official's or town engineer's interpretations of HPMC Title 18;

(4) Hear appeals of all notices of violation;

(5) Hear all other quasi-judicial appeals of administrative decisions, except those specifically prescribed by state law to be heard by the town council; and

(6) Perform other duties as may be assigned by the mayor or council by ordinance. [Ord. 406 § 1, 2002; Ord. 349 § 1, 1998; Ord. 317 § 2, 1996]

2.35.030 Appointment.

The hearing examiner shall be appointed by the mayor and confirmed by a majority of the town council. The hearing examiner will be appointed and shall serve as hearing examiner under such terms and conditions as are set forth in a written contract between the parties. The compensation of the hearing examiner shall be established by contract, which shall be approved by a resolution of the town council or may be established by the terms of an agreement with any other city or county to provide for a joint hearing examiner procedure. The duties and responsibilities of the hearing examiner shall be quasi-judicial in nature. [Ord. 328 § 1, 1997; Ord. 317 § 3, 1996]

2.35.040 Qualifications.

The hearing examiner shall be appointed solely with regard to qualifications for the duties of the office and will have such training and experience as will qualify him or her to conduct administrative or quasi-judicial hearings and to discharge the other functions conferred upon the office. An examiner shall hold no other elective appointive office or position in the town of Hunts Point. Examiners shall be appointed solely with regard to their qualifications to the duty of the office which shall include, but not be limited to, appropriate educational and practical experience in urban planning or law. [Ord. 317 § 4, 1996]

2.35.050 Freedom from undue influence -- Conflict of interest.

(1) No person shall attempt to influence an examiner in any matter pending before him, except publicly at a public hearing duly called for such purpose, or to interfere with examiner in the performance of his duties in any other way; provided, that this section shall not prohibit the town attorney from rendering legal services to the examiner.

(2) No examiner shall conduct or participate in any hearing or decision in which the examiner has direct or indirect substantial financial or other interest, or concerning which the examiner has had substantial prehearing contacts with proponents or opponents wherein the issues were discussed; nor shall any member of the town council who has such an interest or who has such contacts participate in the consideration thereof. The office of the examiner shall be separate from and not a part of the building department or any other agency of the town. This section is not intended to prohibit necessary or prompt inquiries on matters as scheduling but, whenever possible, such inquiries shall be in writing and be entered into the official record of the hearing. [Ord. 317 § 5, 1996]

2.35.060 Rules for hearings.

The examiner shall provide rules for scheduling and conduct of hearings and other matters relating to the duties of his office. Such rules shall provide for the admission of evidence, examination and cross-examination of witnesses, rebuttal evidence and all other matters relevant to the conduct of the hearing. The examiner may limit the time allowed to parties testifying on an equal basis, may establish time limits for initial or rebuttal evidence, may limit cross-examination of witnesses and may limit the number of witnesses to be heard. [Ord. 317 § 6, 1996]

2.35.070 Power of hearing examiner.

The examiner shall receive and examine available information, conduct public hearings, prepare a record and tape recording thereof, and enter written decisions as provided for in this section.

Chapter 3.05

FEE SCHEDULE

Sections:

- 3.05.010 Purpose.
- 3.05.020 Professional consultants – Town policy.
- 3.05.030 Consultants – Review and consulting costs.
- 3.05.040 Consultants – Assistance service.
- 3.05.050 Consultants – Review costs.
- 3.05.060 Consultants – Monitoring costs.
- 3.05.070 Consultants – Enforcement costs.
- 3.05.080 Consultants – Building and mechanical permit fees.
- 3.05.090 Consultants – Service user responsibility.
- 3.05.100 Public works department fees.
- 3.05.110 Planning department fees.
- 3.05.120 Building department fees.
- 3.05.130 Delegated jurisdiction agency fees.
- 3.05.140 Miscellaneous fees.
- 3.05.145 Facility rental policy.
- 3.05.150 Collection of fees.
- 3.05.160 Heavy truck fees.

3.05.010 Purpose.

It shall be the purpose of this chapter to set the fees charged for the various services of the town, establish the methods for computing said fees, determine times for payment and define recourse by the town in the event of unpaid fees and costs incurred by the town. [Ord. 294 § 1, 1995]

3.05.020 Professional consultants – Town policy.

The town of Hunts Point retains professional consultants to fill the offices of town attorney, town landscape architect, town building official, town engineer, and town planner and may retain other professional consultants from time to time to provide expert supplemental service to the town. [Ord. 294 § 2(A), 1995]

3.05.030 Consultants – Review and consulting costs.

Costs for the services of the consultant shall be charged to the user at the same hourly rate set by the agreement with the consultant for providing the specified service to the town. [Ord. 294 § 2(B), 1995]

3.05.040 Consultants – Assistance service.

The consultants are not employed by the town to provide assistance to citizens, applicants and appellants. The consultants will provide clarification of the meaning and interpretation of ordinances and terminology on a general basis at no charge to the citizen or the public, provided the request for clarification does not relate to a specific property or project within the town. The consultants may provide consulting services, in their official capacity through the offices of the town, to the citizen, applicant or appellant, when payment for the cost of such service is arranged in advance with the town clerk-treasurer. [Ord. 294 § 2(C), 1995]

3.05.050 Consultants – Review costs.

These costs may include, but are not limited to, the cost incurred by the town for services of the consultants required for review of an application or appeal, preparation of reports as may be required by town ordinances or procedures, and attendance by the consultant at council or board meetings set for consideration of the application or appeal. [Ord. 294 § 2(D), 1995]

3.05.060 Consultants – Monitoring costs.

These costs may include, but are not limited to, the costs incurred by the town for services of the consultant to monitor an approved project for compliance with the ordinances of the town and/or conditions of any variance and/or permit issued by the town. Monitoring includes in-progress reviews, site inspections and reports generated by the consultant. [Ord. 294 § 2(E), 1995]

3.05.070

3.05.070 Consultants – Enforcement costs.

These costs may include, but are not limited to, the costs incurred by the town for services of the consultant to enforce the provisions of town ordinances against persons or entities in violation thereof. Enforcement costs are assessed in addition to any penalties that may be imposed by law. [Ord. 294 § 2(F), 1995]

3.05.080 Consultants – Building and mechanical permit fees.

Building and mechanical permit fees, including plan review fees, shall be established in accordance with Sections 107.1, 107.2, and 107.3 of the Uniform Building Code, current edition adopted and in force as the Washington State Building Code. There shall also be an inspection fee charged to the user at the same hourly rate set by the agreement with the consultant for providing inspection services. There shall be an inspection fee deposit paid in the amount of \$1,800, prior to the performance of any inspection services; provided, however, that the building official may reduce the base inspection fee for small projects.

In the event that the actual costs of inspections exceed the deposit, the difference shall be charged to the user. In the event that the actual costs of inspections are less than the deposit, the difference shall be refunded to the user. [Ord. 393 § 1, 2001; Ord. 365 § 3, 1999; Ord. 294 § 2(G), 1995]

3.05.090 Consultants – Service user responsibility.

It is the responsibility of the individual person or entity to ascertain the full requirements of the ordinances and codes in force in the town of Hunts Point and accept full responsibility for compliance therewith. No requirement of the ordinances or codes may be waived by any town official unless such authority is specifically granted by the ordinance or code in question. No person shall rely on any verbal or written communications with an official, consultant or employee of the town that is in conflict with any provision of the ordinances or codes in effect. [Ord. 294 § 2(H), 1995]

3.05.100 Public works department fees.

(1) Right-of-way permit for telecommunications: \$250.00 plus actual staff/consultant time.

(2) Telecommunications site development permit or special use permit: \$500.00 plus actual staff/consultant time.

(3) Street cleaning permit: \$3,000 deposit.

(4) Street opening permit: \$250.00 plus actual staff/consultant time. [Ord. 371 § 1, 2000; Ord. 365 § 1, 1999; Ord. 294 § 3, 1995]

3.05.110 Planning department fees.

(1) Short plat: \$2,500 plus actual staff/consultant time.

(2) Boundary line adjustments and lot consolidations: \$500.00 plus actual staff/consultant time.

(3) Reconsideration/appeals: \$500.00 plus actual staff/consultant time.

(4) Conditional use permit: \$500.00 plus actual staff/consultant time.

(5) Shoreline substantial development permit: \$500.00 plus actual staff/consultant time.

(6) Shoreline exemption: \$250.00 plus actual staff/consultant time.

(7) SEPA review: \$500.00 plus actual staff/consultant time.

(8) EIS review/assessment: \$500.00 plus actual staff/consultant time.

(9) Preapplication meeting (for new construction or remodel valued at \$25,000 or greater): \$500.00 passed through to consultant.

(10) Preliminary plat: \$2,500 plus actual staff/consultant time.

(11) Final plat: \$2,500 plus actual staff/consultant time. [Ord. 381 § 1, 2000; Ord. 371 § 1, 2000; Ord. 369 § 4, 2000; Ord. 294 § 5, 1995]

3.05.120 Building department fees.

(1) Variance: \$500.00 for each variance requested, plus actual staff/consultant time.

(2) Site development permit: \$500.00 plus actual staff/consultant time.

(3) Tree permit: \$50.00 plus actual staff/consultant time.

(4) Building permit fees:

(a) For all new construction, remodels, and any other structures having a floor area

17.10.100 Plat.

“Plat” means a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys or other divisions and dedications. [Ord. 467 § 24, 2008; Ord. 106 § 2(h), 1972]

17.10.110 Public highway.

“Public highway” means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. [Ord. 106 § 2(i), 1972]

17.10.120 Preliminary plat.

“Preliminary plat” means a neat and approximate drawing of a proposed major subdivision, showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements set forth in this title. The preliminary plat is the basis for approval or disapproval of the general layout of a subdivision. [Ord. 467 § 25, 2008; Ord. 106 § 2(h)(1), 1972]

17.10.130 Short plat.

“Short plat” means the map or representation of a short subdivision. [Ord. 467 § 26, 2008; Ord. 106 § 2(h)(3), 1972]

17.10.140 Short subdivision.

“Short subdivision” means the division of land into four or fewer lots, plots, tracts, parcels, sites, or other divisions of land for the purpose of sale, lease, or transfer of ownership, and not previously having been divided for a period of five years from the date of application. [Ord. 467 § 27, 2008; Ord. 106 § 2(k)(2), 1972]

17.10.150 Subdivider.

“Subdivider” means any person, firm, corporation, or association proposing to make, or having made, a subdivision. [Ord. 106 § 2(j), 1972]

17.10.160 Subdivision.

“Subdivision” means a major subdivision as described in HPMC 17.10.070. [Ord. 467 § 28, 2008; Ord. 106 § 2(k), 1972]

Chapter 17.15

**PRELIMINARY APPROVAL
PROCEDURE**

(Repealed by Ord. 467)

Chapter 17.45

VIOLATIONS AND PENALTIES

Sections:

17.45.010 Enforcement pursuant to Chapter 18.60 HPMC.

17.45.010 Enforcement pursuant to Chapter 18.60 HPMC.

Violations of HPMC Title 17 shall be enforced pursuant to Chapter 18.60 HPMC. [Ord. 335 § 2, 1998]

Chapter 17.50

SUBDIVISION ALTERATIONS AND VACATIONS

Sections:

17.50.010 Alteration and vacation procedures.

17.50.010 Alteration and vacation procedures.

A request for alteration or vacation of any short subdivision or a major subdivision that involves a public dedication shall be processed as provided in RCW 58.17.212 or 58.17.215 with review and approval by the hearing examiner pursuant to RCW 58.17.217 and 58.17.330. [Ord. 467 § 72, 2008]