

No. 37282-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GRACE GROUP, INC., a Washington corporation, EDWARD C.
BECKER, III; THEODORE R. COLLINS, JR., and MICHELLE E.
COLLINS; PIERCE COUNTY, a Washington municipal corporation,

Appellants,

v.

WILLIAM SYLVESTER and BETTY SYLVESTER,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Pierce County Hearing Examiner approved the Appellants application for a reasonable use exception (RUE) to allow Appellants to construct single-family residences on three lots. The Hearing Examiner's decision whether to grant a reasonable use exception is guided by and limited to specific criteria contained in the Pierce County Code. Respondents, however, conflate a number of issues and attack the validity of the underlying division that created the lots even though that is not an issue here.

The primary question before this Court, assuming *arguendo* that the issue was properly raised and preserved in the administrative proceeding below, is as follows: On what date were the lots that are the subject of this appeal created or, more specifically, were the lots created (vested) prior to March 1, 2005? Though it appears at times that Respondents are claiming that the subject lots were not lawfully created lots, the reality is that no one in this action disputes that the property could be divided by a will or that the property was in fact divided into seven lots. When Respondents' arguments are reviewed in their totality, Respondents' singular claim is that the lots were not lawfully created as of March 1, 2005.¹ Respondents assert that the lots were not lawfully

¹ Respondents cite to cases that address circumstances in which the property owner attempted to use testamentary division of land to avoid compliance with applicable land use regulations. (*See Dykstra v. Skagit County*, 97 Wn.App. 670, 785 P.2d 424 (1999)).

divided until *after* the County assigned separate tax parcel numbers to the individual lots. Contrary to Respondents' argument, however, such formalities are not required by RCW 58.17.040(3), which expressly exempts property owners from the extensive procedural requirements of Chapter 58.17 RCW when land is divided by "testamentary provisions." As acknowledged by the Court in *Dykstra v. Skagit County*, "lots are thus created by the will itself, not compliance with the subdivision code." 97 Wn.App. 670, 674, 985 P.2d 424 (1999).

No one disputes that the lots subject to this appeal could not be divided by a will or that they were in fact divided. That is all that matters for purposes of this Court's review of the Hearing Examiner's decision. Nevertheless Respondents attempt to inappropriately deflect the focus of the appeal from the applicable criteria to the validity, or in their opinion invalidity, of the underlying division. While Appellants maintain that Respondents' contention is baseless, it nevertheless bears repeating that the issue for this Court is not if the property was divided, but when the property was divided.

When the property was divided is the key issue to this appeal because it is determinative of the two RUE criteria actually challenged by the Respondents. Those criteria require: (1) that lots existed prior to

That is not the situation presented here. In this case, Appellants submitted a land use application that complies with the applicable land use regulations, which included Wetlands Reasonable Use Exception application as authorized by PCC 18E.020.050.

March 1, 2005 and (2) that the Appellants did not divide the lots in a manner that created the undevelopable condition. Of course, the Court does not need to conclude exactly when the property was divided, but only that it was divided prior to March 1, 2005. If the property was divided prior to March 1, 2005 it unequivocally demonstrates that the lots existed prior to then. Additionally, it further demonstrates that the Appellants did not divide the property because they did not acquire legal ownership until May 31, 2005 and thus, were without legal authority to divide the property. Accordingly, if the Court finds that the Hearing Examiner's finding that the lots existed prior to March 1, 2005 is supported by the substantial evidence in the record it must rule in favor of the Appellants and reinstate the Hearing Examiner's decision.

II. REPLY TO RESPONDENTS' RECITATION OF THE STATEMENT OF FACTS

A brief reply to Respondents' recitation of the facts is necessary to clarify the issues and the factual evidence in the record.

A. The Proposed Single-Family Residences and Their Septic Systems Will Not Harm The Environment.

Respondents suggest to this Court that the Appellants' lots cannot be safely developed. Respondents' Brief at 2-4. Specifically, Respondents cite to personal difficulties with septic-systems in the area to give the Court the false impression that there will be dire consequences if

the Court allows Appellants to build their homes on the property. This is not an issue before this Court because the substantial scientific evidence to the contrary convinced the Hearing Examiner otherwise and more importantly, Respondents did not appeal that finding.

Clearly this was an important issue, if not the only issue, for Respondents during the public hearing. The Respondents in particular dedicated their entire participation during the public hearing to the issue of whether the lots could accommodate septic systems safely. (AR 220-223, 276-279). Yet, the Respondents did not appeal the Hearing Examiner's findings or conclusions with respect this issue or the RUE criteria that address those concerns. (CP 5). Rather, the Respondents appealed the decision based on criteria that they took no issue with during the hearing. (AR 1-8, 220-223, 276-279; CP 5).

Nevertheless, the overwhelming scientific evidence presented during the hearing demonstrated that septic systems on these lots would be designed so they do not pose a danger to groundwater or public health. (AR 37, 230-245). That evidence supports the Hearing Examiner's finding that the proposed development will "cause no degradation to surface water or ground water other than those normally associated with typical residential development." (AR 18, finding 8). This finding was not challenged by Respondents and is a verity for the purposes of this Court's review. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239

(1997); *cert denied*, 523 U.S. 1008 (1998). The Court should not be influenced by Respondents' erroneous suggestion that the lots cannot be safely developed.

B. Chronology of Events

Similarly, Respondents take some interpretive liberties with their recitation of the "Chronology of Relevant Events" that are not supported by the Administrative Record. Respondents suggest that the Appellants directed a surveyor to "map the property as seven (7) parcels" to support their argument that Appellants were somehow responsible for dividing the property. Respondents' Brief at 4. While Appellants did have a survey of the property done of the property in February of 2005, they did not direct the surveyor to create seven parcels. The record is devoid of any evidence that Appellants gave any such instructions. Rather, as the Hearing Examiner found, the surveyor mapped the lots as they existed in February of 2005. (AR 10 and 18).

C. Proceedings Before the Hearing Examiner

Respondents also attack the administrative process as unfair to those opposed to the Appellants' application. Nothing could be further from the truth. Notice of the Application was posted six months prior to the hearing date. (AR 90-99). Moreover, notice of the public hearing was posted two weeks prior to the hearing. (AR 30). While the parties could have gone to the County to review the exhibits prior to the hearing none of

them did and instead complained at the hearing itself that the 200-plus pages of exhibits were not sent to them with the staff report. The Hearing Examiner could have easily decided that the parties were out of luck given that they had six months notice of the application and two weeks of notice of the hearing to review the exhibits at the County offices. The parties, including the Appellants, could have also hired attorneys to protect their interests, yet none did.

The Hearing Examiner, however, accommodated Respondents and left the record open for an additional two weeks to allow those participants to review the exhibits to the staff report and submit additional comments. (AR 6). During that open record period the Respondent submitted two letters that further questioned the ability of the lots to accommodate septic systems, but Respondents did not submit anything that would indicate that they believed the lots did not exist as of March 1, 2005 or that the Appellants were responsible for dividing the lots. (AR 7, 270-274, 276-279). The Hearing Examiner, consistent with due process, then gave the County and the project applicant a brief time to reply to those comments. Respondents were well aware of the deadline to submit additional materials given their submissions above. Yet, Respondents failed to timely submit the additional materials prepared by their attorney until after the record had closed. The Respondents were afforded every opportunity to present their case and the Hearing Examiner properly excluded the

additional material submitted after the record had closed. (AR 7). Respondents are no doubt aware of the propriety of that decision as Respondents did not appeal the exclusion of that material from the record. (CP 5).

III. REPLY TO RESPONDENTS STANDARD OF REVIEW

The standards used to review the Hearing Examiner's findings and conclusions are critical to this Court's analysis of the issues. Respondents direct this Court that its review of the Hearing Examiner's decision is simply de novo. Respondents' Brief at 16. While the Court does review the Hearing Examiner's decision de novo—in that this Court gives no regard to the Superior Court's decision and reviews the Hearing Examiner's decision directly—the standards of review are actually deferential to the party who prevailed before the Hearing Examiner (the Appellants). *See* RCW 36.70C.130(1) (requiring that the Court give such deference as due the construction of law by a local jurisdiction with expertise); *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008 (1992) (noting that a reviewing Court must view the evidence and inferences therefrom in favor of the party who prevailed before the Hearing Examiner when reviewing factual findings under the substantial evidence standard).

Rather than recite the applicable standards again, Appellants refer the Court to the standards this Court must use to review the Hearing Examiner's decision on pages 17-20 of their Opening Brief. Nevertheless, it is worth repeating that even though Becker and Collins are the Appellants, the burden rests with the Respondents to successfully demonstrate that the Hearing Examiner erred. *North Pacific Union Conference Ass'n. of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003); RCW 36.70C.130(1).

IV. ARGUMENT IN REPLY

A. The Lots Were Lawfully Divided and That Decision May Not Be Challenged Here.

1. The Lots Were Lawfully Divided.

The unrefuted evidence in the record clearly demonstrates that the lots were lawfully divided by the heirs to the Estate. The Deputy Prosecuting Attorney confirmed that she officially acknowledged the division in August of 2005. (AR 267). The Deputy Prosecuting Attorney would not have officially acknowledged the propriety of the division so the lots could receive separate tax parcels unless the division was done in accordance with applicable law. Moreover, Appellants also submitted a letter further attesting to the fact that the heirs divided the property. (AR 347-348). There is no evidence in the record demonstrating otherwise.

2. Review of the Propriety of the Testamentary Division is Nevertheless Barred by LUPA's 21-Day Statute of Limitations.

The Deputy Prosecuting Attorney's decision to acknowledge the propriety of the division so the existing lots could receive new tax parcels constitutes a final land use decision. RCW 36.70C.120(1). *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (finding that final land use decisions under LUPA consist of both quasi-judicial and ministerial decisions). Thus, challenges to the propriety of the division are time barred by the Land Use Petition Act's 21 day appeal period. RCW 36.70C.040(3); *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194, 63 P.3d 764 (2002); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000).

LUPA provides the exclusive means of judicial review of land use decisions. RCW 36.70C.030. In order to invoke the court's jurisdiction, a party harmed by the decision is required to file a petition within 21 days of the date the decision is issued. RCW 36.70C.040(3). LUPA's 21-day statute of limitations furthers the "strong public policy supporting administrative finality in land use decisions." *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001); see also *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974) ("[i]f there were not finality [in land use decisions], no owner of

land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of the law in making a definite time limit.”)

Under LUPA a land use decision is issued:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

RCW 36.70C.040(4). Respondents agree that the County officially acknowledged the testamentary division on August 22, 2005 when the Pierce County Assessor issued seven (7) new tax parcel numbers to the lots.² Respondents’ Brief at 6; (AR 307-309). Accordingly, August 22, 2005 serves as the date this land use decision entered into the public record and Respondents’ attempt to challenge that decision two years later

² The County’s decision to acknowledge the division for the purposes of issuing new tax parcels numbers should not be confused with the RUE criteria that the lots existed as of March 1, 2005. The lots could have existed prior to that date without having been officially acknowledged and assigned tax parcel numbers.

is barred even if the division was somehow flawed, which it is not. RCW 36.70C.040(3); *Nykreim*; 146 Wn.2d at 925-926.

For instance, *Nykreim* involved a 1997 approval of a boundary line adjustment (BLA) by the Chelan County Planning Department. 146 Wn.2d at 909, 911. A year after receiving the BLA approval the owners applied for conditional use permits (CUPs) to construct single-family dwellings on the three lots that were subject to BLA. A quasi-judicial hearing was held for the CUPs and a number of neighbors questioned the validity of the underlying BLA. *Id.* at 912-913. As a result, the County withdrew its approval of the BLA. *Id.* at 913. Appeals followed and ultimately, the Division Three Court of Appeals determined that LUPA did not bar a challenge to the validity of the BLA even though it was issued two years earlier. The Washington Supreme Court disagreed. It found that LUPA applies to both quasi-judicial and ministerial land use decisions and held that LUPA's statute of limitation barred subsequent review of the BLA even though may have been invalidly issued. *Id.* at 939-940.

To the extent this Court believes the division may be invalid, this case is no different. The County Prosecutor reviewed and acknowledged the testamentary division to allow the Assessor to segregate the property

in April of 2005.³ (AR 307-309). While the decision was not mailed or otherwise distributed it did become part of the public record on August 22, 2005 when, as Petitioners' Brief notes, the lots were each given tax parcel numbers. Respondents' Brief at 6. Moreover, Respondents had actual or constructive knowledge of the testamentary division as early as March 5, 2007 when Respondents addressed a letter to the County Planning Department that acknowledges they were aware the property had been divided. (AR 220-222); *See also Larsen v. Town of Colton*, 94 Wn. App. 383, 393, 973 P.2d 1066 (1999) (finding that the beginning of construction may give a neighbor constructive knowledge of building permits). Despite this knowledge, Respondents failed to invoke the Court's jurisdiction under LUPA in a separate and timely action to review the underlying testamentary division. Accordingly, even under the most liberal interpretation of LUPA, Respondents were required to file a LUPA appeal to challenge the testamentary division no later than March 26, 2007. They did not and thus, the Court does not have jurisdiction to review the testamentary division here.

³ Again, it bears repeating, that the County's acknowledgment that the lots were properly divided should not be confused with when the lots were actually divided for purposes of the RUE criteria.

B. Respondents Do Not Contest That They Did Not Raise Objections to the Specific Criteria They Presently Challenge.

Appellants assert in their Opening Brief that the Respondents did not object to the two criteria they presently contest. Respondents have not demonstrated otherwise and provide no argument that they are still entitled to contest those criteria even though they failed to raise objection to those criteria during the public hearing.

The criteria challenged by Respondents in this appeal state that:

a. The proposed development is located on a lot that was vested (see Chapter 18.160) prior to March 1, 2005 and there is no other reasonable use or feasible alternative to the proposed development with less impact on the critical area(s) and/or associated buffers including phasing or project implementation, change in timing of activities, buffer averaging or reduction, setback variance, relocation of driveway, or placement of structure.

....

e. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant in subdividing the property or adjusting a boundary line thereby creating the undevelopable condition after the effective date of this Title.

Respondents contend that four sentences of testimony and a letter submitted by a Mr. Rodney Hodel⁴ questions the testamentary segregation

⁴ Mr. Hodel has not appealed the Hearing Examiner Decision.

is sufficient to raise a challenge to both criteria. Mr. Hodel did not, however, question when the property was divided, nor did he question whether the applicants divided the property. Rather, he questioned the segregation itself, which, as explained above was approved by the Deputy Prosecuting Attorney in 2005. Even if the Court were to construe Mr. Hodel's brief comment as a challenge to the applicant's ability to satisfy these criteria, which it should not, it is still not sufficient to raise the issue for appeal. In order for an issue to be properly raised before an administrative agency "there must be more than simply a hint or slight reference to the issue in the record." *Boehm v. City of Vancouver*, 111 Wn.App. 711, 722, 47 P.2d 137 (2002) (quoting *King County v. Wash. State Boundary Review Board*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993)). Mr. Hodel's fleeting statements do not satisfy that standard.

Moreover, the Respondents themselves never assert in their Brief that they raised a challenge to the Appellants' ability to meet those criteria below.⁵ Respondents' Brief at 16-19. Rather, they point to statements made by other participants at the public hearing who did not appeal the decision. Again, those statements, even if they could be attributed to

⁵ Respondents do inappropriately cite to a letter they did submit after the record had closed. That letter was not considered by the Hearing Examiner. Respondents never asserted error on behalf of the Hearing Examiner for excluding that letter, therefore, it was properly excluded and may not be considered by this Court in reaching its decision.

Respondents, which they can not, did not contest the criteria presently challenges by Respondents.

Since Respondents failed to appropriately raise a challenge to the criteria the Court cannot consider them on appeal. *See Boehm v. City of Vancouver*, 111 Wn. App. 711, 716, 47 P.2d 137 (2002).

C. Respondents Have Not Met Their Heavy Burden to Reverse the Hearing Examiner's Decision.

Even if this Court were to reach the merits of the appeal, which it does not need to, Respondents fail to meet their burden of demonstrating that the Hearing Examiner erred.

1. Respondents Have Not Demonstrated That The Hearing Examiners Erred in Finding and Concluding That The Lots Vested Prior To March 1, 2005.

Contrary to the interpretation reached by County Planning Staff, the County Hearing Examiner and the Deputy Prosecuting Attorney, the Respondents continue to maintain that applicants must have Vested Rights prior to March 1, 2005 in order to obtain an RUE. In support of their argument Respondents direct the Court's attention to a parenthetical reference to Chapter 18.160 of the Pierce County Code which addresses Vested Rights. From that parenthetical the Respondents argue that the Appellants must have a Vested Right prior to March 1, 2005. While Appellants maintain that even if the Court were to construe the ordinance

in favor of Respondents that they would satisfy the criteria,⁶ however, Respondents' interpretation is not correct.

This Court must look at and interpret this provision in light of its purpose. *State v. Cooper*, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006). Respondents have acknowledged that reasonable use exceptions are a tool used by local jurisdictions to provide regulatory flexibility to avoid constitutional challenges under the takings or substantive due process clauses of the Washington U.S. Constitutions. (CP 41-42). Yet, Respondents assign an interpretation to this provision that would defeat this purpose. Respondents' interpretation, which requires that the applicant have Vested Rights, rather than the lots vest or be created prior to March 1, 2005 would deprive owners of lots of the ability to apply for a RUE when the County's wetland ordinance deprives them of the ability to use the property. Moreover, Respondents do not provide any argument that explains how their interpretation is consistent with this purpose, and more importantly, how their interpretation would not yield unconstitutional or absurd results, especially in the present case.

Respondents appear to take a plain meaning approach to this section. Appellants are cognizant that the parenthetical reference to chapter 18.160 refers to the Vested Rights Doctrine. That reference,

⁶ Appellants' Opening Brief at 25-28.

however, is not dispositive of the meaning of vested as Respondents contend. In fact, the reference to chapter 18.160 is entirely appropriate given that applicants who have acquired Vested Rights as of March 1, 2005 will be the owners of lots that were created (vested) as of March 1, 2005. This does not mean, however, that only lots that were divided through the subdivision process may obtain a RUE. Rather the parenthetical reference, like most parentheticals, provides an example, of a situation where an applicant will be the owner of a lot that was vested or created.

Moreover, there are numerous cases in Washington that look beyond the literal import of the text where it is inconsistent with the intent of the provision or if the literal import would lead to absurd results. *See e.g. State v. Neher*, 52 Wn. App. 298, 300, 759 P.2d 475 (1988) (citing *State v. Keller*, 98 Wn.2d 725, 657 P.2d 1384 (1983); *State v. Stannard*, 109 Wn.2d 29, 742 P.2d 1244 (1987)). This is undoubtedly the case here. The interpretation given to this provision by Respondents would defeat the purpose of the RUE and open the County's regulatory system up to takings challenges. Specifically, the County here has already conceded that nothing can be built upon this property without a RUE. Thus, the interpretation advanced by Respondents should not be accepted.

Finally, Courts give considerable deference to the interpretation of ordinances of those officials charged with their enforcement. *Friends of*

the Law v. King County, 63 Wn. App. 650, 654, 824 P.2d 539 (1991). It would be one thing if there were disagreement among County officials with respect to the interpretation of this particular provision. Yet, in this case, County Staff, the County Hearing Examiner and the County Deputy Prosecuting Attorney all concur that lots need only exist as of March 1, 2005 to obtain a RUE. Given the consensus among all levels of government, deference is particularly appropriate here.

The only meaning that takes into account the purpose of the RUE and that does not lead to unconstitutional or absurd results, is interpretation advanced by the County Staff, the County Hearing Examiner and the Deputy Prosecuting Attorney. That interpretation requires that the lots exist as of March 1, 2005. Here there is no doubt that the lots existed as of March 1, 2005 and Respondents provide no argument otherwise.⁷

2. Respondents Failed To Meet Their Burden That the Hearing Examiner Erred by Finding That Appellants Did Not Divide the Property and Create Their Own Hardship.

The factual findings made by the Hearing Examiner are reviewed under the substantial evidence standard. That standard is more fully explained in Appellant's Opening Brief. Appellants' Opening Brief at 19, 28-30. Nevertheless, the Court must uphold the Hearing Examiner's

⁷ Respondents do not argue that the lots were not created prior to March 1, 2005. Nevertheless, the survey of the lots done at the request of Appellants demonstrates the lots existed as of February 2005, before March 1, 2005.

findings if there is “a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order.” *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). The Court is required to ‘view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008 (1992).

The heart of Respondents’ argument with respect to this criteria rests upon their subjective view of a survey done at the request of Appellants. Based upon that survey alone, the Respondents assert that the Hearing Examiner erred. In order to reach that conclusion, the Respondents are forced to subscribe a meaning to the survey that finds no basis in the administrative record.⁸ While Appellants did survey the property they were thinking about buying, that in no way can be equated to them dividing the property. Even if it could, the Court is required to

⁸ Respondents assert in their statement of the facts that the Appellants directed the surveyor to map the property as seven separate lots. Respondents’ Brief at 4. Noticeably, Respondents do not include a citation to the record to support this assertion. In fact, there is no evidence in the record to support Respondents’ theory that the Appellants divide the property.

adhere to the competing inference reached by the Hearing Examiner. *Id.* at 68.

Finally, Respondents' argument that there is not a "shred of evidence in the record made by the Hearing Examiner⁹ that the boundaries of the seven parcels . . . were drawn by anyone other than [the Appellants]" is, frankly, disingenuous. For no apparent reason Respondents ignore the letter submitted on their behalf affirmatively stating they did not divide the property.¹⁰ (AR 62). Respondents similarly ignore the fact that Appellants did not own the property until May and, thus had no authority to divide the property. Finally, the survey itself demonstrates that the lots were in fact created by the heirs prior to sale.

D. Due Process Requires That Applicants Have the Ability to Create a Record That is Reflective of the Issues Raised Before the Fact-Finder.

Supplementation of the record and remanding the decision should not be necessary. The lots were lawfully divided, and review of that division is barred by LUPA anyhow. Respondents are further barred from contesting the criteria they presently challenge since they did not sufficiently contest the Appellants' ability to meet these criteria during the

⁹ The parties make the record not the Hearing Examiner.

¹⁰ In their recitation of facts Respondents raise that the letter that was supposed to be attached to that report was not submitted into the record. Yet the absence of that letter does not relieve Respondents from their failure to introduce any evidence to reflect that fact. The only evidence in the record states that the Applicants did not divide the property.

public hearing. Moreover, even if this Court were to consider the merits of Respondents' appeal, they have not met their burden of proving that the Hearing Examiner's interpretation of the County was erroneous, or that its factual finding is not supported by evidence that is substantial when viewed in light of the entire record.

To the extent this Court considers the merits and is convinced by Respondents' argument that the single survey referenced by Respondents does unequivocally demonstrate that Appellants divided the property then it must allow Appellants to supplement the record to refute the novel allegation or remand the matter back to the Hearing Examiner to consider additional evidence. To be clear, Respondents' view of the survey as indicative of Appellants division of the property is erroneous and not supported by anything in the record. Nevertheless, that view was never presented during the public hearing and thus, Appellants never had the opportunity, consistent with due process, to rebut those allegations with additional evidence.

Thus, it was clear error for the Superior Court to refuse both Appellants' attempt to supplement the record, or at least remanded to the Hearing Examiner for further review, to respond to arguments challenging the evidence for the first time on appeal.

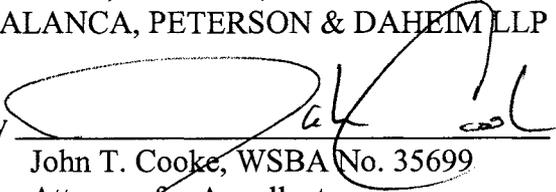
CONCLUSION

The only evidence in the record demonstrates that the lots owned by Appellants and requiring a reasonable use exception were lawfully divided prior to March 1, 2005 by the heirs of the estate. There is absolutely no evidence that would suggest otherwise and even if there were, this Court is required to uphold any competing inferences reached by the Hearing Examiner. Finally, Respondents' appeal suffers from a significantly greater flaw. Respondents challenge the Appellants' ability to meet certain criteria that they did not challenge during the public hearing. For the reasons set forth in Appellants' Opening Brief in addition to the Responses to Respondents' argument provided here, and this Court should reverse the Order of the Superior Court and re-instate the Hearing Examiner's Decision approving Appellants' applications for reasonable use exceptions.

Dated this 6th day of June, 2008.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By 

John T. Cooke, WSBA No. 35699
Attorney for Appellants

CERTIFICATE OF SERVICE

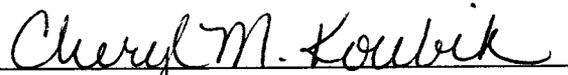
THIS IS TO CERTIFY that on this 6th day of June, 2008, I did serve via ABC Legal Messengers (or other method indicated below), true and correct copies of the foregoing by addressing and directing for delivery to the following:

Counsel for Petitioners Sylvester:

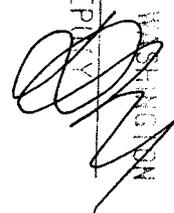
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