

ORIGINAL

NO. 40146-1-II

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

**Patricia L. Ambrose,
Appellant (Petitioner)**

v.

**City of Montesano and Steven Hyde,
Respondents**

APPELLANT'S REPLY BRIEF

Ben D. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360/534-9183

Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
10 OCT - 1 PM 1:56
STATE OF WASHINGTON
BY [Signature]
DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
1. Respondent City of Montesano Agrees with Appellant that Examiner’s Decision Should be Reversed.....	1
2. Respondent Hyde Fails to Respond to Appellant’s Issues or Cited Authority.....	2
3. Respondent Hyde has Misinterpreted MMC 17.45.030.....	4
4. All of Ms. Ambrose’s Issues Briefed to this Court were Raised in her LUPA Petition.....	6
5. Examiner Exceeded His Authority and Jurisdiction to Reverse a 2006 Variance when that was Not the Matter on Appeal Before Him. His Decision Revoking the Building Permit was therefore Clearly Erroneous and Arbitrary and Capricious.....	7
6. Constitutional Issues – Reviewability and Remedies.....	12
7. Constitutional Issues – Damages and Attorneys’ Fees.....	16
Summary & Conclusion.....	20

TABLE OF AUTHORITIES

Table of Cases

<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	2, 10, 20
<i>Conom v. Snohomish County</i> , 155 Wn2d 154, 118 P.3d 344 (2005).....	2, 20
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	1
<i>Isla Verde Intern. Holdings v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d (2002).....	19
<i>Lester v. Town of Winthrop</i> , 87 Wn. App. 17, 939 P.2d 1237 (1997).....	15, 17
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829, P.2d 746 (1992).....	16-17
<i>Mission Springs v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998).....	13
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006).....	15
<i>Samuel’s Furniture v. Department of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	1
<i>Sintra, Inc., v. City of Seattle</i> , 119 Wn.2d 1, 829 P.2d 765 (1992).....	17
<i>Sintra, Inc., v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	17
<i>Wenatchee Sportsmen Association v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	2

Constitutional Provisions

42 U.S.C.sec.1983.....	15, 16, 17, 19, 22
42 U.S.C.sec.1988.....	19

Statutes

RCW Chapter 37.70C.....14
RCW 36.70C.100.....14
RCW 36.70C.130(1).....22
RCW 36.70C.130(1)(a), (b),(e),(f).....22

Montesano Municipal Code

MMC 2.38.....10
MMC 17.45.030(1), (2).....5
MMC 17.46.090.....7
MMC 17.47.020.....17
MMC 17.47.080.....17

Appellant Patricia Ambrose, through her attorney Ben D. Cushman of Cushman Law Offices, P.S., makes the following Reply to both Respondents' Briefs.

1. Respondent City of Montesano Agrees with Appellant that Examiner's Decision Should Be Reversed.

We are pleased the City has now stated that the Hearing Examiner erred in revoking Patricia Ambrose's building permit, and the Trial Court erred in upholding the Examiner's revocation (City Brief at pp. 8, 18). The City has properly identified the primary error, which was the Examiner's erroneous interpretation of law concerning the effect of a previously-granted Variance and BLA on the building permit, when neither the Variance nor the BLA had ever been appealed. The City cites to the authority in *Samuel's Furniture v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) and *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) for the Court holdings that once the 21-day LUPA appeal period expires, the land use decision is no longer reviewable, even if done within the context of a subsequent land use decision, and even if the never-appealed land use decision was allegedly void (City Brief at pp. 10-13, see also Appellant Brief at pp. 9-17). Thus, the Courts have already ruled that the situation in the instant case would be determined in favor of the Petitioner. Ms. Ambrose was granted a

Variance and BLA which were not appealed. She later obtained a building permit predicated upon the previously-approved Variance and BLA, but errors with those earlier approvals are now alleged. Although the Examiner was persuaded that an error had occurred which extinguished the Variance, according to our Supreme Court (see case citations *infra.*, at 1-2), since the Variance was never appealed, it stands as valid. Therefore, the Examiner was clearly erroneous to effectively annul the Variance by ignoring its existence when he revoked Ms. Ambrose's building permit.

2. Respondent Hyde Fails to Respond to Appellant's Issues or Cited Authority

Respondent Hyde offers no explanation as to why Appellant's arguments and cited authority of *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 154, 118 P.3d 344 (2005); and *Conom v. Snohomish County*, 155 Wn2d 154, 118 P.3rd 344 (2005) should be disregarded. These court rulings all uphold the 21-day appeal requirement in LUPA actions even when there is a subsequent, or pending related land use approval, on the basis that such strict adherence is

consistent with the “strong public policy supporting administrative finality in land use decisions” (*Id.*). (Appellant’s Brief at pp. 16-19).

Rather than addressing the issues on appeal, Respondent Hyde instead appears to be asking this Court to directly reconsider both the prior Variance and BLA approvals by reanalyzing the criteria under which the Examiner might have originally approved them, and offers all manner of conjecture to tempt a reply to his unsupported statements (Hyde Response at pp. 2, 8-14). The authority cited by Respondent Hyde in this attempt is either irrelevant to Appellant’s issues, or is now superseded by the LUPA appeal procedure which prohibits the re-examination of land use decisions that were not timely appealed¹ (which is what the Examiner did, and thus is why his decision is clearly erroneous as a matter of law).

Appellant stands by her statements that there is nothing in the Examiner’s Decision which identifies with certainty that her BLA was approved prior to her Variance (Finding 14 and Conclusion 4 at CP13), and even if it was, how having a BLA approved prior to a Variance would be either unlawful or cause anything more than harmless error (Appellant’s Brief at pp. 5-6). None of Ms. Ambrose’s issues on appeal ask this Court to substantively re-evaluate those prior land use approvals.

¹ *Infra* at pp. 1-2. See also Appellant’s Brief at pp. 16-29 and Respondent City’s Brief at pp. 9-13.

They do not need to be re-examined, since they stand as valid. What does need to be reviewed is the Examiner's error in concluding Ms. Ambrose's Variance was of no force or effect, and then using that as the basis to revoke Ms. Ambrose's building permit.

Without a foundation to support his extinguished variance theory, Respondent Hyde has raised an even more specious theory: fraud (Hyde Response at pp. 2, 6-9, 13). However, there is nothing contained in the Examiner's Decision (CP 8-15) which shows that allegation of fraud was ever raised, not even by any citizen who testified at the hearing, nor is there any claim of fraud in Mr. Hyde's briefing to the Examiner (CP 56-63). In fact, Mr. Hyde specifically did *not* assert fraud before the Examiner, as summarized in the Examiner's Decision:

Mr. Kalikow said they are not alleging that Ms. Ambrose acted in bad faith, but rather the city processed things incorrectly.

Examiner's 3/3/09 Decision, CP 10.

Without fraud having been an issue before the Examiner, then Respondent Hyde's attempt to now assert such a claim is misplaced. Respondent Hyde failed to initiate a cross review as required by RAP 5.1 and 5.2.

3. Respondent Hyde has Misinterpreted MMC 17.45.030.

The reason why fraud was never brought up as an issue before the Examiner was because there was no fraud. As explained in more detail in

Appellant’s Brief (at pp. 5-7, 9-11), Ms. Ambrose fully complied with the City’s requirement to obtain both a Variance and a BLA prior to seeking a building permit. Ms. Ambrose had two nonconforming lots of record, both deemed “legal building site(s)” under MMC 17.45.030:

17.45.030 Nonconforming lots. A lot which existed prior to the effective date of the ordinance codified in this title and which is nonconforming as to area or dimension, as required by the district where such lot is located, *shall be considered a legal building site*; provided that:

- (1) Such lot has at least twenty feet of frontage on a public street;
- (2) All other regulations for the district, and other rules and regulations of the city, shall be satisfied. (Ord. 1366 (part), 1995).

MMC 17.45.030 (emphasis added).

As such, these lots were eligible for consideration for a boundary line adjustment and setback variance, just like any other legal building site in the City. Ms. Ambrose underwent the necessary regulatory procedures to obtain both of those land use approvals, thus “satisfying” the MMC 17.45.030(2) requirement (and the Examiner’s Conclusion 3 affirmed the 20 feet of [unopened] road frontage, thus fulfilling MMC 17.45.030(1), CP at 13). Under Mr. Hyde’s analysis (Hyde Response at p. 14), no nonconforming lot within the City of Montesano, not even those lots specifically deemed to be legal building sites, would ever be allowed any variance or BLA at all – certainly, that is not the case.

There is confusion in this matter as to whether the BLA came before the Variance, and it is still not clear: see Examiner's Finding 14 and Conclusion 4 at CP 13, and last page of Appellant's Appendix I, which depicts an assessor map showing the lots already configured in an east-west orientation in June 2006, well before the recording of the BLA in February 2007. But even if the BLA-Variance sequencing mattered at the time, it no longer matters now. Since neither the Variance nor BLA were appealed, they both now stand as valid. The Examiner was in error to have given the Variance no recognition in his Conclusions 5 and 6, and then using that as the basis to revoke Ms. Ambrose's building permit.

4. All of Ms. Ambrose's Issues Briefed to this Court were Raised in her LUPA Petition

The City claims that Appellant has raised issues to this Court which are different than what she raised in her Petition to the trial court (City Response at p. 17). Although we thought it evident which of Appellant's LUPA Petition issues correspond to which Brief issues, for the sake of clarity, a comparison chart follows below. See LUPA Petition at CP 2-4 and compare with Appellant's Brief listing the issues at pp. ii – iii, (and pp. 3-4) therein:

///

///

LUPA Petition (CP 2-4)	Appellant Brief
Error 3.1 – Examiner found no construction had occurred prior to Hyde’s appeal.	Errors 1, 6
Error 3.2 – Examiner determined BLA changed the criteria upon which the Variance was based.	Errors 1, 2, 3; Issues 1, 2
Error 3.3 – Examiner determined Variance was extinguished by BLA.	Errors 1, 2, 3; Issues 1, 2, 3, 4
Error 3.4 – Examiner determined Variance was extinguished under MMC 17.46.090.	Errors 1, 3, 4; Issues 1, 2, 3, 4
Error 3.5 – Examiner determined he had jurisdiction to decide effectiveness of Variance.	Errors 1, 3, 4; Issues 1, 2, 3, 4
Error 3.6 – Examiner determined he had authority to decide Variance had terminated.	Errors 1, 3, 5; Issues 1, 2, 3, 4, 5
Error 3.7 – Examiner’s decision violated Ms. Ambrose’s constitutional rights: Prohibiting her building amounts to an unconstitutional taking; due process rights were also violated since extinguishing the Variance was outside the scope of the matters to be considered by Examiner.	Errors 1, 5, 7; Issues 4, 5, 6

Appellant brings no issue to this Court that was not previously raised as an issue in her LUPA Petition to the trial court. Ms. Ambrose’s issues on appeal before this Court are legal matters to be decided *de novo*.

5. Examiner Exceeded His Authority and Jurisdiction to Reverse a 2006 Variance when that was Not the Matter on Appeal Before Him. His Decision Revoking the Building Permit was therefore Clearly Erroneous and Arbitrary and Capricious.

The City states that Appellant is “simply incorrect” in her contention that the Examiner considered issues not before him, yet later in the same paragraph acknowledges “it is clear from the decision issued by

the Examiner that Mr. Hyde raised issues relating to the 2006 variance and to the 2007 BLA. (See Findings of Facts # 5 & 7).” (City Response Brief at pp. 13-14.) This is exactly Appellant’s point – the Examiner was not supposed to consider any issue other than the building permit, but as evidenced in his Conclusions 5 and 6, he certainly did:

5. The appellant maintains that the variance granted in 2006 was extinguished by the approval of the BLA in 2007. The appellant cites the standard in the MCC and in state law: “...the variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property...” The appellant *argues that if the variance is based on the “unique special circumstances relating to the size, shape, topography, location or surroundings of the subjection”, when those criteria change the basis for the variance longer exists. The Examiner concurs with this position and believes absent a variance legally in effect, any new construction must comply with the setbacks in the zoning ordinance.*
6. The appellant submitted a drawing showing measurements of the new house from each of the property lines. The measurements on the south (side yard) and east (rear yard) of the house conform to zoning requirements; it is unclear from these measurements whether the west side (front yard) complies since the drawing shows 19 feet with a question mark. *Since the 2006 variance was extinguished by the 2007 BLA, the measurement of 6 feet on the north side (the side yard) does not conform to the setback requirement of 15 feet (for the side yard abutting a street for a corner lot).*

Hearing Examiner’s March 3, 2009 Decision, Conclusions 5 and 6
(emphasis added) (CP at 14).

As the Examiner's Conclusions 5 and 6 point out, he not only accepted variance criteria testimony from Mr. Hyde (the appellant in the Examiner's proceedings), but he actually made findings and conclusions affecting Ms. Ambrose's Variance and BLA, which were matters that were not before him. The Variance and BLA could not have officially or legally been before the Examiner because the only land use approval Mr. Hyde appealed was Ms. Ambrose's building permit.

The error of the Examiner's reconsideration of Ms. Ambrose's Variance during what was supposed to be an appeal of only her building permit is discussed in Appellant's Brief at pp. 17-18. The Examiner made incongruent analyses, as noted therein, by stating that since the BLA was not before him, he could not rule on it; however the Variance was not before him either, but as evidenced through his Findings, Conclusions, and Decision the Examiner obviously reanalyzed the Variance criteria and summarily reconsidered his earlier 2006 decision by voiding the Variance. Unfortunately, no opportunity was provided to Ms. Ambrose to respond, since the only matter she had expected to be heard in the 2009 proceeding was whether or not her building permit was in compliance.

Even the Examiner identifies no fault with the building permit itself. It is particularly worth noting that if the Examiner had not ignored

the existence of the 2006 Variance, then he would have had no other basis upon which to revoke Ms. Ambrose's building permit in 2009.

Since Conclusions 5 and 6 are, on their face, erroneous as a matter of law, there is no need to review any testimony before the Examiner for underlying facts. The Examiner was incorrect to conclude in Conclusion 5 that the Variance was not "legally in effect", and he was similarly incorrect to conclude in his Conclusion 6 that "the 2006 Variance was extinguished by the 2007 BLA". Because the 2006 Variance was not appealed 21 days after its issuance, under the authority of *Chelan County v. Nykreim*, 146 Wn.2d 904, 925-926, 52 P.3d 1 (2002), the land use approval is established as valid and cannot be extinguished (and especially cannot be rendered void under the guise of a proceeding at which the Variance is not the topic of appeal, or without due process afforded to the permit holder).

The City relies on MMC 2.38.130 to respond to Appellant's issue, stating that the Montesano Municipal Code allows an Examiner to rule on all types of land use matters (City Response Brief at p. 16). But that is true only if the matter is first properly before him! The *only* matter legally brought before the Examiner by Mr. Hyde for hearing on appeal in 2009 was Ms. Ambrose's 2008 building permit. If Mr. Hyde had three years earlier appealed her 2006 Variance, then the Examiner would have had the

authority and jurisdiction to hear the matter, but only back then at that time. Mr. Hyde raised, for the first time, an issue of the legality of Ms. Ambrose's 2006 Variance during his 2009 appeal of her building permit, but both the Examiner and the City knew or should have known that: (1) the Examiner had no authority to entertain an appeal three years past the time that such appeal could be heard, and (2) the Examiner did not have jurisdiction to entertain a Variance appeal through the "backdoor" as part of a different proceeding.

The Examiner's lack of authority and jurisdiction to determine Ms. Ambrose's 2006 Variance was "extinguished" or void, is reflected through his Conclusions 5 and 6, which are, on their face, erroneous as a matter of law. There is therefore no need for this Court to review the testimony before the Examiner or decide any facts when, for the reason above stated, Conclusions 5 and 6 are clear errors of law.²

See discussion in Appellant's Opening Brief at pp. 13-22 and *infra* below at pp. 15-19, explaining why the Examiner's decision was also arbitrary and capricious.

///

² A decision is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Norway Hill Preservation Prot. Ass'n v. King County Council*, 84 Wn.2d 267, 274, 552 P.2d 674 (1976).

6. Constitutional Issues – Reviewability and Remedies

In its Response Brief, the City states that since Ms. Ambrose did not raise her Constitutional violation issues to the Examiner, then she is precluded from bringing them to this Court, and further asserts that Mr. Hyde's counsel provided Ms. Ambrose notice of his intentions, and implies that Mr. Kalikow's letter served to fulfill the City's Due Process requirements (City's Response at p. 7 and City's Appendix 1). The City is wrong on several levels.

First of all, a letter from attorney Barnett Kalikow to Ms. Ambrose's then-attorney Gary Morean, does not fulfill Due Process requirements, no matter what it says. Mr. Kalikow is acting on behalf of his client, and as such postulates all manner of purported facts and unsubstantiated claims, frequently makes threats, and in general tries to be as intimidating as possible. Not only do we disagree with the statements contained in Mr. Kalikow's letter, but it provides no notice whatsoever to Ms. Ambrose that the Montesano Hearing Examiner would be re-opening for consideration the Variance approval she had been granted in 2006. The Examiner's reconsideration, without notice, of her previously-approved and never-appealed Variance permit, as well as the City's enforcement of same which resulted in the immediate revocation of her building permit, are due process violations.

Secondly, both Procedural and Substantive Due Process violations occurred *after* the February 2009 hearing, thus the time for appealing the constitutional issues did not become ripe until the Examiner rendered his Decision in March 2009. Under the City's rationale (City's Response at p. 15), Ms. Ambrose should have foreseen the future and made an appeal of something that had not yet happened. At the time of the February 2009 building permit appeal hearing, Ms. Ambrose had a fully-effective Variance approval which granted her the 6-foot setback she needed for her home, and since the Variance permit was not the matter on appeal, that fact in and of itself should have precluded the Examiner from making the decision he did.

It was only after the Examiner revoked Ms. Ambrose's building permit – which he specifically premised upon his Conclusion that the Variance was extinguished – did it become known that the Examiner had also voided her Variance permit by association. But because the Variance was not the matter before him and thus beyond the scope of the matters to be heard, this *de facto* Variance revocation was done without due process, which in turn has taken away a property right (e.g., the administrative building permit which confers the right to build her home on her property) to which Ms. Ambrose is entitled. See *Mission Springs v. Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1997) wherein a ministerial grading

permit was held to be a “constitutionally cognizable property right” and the “right to use and enjoy land is a property right” (see also Appellant Brief at pp. 19-22).

Next, the City also incorrectly claims that Ms. Ambrose’s LUPA appeal of the 2009 building permit revocation has provided her the appropriate avenue to challenge the Examiner’s corresponding revocation of her 2006 Variance (City Response at p. 15). Not so. It is outrageous that the City has put Ms. Ambrose in this position in the first place. She should not have needed to make this appeal (especially all the way to the Court of Appeals) to reinstate a 2006 permit that was illegally annulled. The City should have, early on, acted upon the position expressed in its Response Brief at pp. 8, 18 (*infra.* at 1). The City instead did the polar opposite by immediately enforcing the Examiner’s erroneous decision through its issuance of a stop-work order on Ms. Ambrose’s house construction, and offering her no opportunity to contest the *de facto* variance revocation, separate from the building permit revocation. The City’s suggestion that Ms. Ambrose should have sought a stay under RCW 36.70C.100 (City Response at p. 15) would have been entirely pointless, as it was the building permit revocation (not variance) which was the only applicable land use “decision” under Chapter 36.70C RCW that could have been eligible to be stayed, and an attempt to stay this convoluted

matter would have caused even more delay than directly appealing the building permit revocation.

Finally, Ms. Ambrose's Constitutional violation claims are now ripe for review before this Court. The Courts have frequently considered a denial of a building permit to be a deprivation of a federal right, which gives rise to a claim of Substantive Due Process under 42 U.S.C. § 1983:

If a plaintiff has been deprived of a federal right, he or she can recover money damages under 42 U.S.C. § 1983.... Two essential elements exist in § 1983 action: (1) the plaintiff must show that he or she was *deprived* of a federal constitutional or statutory right, and (2) the person depriving the plaintiff must have been acting under color of state law ... The denial of a building permit may give rise to a substantive due process claim ...

Lester v. Town of Winthrop, 87 Wn. App. 17, 21, 939 P.2d 1237

(1997) [citations omitted; emphasis in original].

This Court, specifically, has ruled that Constitutional Due Process violations may be brought through the State's Land Use Petition Act appeals:

RCW 36.70C.130(1)(f) expressly allows Peste to bring its constitutional takings and substantive due process claims in its LUPA petition Additionally, RAP 2.5(a) allows parties to raise manifest errors affecting constitutional rights for the first time on appeal. And finally, we have inherent authority to consider all issues necessary to reach a property decision [citation omitted].

Peste v. Mason County, 133 Wn. App. 456, 469-470, 136 P.3d 140 (2006).

7. Constitutional Issues – Damages and Attorneys’ Fees

In *Lutheran Day Care v. Snohomish County*, the Supreme Court clarified certain legal points that are relevant to the instant action (for purposes of analysis, “city” is interchangeable with “county”):

[T]he County does not enjoy the immunity of its agents in actions for compensatory damages under § 1983.

...

There is no question that a city or county can be a “person” for purposes of establishing liability under § 1983.

...

The primary issue as to the County’s liability under § 1983 is whether the County actually caused appellant any injury.

...

The Supreme Court has held in *Monell* that for the municipality itself to “subject” the plaintiff to the injury, the act of its agent which actually causes the injury must be pursuant to municipal policy.

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 118-119, 829, P.2d 746 (1992)

These holdings clarify that the City of Montesano can be held liable for compensatory damages under § 1983 caused by its Hearing Examiner’s erroneous decision.

The Court continues its clarifications with its ruling that proof of a § 1983 claim requires no extraordinary showing, other than arbitrary and capricious:

To the extent this suggests that § 1983 requires a greater showing of fault than required to make out the constitutional violation which is being sued upon, it is incorrect [citations omitted] ... § 1983 imposes no state of

mind requirement beyond that necessary to establish the constitutional violation involved. Therefore, if a constitutional violation can be shown, relief is available under § 1983, assuming the other prerequisites for stating a § 1983 claim have been met.

...

In the present case, the trial court can be interpreted as denying appellant's due process claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is wrong standard. The standard is arbitrary or capricious

Lutheran Day Care, supra., at 124-125.

More recently, in *Lester v. Town of Winthrop*, 87 Wn. App. 17, 939 P.2d 1237 (1997), the Court analyzed the criteria that must be present to establish when a land use decision denies Substantive Due Process. Although the Supreme Court, in "*Sintra I*"³ had previously determined that irrational or invidious conduct must be shown, it revisited the matter in "*Sintra II*"⁴ and now holds that § 1983 provides a damage remedy for Substantive Due Process violations irrespective of the invidious or irrational standard. *Lester, supra.* at p. 21.

What we have in the instant case is a City Examiner who is charged with interpreting the City Code in a quasi-judicial capacity, but only on land use matters that have specifically come to him for review by

³ *Sintra, Inc., v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

⁴ *Sintra, Inc., v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997).

application or appeal pursuant to MMC Chapter 17.47. He is thus prohibited under MMC 17.47.020 and 17.47.080 from rendering decisions on sections of the City's zoning ordinance that are not before him on appeal. Unfortunately, that is exactly what he did.

On his own accord under the guise of reviewing Mr. Hyde's appeal of Ms. Ambrose's building permit (e.g., under color of law), the Montesano Hearings Examiner made Findings and Conclusions pertaining to Ms. Ambrose's previously-granted Variance permit and Boundary Line Adjustment. He then ignored the abundance of well-established case law which holds that if a land use decision is not appealed in 21 days, it stands as valid, to erroneously conclude that Ms. Ambrose's 2006 Variance was extinguished. The Examiner then used this "absence" of an approved setback variance to decide that Ms. Ambrose's house could not meet Code requirements and revoked her building permit on that basis. Although Ms. Ambrose had an avenue to appeal the building permit revocation (and what a long and winding road that has been), there was no forum in which to pursue a separate or speedy remedy to rectify the Examiner's covert annulment of her Variance permit.

If resurrecting the Variance had officially been before the Examiner on appeal (putting aside, for the moment, the illegality of such a procedure), then the Examiner's resulting decision would have merely

been “clearly erroneous”. But because the Examiner exceeded his authority and jurisdiction to reconsider and void the Variance, and then used the absence of a Variance approval as the explanation for revoking Ms. Ambrose’s building permit, his actions have accelerated into “arbitrary and capricious” – a “willful and unreasonable action, without consideration and regard for facts or circumstances”.⁵ As such, Ms. Ambrose is entitled to § 1983 compensatory damages and reimbursement of attorney’s fees through § 1988 and appellate processes per RAP 18.1 (see Appellant Brief at 19-22).

Ms. Ambrose has suffered significant economic (and emotional) harm caused by the City’s Procedural and Substantive Due Process violations, which resulted in the deprivation of Ms. Ambrose’s rights. Although overturning the Examiner’s decision and restoring her building permit will help alleviate future damages, and it is what both the Appellant and Respondent City are asking this Court to grant, the significant delay has exponentially compounded Ms. Ambrose’s damages (building permit revocation was enforced in early-March 2009, and it is now late-September 2010 – 19 months and counting). Under the authorities cited above, this Court is allowed to grant appropriate relief.

⁵ Quoting *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).

SUMMARY & CONCLUSION

Appellant prays this Court will continue to uphold Washington Courts' recognition of the value in having "finality of land use decisions" as enunciated through *Conom v. Snohomish County*, 155 Wn.2d 154, 159, 118 P.3d 344 (2005) (quoting *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), quoting *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3 241 (2001)). The Examiner's decision revoking Ms. Ambrose's building permit was based on his erroneous interpretation of law and application of law to the facts wherein he determined that her previous Variance in 2006 – which had never been appealed – had become "extinguished" and then used that as the basis for concluding that her building could not meet the required 15-foot setback from the unopened street. The Examiner misapplied the law by failing to recognize the legal validity of Ms. Ambrose's 2006 Variance permit which had previously granted permission for a 6-foot setback from this unopened street. The Examiner's decision was therefore clearly erroneous.

Further, the Examiner's Conclusions 5 and 6 also reference arguments of Mr. Hyde (the appellant before the Examiner) which the Examiner used to re-examine Ms. Ambrose's Variance, yet the 2006 Variance was not the matter before him. The Examiner made a *de facto*

ruling that Ms. Ambrose's Variance had become extinguished, and did so both contrary to State law, and to City regulation which prevented him from considering matters not lawfully before him. The Examiner erroneously concluded that because Ms. Ambrose's Variance had become "extinguished" that her lot could not meet the setback criteria for a building permit which would require the setback variance he decided she no longer had (e.g., a setback of 15 feet instead of 6 feet from an unopened right-of-way), and thus revoked her building permit on that basis.

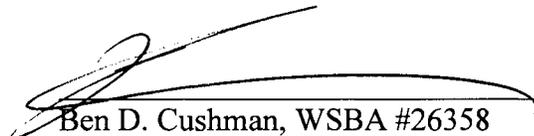
Based on the Examiner's faulty legal analysis of a matter that was not even supposed to be before him, the Examiner's Decision was also arbitrary and capricious. His 2009 decision took away Ms. Ambrose's 2006 Variance as much as it took away her 2008 building permit. Although Ms. Ambrose had a means to appeal the building permit revocation – which has brought the instant action to this Court, there was no advance notice that her previous Variance permit would be reconsidered, and no later opportunity provided to her in which she could contest the Examiner's *de facto* ruling that her 2006 Variance had become extinguished, nor did the City provide a forum for appeal prior to its immediate stop-work order enforcing the Examiner decision. As such, Ms. Ambrose has brought claims into this LUPA appeal of the City's Due Process violations which have deprived her of her Constitutional rights.

All of the standards for relief under RCW 36.70C.130(1) are met in this case. In particular, Ms. Ambrose has shown that the City of Montesano, either directly or through the Montesano Hearing Examiner acting as its agent, violated RCW 36.70C.130(1)(a),(b),(e), and (f). Appellant Patricia Ambrose prays the Court will find in her favor by reversing the Hearings Examiner's decision and reinstating her building permit.

Appellant has further demonstrated Procedural and Substantive Due Process violations which have deprived her constitutional rights, for which this Court may grant relief under § 1983, using the appeal process of RCW 36.70C.130(1), including an award attorney's fees as allowed through RAP 18.1. Appellant Ambrose prays the Court will so award her attorney's fees for having to bring this appeal, and determine that she is entitled to compensatory damages for § 1983 violations, as may be established through a supplemental or separate action. Appellant further reiterates her request for the Court's accelerated review of this matter.

SUBMITTED this 20th day of September, 2010.

CUSHMAN LAW OFFICES, P.S.


Ben D. Cushman, WSBA #26358
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel as indicated below:

Attorney for Respondent City of Montesano:

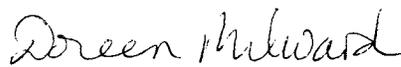
Daniel O. Glenn, WSBA# 4800
Glenn & Associates PS
2424 Evergreen Park Dr. SW
P. O. Box 49
Olympia, WA 98507-0049
T: 943-7700
F: 943-7721
glennsatsop&msn.com

Attorney for Respondent Steven Hyde:

Barnett N. Kalikow WSBA# 16907
Kalikow & Gusa PLLC
1405 Harrison Avenue NW, Suite 207
Olympia, WA 98502-5327
T: 360/705-3342
F: 360/705-0175
Kalikow@kandglegal.com

FILED
COURT OF APPEALS
DIVISION II
10 OCT - 1 PM 1:56
STATE OF WASHINGTON
BY 
DEPUTY

DATED this 30 day of September 2010.



Doreen Milward, Paralegal

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360/534-9183