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DIVISION II

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STATE OF WASHINGTON

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No. 40178-9-II  
**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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WILLIAM ANTHONY,

Appellant,

vs.

MASON COUNTY,

Respondent

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APPELLANT'S OPENING BRIEF

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## ASSIGNMENTS OF ERROR

1) The Examiner who made the land use decision engaged in unlawful procedure and failed to follow a prescribed process, and the error was not harmless.

**a. Issues:**

- i.** Whether the Examiner conducted the appeal in a manner consistent with process and procedure established by the Mason County Code.
- ii.** Whether the Examiner conducting the appeal hearing erred by importing review criteria not set forth in the subject code section and not relied upon by the Review Authority to support the underlying determination on appeal before the Examiner.

2) 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.

**a. Issues:**

- i.** Whether the Examiner erred in importing review criteria not set forth in the code section at issue, not relied upon by the Review Authority to support the

4) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.

**a. Issues:**

- i.** Whether the Examiner erred in concluding that Appellant Anthony has options to reconfigure and expand his existing garage in the absence of any evidence to support this conclusion.
- ii.** Whether the Examiner erred in concluding that Appellant Anthony's proposal is not necessary for reasonable use of the property, after concluding that Appellant Anthony's proposal, even when considered cumulatively with Appellant's existing garage, is within the range of average garage sizes in the applicable vicinity, and in light of evidence establishing Appellant's need for the proposed garage.
- iii.** Whether the Examiner erred in admitting evidence related to alleged view impacts, over the objections of Appellant Anthony's counsel.

5) The land use decision is a clearly erroneous application of the law to the facts.

a. Issues:

- i. Whether the Examiner erred in sustaining denial of the administrative variance based on view-related objections voiced by area residents.
- ii. Whether the Examiner erred in sustaining denial of the administrative variance on an analysis not founded on consistent, predictable and logical review criteria; but rather founded on an ad hoc evaluation.
- iii. Whether the Examiner erred in sustaining denial of the administrative variance after concluding that the sole purpose of the administrative variance section at issue is to relieve non-conforming parcels of the burdens associated with increased property line setback requirements.
- iv. Whether the Examiner erred in importing a “view impact analysis” in light of the purpose, legislative history, and plain language of the administrative variance code section at issue.

6) The land use decision violates the constitutional rights of the party seeking relief.

a. Issues:

- i. Whether the Examiner erred in sustaining denial of the administrative variance based on a code section that is unconstitutionally vague, and that requires persons of ordinary intelligence to guess at its meaning.
- ii. Whether the Examiner deprived Appellant Anthony of due process requirements by conducting the review associated with the appeal of the Review Authority's determination in an ad hoc manner, and in rendering a final decision based on whim, caprice and subjective considerations.

### **STATEMENT OF THE CASE**

Anthony desires to construct a detached garage measuring approximately 720 square feet, on an approximately one-half acre parcel. CP 45, line 1. The parcel is presently improved with a single family residence and attached garage. CP 45, line 5 - 7. The existing attached

garage measures approximately 724 to 1000 square feet. CP 45, lines 11 – 13. The Examiner determined that the cumulative square footage total of Anthony’s existing attached garage and the proposed detached garage would not exceed the average square foot totals of garages on comparable properties in the vicinity. CP 45, lines 21 – 24.

Due to the location of Anthony’s drain fields and other property improvements, Anthony has no place to locate the proposed detached garage except in the proposed location. CP 45, lines 1 – 3. The proposed location requires reduction of the required setbacks from property lines through the administrative variance process. The proposed garage structure will be located approximately 5’ from the east-west property line and approximately 8’ from the north-south property line. CP 45, lines 24 – end.

Only one Mason County Code section, MCC 17.05.034(D), addresses administrative variances to side yard setbacks. CP 48, lines 10 – 17. This appeal arises from the manner in which the Examiner applied this code section. MCC 17.05.034(D) provides:

The Administrator may allow a reduction in the required side yard setback by administrative variance under the following circumstances: for existing lots of record as of March 5, 2002 that are parcels designated as Rural Residential 2.5, Rural Residential 5, Rural Residential 10, or Rural Residential 20; and where physical attributes of the lot (such as steep slopes, streams, wetlands, and soils;

lot width at the front yard line of no more than 50 feet or lot size of no more than one-half acre; and existing improvements of buildings, septic systems, and well areas) preclude a proposed development from meeting the 20-foot side yard setback standard. The variance to the side yard setback shall be the minimum necessary to accommodate a **reasonable development proposal**. This side yard setback shall not be less than 5 feet distance from the property line. The Administrator shall document in the property file the rationale for said administrative variance decision.

CP 48, lines 10 – 17 (emphasis added).

The Examiner concluded that the subject parcel satisfies the requisite elements set forth in MCC 17.05.034(D), and that it is therefore eligible for the administrative variance established by the code section. CP 48, lines 18 – 23. The subject parcel was created by short plat approved on August 13, 1991. CP 45, lines 12 – 13. The short plat pre-dated regulatory changes, including increased minimum lot sizes, resulting from Growth Management Act mandates. Prior to the regulatory changes, Anthony's property was subject to 5' standard setback requirements from the property lines at issue, and the proposed garage location at issue does in fact satisfy the historical 5' setback requirements. In response to Growth Management mandates, Mason County zoned significant portions of Mason County as "Rural Residential" properties, with minimum acreage requirements generally ranging from 5 acres to 20 acres. The new minimum acreage standards and associated land use regulations, including

increased setback requirements, were imposed broadly and were even imposed upon small existing parcels such as Anthony's approximately one-half acre parcel. For example, the land in the vicinity of and including Anthony's parcel was zoned "Rural Residential 5," providing for a minimum lot size of five acres, and providing for increased side and rear yard setbacks of twenty feet, despite the fact that existing parcels in the vicinity are far less than 5 acres in size. CP 46, line 10; CP 47, lines 13 – 20.

In recognition of the fact that many parcels such as Anthony's were historically platted into much smaller parcels, and that the increased setback requirements tend to impose significant burdens on small, non-conforming parcels, Mason County implemented the "administrative variance" process at issue, to allow owners of small, pre-existing lots to receive "administrative" variance approval to construct up to the historical 5' side yard setback. The review associated with the "administrative variance" process is quite different than the review associated with the standard variance process. The Examiner determined that "administrative variances" are subject to a lower standard of review than standard variance applications. CP 216, lines 15 – 21; CP 46, lines 16 - 22. In contrast with stringent and detailed review criteria applicable in the standard variance review context, administrative variance approval simply hinges upon

whether the proposal is a “reasonable development proposal.” CP 47, lines 13 – 20; CP 48, lines 10 – 17. The Examiner’s substantive conclusion of law number 3 provides in part:

... the Appellant adds the compelling assertion that the administrative variance process was intended to be more lenient in order to mitigate the burdens caused by an increase in minimum lot sizes under the Growth Management Act, Chapter 36.70A RCW ‘GMA’. Prior to implementation of the GMA, minimum lot sizes were smaller in rural areas and setbacks were correspondingly smaller (often around five feet).

CP 46, lines 17 – 22.

The Examiner’s substantive conclusion of law number 3 additionally provides that:

... it is clear that an administrative variance should be granted more liberally than a standard MCC 15.09.057 variance....

CP 46, lines 23 – 24.

In 2004, Anthony sought an administrative variance for the proposed garage construction at issue. Mason County approved the administrative variance. CP 99 – 100. Actual garage construction was delayed, and the related permit and administrative variance approval expired. In 2008, Anthony re-initiated a building permit application for the garage and reapplied for an administrative variance to reauthorize the setbacks administratively approved by the County in 2004. CP 108 – 111.

The 2008 administrative variance application was reviewed by Mason County Planner Rebecca Hersha (hereinafter “Hersha” /

“Planner”). On September 22, 2008, Hersha denied the administrative variance and issued a formal notice specifying the basis for denial. CP 51 – 52. Hersha did not consider alleged aesthetic/view impacts when evaluating the administrative variance application. The letter of denial specifically identified the only basis for the denial:

... Your proposal is to increase that amount [garage square footage] to 1616 square feet, which is well above the average for the area.

CP 51 – 52.

No other basis for denial was set forth in the notification of denial. CP 51 – 52. The notification of denial advised that Anthony could appeal the administrative decision pursuant to Mason County Code 15.11.010. CP 51 – 52. Anthony did appeal the decision to the Mason County Hearing Examiner. Anthony’s appeal focused entirely on the single basis for denial set forth in the notification of denial (square footage nonconformity). CP 93 – 96. The Hearing Examiner reversed the County’s determination regarding square footage conformity. The Examiner’s decision specifically provides: “... the Examiner finds that the amount of garage area proposed by the Appellant is within the range of garage sizes in the area ... .” CP 45, lines 14 – 24. In so finding, the Examiner reversed the County on the only basis for denial identified by the County in the letter of denial. CP 51 – 52. Not only was “square footage nonconformity” the only issue cited as

a basis for denial in the County's denial letter, but "square footage nonconformity" was the only issue analyzed in any detail in the County's staff report issued in preparation for the appeal hearing before the Examiner. CP 132 – 135.

However, the Examiner ultimately sustained the County's denial of the administrative variance on grounds not set forth in the County's denial letter, nor analyzed in the County's staff report issued in preparation for the appeal hearing. The Examiner's decision is based on the Examiner's decision to afford substantial consideration to view impacts on water view corridors enjoyed by adjacent upland properties, as well as the Examiner's conclusion that Anthony could be required to reconfigure his existing garage (absent any evidence in the record to establish this as a feasible alternative, and absent any evidence in the record to contradict Anthony's contention that increasing the size of his current garage is cost prohibitive because of difficulties in incorporating the alterations into his existing home design). CP 41, lines 9 – 12; CP 44, lines 2 – 4; CP 49, lines 1 - 8.

The Examiner's substantive conclusion of law number 3 provides:

A key issue in this appeal is whether an assessment of what constitutes a 'reasonable development' in MCC 17.05.034 should include impacts on adjoining properties. MCC 17.05.034 does not allow the granting of a side-yard variance unless the variance is the minimum necessary for a 'reasonable development.' The Examiner concludes that impacts on adjoining uses are a relevant, even

priority, consideration in determining whether a proposal constitutes a ‘reasonable development.’

CP 46, lines 11 – 15.

The Examiner’s substantive conclusion of law number 7 further provides that, although the subject proposal complies with the administrative variance criteria set forth in the applicable code section:

The variance must be denied, however, due to the failure of the proposal to constitute a “reasonable development.” As discussed in Conclusion of Law No. 6, whether a development proposal is reasonable or not depends in part upon the impacts it has upon adjacent properties ...

CP 48, lines 18 – end; CP 49, lines 1 – 8.

Anthony challenges this conclusion of law and the Examiner’s application of this conclusion to sustain the denial of Anthony’s administrative variance application. Anthony also challenges the Examiner’s conclusion that Anthony has sufficient existing garage space. The Examiner’s Substantive Finding of Fact 5 provides that the amount of garage area proposed by Anthony, even when considered in addition to Anthony’s existing garage space, is within the range of garage sizes in the area. CP 45, lines 14 – 24. Anthony also challenges the Examiner’s conclusion that Anthony could increase the size of his existing garage, absent evidence in the record to establish this as a feasible alternative; absent evidence in the record to contradict Anthony’s contention that

increasing the size of his current garage is cost prohibitive because of difficulties in incorporating the alterations into his existing home design; and in light of the Planner's failure to analyze this issue as a basis for denial of Anthony's administrative variance application.

## **ARGUMENT**

### **STANDARD OF REVIEW**

Judicial review of land use decisions is governed by the Land Use Petition Act (LUPA), chapter 36.70C RCW. Under LUPA, a court may grant relief if certain criteria set forth in RCW 36.70C.130 are met.

The criteria set forth in RCW 36.70C.130 include:

- (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.

The court may grant relief upon a showing that one or more of the above-stated criteria is satisfied. One seeking relief is not required to establish that the local jurisdiction engaged in arbitrary or capricious conduct in order to have relief afforded. RCW 36.70C.130(2). The question of whether the criteria set forth in RCW 36.70C.130(a), (b), (e), and (f) are satisfied present questions of law that the appellate court reviews de novo. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). The question of whether criteria set forth in RCW 36.70C.130(c) are satisfied involves a factual determination that the appellate court reviews for substantial evidence supporting it. *Freeburg v. City of Seattle*, 71 Wn.App. 367, 371, 859 P.2d 610 (1993); See also *Abbey Road Group v. City of Bonney Lake*, 141 Wn.App. 184, 192, 167 P.3d 1213 (2007); *Quality Rock Products, Inc. v. Thurston County*, 139 Wn.App. 125, 133, 159 P.3d 1 (2007). Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Freeburg*, 71 Wn.App. at 371. The clearly erroneous standard (d) test involves applying the law to the facts. *Citizens to Preserve Pioneer Park, L.L.C. v. The City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). Under that test, the appellate court is to determine whether it is left with a definite and firm conviction that a

mistake has been committed. *Id.* The appellate court defers to factual determinations made by the highest forum below that exercised fact-finding authority. *Id.*

Under the Land Use Petition Act, when reviewing a decision on a land use petition, the appellate court stands “in the shoes of the superior court” and review is limited to review of the hearing examiner’s action on the basis of the administrative record. *Pavlina v. City of Vancouver*, 122 Wn.App. 520, 525, 94 P.3d 366 (2004); *HJS Development, Inc. v. Pierce County ex rel. Dpt. of Planning and Land Services*, 148 Wn.2d 451, 61 P.3d 1141 (2003) (citing *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn.App. 461, 470, 24 P.3d 1079 (2001)).

EXAMINER ENGAGED IN ULAWFUL PROCEDURE OR FAILED TO FOLLOW A PRESCRIBED PROCESS AND THE ERROR WAS NOT HARMLESS

In the administrative variance context, the authority to approve, approve with conditions, or deny applications to adjust side yard setbacks is reserved to the Mason County Director of Community Development (“review authority”). MCC 15.09.030(A)(4). CP 56 – 57. The Hearing Examiner is not authorized to grant administrative variances. MCC 15.03.050(I). CP 54. Rather, the Hearing Examiner is authorized to hear appeals of administrative decisions rendered by the Director of

Community Development. MCC 15.03.050(G); MCC 15.11.010. CP 54; CP 59. The administrative variance code section specifically requires the Administrator to “document in the property file the rationale for said administrative variance decision.” MCC 17.05.034(D).

It is clear from the record that at the time of the appeal hearing before the Examiner, neither the County planner who originally denied the administrative variance, nor the Examiner presiding over the appeal, knew whether view impacts on adjacent parcels would be considered, let alone in what manner, or to what extent. *See for example*, CP 193, lines 8 – 12; CP 212, lines 22 – end; CP 213, lines 1 – end; CP 214, lines 1 – end; CP 215, lines 1 – 3; CP 134; CP 46, lines 11 – 15; CP 189, lines 13 – 22.

Hersha, the county planner who had not based the denial on view or aesthetic impact considerations, and who had not analyzed any view-related impacts in the staff report prepared for the appeal hearing, could not even respond to the Examiner’s questions regarding whether view/aesthetic impacts should be considered in the administrative variance context:

HEARING EXAMINER: Do you know has – in applying these setback variance criteria, does the staff consider impacts on adjoining properties at all, do you know? I don’t know if you have dealt with this, you know.

MS. HERSHA: Well, that’s a good question because it is not perfectly clear in our regulations whether the

administrative variance criteria is separate from the variance criteria. You know, the regular criteria has some in-depth review –

HEARING EXAMINER: Mm-hmm.

MS. HERSHA: -- that we go through, including impacts. **And I was told that the intent of the administrative variance section is to bypass those –**

HEARING EXAMINER: Right.

MS. HERSHA: -- **and just have a separate set. But it is not real clear to me that – that is not super clear to me if that's really how the regulations are –**

HEARING EXAMINER: Okay.

MS. HERSHA: -- **interpreted.**

CP 212, lines 22 – end; CP 213, lines 1 – end; CP 214, lines 1 – end; CP 215, lines 1 - 3.

Hersha informed the Examiner that she was also unable to testify as to whether view impacts were ever considered by other staff in the planning department when evaluating administrative variances. CP 214, lines 15 – end. With the exception of limited argument presented regarding the square footage comparable issue (issue decided by Examiner in Anthony's favor), Hersha deferred almost entirely to testimony by adjacent property owners regarding alleged view-impacts and aesthetic concerns. CP 172, lines 23 – end; CP 173, lines 1 – 5.

Further, Hersha's staff report prepared for the appeal hearing before the Examiner indicates that Hersha had no idea of how to apply the term "reasonable development proposal" as used in the subject code section, and sets forth no analysis whatsoever regarding view-related impacts or construction alternatives. The staff report states the following:

... **Since "reasonable development proposal" is not defined** in the Mason County Development Regulations, which governs structural setbacks from property lines, an average was determined. Utilizing Assessor records, Staff averaged all the developed residential lots within 1,000 feet on the water side of the road, which is 951 square feet (Exhibit #10). The APP currently has 724 (Exhibit #11) square foot attached garage and wishes to add another 720 square feet of detached garage. This totals 1444 square feet, which is well above the average of 951 square feet, and therefore is not considered a reasonable development proposal.

**The averaging of neighboring structures is not commonly performed when reviewing requests for setback reductions. However, when a neighbor expresses one or more concerns pertinent to County Regulations, Staff feels that this is reason to conduct a more discriminating review than is customary. This is not a policy, but simply common sense and courtesy. Furthermore, aside from Mr. Anthony, the entire Community Group does not approve of the request to build the proposed garage (Exhibit #12).**

CP 134, emphasis added.

Hersha's written analysis, presented in a formal staff report submitted for review by the Examiner in conjunction with the appeal hearing, is concerning. First, Hersha acknowledged that the fundamental term guiding administrative variance review, "reasonable development

proposal,” is not defined in the Mason County Development Regulations. Next, Hersha acknowledged that she engaged in an averaging process “not commonly performed.” Her justification for conducting what she characterized as a “*more discriminating review than is customary*” was not based on policy, but “simply common sense and courtesy,” in light of concerns expressed by neighbors. By these statements, Hersha acknowledged that the code section at issue is not applied by Planning staff in a consistent, predictable, and logical manner, contrary to requirements under the law. See *Mason v. King County*, 134 Wn.App. 806, 813, 142 P.3d 637 (2006). Hersha acknowledged that the code provision regulates action in terms so vague that persons of ordinary intelligence must guess at its meaning, contrary to requirements under the law. *Cingular Wireless, LLC v. Thurston Co.*, 131 Wn.App. 756, 777, 129 P.3d 300 (2006) (citing *Anderson v. City of Issaquah*, 70 Wn.App. 64, 75, 851 P.2d 744 (1993)); *Grant County v. Bohne*, 89 Wn.2d 953, 955, 577 P.2d 138 (1978). Hersha’s Staff Report to the Examiner went on to state:

**Because there is no definition in the Development Regulations for a reasonable development proposal, Staff researched other regulations as well as case law to get an idea of any garage size limitations imposed in other situations.** This information did not serve as the primary basis for denying the Administrative Variance for the reduction in the side yard setback. Rather, it was used as guidance. Staff was unable to find related case law. However the Mason County Ordinance Section 17.01.150(E) does include a maximum structural area in its criteria for approving a Variance...

CP 134 (emphasis added).

This statement adds additional support to Anthony's contention that the subject code provision is not applied by Planning staff in a consistent, predictable, and logical manner; and is so vague that persons of ordinary intelligence must guess at its meaning. In fact, the Examiner reversed the County's attempt to apply by analogy an unrelated code section (MCC 17.01.150(E)), and reversed the County's determination regarding square-footage non-conformity – *the only basis relied upon by the County to support denial of the administrative variance in the County's letter of denial and oral representations to Mr. Anthony; and the only basis for denial analyzed in the associated staff report to the Examiner*. The Examiner determined that the square footage of Anthony's proposed garage is within the square footage range of garage sizes in the vicinity. CP 45, lines 14 – 24.

However, the Examiner then departed from the review structure set forth in the Mason County Code. The Examiner imported a view-impact analysis - an analysis not employed by Hersha; an analysis not supported by any established Planning Department policy or procedure; an analysis not set forth in the applicable code section. The Examiner sustained the administrative variance denial based on (1) view and aesthetic impacts to

an adjoining residence; and (2) the availability of an alternative site (expansion of the existing garage). CP 41, lines 10 – 12.

By importing a view-impact analysis with no discernable criteria and only after the applicant had appealed the determination rendered by the Review Authority explicitly vested with the authority to render administrative variance decisions, the Examiner engaged in an unlawful procedure and failed to follow a prescribed process. Because the County planner who denied the administrative variance did not engage in view-impact or construction alternative analysis; did not base the denial on view-impact or construction alternative grounds; and did not conduct view-impact or construction alternative analysis in the Staff Report prepared for the appeal before the Examiner, the Examiner was not in a position to make rulings regarding view-impacts or construction alternatives in the appeal hearing context.

The Examiner allowed the appeal of the Director's zoning determination to be conducted as an open forum hearing and imported a view impact analysis and alternative construction analysis with no basis in the code; in a manner not supported by the County planner's testimony, not set forth as a basis for the County planner's administrative variance denial, and not set forth in the planner's staff report prepared for the appeal hearing. In doing so, the Examiner failed to follow a prescribed

review process in conducting the appeal hearing, and erred in overruling the objections of Anthony's counsel regarding the admissibility of evidence pertaining to the view-related impacts of the subject proposal on adjoining properties. CP 44, lines 17 – 22.

THE EXAMINER'S 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

The Examiner ultimately sustained the County's denial of the administrative variance on grounds not set forth in the County's denial letter nor analyzed in the County's staff report issued in preparation for the appeal hearing. The Examiner's decision to affirm the denial of the administrative variance is based in large part on the Examiner's decision to afford substantial consideration to view impacts on water view corridors enjoyed by adjacent upland properties.

The Examiner's substantive conclusion of law number 3 provides:

“A key issue in this appeal is whether an assessment of what constitutes a ‘reasonable development’ in MCC 17.05.034 should include impacts on adjoining properties. MCC 17.05.034 does not allow the granting of a side-yard variance unless the variance is the minimum necessary for a ‘reasonable development.’ The Examiner concludes that impacts on adjoining uses are a relevant, even priority, consideration in determining whether a proposal constitutes a ‘reasonable development.’”

CP 46, lines 11 – 15.

The Examiner's view-related analysis continues as follows:

Although it is clear that an administrative variance should be granted more liberally than a standard MCC 15.09.057 variance, it is a long leap to conclude that impacts upon adjoining properties have no relevance. This interpretation discounts almost entirely the purpose of setbacks, which is primarily to protect adjoining uses and the community as a whole. As noted in *McQuillin Mun Corp* § 25.138 (3d Ed), setbacks “tend to preserve public health, add to public safety from fire, and enhance the public welfare by improving living conditions and increasing the general prosperity of the neighborhood...”

CP 46 – 47.

The Examiner's substantive conclusion of law number 7 further provides that, although the subject proposal complies with the administrative variance criteria set forth in the applicable code section:

“The variance must be denied, however, due to the failure of the proposal to constitute a “reasonable development.” As discussed in Conclusion of Law No. 6, whether a development proposal is reasonable or not depends in part upon the impacts it has upon adjacent properties ...”

CP 48, lines 18 – end; CP 49, lines 1 – 8.

The manner in which the Examiner proceeded to create and rely upon the view-impact analysis detailed in the Examiner's decision constitutes an erroneous interpretation of the law. Aesthetic factors may not be the sole basis for denying a proposed use. *Seattle SMSA Ltd. Partnership v. San Juan County*, 88 F.Supp. 2d 1128, 1130-31(W.D.Wn.

1997) (citing *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 70, 578 P.2d 1309 (1978); *Anderson v. Issaquah*, 70 Wn.App. 64, 82, 851 P.2d 744 (1993)).

Local jurisdictions may not deny land use permits based solely on evidence of general neighborhood opposition. See *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986; *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 804, 801 P.2d 985 (1990); *Kenart & Associates v. Skagit County*, 37 Wn.App. 295, 680 P.2d 439, review denied, 101 Wn.2d 1021 (1984). In *Sunderland*, local officials denied a permit based on the unsubstantiated, generalized fears of area residents regarding reduction of property values and other related impacts. *Sunderland*, 127 Wn.2d 782. In *Maranatha Mining*, the reviewing court reversed the decision of the city counsel, as the court could not escape the conclusion that the council based its decision on community displeasure and not on reasons backed by policies and standards as the law requires. *Maranatha Mining*, 59 Wn.App. at 805. In *Kenart*, the planning board's permit denial was based on a number of findings that either lacked factual support or did not provide a reason for denial. *Kenart*, 37 Wn.App. 295 The court in *Kenart* reversed the denial, expressing a concern that the planning commission may have denied permit approval as a result of community displeasure rather than for the reasons stated. *Id* at 303. In *Kenart*, much like in the present case,

inconsistency existed between the reasons advanced for the denial and the applicable code provisions.

Anthony also challenges the Examiner's conclusion that Anthony has sufficient existing garage space and challenges the Examiner's related conclusion that the proposal therefore is not a "reasonable development proposal" per the subject code section. In support, Anthony cites to the Examiner's Substantive Finding of Fact 5, which establishes that the amount of garage area proposed by Anthony, even when considered in addition to Anthony's existing garage space, is within the range of garage sizes in the area. CP 45, lines 14 – 24. Anthony also cites to evidence of his personal need for additional garage space, particularly where such additional garage space, even when combined with Anthony's existing garage space, is within the range of average garage sizes in the comparable area. CP 45, lines 14 – 24; CP 42, lines 14 - 17.

Finally, Anthony challenges the Examiner's conclusion that Anthony could increase the size of his existing garage, and challenges the Examiner's related conclusion that the proposal therefore is not a "reasonable development proposal" per the subject code section. No evidence exists in the record to establish this as a feasible alternative; Anthony's uncontested testimony establishes that increasing the size of his current garage is cost prohibitive because of difficulties in incorporating

the alterations into his existing home design; and the Planner engaged in no analysis whatsoever regarding this issue as a basis for denial of Anthony's administrative variance application. CP 41, lines 9 – 12; CP 44, lines 2 – 4; CP 49, lines 1 - 8.

EXAMINER'S ORDER NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A decision-making body (Examiner) must provide written findings of fact which indicate their evidentiary basis. *Seattle SMSA*, 88 F.Supp. 2d 1128 (citing *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994); *Levine v. Jefferson County*, 116 Wn.2d 575, 581, 807 P.2d 363 (1991)).

Much like the written findings of fact at issue in *Seattle SMSA*, the Examiner's findings of fact in the present case are flawed. For example, there is no evidence in the record to support the Examiner's conclusion that Anthony has the option of reconfiguring and expanding his existing garage to serve the purposes that necessitate the construction of the proposed detached garage. The Examiner's order contains conclusory statements for which no explanations are provided with respect to this issue. The Planner did not reference this as a basis for denial in the denial letter, and neither the Planner who denied the administrative variance, nor

the Examiner evaluated or cited to any evidence that establishes this as a viable option.

The Examiner's conclusion that the variance is not necessary for the reasonable use of Anthony's property is not supported by substantial evidence. To the contrary, no evidence supports this conclusion, and the Examiner's own Substantive Finding of Fact 5 provides that the amount of garage area proposed by Anthony, even when considered in addition to Anthony's existing garage space, is within the range of average garage sizes in the area. Absent any supporting evidence, the Examiner's order with respect to this issue constitutes a broad and unsupported statement that could justify the denial of almost any application for any use.

Most significantly, the Examiner's conclusions regarding view-impacts are not supported by substantial evidence. Anthony's counsel objected to the introduction of evidence related to alleged view impacts. The objections were founded on Anthony's contention that the view-impact analysis that the Examiner engaged in was improper and that related evidence is inadmissible. *See for example*, CP 193, lines 8 – 12; CP 212, lines 22 – end; CP 213, lines 1 – end; CP 214, lines 1 – end; CP 215, lines 1 – 3; CP 134; CP 46, lines 11 – 15; CP 189, lines 13 – 22. The Examiner overruled the objections and admitted the evidence. CP 44, lines 17 – 24. Anthony has established that view-related impacts did not serve

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as the basis for the County Planner's denial of the administrative variance. In other sections of this brief, Anthony has also established that a view-impact analysis is not appropriate when applying the administrative variance criteria set forth under MCC 17.05.034(D). Additionally, aesthetic considerations and community opposition do not constitute a substantial basis for denying the administrative variance at issue, and related testimony and evidence considered by the Examiner does not constitute substantial evidence. Much like the case at issue in *Seattle SMSA*, the Examiner in the present case erred in relying upon evidence which, as a matter of law, does not constitute a sufficient basis for the decision. The view-related evidence is irrelevant and inadmissible, and findings or conclusions related to view-related impacts are not supported by substantial evidence. *Seattle SMSA*, 88 F.Supp. 2d 1128.

#### EXAMINER'S DECISION WAS CLEARLY ERRONEOUS

The clearly erroneous standard (d) test involves applying the law to the facts. *Citizens to Preserve Pioneer Park*, 106 Wn.App. at 473. Under that test, the appellate court is to determine whether it is left with a definite and firm conviction that a mistake has been committed. *Citizens to Preserve Pioneer Park*, 106 Wn.App. at 473; *Woodinville Water District v. King County*, 105 Wn.App. 897, 21 P.3d 309 (2001). The appellate

court defers to factual determinations made by the highest forum below that exercised fact-finding authority. *Citizens to Preserve Pioneer Park*, 106 Wn.App. at 473.

In the present case, the Examiner's decision to deny the application based on view-related objections voiced by area residents is inconsistent with the administrative variance review process set forth in the Mason County Code. Even if the Examiner could weigh view-related objections and general community displeasure, the Examiner could not base the decision solely on this basis. *Seattle SMSA*, 88 F.Supp. 2d at 1130-31 (citing *Sunderland*, 127 Wn.2d at 797; *Kiewit Construction Group, Inc. v. Clark County*, 83 Wn.App. 133, 142-43, 920 P.2d 1207 (1996)).

In *Mason v. King County*, the court held that the county's approval of a land use application was erroneous as a matter of law, in part because the county's interpretation and application of relevant regulatory provisions was contrary to the requirement that land use regulations be applied in a consistent, predictable, and logical manner. *Mason v. King County*, 134 Wn.App. 806, 813, 142 P.3d 637 (2006). Similarly, in the present case, the Examiner's decision was a clearly erroneous application of the law to the facts, and is contrary to the requirement that land use regulations be applied in a consistent, predictable, and logical manner. With the very limited exception of Mason County Shoreline Master

Program provisions not at issue in the present case, the Mason County Code does not provide for any of the view-related protections that have been afforded to upland owners by the Examiner's decision. The Mason County Code, and particularly the code section at issue in the administrative variance context, sets forth no consistent, predictable and logical view-related standards or review criteria.

As set forth in detail in other sections, it is undisputed that the sole purpose of the administrative variance section at issue is to relieve owners of small, encumbered parcels of the burdens associated with increased setbacks intended to be applied to parcels of at least five acres in size. The purpose of the administrative variance section at issue is not to vest new view-related rights in upland owners, where no such rights have existed historically and where no such rights exist pursuant to the plain language of the code section at issue. The code section at issue explicitly omits any reference to view-related analysis, where such reference could have easily been incorporated if that were the legislative intent. The Examiner explicitly concluded that the variance criteria associated with standard variances (MCC 15.09.057) and which set forth a requirement that the development not adversely impact adjacent properties, is not applicable in the present administrative variance context. CP 47, lines 13 – 20. The code section at issue contains no criteria whatsoever to guide any such

view protection analysis, and such criteria could have easily been incorporated into the subject section if that were the legislative intent.

Given this, the Examiner erred in importing a “view impact analysis” and sustaining denial of the application on that basis. There is no question that the standard five (5) foot side yard setback accomplishes the purposes of protecting adjoining uses in the contexts of public health and safety, or else it could not be set forth by the County in the code section at issue as the distance to which setbacks may be administratively reduced. While it may be the case that a primary purpose of the side yard is to protect adjoining property, such protection (particularly in the context of administrative variance review) is properly limited to protecting adjoining uses in the contexts of public health and safety, and does not create a new and unquantified rights of protection of “water view corridors” to be enjoyed by upland parcels in the vicinity of the development proposal. The Code affords no protection against view impairment or against the alleged value reduction of upland parcels whose views may be impacted.

Even assuming, solely for the sake of argument, that the Examiner did not err in concluding that upland properties are to be afforded view protection, the Examiner’s analysis, conclusions and ultimately the Examiner’s act in sustaining the permit denial constitute ad hoc and arbitrary decision-making. The Examiner’s decision was not based on

ascertainable standards, and is analogous to the “ad hoc” decision-making rejected in cases cited by Anthony in other sections of this brief. Similarly, even if the Examiner did not err in concluding that applicants can be required to modify existing structures at a significantly increased cost to achieve garage square footage equivalent to other developed sites in the vicinity, the Examiner’s decision was not based on ascertainable standards and was not supported by sufficient evidence, and is analogous to the “ad hoc” decision-making rejected in cases cited by Anthony.

THE ORDINANCE AT ISSUE AND LAND USE DECISION BY THE EXAMINER VIOLATED ANTHONY’S CONSTITUTIONAL RIGHTS

An ordinance is unconstitutionally vague if it regulates action in terms so vague that persons of ordinary intelligence must guess at its meaning. *Cingular Wireless, LLC v. Thurston Co.*, 131 Wn.App. at 777 (citing *Anderson*, 70 Wn.App. at 75); *Grant County v. Bohne*, 89 Wn.2d at 955. The fact that neither the reviewing planner (Hersha), nor the Examiner, could determine from the code whether view-related impacts are considered in the administrative variance context, dictates that it is a code provision that requires persons of ordinary intelligence to guess at its meaning.

Hersha, the county planner who had not based the denial on view or aesthetic impact considerations, and who had not analyzed any view-related impacts in the staff report prepared for the appeal hearing, could not even respond to the Examiner's questions regarding whether view/aesthetic impacts should be considered in the administrative variance context:

HEARING EXAMINER: Do you know has – in applying these setback variance criteria, does the staff consider impacts on adjoining properties at all, do you know? I don't know if you have dealt with this, you know.

MS. HERSHA: Well, that's a good question because it is not perfectly clear in our regulations whether the administrative variance criteria is separate from the variance criteria. You know, the regular criteria has some in-depth review –

HEARING EXAMINER: Mm-hmm.

MS. HERSHA: -- that we go through, including impacts. **And I was told that the intent of the administrative variance section is to bypass those –**

HEARING EXAMINER: Right.

MS. HERSHA: -- **and just have a separate set. But it is not real clear to me that – that is not super clear to me if that's really how the regulations are –**

HEARING EXAMINER: Okay.

MS. HERSHA: -- **interpreted.**

CP 212, lines 22 – end; CP 213, lines 1 – end; CP 214, lines 1 – end; CP 215, lines 1 - 3.

Hersha informed the Examiner that she was also unable to testify as to whether view impacts were ever considered by other staff in the planning department when evaluating administrative variances. CP 214, lines 15 – end. The staff report prepared for the appeal hearing before the Examiner indicates that as the reviewing planner, Hersha had no idea of how to apply the term “reasonable development proposal” as used in the subject code section. The staff report contains the following analysis by Hersha:

... **Since “reasonable development proposal” is not defined** in the Mason County Development Regulations, which governs structural setbacks from property lines, an average was determined. Utilizing Assessor records, Staff averaged all the developed residential lots within 1,000 feet on the water side of the road, which is 951 square feet (Exhibit #10). The APP currently has 724 (Exhibit #11) square foot attached garage and wishes to add another 720 square feet of detached garage. This totals 1444 square feet, which is well above the average of 951 square feet, and therefore is not considered a reasonable development proposal.

**The averaging of neighboring structures is not commonly performed when reviewing requests for setback reductions. However, when a neighbor expresses one or more concerns pertinent to County Regulations, Staff feels that this is reason to conduct a more discriminating review than is customary. This is not a policy, but simply common sense and courtesy. Furthermore, aside from Mr. Anthony, the entire Community Group does not approve of the request to build the proposed garage (Exhibit #12).**

CP 134, emphasis added.

Hersha's statements, presented in a formal staff report submitted for review by the Examiner in conjunction with the appeal hearing, support Anthony's contention that the ordinance and land use decision at issue violated Anthony's constitutional rights. First, Hersha acknowledged that the fundamental term guiding administrative variance review, "reasonable development proposal," is not defined in the Mason County Development Regulations. Next, Hersha acknowledged that she engaged in an averaging process "not commonly performed." Her justification for conducting what she characterized as a "*more discriminating review than is customary*" was not based on policy, but "simply common sense and courtesy," in light of concerns expressed by neighbors. CP 134. By these statements, Hersha, as the reviewing planner, acknowledged that the code section at issue is not applied by Planning staff in a consistent, predictable, and logical manner, contrary to requirements under the law. See *Mason v. King County*, 134 Wn.App. at 813. Hersha's statements establish that the code provision regulates action in terms so vague that persons of ordinary intelligence must guess at its meaning, contrary to requirements under the law. *Cingular*, 131 Wn.App. at 777 (citing *Anderson*, 70 Wn.App. at 75); *Grant County v. Bohne*, 89 Wn.2d at 955. Hersha went on to state:

**Because there is no definition in the Development Regulations for a reasonable development proposal, Staff researched other regulations as well as case law to get an idea of any garage size**

**limitations imposed in other situations.** This information did not serve as the primary basis for denying the Administrative Variance for the reduction in the side yard setback. Rather, it was used as guidance. Staff was unable to find related case law. However the Mason County Ordinance Section 17.01.150(E) does include a maximum structural area in its criteria for approving a Variance [note: Examiner subsequently invalidated County's attempt to apply Section 17.01.150(E) by analogy].

CP 134 (emphasis added).

This statement adds additional support to Anthony's contention that the subject code provision is not applied by Planning staff in a consistent, predictable, and logical manner; and is so vague that persons of ordinary intelligence must guess at its meaning.

The Examiner explicitly determined that the purpose of the administrative variance code section at issue is to provide a summary review process to make it relatively easy to acquire variances for small, nonconforming lots where the wider GMA setbacks are unduly burdensome," and that "applying MCC 15.09.057 [standard variance criteria] would clearly subvert this purpose." CP 47, lines 13 – 20 (Examiner contrasting standard variance review with administrative variance review).

The code section at issue is a unique section that stands alone and must be interpreted alone. The Examiner was correct in finding that other unrelated code sections could not be applied to aid in interpreting the

subject code section. It is readily apparent that the legislative body could have incorporated the standard variance requirement, that “the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the environment,” into the administrative variance “reasonable development” context. The legislative body did not. The absence of any such provision in the administrative variance code section at issue is a strong indicator that impacts to adjacent properties are not to be considered in the same manner that they would be in a standard variance context. This fact undermines the Examiner’s reliance on view/aesthetic impacts as a basis for denial, particularly in light of the Examiner’s express conclusion that the standard variance criteria are not applicable in the unique administrative variance context.

In *Anderson*, the court examined a section of the Issaquah Municipal code setting standards governing building design. The criteria amounted to a general requirement that buildings be harmonious with the natural environment and neighboring structures. *Anderson*, 70 Wn.App. at 75. The *Anderson* decision chronicled the repeated efforts of one developer to satisfy the shifting personal demands of members of the development commission. See *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 292, 87 P.3d 1176 (2004)

(*Pinecrest* court distinguishing *Anderson*). In *Bohne*, Washington's Supreme Court held that an ordinance was overly vague where it did not expressly include provisions that it easily could have. *Bohne*, 89 Wn.2d 953 (1978).

In contrasting the *Pinecrest* and *Anderson* cases, this Court observed that the Supreme Court in *Pinecrest* distinguished *Pinecrest* from *Anderson* on the following grounds (a) *Anderson* involved an “extremely vague building review process,” (b) the design standards were more general than the design concepts at issue in *Pinecrest*, and (c) the design concepts in *Pinecrest* did not stand alone (as in *Anderson*), but instead were to be considered along with other zoning ordinances. *Cingular*, 131 Wn.App. at 778. As discussed in further detail below, the administrative variance section at issue in the present case stands alone and is therefore analogous to the code provision at issue in *Anderson*.

The term “reasonable development proposal,” as it is used in the MCC section at issue, requires that persons of ordinary intelligence must guess at its meaning. The code provision vests officials with improper discretion regarding the application of the term, as clearly illustrated by the fact that neither the reviewing planner nor the Examiner knew whether, let alone to what extent or in what manner, view-related impacts were to be considered. Just as overly general requirements were struck

down in *Anderson* and *Bohne*, so should the overly general requirement at issue - that the “variance to the side yard setback be the minimum necessary to *accommodate a reasonable development proposal*” - be invalidated as an unconstitutionally vague provision. As in *Anderson*, the provision at issue leaves the review authority to guess at the meaning of what constitutes “reasonable development,” and requires that staff apply their own subjective opinions in determining whether a proposal constitutes “reasonable development.”

The Planning Department approved Anthony’s 2004 administrative variance, for the precise development proposal that is presently at issue. After that administrative variance expired due to lapse of time, Anthony reapplied for the very same approval. As set forth in detail in other brief sections, Planner Hersha then denied Mr. Anthony’s application, based solely on her determination that the proposed garage is not a “reasonable development proposal” because of nonconformity with square footage comparisons of other garages in the vicinity. CP 51 – 52. The Examiner overturned this basis for denial, concluding that Mr. Anthony’s proposed garage does conform with the square footage of other garages in the vicinity. CP 45, lines 14 – 24. However, the Examiner proceeded to import his own interpretation of the term “reasonable development proposal,” concluding that “the impacts on adjoining uses are a relevant, even

priority, consideration in determining whether a proposal constitutes a ‘reasonable development’ and that “the impacts upon the Cooper [adjacent] property are highly relevant to the resolution of this appeal.” CP 46, lines 13 – 15; CP 47, lines 11 – 12.

When Anthony’s counsel initially voiced objections regarding the admissibility of evidence regarding view impacts on adjacent properties, the Examiner first stated that he was “open to interpretation” on the question of whether adverse impacts on adjoining property owners could be considered in a “reasonable development” analysis associated with an administrative variance. CP 146, lines 1 - 11. The Examiner further stated, in response to argument by Anthony’s counsel that impacts to adjacent properties are not to be considered in the “administrative variance” context, that:

HEARING EXAMINER: Yeah, and I agree. That is a noticeable (inaudible), almost a puzzling one really, but I’m not prepared to rule on that yet. I still want to think about that. That’s obvious[ly] going to be really important to this case, so I’m going to admit this [composite drawing allegedly depicting Anthony’s proposed structure from the adjacent property], you know, with the understanding that I could conclude when I write my decision that, you know, impacts on neighbors isn’t germane to the criteria, but I think since there is, you know, a reasonable use term in here that I’m going to still consider it for now.

CP 189, lines 13 – 22.

The *Anderson* court observed that where a community endeavors to implement aesthetic standards, such standards can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. It is a deprivation of due process to expect or allow standards to be created on an *ad hoc* basis. *Anderson*, 70 Wn.App. 64. The applicable code provision should set forth workable guidelines and must avoid vague provisions that promote determinations based on whim, caprice, or subjective considerations.

Additionally, the presence of more specific review criteria in the Mason County Code in the context of standard, non-administrative variance review dictates that the present ordinance should be invalidated on the basis set forth in *Bohne*. *Bohne* sets forth the principle that constitutional standards of definiteness dictate that clarity is required, and where alternative language is plainly available which would clarify doubt, the failure to utilize such language is constitutionally infirm. *Bohne*, 89 Wn.2d at 956. The administrative variance code provision at issue is constitutionally infirm, as the term “reasonable development proposal” requires that persons of ordinary intelligence must guess at its meaning and because other inapplicable variance standards set forth in the Mason

County Code leave no doubt regarding the availability of alternative language.

Anthony was entitled to notice of the basis for denial of his application, a hearing at which he could present evidence related to the specific basis for denial, and an opportunity to establish that the review criteria is unnecessarily burdensome or unrelated to the purpose which the criteria is legitimately designed to serve. *Anderson*, 70 Wn.App. at 80.

In *Sunderland*, the court found general standards inadequate, where the municipal code allowed special permits on a case-by-case basis, but without further elaboration of the applicable standards. Much like the situation in *Sunderland*, the present case involves an inadequate general provision that fails to set forth sufficient standards to safeguard against ad hoc and arbitrary decision-making. The decision making-process at issue in the subject case is analogous to the “ad hoc” decision-making rejected in *Sunderland*. *Sunderland*, 127 Wn.2d 782.

The administrative variance review standards at issue in the present case are much more analogous to the “vague, free-floating aesthetic standards at issue in *Anderson*,” or the “standardless case-by-case” determination in *Sunderland*, than the standards challenged in *Pinecrest* and *Cingular*. See *Cingular*, 131 Wn.App. at 779 (contrasting *Pinecrest*, 151 Wn.2d 279, *Anderson*, 70 Wn.App 64, and *Sunderland*,

127 Wn.2d 782). In *Pinecrest* and *Cingular*, the code provisions at issue did not stand alone, but were properly considered along with other provisions that were determined to be sufficient.

In *Burien Bark Supply v. King County*, the Washington Supreme Court held that a code provision relied upon by King County was unconstitutionally vague. *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986). The code provision at issue in that case prohibited operations exceeding the “limited degree” standard set forth in the code. Upon receipt of a complaint, King County conducted an investigation. At least one county employee determined that the operations at issue (bark sorting) constituted a “limited” and “accessory” process that satisfied the “limited degree” requirement set forth in the code. Nevertheless, the County initiated enforcement action against Burien Bark, issued a notice and order to correct, and Burien Bark appealed to the examiner. The examiner affirmed the County’s determination that the sorting process violated the code provisions, and Burien Bark appealed to Superior Court by writ of certiorari. The Superior Court concluded, among other things, that the ordinance was unconstitutionally vague as applied to the Burien Bark Supply site. King County appealed, and the case was transferred to the Washington Supreme Court. The Supreme Court stated the following:

An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.

*Burien Bark*, 106 Wn.2d 868 at 871, citing *Myrick v. Bd. of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984); *Grant Cy. v. Bohne*, 89 Wn.2d 953. Such an ordinance violates the essential element of due process of law - fair warning. *Id.*

In the area of land use a court does not look solely at the face of the ordinance; the language of the ordinance is also tested in its application to the person alleged to have violated it. The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. *Grant Cy. v. Bohne*, 89 Wn.2d 953.

With respect to the code provision at issue in the *Burien Bark* case (“limited degree”), the Supreme Court found that the code did not sufficiently explain how a procedure is to be deemed “limited.” *Burien Bark*, 106 Wn.2d at 871. This same deficiency is present in the code provision at issue in the present case (“reasonable development proposal”). The Mason County Code does not sufficiently explain what constitutes a “reasonable development proposal.” Just like the code provision at issue in *Burien Bark*, the Mason County Code provision at issue leaves to county officials the substance of determining what activities and development will be permitted or prohibited. *Id.* at 871.

Just like King County in the *Burien Bark* case, Mason County argued at the hearing before the superior court that the code provision at issue is not unconstitutionally vague because other code standards enable administrators to determine what constitutes a “reasonable use.” However, there are no such code provisions that further define the “reasonable development proposal” term as that term is used in the administrative variance code section. This fact is established by multiple citations throughout this brief, for example, CP 134. The record contains no reference to any such provisions. In light of the legislative and contextual history in which the administrative variance code section developed (see analysis in prior brief sections); in light of Planner Hersha’s testimony and written analysis; and in light of the Examiner’s express findings regarding the inapplicability of other Mason County Code sections, it is readily apparent that one cannot look to other code sections to supplement the “reasonable development proposal” term as it is used in that code section. Just as in the *Burien Bark* case, in the present case no additional code standards exist that reduce the discretion of county officials to a constitutionally acceptable degree. Just like the *Burien Bark* case, no “common practice and understanding” provide fair notice regarding what the code section permits and prohibits. Just like the *Burien Bark* case, Mason County cannot argue that a common practice and understanding

exists when the record in the present case establishes the following: (i) the administrative variance was initially granted by one county planner, (ii) subsequently denied by another county planner based on a square footage analysis, (iii) the square footage analysis as a basis for denial was subsequently reversed in Anthony's favor by the Examiner, (iv) Planner Hersha's testimony at the hearing and written staff report acknowledge no established practice or standards exist; the (v) the Examiner determined that other Mason County Code sections are inapplicable and that application of other code sections would subvert the purpose of the administrative variance code section; and (vi) at the time of the appeal, neither the Examiner nor Planner Hersha knew whether, or to what extent, a view-impact analysis should be incorporated into the "reasonable development proposal" analysis. See *Burien Bark*, 106 Wn.2d at 872.

A citizen should be able to determine the law by reading the published code. A citizen should not be subjected to ad hoc interpretations of the law by county officials. *Id.* In *Grant County v. Bohne*, the Supreme Court concluded that the ordinance at issue did not adequately inform citizens regarding what uses were prohibited, and unconstitutionally allowed county officials the discretion to decide exactly what the ordinance prohibited. *Grant County v. Bohne*, 89 Wn.2d 953. The court stated that the county must provide ascertainable standards to guide local

officials who enforce zoning ordinances in order to satisfy due process.

*Grant County v. Bohne*, 89 Wn.2d at 957.

## CONCLUSION

In light of the foregoing analysis, it is apparent that the trial court erred in denying Anthony's land use petition on the grounds set forth in the order, specifically with respect to those findings of fact and conclusions of law specified in Anthony's Notice of Appeal. The Examiner engaged in unlawful procedure and failed to follow a prescribed process with resulting harm to Anthony; the Examiner's decision is an erroneous interpretation of the law; the Examiner's decision is not supported by substantial evidence; the Examiner's decision is clearly erroneous; and the code section and land use decision by the Examiner violated Anthony's constitutional rights.

Anthony requests that this Court reverse the decision of the Mason County Hearing Examiner, and issue an order approving administrative variance application DDR2008-00106. Anthony further requests that the Court invalidate the unconstitutionally vague code provision at issue. In the alternative, Anthony requests that the Court reverse the denial and remand the case back to the Department with direction that the Department process Petitioner's application consistent with due process

requirements under the Washington Constitution and Chapter 36.70C RCW, and with direction that view-related impacts to adjacent upland properties are not to be imported into the administrative variance review process in light of the historical context in which the administrative variance review process developed.

Respectfully submitted this 12<sup>th</sup> day of March, 2010.

Attorneys for Appellant Anthony



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STATE OF WASHINGTON

BY Or  
DEPUTY

IN THE COURT OF APPEALS, DIVISION II OF WASHINGTON

WILLIAM ANTHONY, a single man,  
  
Petitioner,  
  
v.  
  
MASON COUNTY, a Washington county,  
  
Respondent.

Case No.: 401 78-9 II

DECLARATION OF SERVICE

I, KRISTIN L. FRENCH, declare the following:

I am a citizen of the United States and a resident of the state of Washington, I am over the age of eighteen years and not a party to the above-entitled action; I am an attorney employed by the office of Robert W. Johnson, P.L.L.C., Attorneys at Law, located at 103 S. 4<sup>th</sup> Street, Shelton WA 98584.

On the 12th day of March at 3:30 p.m. I personally served the defendant, MASON COUNTY by delivering to the Mason County Prosecutors Office, at 521 N 4th St #B, Shelton WA 98584, a copy of APPELLANT'S OPENING BRIEF.

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

Signed at Shelton, Washington on the 12th day of March 2010.

  
\_\_\_\_\_  
KRISTIN L. FRENCH  
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DECLARATION OF SERVICE

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