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COURT OF APPEALS
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STATE OF WASHINGTON
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REPLY

No. 40178-9-II

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

WILLIAM ANTHONY,

Appellant,

vs.

MASON COUNTY,

Respondent

APPELLANT'S REPLY BRIEF

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I. To the Extent Provided by Applicable Authority, New Arguments and Theories Advanced by Mason County Should be Precluded

Under the Land Use Petition Act (LUPA), an appellate court stands in the shoes of the superior court and limits review to the hearing examiner's record. *Stanzel v. City of Puyallup*, 150 Wn.App. 835, 841, 209 P.3d 534 (2009); citing *Abbey Rd. Group, LLC v. City of Bonney Lake*, 141 Wn.App. 184, 192, 167 P.3d 1213 (2007) (quoting *Pavlina v. City of Vancouver*, 122 Wn.App. 520, 525, 94 P.3d 366 (2004)), affirmed 167 Wn.2d 242, 218 P.3d 180 (2009)); *Mower v. King County*, 130 Wn.App. 707, 712-13, 125 P.3d 148 (2005). An appellate court reviews alleged errors of law de novo. *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

RCW 36.70C.120 provides that when the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, with certain explicit exceptions. RCW 36.70C.120.

To the extent that the above-referenced provisions preclude Mason County's new arguments and theories regarding interpretation of the subject code provisions, the arguments should be precluded. To the extent that the above-referenced standards of review do not preclude Mason County's new arguments and theories regarding interpretation of the subject code provisions, Anthony replies as follows.

II. Undisputed Fact: Sole Purpose of the Administrative Variance Code Section at Issue

The Hearing Examiner concluded that the sole purpose of the administrative variance code section at issue is to relieve non-conforming parcels of the burdens associated with increased property line setback requirements resulting from Growth Management regulations. Neither party disagrees with this conclusion. It is clear from Mason County's Brief of Respondent that both Anthony and Mason County agree that the "administrative variance" procedure was adopted for the purpose of lessening the burden on landowners where increased setback requirements were imposed upon small, existing nonconforming parcels pursuant to Growth Management regulations. The administrative setback variance at issue is provided for in Mason County Code section 17.05.034(d).

III. Argument

Summary of Disputed Issues Addressed in Parties' Appellate Briefs

Anthony and Mason County disagree regarding the standards that apply in the context of “administrative variance” review, MCC 17.05.034(d), as opposed to “standard variance” review provided for in other code sections. In sum, the parties disagree regarding interpretation of the applicable code section; disagree regarding whether the Hearing Examiner conducted Anthony’s appeal of denial of administrative variance in a manner consistent with process, procedure and criteria established by the Mason County Code; and disagree regarding whether the Hearing Examiner erred by importing and affording substantial consideration to view-related criteria where such criteria: a) is not explicitly set forth in the subject code section; b) was not relied upon by the Review Authority to support the underlying determination on appeal before the Examiner; c) was not referenced or set forth in the standardized administrative variance application form provided by the County to applicants; and d) appears inconsistent with the legislative history associated with the administrative variance provision.

Mason County's Newly Developed Theory is Flawed

Despite the fact that the County places much emphasis on the rules of statutory construction, the County's newly developed theory regarding interpretation of the Code section at issue is in fact contrary to the explicit language of the subject code section MCC 17.05.034.

The County cites to MCC 17.05.035 to support the County's new assertion that in creating the administrative variance process, Mason County did not eliminate consideration of criteria set forth at MCC 15.09.057, and that the MCC 15.09.057 criteria are applicable in the administrative setback variance context at issue in this case. *See* Brief of Respondent, p. 6. Mason County's new argument is based on the County's contention that:

[b]y creating the administrative variance procedure, the county legislative body granted some level of discretion to the department of community development to grant a variance outside of the strict, mandatory requirements of MCC 15.09.057. The legislative body did not however state that the review authority could not consider the factors in MCC 15.09.057. In fact, it is clear that all variances, administrative or otherwise, must be viewed in light of the MCC 15.09.057 factors. The difference is that in an administrative variance, those factors are not mandatory but are there to provide guidance. And the administrative variance decision-making process is not specifically limited to consideration of the MCC 15.09.057 factors.

See Brief of Respondent, p. 12-13.

The County further asserts that “perhaps without even realizing” the Hearing Examiner correctly gave consideration to “at least some of the standards in MCC 15.09.057,” in accordance with the County’s new interpretation of the Mason County Code. The County asserts that the Examiner “perhaps inartfully, perhaps even unknowingly,” applied the correct process and standards in denying Anthony’s appeal. *See* Brief of Respondent, p. 7-8. However, an analysis of the individual subsections of 17.05.034 reveals significant flaws in the County’s newly developed theory.

First, MCC 17.05.034(a) – a “standard variance” section not applicable in the present case - authorizes the hearing examiner to grant a variance “*when the conditions set forth in Section 17.05.036 have been met... .*” MCC 17.05.034(a) (emphasis added). Similarly, MCC 17.05.034(b) – a “10 % variance” section not applicable in the present case – authorizes the administrator to grant a variance when the variance will result in a measurable deviation of ten percent or less and where the administrator makes “*a positive determination that the conditions set forth in Section 17.05.035 have been met*” MCC 17.05.034(b) (emphasis added). In contrast, the subsection at issue, MCC 17.05.034(d), authorizes the administrator to allow a reduction in the required setbacks under

circumstances explicitly defined in the respective subsection, without any directive that the administrator apply or reference criteria set forth in either MCC 17.05.035 or MCC 17.05.036.

Second, if MCC 17.05.034(d) incorporated the standards set forth in MCC 15.09.057, the language in MCC 17.05.034(d) regarding “minimum necessary to accommodate a reasonable development proposal” would be rendered meaningless or superfluous, contrary to the rules of statutory construction cited by Mason County. *See* Brief of Respondent, p. 5. The explicit inclusion of the “reasonable development proposal” standard in MCC 17.05.034(d), combined with the explicit exclusion of any cross-reference to any other code section, supports Anthony’s position that MCC 17.05.034(d) stands alone and does not incorporate the standards set forth in MCC 15.09.057. Mason County argues that if the legislative body had wanted to completely divorce consideration of the factors in MCC 15.09.057 from the administrative variance section at issue, it could have done so. *See* Brief of Respondent, p. 6. In response, Anthony asserts that the legislative body did just that, by explicitly incorporating reference to other code sections in certain variance sub-sections, omitting said references from the subject code section, and including in MCC 17.05.034(d) an independent standard not explicitly

referenced in the other variance sub-sections: “reasonable development proposal.”

Third, variance applications are made to the department of community development on forms furnished by the county. It is readily apparent, from a review of the administrative setback variance application forms furnished by Mason County, that the standard variance review criteria set forth in MCC 15.09.057 do not apply in the context of administrative setback variance applications, and are not considered by county planning staff reviewing administrative setback variance applications. *See* application form, CP 108-109. As evidenced by the administrative variance application form in the record, the administrative setback variance application form furnished by Mason County only requires 1) an illustrated site plan; 2) proof that criteria set forth in the applicable code section 17.05.034(c) or (d) are satisfied; and 3) an explanation regarding how the criteria set forth in the applicable code section 17.05.034 (d) precludes a reasonable development proposal from meeting the standard setback. *Id.* The form contains no reference to MCC 15.09.057, does not direct applicants to respond to the criteria set forth in MCC 15.09.057, and provides no notice that the criteria set forth in MCC 15.09.057 pertain to the administrative variance review. The application form provided by Mason County afforded Anthony no notice that the

views of adjacent property owners and/or monetary impact on adjacent property values were applicable review criteria, and sought no information from Anthony regarding view/value impacts.

Fourth, nothing in the record indicates that either the reviewing planner or the hearing examiner applied the review criteria set forth in MCC 15.09.057 in the administrative setback variance context. The Examiner relied upon MCC 17.05.034(d), explicating stating that “MCC 17.05.034(d) governs the requested variance,” and quoting said section in full. CP 90.

Fifth, MCC 17.05.034(d) requires that the administrator document in the property file the rationale for the administrative variance decision. With the exception of a citation to Mason County Resource Ordinance section 17.01.150(E) (which the Examiner concluded was an erroneous, inapplicable citation by the reviewing planner), the only relevant code section cited by Mason County in the letter of denial was the very code section that Anthony argues is the only applicable code section. Nothing in the planner’s letter of denial afforded Anthony notice that the views of adjacent property owners and/or monetary impacts on adjacent property values were applicable review criteria. The planner did not document in the property file rationale based on criteria set forth in MCC 15.09.057. As detailed in Anthony’s Opening Brief, the planner could not even respond

to the Examiner's questions posed to the planner during the appeal hearing regarding whether view/aesthetic impacts should be considered in the administrative variance context.

Finally, the County's proposed interpretation affords no certainty to applicants and affords no protection against arbitrary and inconsistent application of standards by county staff. The Code must provide applicants and staff with sufficient review standards, and the County's proposed interpretation fails to do so.

In sum, the County's proposed interpretation, based on incorporation of review criteria not set forth on the County-supplied administrative variance application form, criteria not applied by the county planner, criteria not applied by the Examiner, criteria not relied upon by the County until this late stage of the proceedings, and criteria explicitly omitted in the applicable code section, is not well-founded and should not be allowed to overshadow the issues properly before this Court.

Issues Properly Before this Court

The issues properly before this Court are those analyzed in Appellant's Opening Brief, which implicate the single code section applicable in the present context: MCC 17.05.034(d). This administrative setback variance sub-section, unlike other MCC variance sub-sections, does not reference or incorporate other variance review criteria or other

code sections. Consistent with its legislative purpose, the sub-section exists separate and apart from the standard variance procedure, to lessen the burden imposed on landowners where increased setback requirements were imposed upon small, existing nonconforming parcels pursuant to Growth Management regulations. Pursuant to the plain language of MCC 17.05.034(d), whether an administrative variance should be granted by the administrator hinges upon whether the applicant satisfies the explicit review criteria set forth in the specific subsection, and whether the variance is the minimum necessary to accommodate a “reasonable development proposal.”

Reasonable Development Proposal

Both Mason County and Anthony agree that the hearing examiner’s final decision rested on the determination that Anthony’s request was not a “reasonable development proposal,” in light of view impacts alleged by adjacent owners. In response to Anthony’s Opening Brief arguments regarding the term “reasonable development proposal,” Mason County cites to an online definition of the term “reasonable” and argues that “to suggest that a person of common intelligence would not have an understanding of the meaning of reasonable is simply laughable.” *See* Brief of Respondent p. 12-13. Mason County further suggests that

[i]mposing a definition on the term ‘reasonable development proposal’ in the context of a discretionary process would obviate the legislative intent of providing potential relief for a class of affected landowners. A definition which spelled out what could be considered in an administrative variance application would by its very nature limit the ability of the review officer to look at the individual characteristics of the application, positive and negative, and exercise the discretion granted by the County code.

See Brief of Respondent p. 13.

Mason County’s argument detailed above contradicts its position that the County’s new proposed interpretation of the subject code section would “help define what a ‘reasonable development proposal’ is for the purpose of an administrative variance.” *See* Brief of Respondent, p. 6. Through this statement Mason County acknowledges a need to define what constitutes a “reasonable development proposal” in the administrative setback variance context.

Anthony does not suggest that Mason County “impose a definition on the term ‘reasonable development,’ as suggested by Mason County. Rather, it is Anthony’s position that the code must clearly specify review criteria in a manner that provides sufficient notice to landowners, permit applicants and county staff. It is imperative that landowners and permit applicants be put on notice regarding review criteria that will apply to development proposals so that they have an opportunity to prepare a

complete application responsive to said criteria. It is imperative that county staff vested with authority to review applications have a clear understanding of what review criteria are applicable and how they are to be applied, so that the review process is uniform and consistent. It is imperative that the County Code provisions be clear enough to avoid unacceptable review procedures such as the procedure to which Anthony has been subjected. The fact that as of the date of the appeal hearing neither the examiner nor the reviewing planner knew whether, or the extent to which, view impacts were to be considered in the administrative setback variance context, coupled with the fact that the county-supplied application form made no reference whatsoever to the review criteria imported by the examiner, dictates that Anthony was not afforded sufficient notice and opportunity to prepare and present an application with respect to the “reasonable development proposal” inquiry. The record establishes unacceptable deficiencies that, as detailed in Anthony’s Opening Brief, are contrary to established case law and fundamental concepts of notice, opportunity to be heard, and predictability and consistency in land use decisions.

IV. Conclusion

When Mason County’s newly developed interpretative theory is disregarded, and when the legislative intent and purpose behind the

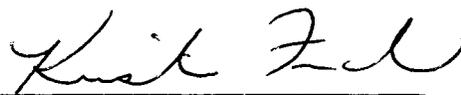
subject code section is considered, it is apparent that the denial of Anthony's administrative variance should be reversed. As set forth in detail in Anthony's Opening Brief, the code section at issue requires persons of ordinary intelligence to guess at its meaning. The Examiner conducted the review associated with the appeal of the Review Authority's determination in an ad hoc manner, and rendered a final decision based on arbitrary and subjective considerations. The Examiner imported review criteria not set forth in the subject code section, not relied upon by the review authority to support the underlying denial on appeal, and not evidenced by any ascertainable standards, including alleged view and valuation impacts on adjacent parcels. In this respect, the Examiner erred in admitting evidence related to alleged view and value impacts, over the objection of Anthony's counsel. The Examiner erred in concluding that Anthony's proposal is not necessary for reasonable use of the property, after concluding that the proposed garage, even when considered cumulatively with Anthony's existing garage, is within the range of average garage sizes in the applicable vicinity, and in light of evidence establishing Anthony's need for the proposed garage.

On the grounds set forth in Anthony's Opening Brief, Anthony respectfully 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 Anthony'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 2nd day of June, 2010.

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WILLIAM ANTHONY, a single man,

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MASON COUNTY, a Washington county,

Respondent.

Case No.: 40178-9-II

DECLARATION OF SERVICE

KRISTIN L. FRENCH

1. At all times mentioned, I was over the age of 18, not a party to the above-entitled action, and not interested in the action. I am competent to be a witness in the action.
2. On the 2nd day of June, 2010 at 1:30 p.m. I personally served the defendant, MASON COUNTY by delivering to Monty Cobb at the Mason County Prosecutor's Office, at 521 N 4th St #B, Shelton WA 98584, a copy of Appellant's Reply 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 2nd day of June 2010.



KRISTIN L. FRENCH

DECLARATION OF SERVICE

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