

NO. 304175

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FAMILIES OF MANITO, ANN BERGMAN, TODD STECHER,
and SADIE LAKE,

Respondents/ Cross-Appellants,

vs.

ST. MARK'S LUTHERAN CHURCH,

Appellant / Cross-Respondent.

and,

CITY OF SPOKANE, a First Class Charter City of the State of
Washington,

Respondent/ Cross-Respondent.

CITY OF SPOKANE'S BRIEF IN RESPONSE TO
RESPONDENTS/CROSS-APPELLANTS' OPENING CROSS-
APPEAL BRIEF

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I. INTRODUCTION

Manito does not allege that St. Mark's parking lot and improved access is not allowed under the City's development regulations. There is no question the use is permitted. Instead, Manito argues that the City's approval of St. Mark's application should be overturned because of the service the City provided to St. Mark's during the application process. There is no basis for Manito's claim.

Manito does not point to any evidence of bias, self-interest, prejudice, or improper dealings by those involved in approving St. Mark's application. There is none. But processing project permit applications like St. Mark's necessarily involves frequent informal contacts between the applicant and members of the City's Planning Department. St. Mark's application was no different.

Manito was allowed to fully explore the nature and substance of the informal contacts between St. Mark's and the Planning Department during an open record hearing

before the City of Spokane Hearing Examiner. In addition, contrary to their claims, there were also *extensive* contacts between Manito and Planning Department employees regarding St. Mark's application. These contacts are a normal part of the development permit application process and do not provide a basis for overturning a decision on an application.

**II. ISSUES PRESENTED BY MANITO'S ASSIGNMENT OF
ERROR**

A. Whether the Court should review an argument that was not raised before the Hearing Examiner or trial court.

B. Whether the contacts that necessarily and frequently occur between an applicant and the City's Planning Department provide a basis for overturning the Department's decisions on project permit applications under Washington land use law.

C. Whether alleged harmless procedural error which is followed by an open record administrative hearing, where the Hearing Examiner can affirm, modify, remand or

reverse the decision being appealed, provides a proper basis for overturning a land use decision under Washington land use law.

III. STATEMENT OF THE CASE

This appeal follows a decision by the City of Spokane Hearing Examiner. Following a two-day public hearing, the Hearing Examiner modified a decision by the City of Spokane Planning Services Department (the “Department”) approving St. Mark’s application to increase its off-street parking and improve the safety of ingress and egress to the church (the “Project”). Record, p. 283.

There is *no evidence* or even a suggestion of bias, self-interest, prejudice, or improper dealings by those involved in approving St. Mark’s application. Processing applications like St. Mark’s, however, necessarily involves frequent informal contacts between the applicant and Department employees. St. Mark’s application was no different. Record, p. 72-73. During the public hearing, Manito was allowed to fully explore the nature and substance of these contacts. *Id.* Contrary to the claims

made in Manito's brief, there were also extensive contacts between Manito representatives and Department employees. Record, pp. 306-909 & 1304-1324. The record demonstrates that Manito enjoyed liberal access to the decision maker while St. Mark's application was being processed. In fact, while the application was being processed, Manito scheduled what some might consider a "hearing" with the decision maker:

Hi Dave,

This is to confirm our meeting scheduled for Wednesday, June 2nd at 2 pm.

As I mentioned on Tuesday, when we spoke, I believe it will take approximately 1-2 hours to go through all the information we have prepared depending on the questions you may ask. The information is summarized in presentation format. It would be best if a computer projector is available for use in the meeting room, otherwise we will prepare multiple hard copies of the presentation. Please advise as necessary. The entire package consists of three 3 ring binders that we ask to be entered into the public record as the information will be used on appeal if necessary.

Deb Barnes, another Manito neighbor, will be in attendance as well.

Regards,
Ann Bergeman – Chair
Families of Manito

(Record, p. 1399) Manito cancelled this meeting when City representatives suggested St. Mark's should be notified about the meeting and provided with copies of materials supplied by Manito during the meeting. Record, p. 1397.

Following the Department's approval of St. Mark's application, Manito appealed the Department's decision to the Hearing Examiner. Record, pp. 1,191-98. Upon receiving an administrative appeal of this nature,

[t]he hearing examiner may affirm, modify, remand or reverse the [Department's] decision ...

Record, p. 29; SMC 17G.050.320. Pursuant to this delegation of authority, and in response to hearing testimony and requests submitted by Manito, Record, p. 160, the Hearing Examiner modified the Department's approval by requiring St. Mark's to comply with alternative project designs that moved parking spaces away from neighboring houses, preserved trees, and promoted traffic calming in the

church's parking area ("Hearing Examiner's Decision").
Record, pp. 32 & 160-61.

Manito appealed the Hearing Examiner's Decision to superior court. Record, pp. 3-4. In their petition to the superior court, Manito alleged that St. Mark's application should have been processed as a Type III application which requires Hearing Examiner approval. Record, p. 8. Alternatively, Manito alleged that, even as a Type II application (approved by the Department with option for open record appeal to Hearing Examiner), the City's code required the application to be decided pursuant to a quasi-judicial process. Record, p. 8. Manito alleged there were multiple contacts between St. Mark's and the Department (which the City admitted) and that they were denied access to the Department during the application process. As indicated above, the record does not support Manito's claim.

Manito did not allege in their trial court petition, however, that the Hearing Examiner's Decision was in some way flawed because the Department's decision was not signed by the Planning Director. Record, pp. 3-13. In their

opening trial court brief, Manito indicates in passing that the Department's decision was signed by a City Planner and not the Planning Director, but does not argue that this somehow invalidated the decision. CP 32-67 (Petitioner's Opening Brief, p. 12, lines 21-22). In their trial court response brief, Manito again notes that the Department's decision was signed by a Planner and not the Planning Director. CP 134-157 (Petitioner's Reply Brief, pp. 8-9). Again, Manito did not argue that this invalidated the land use decision. The record does indicate, however, that the City Planner that signed the Department's decision had been delegated responsibility for making a decision on St. Mark's application as authorized by the City's development regulations. Record, pp. 75 & 1261.

For the first time, in their Response/Opening Cross-Appeal Brief, Manito alleges that the absence of the Planning Director's signature provides a basis for reversing the Hearing Examiner's Decision. Manito's brief, p. 2.

IV. ARGUMENT

A. STANDARD OF REVIEW.

When reviewing a superior court's decision under Chapter 36.70C RCW ("LUPA"), the appellate court stands in the shoes of the superior court, reviewing the ruling below on the administrative record. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 252 P.3d 382 (2011) (citing *HJS Dev., Inc. v. Pierce County ex. Rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003)). The Hearing Examiner's Decision is presumed correct and, in order to prevail on its cross-appeal, Manito has the burden of proving that

[t]he body or officer *that made the land use decision*¹ engaged in unlawful procedure or failed to follow a prescribed process, *unless the error was harmless* . . . (Emphasis supplied.)

RCW 36.70C.130(1)(a); *see also Julian v. City of Vancouver*, 161 Wn. App. 614, 255 P.3d 763 (2011) (LUPA petitioner

¹ Under RCW 36.70C.020(2), a "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, *including those with authority to hear appeals*, on . . . [a]n application for a project permit . . ." *In this case, the land use decision is the Hearing Examiner's Decision.*

challenging a land use decision has the burden of establishing that the hearing examiner erred). Manito has failed to carry this burden.

B. THE COURT SHOULD REFUSE TO REVIEW THE CLAIM PRESENTED IN MANITO'S CROSS-APPEAL.

Manito waived the claim presented in their cross-appeal by failing to present it to either the Hearing Examiner or trial court. Questions not raised below cannot be raised on appeal. See RAP 2.5(a) and a litany of cases going back at least to *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 P. 1121 (1903). In a more recent case, Division I of the Court of Appeals indicates “[w]e will not review an issue, theory, argument, or claim of error not presented at the trial court level.” *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 31 P.3d 1 (2001); see also *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 869 P.2d 120 (Div. 3 1994) (arguments or theories not presented to trial court will not generally be considered on appeal); *McConiga v. Riches*, 40 Wn. App. 532, 700 P.2d 331 (Div. 3 1985); *In re Welfare of Hoffer*, 34 Wn. App. 82, 659 P.2d 1124 (Div. 3 1983) (argument not raised

at trial court is deemed waived on appeal). Last year, this Court applied RAP 2.5 in a LUPA appeal, indicating “[w]e will not review an issue that was not reached by the superior court.” *Vogel v. City of Richland*, 161 Wn. App. 770, 780, 255 P.3d 805 (2011) (also refusing to address standing argument raised for first time on appeal).

As outlined above, the error assigned in Manito’s cross-appeal was not presented to either the Hearing Examiner or the trial court. Nor was it reached by the trial court. Under the weight of authority in Washington, Manito has waived the claimed error. The City respectfully asks the Court to decline review of Manito’s cross-appeal.

C. MANITO HAS FAILED TO CARRY THE BURDEN OF PROOF ON THEIR CROSS-APPEAL.

1. The Hearing Examiner Did Not Engage in Unlawful Procedure.

In order to prevail on their cross-appeal, Manito must prove that the *Hearing Examiner* (not the Planning Department) engaged in unlawful procedure or failed to follow a prescribed process. RCW 36.70C.130(1)(a). Manito has failed to make such a showing and argues instead that

follow a prescribed process. RCW 36.70C.130(1)(a). Manito has failed to make such a showing and argues instead that the Planning Department failed to follow a prescribed process at an earlier stage in the approval process. Manito's arguments do not provide a basis for overturning a land use decision under LUPA.

Pursuant to RCW 36.70C.020(2), it is the Hearing Examiner's decision, and not the Planning Department's, that is under review in this appeal. Pursuant to the City's development regulations,

[u]pon receiving an administrative appeal, the hearing examiner's office shall schedule a hearing on the appeal with the appropriate parties . . . *The hearing examiner may affirm, modify, remand or reverse the decision being appealed.* (Emphasis supplied.)

SMC 17G.050.320. As the record demonstrates, the Hearing Examiner followed the administrative appeal process prescribed by the City's development regulations. Aside from Manito's arguments that the Hearing Examiner improperly modified the Planning Department's decision,² which are

² SMC 17G.050.320B expressly authorizes this.

procedure or otherwise failed to follow a prescribed process.

Manito has failed to carry their burden of proof.

2. The Planning Department Did Not Engage in Unlawful Procedure or Fail to Follow a Prescribed Process.

Manito has also failed to demonstrate that the Planning Department committed any reversible errors in processing St. Mark's application. Manito argues that the decision they appealed to the Hearing Examiner was flawed because it was not signed by the Planning Director and was instead signed by the City Planner assigned responsibility for processing St. Mark's application. Manito's argument does not provide a basis for reversing the Hearing Examiner's Decision.

Pursuant to SMC 17A.010.070A.3. and SMC 17G.060.020A.3., the Planning Director may delegate his or her responsibilities under the City's development regulations. This authority is also found in SMC 01.02.130, which indicates:

[E]very function, authority and responsibility vested by this code in a particular officer is delegable, subject to the City's personnel

system. Any act performed by a person or body without actual authority at the time may be ratified.

SMC 01.02.130. As the record indicates, and as authorized by the City's regulations, responsibility for processing St. Mark's application was properly delegated/assigned to Mr. Compton. Record, pp. 75 & 1260.

Schwartz: Okay. Mr. Compton, just to establish, your role in this matter was to make a decision on behalf of the Planning Department concerning this requested conditional use permit, correct?

Compton: Correct.

Record, p. 75.

Regardless, even if Mr. Compton was acting without authority (he was not and was instead doing the job assigned to him), the Hearing Examiner's subsequent decision modifying the Planning Department's decision replaced or ratified the Planning Department's decision per SMC 01.02.230 and SMC 17G.050.320, which authorizes the Hearing Examiner to affirm or modify any decision appealed to him. The absence of the Planning Director's signature

provides *no basis* for overturning the Hearing Examiner's Decision.

3. Even if the Planning Department Did Err in Processing St. Mark's Application, the Error Was Harmless.

Harmless procedural errors do not provide a basis for overturning land use decisions under LUPA. RCW 36.70C.130(1)(a). Under LUPA, a reviewing court may grant relief if the officer that made a land use decision³ failed to follow a prescribed process, *unless the error was harmless. Id.* Applied here, even if there was any merit to Manito's claim that the City erred in processing St. Mark's application (there is not), the alleged error was harmless.

Despite their own extensive contacts and interaction with the decision maker regarding St. Mark's application, Manito complains about the informal contacts that necessarily occurred between the Department and St. Mark's while the church's application was being processed. Manito's

³ As indicated earlier, the "land use decision" appealable under LUPA is the Hearing Examiner's, not the Planning Department's. RCW 36.70C.020(2).

complaints, however, provide no legal basis for overturning *the Hearing Examiner's Decision*.

During the administrative appeal, the Hearing Examiner properly rejected Manito's arguments that the Planning Department committed any error (let alone reversible error) in processing St. Mark's application:

I'm not sure that his decision is quasi judicial. I think his decision was administrative, which is totally different. I think the Hearing Examiner holds quasi judicial hearings, as does the City Council, but I don't believe the Planning Director holds quasi judicial hearings.

Record, p. 70. The Hearing Examiner's findings similarly reject Manito's claims:

In a decision dated June 21, 2010, Dave Compton, City Planner (hereafter "Decisionmaker") granted an Administrative Conditional use Permit to St. Mark's Lutheran Church (hereinafter "the Church") for an expansion of their parking area. . . . *The Administrative Conditional Use Permit is a Type II permit which can be issued administratively by the Planning Department rather than by the Hearing Examiner after a public hearing. (Emphasis supplied.)*⁴

⁴ Manito does not assign error to this finding.

Record, p. 28. See also SMC 17.050.070(A), indicating that the Hearing Examiner exercises *all* quasi judicial powers and functions authorized by the City Council; and RCW 36.70C.130(1)(b) (court must give deference to City's interpretation of its land use regulations); *Milestone Homes, Inc. v. City of Bonney Lake, supra* (court must give deference to city's interpretations of city ordinances); *Habitat Watch v. Skagit County, supra* (local jurisdiction with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island, supra*; see also, *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998) (substantial weight is given to an agency's interpretation of the statutes it administers).

As it did in the trial court, Manito quarrels with the Hearing Examiner's determination, relying solely on a confusing passage in the definition section of the City's development regulations. Those definitions define Type II applications as applications subject to a quasi-judicial decision by a department director, but that do *not* require a

public hearing. SMC 17A.020.200(O).⁵ This definition is internally inconsistent and conflicts with SMC 17G.050.070(A) which delegates quasi-judicial authority to the Hearing Examiner, not department heads.

Under the City's development regulations, Type II applications include short plat applications. State law requires the City to provide for summary *administrative* approval of these applications. RCW 58.17.060. State law also limits the City to allowing one open record hearing and one closed record appeal in processing development permit applications. RCW 36.70B.05092). Subjecting Type II applications to a conventional quasi judicial process would potentially run afoul of this limitation because the City's code treats appeals on such applications as open record appeals. SMC 17G.060.210(B).

For these reasons, we believe the definition found in SMC 17A.020.200(O) is the result of a clerical error and/or

⁵ By contrast, a Type III application is defined as an application that is subject to a quasi-judicial decision by the City's hearing examiner that *does* require a public hearing. SMC 17A.020.200(P).

drafting oversight that needs correction. Despite this conflicting definition, as the Hearing Examiner's determination recognizes, the City routinely interprets its development regulations to require *administrative* processing of Type II applications.⁶ Record, p. 70.

This is fully consistent with Washington law which recognizes that the appearance of fairness doctrine does not apply unless a public hearing is required by statute.⁷ *Polygon Corporation v. City of Seattle*, 90 Wn.2d 59, 67-78, 578 P.2d 1309 (1978); *see also* RCW 42.36.010 ("Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards

⁶ As this case illustrates, in the case of Type II permit applications, applicants and project opponents alike are afforded the opportunity for an administrative appeal hearing before the Hearing Examiner that is subject to the appearance of fairness doctrine. *See* SMC 17G.050.050, which restricts *ex parte* communications with the hearing examiner or city council on matters that may come to them in a public hearing.

⁷ It is also consistent with RCW 58.17.060 which *requires* the City to provide for summary administrative approval of some of its Type II applications.

which determine the legal rights, duties, or privileges of specific parties in a *hearing* or other contested case proceeding.”)

[The appearance of fairness doctrine] has never been applied to administrative action, except where a public hearing was required by statute. The appearance of fairness requirements which have been developed for hearings are inappropriate in the building permit application process which necessarily involves frequent informal contacts between the applicant and employees of the building department. (Emphasis supplied.)

90 Wn.2d at 67-68. *Accord, Zehring v. City of Bellevue*, 103 Wn. 2d 588, 591, 694 P.2d 638 (1985) (“The appearance of fairness doctrine has never been applied to administrative action except where a public hearing was required by statute”).

Applied here, the court’s holding in *Polygon* confirms that the appearance of fairness doctrine did not apply to the Department’s processing and approval of St. Mark’s application. Under the City’s development regulations, the Planning Department’s decision on the Application did *not* require a public hearing. SMC 17A.020.200(O).

Consequently, not only is the Hearing Examiner's determination on this subject entitled to deference under LUPA, it is also fully consistent with Washington law requiring denial of Manito's cross-appeal.

In any event, Manito's request for reversal of the Hearing Examiner's Decision based on informal contacts between St. Mark's and the Department makes no sense. The record demonstrates that Manito enjoyed free and liberal access to the Department during the decision-making process. Those contacts as well as the contacts between St. Mark's and the Department were disclosed to the Hearing Examiner. Record, p. 72. There was, however, no evidence of bias, self-interest, pre-judgment, or improper dealings by those involved in the decision making process.

Following the Department's decision, the administrative appeal before the Hearing Examiner afforded Manito an open record hearing that was undeniably subject to the appearance of fairness doctrine. There is no allegation that the administrative appeal was tainted procedurally in any way. Manito raised their concerns regarding contacts,

those contacts were fully disclosed on the record, and Manito's strained and unworkable interpretation of the City's development regulations was rejected. Record, pp. 70-73.

Finally, it is worth noting that Manito fails to support its novel arguments with relevant and/or controlling legal authority. Manito cites *Washington State Medical Disciplinary Board v. Johnston, M.D.*, 99 Wn.2d 466, 663 P.2d 457 (1983), which involved revocation of a medical doctor's license (*i.e.*, deprivation of a "liberty" or "property" interest), but has no application to the case before this Court. Even if it did, the court indicated "[w]e must presume the board members acted properly and legally performed their duties until the contrary is shown.". Here, there has been no showing that either the Planning Department or Hearing Examiner acted improperly. Instead, the assistance provided to St. Mark's during the application process was routine for applications of this nature and was fully disclosed during the administrative hearing.

Manito's reliance on *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 480 P.2d 489 (1971) is likewise misplaced. That

case involved the plan commission's approval of comprehensive plan and zoning amendments to accommodate a new Atlantic Richfield oil refinery in a residential area. Prior to the plan commission hearing, the chairman of the plan commission and the chairman of the board of county commissioners made a trip to inspect Atlantic Richfield's Los Angeles refinery. 78 Wn.2d at 865. Atlantic Richfield provided hotel accommodations and meals, and attended a big league baseball game with them. *Id.* Another member of the plan commission was involved in negotiations between one of his clients and Atlantic Richfield regarding real estate acquisition. *Id.* During these negotiations, there were several fishing excursions and offers of employment with Atlantic Richfield. Other contacts between plan commission members and Atlantic Richfield are outlined in the case. When these matters were raised by plaintiff's counsel at plan commission hearings, the chairman refused to permit any discussion of the matters. *Id.* Based on the cumulative impact of these circumstances, the court determined that the plan commission's hearings

lacked the appearance of fairness. By contrast, Manito was allowed to fully explore the circumstances surrounding the processing of St. Mark's application during the administrative hearing. There was absolutely no evidence of bias, self-interest, pre-judgment, or improper dealings by those involved in the decision making process.

For the same reasons, *Hayden v. City of Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981) does not support Manito's cross-appeal. There, the chairman of the city's plan commission was the local branch manager of a bank that was seeking a zone change to accommodate construction of a new bank office building. There is no evidence of similar partiality, prejudice, and/or conflict of interest in the instant case.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in its earlier response brief, Spokane submits that the superior court erred and that the Hearing Examiner's decision should be reinstated in full.

Respectfully submitted this 12th day of April, 2012.

By: 
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WSB #24125

ATTORNEYS FOR RESPONDENT/
CROSS RESPONDENT CITY OF
SPOKANE

CERTIFICATE OF SERVICE

I, Rebecca L. Riedinger certify that on April 12, 2012, I caused a true and correct copy of the foregoing to be hand delivered to the following parties:

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