IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LYLE and SUE RADER, husband and wife,	)	
	)	No. 66014-4-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
WHATCOM COUNTY,	)	
Respondent.	)	FILED: December 27, 2011

Grosse, J. — Under Whatcom County's critical areas ordinance, clearing and grading land in a wetland is subject to regulation. The hearing examiner did not err in so concluding, and we affirm the superior court's order affirming the hearing examiner's decision. We deny the County's request for an award of attorney fees and costs under RCW 4.84.370. The record does not show that the County has approved the critical areas protection plan or the mitigation plan the Raders submitted and has not identified the process by which the Raders can obtain a clearing and grading permit. According to the County, the parties are still negotiating over what the Raders must do in order to comply with the critical areas ordinance. Accordingly, no "land use approval or decision" has been rendered, and an award of attorney fees and costs to the County under RCW 4.84.370 is not warranted.

FACTS

In November 2006, Whatcom County Planning and Development

Services issued an Order to Correct to Lyle and Sue Rader, alleging that the Raders cleared and graded 10 acres of their 34-acre parcel in violation of the county's critical areas ordinance.[1] The Raders purchased the land, which had previously been used as a pastureland, with the intent to turn it into a blueberry farm. The Order to Correct informed the Raders that the County would be requiring them to retain a qualified wetland professional to generate a mitigation plan in accordance with Whatcom County Code (WCC) 16.16.260 (General mitigation requirements) and 16.16.680 (Standards—Wetland mitigation).

The Raders appealed. The Whatcom County Hearing Examiner issued findings of fact and conclusions of law and upheld the Order to Correct. The hearing examiner determined that the Raders violated the critical areas ordinance by altering a regulated wetland without a critical areas review and without approval by the critical areas technical administrator. The Raders do not claim error in any of the hearing examiner's findings of fact.

The Raders appealed to the Whatcom County Council. The Council affirmed the hearing examiner's decision and adopted the examiner's findings of fact and conclusions of law.

The Raders filed a petition under the Land Use Petition Act (LUPA) in superior court.[2] The superior court issued findings of fact and conclusions of law, concluding that the Raders were not required to obtain a permit to plant blueberries on the 10-acre parcel, but that "all clearing and grading activities to

[1] Lyle Rader died in April 2010. The appellants are identified as Lyle and Sue Rader, and we refer to the appellants as "the Raders."
[2] RCW 36.70C.060.

prepare the parcel for the planting of blueberries is governed by the critical area ordinance and such clearing and grading shall not be done without first being subject to county action under the critical area ordinance."[3] The Raders appeal, challenging the superior court's conclusion of law as to clearing and grading, but none of the superior court's findings of fact, nor its conclusion of law as to planting blueberries.[4]

ANALYSIS

Standard of Review

LUPA is the exclusive means of obtaining judicial review of land use decisions, with certain exceptions not applicable here.[5] We review the decision of the "local jurisdiction's body or officer with the highest level of authority to make the determination."[6] That is, when reviewing a LUPA decision, we stand in the shoes of the superior court, reviewing the ruling below on the administrative record.[7] Here, because the Whatcom County Council adopted the hearing examiner's findings of fact and conclusions of law, it is the hearing examiner's decision that we review.[8]

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[3] Although the Raders' argument focuses to a large extent on planting blueberries, this appeal involves only clearing and grading the land, not planting blueberries. Their arguments as to planting are therefore inapposite.

[4] The Raders appeal the superior court's findings of fact and conclusions of law. Because the findings of fact and conclusions of law resolve the Raders' entitlement to the requested relief, they constitute a "final judgment" for purposes of appeal. Purse Seine Vessel Owners Ass'n v. State, 92 Wn. App. 381, 387, 966 P.2d 928 (1998).

[5] Friends of Cedar Park Neighborhood v. City of Seattle, 156 Wn. App. 633, 640, 234 P.3d 214 (2010).

[6] RCW 36.70C.020(2).

[7] HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

[8] One of many irregularities in this matter is the fact that the superior court's

Under LUPA, a court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in RCW 36.70C.130(1) is met. Although the Raders do not identify which of the standards they claim is met, we assume, based on their argument, that they are arguing that 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,"[9] and/or that the land use decision is "a clearly erroneous application of the law to the facts."[10] Whether the decision is an erroneous interpretation of the law is a question of law that we review de novo.[11] The application of the law to the facts is clearly erroneous, and therefore reversible, only if we are left with a definite and firm conviction that a mistake has been committed.[12]

Applicability of Critical Areas Ordinance to the Clearing and Grading Activities

In their notice of appeal, the Raders specifically limit the scope of their appeal to the determination that their clearing and grading activities are subject to the critical area ordinance. Accordingly, our review is limited to determining

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findings of fact and conclusions of law do not reflect that the court was sitting, as it must in a LUPA proceeding, in an appellate capacity, reviewing the hearing examiner's decision. The superior court, like the hearing examiner, concluded that clearing and grading was subject to the provisions of the critical areas ordinance, although the superior court issued its own findings of fact and conclusions of law which differ from those of the hearing examiner. Neither party raises this irregularity on appeal, and we do not address the propriety of the superior court's actions. Our review under LUPA is of the hearing examiner's decision.

[9] RCW 36.70C.130(1)(b).

[10] RCW 36.70C.130(1)(d).

[11] Friends of Cedar Park Neighborhood, 156 Wn. App. at 649.

[12] Milestone Homes, Inc. v. City of Bonney Lake, 145 Wn. App. 118, 126, 186 P.3d 357 (2008).

whether this conclusion is correct. Based on a number of provisions in the Whatcom County Code, we conclude that the hearing examiner was correct in concluding that the Raders' clearing and grading activities are subject to the critical areas ordinance.

According to the hearing examiner, the Raders stipulated that they conducted clearing and grading in a regulated wetland without permits, without a critical areas protection plan, and without review by the county critical areas specialist.[13] The Raders do not claim that this statement is error. The Order to Correct cites the Raders for violating WCC 16.16.225(A)(1). Under that provision, clearing and grading are subject to the provisions of the critical areas ordinance when they occur within critical areas or their buffers.[14] A "critical area" includes wetlands.[15] Thus the Raders' clearing and grading falls within the scope of the critical areas ordinance, including the mitigation requirements of WCC 16.16.260 and 16.16.680, cited in the Order to Correct.

Other provisions of the critical areas ordinance also bring the Raders' clearing and grading within the scope of the ordinance. First, the provisions of the critical areas ordinance governing ongoing agricultural activities support the hearing examiner's decision that the clearing and grading are subject to the critical areas ordinance.[16] Under the ordinance, ongoing agricultural activities may be conducted in critical areas either (1) in accordance with the standards of

[13] The Raders' counsel stipulated to this effect before the hearing examiner.
[14] WCC 16.16.225(A)(1).
[15] WCC 16.16.800.
[16] The parties do not appear to dispute that the Raders' clearing and grading are either ongoing agricultural activities in and of themselves or are part of an ongoing agricultural activity.

the critical areas ordinance or (2) pursuant to an approved conservation program on agricultural lands (also referred to as a "CPAL" and as a "farm conservation plan").[17] WCC 16.16.290 sets forth the requirements of a conservation program and specifically provides for county review, approval, monitoring, and adaptive management of farm conservation plans.[18] The provision also states that a farm conservation plan may not authorize clearing or grading activities within critical areas "except on existing agricultural land where such activities are an essential part of the ongoing agricultural use and do not expand the boundaries of the existing agricultural use; provided, that impacts are mitigated in accordance with an approved farm conservation plan."[19] Under these provisions, the Raders' clearing and grading activities are subject to the critical areas ordinance.

Second, the provisions contained in Article 6 of the critical areas ordinance, entitled "Wetlands," also support the conclusion that the clearing and grading are subject to the ordinance. Specifically, under Article 6, existing ongoing agricultural activities may be permitted in wetlands "when all reasonable measures have been taken to avoid adverse effects on wetland functions and values, compensatory mitigation is provided for all adverse impacts to wetlands that cannot be avoided, and the amount and degree of alteration are limited to the minimum needed to accomplish the project purpose," provided that (1) the activities are conducted in accordance with all applicable provisions of the critical areas ordinance or (2) the agricultural activity is in compliance with the

[17] WCC 16.16.290.
[18] WCC 16.16.290(C).
[19] WCC 16.16.290(B)(1).

CPAL as described in WCC 16.16.290.[20]

The Raders' arguments that the critical areas ordinance does not apply to their clearing and grading activities are not compelling and are not sufficient to meet the Raders' burden under LUPA of establishing an error of law. They argue that under WCC 16.16.290, ongoing agricultural activities are allowed on wetlands without County approval. They are incorrect. WCC 16.16.290 allows ongoing agricultural activities only if conducted in accordance with the critical areas ordinance, which requires County approval, or in accordance with an *approved* CPAL.

The Raders also argue that WCC 16.16.235 allows the removal of vegetation from a pasture without regard for the requirements of the critical areas ordinance. Again, the Raders are incorrect. Although WCC 16.16.235(C) addresses vegetation removal, it does not unqualifiedly permit the removal of any and all vegetation from a pasture. First, any vegetation removal conducted pursuant to that provision requires written notification to the technical administrator 10 days prior to the initiation of the work.[21] Second, WCC 16.16.235(C) allows "select" vegetation removal and provides that no vegetation may be removed from a wetland "except for lawn, pasture, ornamental vegetation, and similar introduced vegetation." Third, "grading" is a separate activity from "clearing" under the ordinance, and grading is not included in WCC 16.16.235(C).[22] Even if vegetation removal is not subject to regulation, which it

[20] WCC 16.16.620.
[21] There is nothing in the record to indicate that the Raders provided such written notice.
[22] "'Clearing' means the removal of vegetation or plant cover by manual,

clearly is, the Raders have not shown that grading is not subject to regulation. In short, the Raders have failed to meet their burden of establishing an error of law under LUPA with regard to their argument about WCC 16.16.235.

The Raders also claim that the hearing examiner's interpretation of the critical areas ordinance conflicts with "many Washington statutes." They list four of these "many" statutes, but provide no analysis whatsoever as to the asserted conflict. Again, this falls far short of meeting the Raders' burden of proof under LUPA.

The Raders misread this court's opinion in Clallam County v. Western Washington Growth Management Hearings Board.[23] Contrary to the Raders' assertion that no court has decided whether the Growth Management Act, chapter 36.70A RCW, allows reasonable regulation of preexisting agricultural uses located in designated critical areas, the court in Clallam County decided that very issue. The court specifically held that "preexisting agricultural uses are not exempt from all critical areas regulation."[24]

The Raders fail to explain how RCW 36.70A.560 renders the County's action in this case invalid. The statute provides that between May 1, 2007 and July 1, 2011, counties and cities may not amend or adopt critical area ordinances as they specifically apply to agricultural activities. The statute further provides that nothing in it nullifies critical areas ordinances adopted by a county

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chemical, or mechanical means. Clearing includes, but is not limited to, actions such as cutting, felling, thinning, flooding, killing, poisoning, girdling, uprooting, or burning." "'Grading' means any excavating or filling of the earth's surface or combination thereof." WCC 16.16.800.

[23] 130 Wn. App. 127, 121 P.3d 764 (2005).

[24] Clallam County, 130 Wn. App. at 140.

prior to May 1, 2007.[25] The County's critical areas ordinance was adopted prior to May 1, 2007. The adoption of RCW 36.70A.560 has no effect on whether the Raders' clearing and grading activity is subject to regulation under the critical areas ordinance.

In their reply brief, the Raders quote from the Supreme Court's discussion in Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board of the tension between the goals of protecting critical areas and maintaining agricultural lands.[26] As with their citation to RCW 36.70A.560, the Raders fail to explain how the Court's discussion renders the County's action with regard to their clearing and grading activities invalid. It appears that the Raders are contending that the County's critical areas ordinance, as it affects the agricultural use of land within Whatcom County, is invalid. But this is not the issue before us in this appeal.

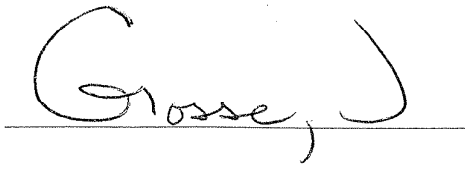
Finally, we do not address the Raders' argument that the critical areas ordinance is unconstitutionally vague. We generally do not consider arguments raised for the first time in a reply brief.[27]

In sum, we hold that the hearing examiner was correct in determining that the Raders' clearing and grading activity is subject to the critical areas ordinance. The hearing examiner also determined that the Raders were required to obtain a clearing and grading permit "or a Critical Areas authorization." At oral argument, the Raders claimed that they attempted to

[25] RCW 36.70A.560(1)(a).
[26] 161 Wn.2d 415, 166 P.3d 1198 (2007).
[27] Oostra v. Holstine, 86 Wn. App. 536, 543, 937 P.2d 195 (1997).

obtain a clearing and grading permit from the County, but discovered that the County has no process in place to apply for and obtain such a permit. The hearing examiner also determined that the Raders are required to obtain "critical areas review" and "compensatory mitigation." The record shows that the Raders submitted both a critical areas protection plan and a proposed mitigation plan. The hearing examiner, in 2008, found that it was not clear whether the County approved the critical areas protection plan, and at oral argument, the County asserted that the Raders' plan is not a farm plan, or CPAL, required for ongoing agricultural activities in critical areas. Further, at oral argument, the County asserted that that it is "in discussions" with the Raders about mitigation. Given that the County has yet to determine the sufficiency of the Raders' efforts to comply with its requirements, we conclude that no "land use approval or decision" has yet been rendered and deny the County's request for an award of attorney fees and costs under RCW 4.84.370.[28]

We affirm the superior court's decision affirming the hearing examiner's decision and deny the County's request for an award of attorney fees and costs.



[28] The Order to Correct was issued over five years ago. The County has yet to determine the sufficiency of the Raders' efforts at compliance and, according to the Raders, has not even identified the process by which the Raders can obtain the clearing and grading permit the County claims they must obtain. If there is a remedy, it may lie in a mandamus action.

WE CONCUR:

Cox, J.