IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PATRICIA L. AMBROSE, Appellant, v. CITY OF MONTESANO, a municipal corporation, and STEVEN HYDE, Respondents.	No. 40146-1-II UNPUBLISHED OPINION

Hunt, J. — Patricia Ambrose appeals the superior court's affirmation of the City of Montesano hearing examiner's revocation of her building permit. Ambrose argues that the hearing examiner (1) erroneously revoked her building permit, based solely on what he deemed to be an improper variance; and (2) lacked authority to consider this issue where the parties had failed to challenge the variance within the requisite 21 days of its issuance in 2006. The City agrees. Agreeing with Ambrose and the City, we reverse the superior court and the hearing examiner's decision to revoke the building permit, order the City to reinstate Ambrose's building permit, and remand to the examiner to consider Hyde's remaining challenges to the building permit.

FACTS

This appeal involves real property located in Montesano, Washington (the Property) and zoned "R -1 (Low Density Residential)."[1] Clerk's Papers (CP) at 8; *see also* CP at 64-65 (map of property). R-1 zoned lots generally require "[m]inimum side yard[s]" of "ten feet from each side lot line"[2]; absent a variance, corner lots, however, require minimum side yards of 15 feet. Montesano Municipal Code (MMC) 17.44.027(a). Ambrose's Property is a corner lot.

I. Variance, Boundary Line Adjustment, and Building Permit

In August 2006, Ambrose received a variance reducing the corner Property's required minimum side yards from 15 feet to 6 feet. As part of her variance request, Ambrose submitted a "site map" dated April 6, 2006, showing the property divided horizontally into north and south lots. CP at 12. No one appealed the City's issuance of this variance.

Ambrose then applied for a boundary line adjustment (BLA), apparently seeking to split the Property horizontally, instead of vertically, so that an existing house on the southern portion of the Property would no longer straddle the vertical lot line.[3] She submitted both an "original" map and a "new" map with her application. CP at 12. Both maps are dated October 10, 2006, but the "original" map shows the Property divided vertically into east and west lots, and the "new" map shows the Property divided horizontally into north and south lots. CP at 12, 64-65.

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[1] *See* Montesano Municipal Code (MMC) 17.20.010-.080.

[2] MMC 17.20.050(5).

[3] Because there is no administrative record before us on appeal, we surmise this purpose from the parties' briefs.

In February 2007, Ambrose received the BLA. No one appealed this BLA.

In August 2007, Ambrose received a building permit to construct a single-family residence on the Property's vacant northern lot.[4] On September 12, 2008, Ambrose received a renewed building permit. Less than a month later, in October 2008, Steven Hyde[5] appealed the City's renewal of Ambrose's building permit.

II. Appeal

Hyde argued that Ambrose's building permit renewal "was in violation of zoning, subdivision and related land use codes." CP at 52.

A. Hearing Examiner

On February 11, 2009, a City hearing examiner conducted a public hearing.[6] CP at 8. Two weeks later, the examiner asked City staff to clarify why the 2006 variance site map depicted the Property as divided into north and south lots while the "original" 2007 BLA site map showed the Property split into east and west lots. CP at 12, 64. The City did not provide an answer to the examiner's inquiry.

Revoking Ambrose's renewed building permit, the hearing examiner noted, "The record is not clear regarding when the lot line between the two parcels was shifted" from a vertical partition (dividing the lots into east and west lots) to a horizontal partition (north and south lots).

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[4] Again, we surmise from the parties' briefs that the BLA changed the lot configuration to divide the property horizontally into north and south lots.

[5] Apparently Hyde is Ambrose's neighbor.

[6] The parties have not provided the record of this hearing for our review in this appeal.

CP at 13 (Conclusion of Law (CL) 4). The hearing examiner further stated:

> The site plan submitted with [the 2006 variance] indicates that the property line had already been so shifted. However, the map labeled as "original" submitted with the [BLA] shows a north/south orientation for the property line, and the map labeled as "new" shows the east/west orientation. [. . . .] The Examiner can only conclude from the record that the site drawing submitted for [the 2006 variance] was not the legal configuration at the time of the variance application.

CP at 13-14 (CL 4).

The hearing examiner then concluded that (1) under "the MCC and in state law,"[7] a variance is "'necessary because of special circumstances relating to the size, shape, topography, location, or surroundings of the subject property'"; (2) Ambrose's 2007 BLA "change[d]" these factors; (3) thus, the "special circumstances" that had served as "the basis for the [2006] variance no longer exist[ed]"; (4) consequently the 2007 BLA had "extinguished" the 2006 variance; and (5) because there was no longer "variance legally in effect," Ambrose's "new construction" under the renewed building permit must conform to the MMC's 15-foot minimum side yard provision. CP at 14 (CL 5). Concluding that Ambrose's house's footprint, as drawn, did not include the requisite 15-foot minimum side yards on the lot, the hearing examiner revoked Ambrose's renewed building permit.

B. Superior Court

Ambrose appealed the hearing examiner's decision to the Grays Harbor County Superior Court under the Land Use Petition Act (LUPA), RCW 36.70C.060. She argued that (1) there is "no ordinance for termination of a variance based on change in circumstances"; (2) thus, the

[7] The hearing examiner did not cite any particular MCC or RCW provision. It appears, however, that he likely was referring to RCW 35A.63.110(2)(b) and MCC 17.46.090(2), which both contain the language quoted above.

hearing examiner's conclusion that the 2007 BLA "extinguish[ed]" the 2006 variance was erroneous, CP at 3; and (3) the hearing examiner lacked jurisdiction to consider whether the 2006 variance was in effect because Hyde had appealed only the September 12, 2008 renewal of Ambrose's building permit, not the 2006 variance.

Hyde also appealed the hearing examiner's decision, seeking only to have the decision "broaden[ed]" to "conclude that the Property is 'unbuildable,'" CP at 26-27; the superior court consolidated Hyde's appeal with Ambrose's appeal. Before the administrative record was prepared and filed, the superior court filed a letter decision in which it "upheld" the hearing examiner's decision revoking Ambrose's building permit, based on his finding the necessary variance improperly issued; the superior court also dismissed Hyde's appeal. CP at 73.

C. Court of Appeals

Ambrose appealed. Both Hyde and the City moved to dismiss Ambrose's appeal on grounds that the superior court's decision did not contain specific findings of fact and conclusions that the superior court had rendered its decision in the absence of the administrative record.[8]

[8] According to the City:

> [T]he Superior Court made its decision sua sponte, before the administrative record was prepared and filed with the Court, and without a dispositive motion having been filed by any party. Indeed, the Superior Court made its decision following a hearing noted on for and conducted only to determine a schedule for the preparation and filing of that administrative record, and to consider a motion by Ms. Ambrose to dismiss a separate LUPA appeal which had been consolidated with the building permit appeal.
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> The record material which had not yet been filed with the Superior Court at the time of the decision to affirm the Hearing Examiner included documentary evidence submitted to the Hearing Examiner, the transcript of the Hearing Examiner's proceedings, and briefing material submitted to the Hearing Examiner on behalf of Steven Hyde and Patti Ambrose. Moreover, at the time of the Superior Court's decision, the parties had not briefed the issues to the Court

Denying the motions to dismiss, our court commissioner ruled:

> It appears from a review of appellant's brief and the subsequent motion and responses that (1) the relevant facts are undisputed; (2) those facts can be found in the hearing examiner's findings and in the portions of the administrative record provided for the motion for summary judgment in the superior court; and (3) the issues presented are issues of law that can be decided upon the record provided to the superior court.

Spindle (Commissioner's Ruling, August 16, 2010). We now address Ambrose's appeal.

ANALYSIS

Finding the threshold jurisdictional issue dispositive, we address only Ambrose's argument that the hearing examiner lacked jurisdiction to revoke her building permit based on the 2006 variance, which the examiner ruled was no longer in effect, because Hyde had appealed only the September 12, 2008 renewal of Ambrose's building permit, not the 2006 variance. Ambrose is correct.

> related to whether the Hearing Examiner's decision should be affirmed, reversed, or modified.

Br. of Resp't (Montesano) at 4-5.

Hyde further noted that LUPA appeals require the reviewing court to evaluate the administrative record, but Ambrose did not include an administrative record on appeal to our court. *See* Spindle (Hyde Mot. to Dismiss at 6) (citing RCW 36.70C.120(1)). The City asserted that the absence of any administrative record "prevented" our court "from undertaking the necessary review of matching the legal validity of the [examiner's] decision which was the subject of the LUPA appeal against the factual record upon which it was based." *See* Spindle (Montesano Mot. to Dismiss at 7).

Ambrose responded that (1) an administrative record is unnecessary because "[a]ll of the issues [pled] in Ms. Ambrose's appeal can be decided by this Court based on legal authority"; (2) the hearing examiner's findings of facts and conclusions of law, combined with the "background summary" contained in Ambrose's opening brief, were sufficient to provide a record for this court to review; and (3) "if [Hyde and Montesano] believe there is a procedural problem because the City never prepared the administrative record, then the remedy is to supply it, not dismiss the . . . case." *Spindle* (Ambrose Resp. Mot. at 3-5).

I. Standard of Review

When reviewing a LUPA decision, we stand in the shoes of the superior court, reviewing the ruling below on the administrative record. *HJS Dev., Inc. v. Pierce County ex. rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). We review conclusions of law de novo. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005).

The party that filed the LUPA petition in the superior court, here, Ambrose, has the burden of meeting one of six standards:[9]

> (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.

RCW 36.70C.130(1). Ambrose contends that the hearing examiner's decision violated all six standards.

[9] *See Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).

II. Hearing Examiner's Decision

According to Ambrose, (1) Hyde did not appeal the 2006 variance within LUPA's 21-day time limit; (2) therefore, the legality of the 2006 variance was not before the hearing examiner; and (3) the hearing examiner lacked jurisdiction to revoke her building permit based on the 2006 variance, which he improperly concluded was invalid. The City agrees with Ambrose on this point.[10] And so do we.

"LUPA's stated purpose is 'timely judicial review.'" *Habitat Watch*, 155 Wn.2d at 406 (quoting RCW 36.70C.010). LUPA "establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities." *Habitat Watch*, 155 Wn.2d at 406. As our Supreme Court has explained,

> [O]nce a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable . . . if not appealed to superior court within LUPA's specified timeline.

Habitat Watch, 155 Wn.2d at 406-07. Accordingly, Washington courts have consistently refused to review land use decisions that parties have failed to challenge within 21 days. *See, e.g.*, *Habitat Watch*, 155 Wn.2d at 409-10; *James v. County of Kitsap*, 154 Wn.2d 574, 586-87, 115 P.3d 286 (2005); *Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 52 P.3d 1 (2002).

It is well established that parties may use LUPA petitions to seek review of variances. *See*, *e.g.*, *Lauer v. Pierce County*, 157 Wn. App. 693, 697-98, 238 P.3d 539 (2010), *review granted* 171 Wn.2d 1008 (2011). Here, however, the record contains no evidence that Hyde filed

[10] Although Hyde challenges the validity of the 2006 variance, he does not explain how the hearing examiner had jurisdiction to consider the correctness of this nearly-three-year-old land use decision.

a LUPA petition challenging the 2006 variance within the requisite 21-day time period. But the hearing examiner revoked Ambrose's building permit on the ground that that the 2006 variance (which allowed Ambrose's house to be built with reduced side yards) was no longer legally in effect. Our Supreme Court's analysis of analogous facts in *Wenatchee Sportsmen Associatin* is instructive here:[11] A party cannot circumvent a time-bar preventing a challenge to a land use decision not previously appealed by filing a LUPA petition challenging a different land use decision, which the party then attempts to argue is erroneous based on the previously unchallenged land use decision. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d 169, 180-82. Similarly, the hearing examiner here purported to consider Hyde's challenge to the City's issuance of Ambrose's renewed building permit, which Hyde had timely appealed; but the hearing examiner actually considered and based his 2009 decision on another land use decision, which Hyde had not timely appealed and which was not properly before him (the hearing examiner), namely the 2006 variance.[12]

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[11] In *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), Chelan County rezoned property located within an area that restricted urban growth to allow greater population density. No one ever challenged this rezoning. Two years later, the owner of the rezoned property obtained county approval of his plat application, which the Wenatchee Sportsmen Association challenged, arguing that it violated restrictions on population density. Our Supreme Court rejected this challenge, reasoning that (1) the property owner's plat application complied with the new zoning's population density limit; (2) the association actually was challenging the zoning ordinance's population density limit, not the property owner's plat application; and (3) because the failed to challenge the rezone in a timely manner, it could not do so under the guise of LUPA challenge to the plat approval. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 181,182.

[12] Hyde did not file a timely LUPA petition disputing the variance; thus, the issue of the 2006 variance "[wa]s no longer reviewable." *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 182.

Applying *Wenatchee Sportsmen Association* here, we hold that, because the 2006 variance was not before the hearing examiner in 2009, he (the hearing examiner) erred in revoking Ambrose's renewed building permit based on the alleged invalidity of that variance. Accordingly, we reverse the superior court and the examiner's decision revoking Ambrose's building permit, order the City to reinstate Ambrose's building permit, and remand to the hearing examiner to consider the other issues that Hyde timely and properly raised, challenging the validity of the building permit renewal.[13] Because Ambrose does not dedicate a portion of her brief to a request for attorney fees on appeal as required by RAP 18.1(b), we deny her request. A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, A.C.J.

Armstrong, J.

[13] For example, Hyde argued that the City should not have granted Ambrose's renewed building permit because her lot is too small. Because there is no administrative record before us, we cannot address these issues. Because Hyde challenged the validity of the renewed building permit in his appeal to the hearing examiner, who addressed only the 2006 variance, Hyde may raise his other proper challenges to the permit on remand. We underscore, however, that our holding forecloses the parties from challenging the validity of the 2006 variance and the 2007 BLA because these are both land use decisions that no one timely appealed within LUPA's 21-day limit.