

**PERMIT APPEALS OVERVIEW:
BUILDING A RECORD**

Land Use and Environmental Law Workshop

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Successful involvement in a local land use process requires a comprehensive understanding of the significance and role of the “administrative record.” The administrative record constitutes the factual information upon which the local decision making body bases its decision to approve or deny a project. The administrative record most often constitutes the sole factual basis upon which that decision is reviewed by the Superior Court, Court of Appeals, and Supreme Court. See RCW 36.70C.120; DeTray v. City of Olympia, 121 Wn. App. 777, 90 P.3d 1116 (2004). It is, therefore, imperative to ensure that the administrative record includes all of the evidence necessary to support your project if you are a developer or to support your arguments that a project should be mitigated or denied if you are a citizen or group of citizens involved in the land use process.

1. The Land Use Petition Act and the Administrative Record

1.1 The process for judicial review of project permit or subdivision decisions made by a city or county is set forth in the Land Use Petition Act, RCW Chapter 36.70C.¹

1.2 Review by the Superior Court constitutes appellate review on the administrative record before the local jurisdiction’s body or officer with the highest level of authority to make the final determination. DeTray v. City of Olympia, 121 Wn. App. 777, 90 P.3d 1116 (2004). 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

¹ LUPA applies any time you are appealing a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination on:

(a) An application for a project permit or other governmental approval required by law or real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public properties; excluding applications for legislative approvals such as area wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvements, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020.

quasi-judicial body or officer, with some exceptions. RCW 36.70C.120(1). The exceptions are:

(2) ... the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

RCW 36.70C.120(2). For land use decisions other than those described in RCW 36.70C.120(1), the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record. RCW 36.70C.120(3). The court may require or permit corrections of ministerial errors or inadvertent admissions in the preparation of the record. RCW 36.70C.120(4).

1.3 Pre-trial discovery is generally not allowed in a land use appeal. LUPA states:

The parties may not conduct pre-trial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a *prima facie* showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. ...

RCW 36.70C.120(5).

1.4 After a land use petition is filed, the local jurisdiction whose decision is at issue is required to submit to the court a certified copy of the record for judicial review of the land use decision. RCW 36.70C.110. The petitioner is required to prepare the transcript and submit it to the court. Id.

1.5 The Superior Court shall review the record and such supplemental evidence as is permitted and grant relief only if the party requesting relief has carried the burden of establishing that one of six standards for granting relief has been met. RCW 36.70C.130. Those standards are:

- 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.

2. Building Your Record Before a Local Jurisdiction

2.1 Know your permit and know your process.

2.1.1 The first step toward building a record is to become familiar with the legal standards for the relevant permit or land use decision and scope out the process that that permit approval requires. With almost every case, you will have to learn new rules and new standards. While there are some basic truths that stay consistent with every jurisdiction and every land use decision, there are also numerous differences in the rules and procedures that apply not only from one jurisdiction to another, but from one permit to another.

2.1.2 Your development may require a conditional or special use permit, a variance, a building permit, master plan approval, subdivision approval, a rezone, planned unit development approval, or other type of approval. To obtain a conditional use permit, for example, you will have to submit evidence that can be very different from what you would have to submit to obtain approval of a variance or a subdivision, or for other approvals. Also, evidence submitted for the same type of permit may differ from

one jurisdiction to another. To obtain a conditional use permit in King County, for example, you will have to submit somewhat different evidence than what you would have to submit to obtain a conditional use permit in the City of Lake Forest Park. Cf. KCC 21A.44.040 with LFPMC 18.54.030 (see attached excerpts from each code)

2.1.3 You also have to become familiar with the procedure that will be required for the particular approval being sought within the particular jurisdiction of the development. In other words, you don't only have to know what to submit, but you need to know when you will be allowed to submit it. State law dictates certain minimum process requirements in Ch. 36.70B RCW. But, like the legal standards, the procedure will differ from one approval type to another. Also, similar to the legal standards, the process for the same permit or approval will differ from county to county or city to city. The permit may be issued by the planning staff with no hearing or it may be subject to a public hearing before a hearing examiner. It may go through a planning commission with a recommendation to the City or County Council or Commissioners or it may be heard by the City or County Council or Commissioners only if an appeal is filed.

2.1.4 If you are representing individuals or organizations who are involved in the process and are not the applicant, you must immediately educate yourself about deadlines and the significance of each deadline. If you miss a deadline, you may lose your chance to build any record at all. See, e.g., Prekeges v. King County, 98 Wn. App. 275, 990 P.2d 405 (1999).

2.2 Advise your client about the significance of the record.

Emphasize to your clients (and your witnesses) that it is critical that you get all evidence in to prove your case at the right level. Once the record is closed, it often is too late to add any evidence later. See RCW 36.70C.120.

2.3 Collect information about the development.

2.3.1 If you are representing an individual or organization that is not the applicant, it is important that you collect all of the information that is in the city or county file on the project. Submit a Public Disclosure Request pursuant to Ch. 42.17 RCW immediately. Do this as early as possible – it can take a while for cities or counties to respond with the information. Be careful with the wording that you use in your request to ensure that you get everything. For example, if you only ask for documents in the conditional use permit file, you may miss important documents that are in a compliance or other file. Also, be sure that you did indeed receive all of the documents requested by carefully reviewing the contents to see if other documents are referred to that were not included in the production.

2.3.2 Consider early what discovery options, if any, you have. Most often in the land use process you are not allowed to engage in formal discovery. If you are allowed to conduct discovery, use depositions, interrogatories, and requests for admission to gather evidence.

2.3.3. Oftentimes the local code requires that the staff prepare a staff report prior to a hearing. It is obviously very important to obtain a copy of the staff report. The staff does not necessarily provide the report to the appellant or other interested citizens, and therefore, you must ask for a copy the report to be sure that you get it.

2.4 Prepare your evidence.

As you went through step 2.1.1 above and reviewed the legal standards applicable to this particular project, you developed an understanding of what is required to win your case. You have to now prepare the evidence that supports your case.

2.4.1 Think through in detail what legal issues are at issue in your case and what evidence you will need to present for each issue. Literally make a list of issues and corresponding supportive evidence.

2.4.2. Think about future judicial appeals and the story of the case you will want to tell then. This is a good approach to ensuring the record is complete at earlier level. Think also about basic visuals you might want in the future. -- things you will want a court to see.

2.4.3. You must know what the baseline record will be before the hearing starts. Collect a copy of every relevant document that will be put into the record by the local jurisdiction before the hearing. Do not assume that the local jurisdiction will put all of the file documents into the record. You will need to make sure that the documents in the file that you want to have in the record are indeed being included in the record. Some jurisdictions create a list of exhibits before the hearing begins, while others create the list of exhibits during the hearing itself. Some jurisdictions are more formal and hold a prehearing conference and/or require a formal exchange of all evidence between the parties prior to the commencement of the hearing. Others can be very informal and allow anyone to submit anything at anytime. Become familiar with what type of approach the jurisdiction will take early on in the process.

2.4.4 Consider whether evidence needs to be presented by a lay or expert witness. Have your clients, experts, and witnesses involved early so that you can obtain their opinions and information early in the process. Line up the proper lay and expert witnesses and prepare timetables for preparing them. Meet with your witnesses before the hearing and fully prepare them and yourself for their testimony – with special emphasis on preparing for cross examination if cross is allowed and anticipated at the hearing.

2.4.5 Focus on the credibility of your evidence – an expert discussing traffic impacts will be given greater weight than a lay witness.

2.5 Presenting Evidence

2.5.1 There are numerous different ways that you may find yourself having to present evidence in a land use matter. If you are the applicant, a significant amount of the evidence presented is done so as part of your application. If you are not the applicant, you may present evidence during a comment period, or during a hearing before a planning commission, a city or county council or county commissioners, a hearing examiner, or other decision maker. As an applicant, you will continue to submit evidence in response to any questions or comments from the local jurisdiction or other persons involved in the process. Strategic decisions about how to present evidence hinge on what the particular process is for the development permit and which decision maker you are presenting to. In other words, it is critical to know the process as you plan your strategy for presenting your evidence.

2.5.2 Educate yourself on the legal standard applicable for the admission of evidence in the matter. If evidence is submitted via comment letters or public testimony, there will be virtually no limits on admissibility (although the decision maker may not give irrelevant or uncredible evidence much weight). There are rules of admissibility of evidence before a hearing examiner, but they tend to be far more relaxed than those of state court, or even state administrative agencies. Most often, any relevant evidence will be admitted if it is the type which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. If you are appearing before a hearing examiner, check to see if the city or county has rules for the hearing examiner – the legal standard for the admission of evidence can often be found in those rules. Oftentimes the hearing examiner office itself will have formal rules of procedure that are not referred to in the local code (and therefore it is not obvious that they exist). Call the Examiner's office to see if such rules exist.

2.5.3 In a hearing before a hearing examiner, Oftentimes, appellants in hearing examiner cases only opportunity to get certain evidence in the record is through cross-examination of staff. Make sure correct staff will be present at the hearing.

2.5.4 If you are presenting evidence at a hearing, such as a hearing before the hearing examiner, a planning commission, or city council, keep in mind that the hearing is likely being recorded. Hearings are typically electronically recorded and such recordings become part of the official case record. Copies of the recordings of a particular proceeding are made available to the public on request and will be transcribed for any appeal. When people speak, be sure to remind them to identify themselves for the record if they have not done so. Also be sure that people describe the exhibit they are relying on or talking about so that the significance of what they are saying can be evident in a transcript. Keep track of simple logistics, such as making sure that everyone is using their microphone, and the like. If you ultimately end up litigating this case in Superior Court on appeal, you will be grateful for a clear and complete transcript.

2.5.5 Do not overlook the obvious. The evidence that you are presenting may ultimately be presented to the Superior Court who is not familiar with the area. Oftentimes, because a presentation is being made to a local body made up of individuals who are very familiar with the local area, obvious street names or vicinity descriptions may be taken for granted and never clearly presented.

Excerpt from the Lake Forest Park Municipal Code

Chapter 18.54

CONDITIONAL USES

18.54.030 Conditional uses in general.

The conditional uses contained in this chapter, or other such uses as may be compatible with the intent of this title may be authorized by the hearing examiner, following a public hearing and procedures established for conditional use permits. Conditional uses existing at the time of adoption of the ordinance codified in this title will not require approval after adoption of that ordinance. A conditional use may be authorized upon a finding that the proposal conforms to specific development criteria established for that use, if any, and that it meets the following minimum criteria:

- A. The proposed use is consistent with the policies and goals of the comprehensive plan;
- B. The proposed use is not materially detrimental to other property in the neighborhood;
- C. The proposed use will supply goods or services that will satisfy a need of the community;
- D. The proposed use is designed in a manner which is compatible with the character and appearance with the existing or proposed development in the vicinity of the subject property;
- E. The proposed use is designed in a manner that is compatible with the physical characteristics of the subject property;
- F. Any requested modifications to the standards of the underlying zoning shall require a variance and be subject to mitigation to minimize or remove any impacts from the modification;
- G. The proposed use is not in conflict with the health and safety of the community;
- H. The proposed use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood;
- I. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities;

J. The applicant's past performance regarding compliance with permit requirements and conditions of any previously issued land use permit including building permits, conditional uses or variances, shall be considered before approving any new permit. (Ord. 924 § 7, 2005; Ord. 773 § 3, 1999)

Excerpt from the King County Code:

21A.44.040 Conditional use permit. A conditional use permit shall be granted by the county, only if the applicant demonstrates that:

A. The conditional use is designed in a manner which is compatible with the character and appearance of an existing, or proposed development in the vicinity of the subject property;

B. The location, size and height of buildings, structures, walls and fences, and screening vegetation for the conditional use shall not hinder neighborhood circulation or discourage the permitted development or use of neighboring properties;

C. The conditional use is designed in a manner that is compatible with the physical characteristics of the subject property;

D. Requested modifications to standards are limited to those which will mitigate impacts in a manner equal to or greater than the standards of this title;

E. The conditional use is not in conflict with the health and safety of the community;

F. The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;

G. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities; and

H. The conditional use is not in conflict with the policies of the Comprehensive Plan or the basic purposes of this title. (Ord. 15032 § 51, 2004: Ord 11621 § 108, 1994: Ord. 10870 § 625, 1993).

21A.44.050. Special use permit. A special use permit shall be granted by the county, only if the applicant demonstrates that:

A. The characteristics of the special use will not be unreasonably incompatible with the types of uses permitted in surrounding areas;

B. The special use will not materially endanger the health, safety and welfare of the community;

C. The special use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;

D. The special use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts;

E. The location, size and height of buildings, structures, walls and fences, and screening vegetation for the special use shall not hinder or discourage the appropriate development or use of neighboring properties; and

F. The special use is not in conflict with the policies of the Comprehensive Plan or the basic purposes of this title. (Ord. 10870 § 626, 1993).

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