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NO. 65408-0 I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re City of Lynnwood North-East-South Annexation Proposal,
Snohomish County, Washington, File No. 01-2009

City of Mill Creek, a Washington municipal corporation,

Appellant,

v.

Washington State Boundary Review Board for Snohomish County; City of
Lynnwood, a Washington municipal corporation; Snohomish County, a
Washington municipal corporation; City of Mukilteo, a Washington
municipal corporation; Snohomish County Fire District No. 7, a
Washington municipal corporation; Snohomish County Fire District No. 1,
a Washington municipal corporation; Opus Northwest, LLC; Gordon
Ness, Clint Olson; and Mark Beales,

Respondents.

BRIEF OF RESPONDENT WASHINGTON STATE BOUNDARY
REVIEW BOARD FOR SNOHOMISH COUNTY

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. AUTHORITY 1

A. The BRB Will Not Advocate For One Party’s Position Over Another’s. 1

B. Where The BRB’s Decision Is Supported By Substantial Evidence, the Court Should Uphold The BRB’s Decision. 2

III. DISCUSSION 4

A. Appearance of Fairness. 4

B. BRB Objectives. 6

IV. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Cases

Ancheta v. Daly, 77 Wn.2d 255, 461 P.2d 531 (1969)..... 3

Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. dismissed*,
479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987)), *cert.*, --- U.S. ---,
112 S.Ct. 1672, 118 L.Ed.2d 391 (1992)..... 3

City of Richland v. Franklin Cy. Boundary Rev. Bd., 100 Wn.2d 864, 676
P.2d 425 (1984) 3

Kaiser Aluminum v. Labor & Industries, 121 Wn.2d 776, 854 P.2d 611
(1993)..... 2

King County v. Central Puget Sound Bd., 91 Wn. App. 1, 951 P.2d 1151
(1998)..... 5

King County v. King County Boundary Review Bd., 122 Wn.2d 648, 860
P.2d 1024 (1993) 2, 3, 4

Kitsap County Fire Protection District No. 7 v. Kitsap County Boundary
Review Board, 87 Wn. App. 753, 943 P.2d 380 (1997)..... 1, 2

Olmstead v. Department of Health, Medical Section, 61 Wash. App. 888,
812 P.2d 527 (1991) 3

Snohomish County v. Hinds, 61 Wn. App. 371, 810 P.2d 84 (1991)..... 3

Summer-Tacoma Stage Co. v. Department of Public Works, 142 Wash.
594, 254 P. 245 (1927) 2

Veredale Valley Citizens' Planning Comm. V. Board of County Comm'rs,
22 Wn. App 229, 588 P.2d 750 (1978)..... 2

World Wide Video, Inc. v. Tukwila, 117 Wn.2d 382, 817 P.2d (1991)..... 3

Statutes

RCW 36.93.160(5)..... 2

RCW 36.93.160(6)..... 2

RCW 36.93.180 4, 6

RCW 42.36.080 5

I. INTRODUCTION

On March 6, 2009, the City of Lynnwood filed a Notice of Intention with the Washington State Boundary Review Board for Snohomish County (the “BRB”) proposing an election method annexation of approximately 3,690 acres. The BRB’s jurisdiction was invoked by the Cities of Lynnwood and Mill Creek, Snohomish County, and Snohomish County Fire Districts Nos. 1 and 7.

The BRB issued its written findings on June 2, 2009. Appellant, City of Mill Creek, filed its appeal to the Snohomish County Superior Court on June 30, 2009. The Superior Court upheld the Board’s decision following a hearing on January 8, 2010. Mill Creek filed an appeal to this Court on May 14, 2010.

II. AUTHORITY

A. THE BRB WILL NOT ADVOCATE FOR ONE PARTY’S POSITION OVER ANOTHER’S.

As a quasi-judicial body, the BRB “has no legal interest in the ultimate decision, [it] represents the public interest and is concerned with assisting the court to make a proper judgment.” Kitsap County

Fire Protection District No. 7 v. Kitsap County Boundary Review Board, 87 Wn. App. 753, 760, 943 P.2d 380 (1997) (citing Veradale Valley Citizens' Planning Comm. V. Board of County Comm'rs, 22 Wn. App 229, 233, 588 P.2d 750 (1978) (citing Summer-Tacoma Stage Co. v. Department of Public Works, 142 Wash. 594, 597, 254 P. 245 (1927)).

It is the parties who appear before a quasi-judicial body that continue to advocate their respective positions on judicial review - not the quasi-judicial body. See Kaiser Aluminum v. Labor & Industries, 121 Wn.2d 776, 854 P.2d 611 (1993).

B. WHERE THE BRB'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE, THE COURT SHOULD UPHOLD THE BRB'S DECISION.

The Court's review is limited to the record before the Board. "Upon appeal of a superior court decision reviewing a boundary review board decision, we apply the standards contained in RCW 36.93.160(6) directly to the record before the board rather than to the decision of the superior court." King County v. King County Boundary Review Bd., 122 Wn.2d 648, 671-672, 860 P.2d 1024 (1993). RCW 36.93.160(5). The Court reviews that record to determine whether substantial evidence exists in the record to sustain the Board's decision. *Id.*, at 672.

“A decision is supported by substantial evidence if ‘the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.’” King County, at 675. (quoting World Wide Video, Inc. v. Tukwila, 117 Wn.2d 382, 387, 817 P.2d (1991) (quoting Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987)), *cert.*, --- U.S. ---, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992). Accord, Olmstead v. Department of Health, Medical Section, 61 Wash. App. 888, 893, 812 P.2d 527 (1991). This “is an extremely limited form of judicial review.” *Id.*, at 675. (Citing Ancheta v. Daly, 77 Wn.2d 255, 260, 461 P.2d 531 (1969). The Court may not weigh the evidence and may not substitute its judgment for that of the Board. Snohomish County v. Hinds, 61 Wn. App. 371, 379-80, 810 P.2d 84 (1991). The Court should give deference to the Board’s expertise, just as an appellate court gives deference to a trial court’s observation of demeanor and testimony of witnesses. *Id.*, at 378-79; Ancheta, at 260. The Board need not give reasons for its conclusions if the record contains substantial evidence in support of the conclusions. City of Richland v. Franklin Cy. Boundary Rev. Bd., 100 Wn.2d 864, 871, 676 P.2d 425 (1984).

It is not necessary that all, or even a majority, of the objectives be realized. As the Washington Supreme Court has stated on this exact issue:

While substantial evidence review of boundary review board decisions is not merely an exercise in counting objectives, our review of the record and the statutory objectives convinces us there is sufficient evidence to convince a fair-minded person that overall the objectives of RCW 36.93.180 would be furthered rather than hindered by approval of the proposed annexations. The decision of the Board was therefore supported by substantial evidence.

King County v. King County Boundary Review Bd., 122 Wn.2d 648, 680, 860 P.2d 1024 (1993). Where, as in King County, the decision is supported by substantial evidence, the Court should uphold the BRB's decision.

III. DISCUSSION

Appellant contends that the BRB's decision approving the Lynnwood Proposed North-East-South Annexation (BRB No. 01-2009) should be reversed because (1) the BRB engaged in unlawful procedure by violating the Appearance of Fairness Doctrine; and/or (2) because the BRB's decision violated five (5) of the statutory objectives under RCW 36.93.180 (the "BRB Objectives").

A. APPEARANCE OF FAIRNESS.

As correctly cited in Appellant's Brief, "[w]hen a party does not take advantage of the opportunity to preclude a decision-maker from

participating in a decision on appearance of fairness grounds, that party waives the right to later challenge the decision on such grounds.” King County v. Central Puget Sound Bd., 91 Wn. App. 1, 34, 951 P.2d 1151 (1998). This has been codified in RCW 42.36.080.

RCW 42.36.080 states:

Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.

On May 12, 2009, the BRB held a public hearing on proposed annexation BRB No. 01-2009. At the outset of the hearing, the chairman of the BRB, Alison Sing, made a conflict disclosure. At the conclusion of the disclosure, Chairman Sing stated “[h]aving made these two disclosures, I believe I’m capable of participating and rendering an impartial decision of the matter before this body.” Record (Sub 21) SC BRB Rec 000016.

No objections were made either immediately following the disclosure or at any other time during the hearing. The following individuals spoke on behalf of the appellant at the May 12th public hearing: Bill Trimm (Director of Community Development for the City of

Mill Creek) and Scott Missall (City Attorney for the City of Mill Creek). Both individuals discussed the BRB Objectives. However, neither individual raised a challenge to Chairman Sing's disclosure at any time during the hearing.

B. BRB OBJECTIVES.

In its decision, the BRB must attempt to achieve the objectives set forth in RCW 36.93.180. RCW 36.93.180 states as follows:

The decisions of the boundary review board shall attempt to achieve the following objectives:

- (1) Preservation of natural neighborhoods and communities;
- (2) Use of physical boundaries, including but not limited to bodies of water, highways, and land contours;
- (3) Creation and preservation of logical service areas;
- (4) Prevention of abnormally irregular boundaries;
- (5) Discouragement of multiple incorporations of small cities and encouragement of incorporation of cities in excess of ten thousand population in heavily populated urban areas;
- (6) Dissolution of inactive special purpose districts;
- (7) Adjustment of impractical boundaries;
- (8) Incorporation as cities or towns or annexation to cities or towns of unincorporated areas which are urban in character; and

(9) Protection of agricultural and rural lands which are designated for long term productive agricultural and resource use by a comprehensive plan adopted by the county legislative authority.

On May 19, 2009, the BRB met to deliberate and reach a decision on proposed annexation BRB No. 01-2009. During the meeting, the BRB members discussed each of the nine (9) BRB Objectives. As to the specific BRB Objectives Nos. 1, 2, 3, 4, and 7, discussed in appellant's brief, the BRB discussed and deliberated whether each of these objectives were achieved, See Record (Sub 21) SC BRB Rec 000136 line 20 (Objective 1); Record (Sub 21) SC BRB Rec 000140, line 13 (Objective 2); Record (Sub 21) SC BRB Rec 000143, line 11 (Objective 3); Record (Sub 21) SC BRB Rec 000148, line 5 (Objective 4); and Record (Sub 21) SC BRB Rec 000149, line 23 (Objective 7). The BRB determined that the objectives had been met.¹ Therefore, in the BRB's Written Decision, it found that the annexation furthered these objectives.

¹ The BRB determined that Objectives 5, 6, and 9 did not apply. Record (Sub 21) SC BRB Rec 000149, line 22, and Record (Sub 21) SC BRB Rec 000152, line 25. The BRB discussed and deliberated Objective 8, Record (Sub 21) SC BRB Rec 000150, line 20. However, the appellant did not take issue with the Board's determination in Objective 8.

IV. CONCLUSION

The BRB has reviewed the appellant's brief and attempted to provide the court with the information necessary to make a proper judgment after considering the argument of the parties who continue to advocate their respective positions on appeal.

Respectfully submitted this 30 day of September, 2010.

Mark K. Roe
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Attorney for respondent BRB

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Respondents.

DECLARATION OF SERVICE OF BRIEF OF RESPONDENT
WASHINGTON STATE BOUNDARY REVIEW BOARD FOR
SNOHOMISH COUNTY

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I, R. Lynne Jardine, hereby certify that on the 30th day of September, 2010, I served a true and correct copy of the Reply Brief of Respondent Washington State Boundary Review Board for Snohomish County upon the person/persons listed herein by the following means:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 30th day of September, 2010.



R. Lynne Jardine
 Legal Asst. to George B. Marsh,
 Deputy Prosecuting Attorney