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COURT OF APPEALS
DIVISION II

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NO. 35956-1

STATE OF WASHINGTON
BY dm
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NEIL TRIEBENBACH,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF FISH AND WILDLIFE,

Respondent.

BRIEF OF RESPONDENT

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This matter comes before the Court on a Petition for Judicial Review of a Final Order issued by the Director of the Washington State Department of Fish and Wildlife (WDFW). The order arose in connection with WDFW's acquisition of an RV park that the agency plans to utilize as part of a habitat restoration project. The order grants the Appellant, Neil Triebenbach, \$5,250 in replacement housing payments, the statutory maximum, and \$450 in moving expenses under RCW 8.26.

WDFW computed the amount of the relocation assistance pursuant to RCW 8.26.055, and associated regulations, based upon its determination that the Appellant was required to re-locate a mobile dwelling, the travel trailer owned by the Appellant and utilized to house his family, to another RV park. Appellant counters that even though he retains ownership of the dwelling – his travel trailer – he should be viewed as a person who has been displaced from a dwelling pursuant to RCW 8.26.045 and is therefore entitled to \$22,500 of Relocation Assistance. Because WDFW correctly utilized RCW 8.26.055, and because its computation of Relocation Assistance is supported by substantial evidence, the Department's Final Order should be affirmed.

I. STATEMENT OF THE CASE

In the spring of 2001, WDFW purchased the South Sequim Bay RV Park. AR 23. The property is located five miles outside of Sequim. AR 27. Because WDFW purchased the property to be utilized as part of an estuary restoration project, the RV park occupants were required to move. AR 23.

Appellant and his family were tenants at the South Sequim Bay RV Park from sometime before October 1998 until June 2001. AR 23. They lived in a large, well-maintained travel trailer, which they parked on a rented RV site. AR 20.

On March 27, 2001, WDFW provided written notice to the Appellant that it planned to purchase the South Sequim Bay RV Park and that the Appellant would be required to move. AR 23, 501. On March 30, 2001, WDFW issued a letter to the Appellant outlining his family's eligibility for relocation assistance under the criteria established in RCW 8.26. AR 24-25. The notice informed the Appellant the family was entitled to a rent supplement payment (housing replacement payment) of \$4,200 based on the cost to rent a RV site in a facility comparable to the South Sequim Bay RV Park in the Sequim area. The Appellant was also entitled to a moving expense payment of \$450. AR 24, 510-11. The notice listed three comparable RV parks in the Sequim area with space available to rent, and the amount of rent for each facility.

The South Sequim Bay RV Park purchased by WDFW was located five miles east of Sequim. AR 28. Its amenities included sewage, water and electrical hook-ups, and both poured concrete and gravel pads. AR 536. South Sequim Bay RV Park did not have cable television service or any on-site laundry facilities. Appellant's commute to work from the South Sequim Bay RV Park to Poulsbo was approximately 38 miles. AR 30. The work commute for the Appellant's wife was approximately seven miles.

Pursuant to RCW 8.26, WDFW located three comparable properties and picked one as the best comparable property for purposes of calculating housing replacement payments for the tenants of South Sequim Bay RV Park. The tenants would not be required to move to the best comparable park. They could relocate to any place of their own choosing. WAC 468-100-402(2)(a). In that case, the housing replacement payment would be the lesser of the difference between the monthly rate at South Sequim Bay and the new park, and the difference between South Sequim Bay RV Park and the park picked to be the best comparable park.

The three RV parks chosen as comparables by WDFW were Sunshine RV Park, Arney's RV Park, and Conestoga RV Park. AR 24-25. Sunshine RV Park, chosen by WDFW as the best comparable, was located six miles from Sequim. AR 27. Its amenities included electrical, septic, water hook-ups, restroom and shower facilities, and paved interior roads with easy access to a state highway. AR 534. It also had laundry facilities, a recreation room, picnic tables, and horseshoe pits. The distance between Mr. Triebenbach's place of employment and Sunshine RV Park was approximately 50 miles, an increase of about 12 miles. AR 17, 27. From Sunshine RV Park, the increase in driving distance to work for Mrs. Triebenbach was no more than a mile. AR 17.

WDFW computed the Relocation Assistance for Appellant at \$4,200 in replacement housing (rent supplement) payments, and \$450 in moving expense payments. Mr. Triebenbach initiated an administrative

appeal of WDFW's computation of the available relocation assistance. The rent supplement was increased to \$5,200 the statutory maximum under RCW 8.26.055 based upon information that became known during the administrative review of WDFW's determination. AR 510-11. At the close of the administrative review, the Hearings Officer issued an Initial Order determining that the Appellant was entitled to \$5,250 in housing replacement payments and \$450 in moving expense payments. AR 22. The Hearing Officer's Initial Order was upheld in the Final Order issued by the Director of WDFW in May 2003. AR 23.

Mr. Triebenbach subsequently appealed the Director's Order to the Clallam County Superior Court. The Honorable George L. Wood upheld the Director's Order in its entirety and dismissed the Appellant's petition. This appeal followed.

II. SUMMARY OF THE ARGUMENT

The Appellant appears to assert that the Final Administrative Order issued by WDFW erred in three respects. First, WDFW erred in its determination that the Appellant was not entitled to relocation assistance in the form of reimbursement for a new home. This argument fails because the Appellant was not "displaced from a dwelling actually owned and occupied" by him. The Appellant simply had to relocate the travel trailer that served as his family's residence.

Second, Appellant appears to argue WDFW erred by not computing the Relocation Assistance under former WAC 468-100-503, which governed the relocation of mobile home owners at the time the

Appellant was required to relocate¹. WDFW's order should be sustained because a recreational travel trailer (RV) is not equivalent to a mobile home. Furthermore, even if the Appellant's RV qualified as a mobile home under former WAC 468-100-503, WDFW did not purchase the Appellant's RV and did not displace him from the RV. WDFW acquired only the RV site that the Appellant rented and the Appellant was able to continue occupying the RV as his family's dwelling.

Finally, Appellant appears to argue that WDFW's selection of comparable properties for purposes of calculating the Relocation Assistance was based upon a faulty analysis of commuting distances and essential services. He asserts that the "Last Resort Housing" provision of RCW 8.26.075 should have been invoked. That provision allows an agency to exceed the statutory maximum amount of relocation assistance where comparable replacement housing is not available. Because there is substantial evidence in the record to support WDFW's identification of comparable RV sites, the agency's Final Order should be sustained.

A. Standard of Review

RCW 8.26.010(3) provides that any final determination under RCW 8.26 is subject to review under RCW 34.05, the Administrative Procedure Act (APA). The appealing party carries the burden of proof in proceedings for judicial review of an agency action. *See* RCW

¹ WAC 468-100-503 was revised in 2006 and is now found at WAC 468-100-502.

34.05.570(1)(a) providing that "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity."

The relevant standards of judicial review of orders are set forth in RCW 34.05.570(3):

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

* * *

- (i) The order is arbitrary or capricious.

The reviewing court applies these standards when reviewing the record developed in the administrative review proceedings. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993); *King Cy. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the "error of law" standard, as found in RCW 34.05.570(3)(d), the court engages in a *de novo* review of the agency's legal conclusions. *See generally Franklin Cy. Sheriff's Office v. Sellers*,

97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983).

Agency findings of fact are entitled to deference and may be overturned only if they are not supported by "substantial evidence". RCW 34.05.570(3)(e). *Terry v. Empl. Sec. Dep't.*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). Under the "substantial evidence" standard, there must be sufficient evidence to "convince an unprejudiced, thinking mind of the truth of the declared premise". *Jefferson Cy. v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987, *rev. denied*, 124 Wn.2d 1029, 883 P.2d 326 (1994). This standard is "highly deferential" to the agency fact finder. *ARCO Prod. Co. v. Washington Util. and Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Unchallenged findings of fact are verities on appeal. *Forsman v. Empl. Sec. Dep't.*, 59 Wn. App. 76, 79, 795 P.2d 1184 (1990).

B. No error was made in the determination of the Relocation Benefits owed to the Appellant.

RCW 8.26, the Relocation Assistance Act, was adopted by the Legislature in 1988. The purpose of the Act was to allow for fair and equitable treatment of persons who are displaced as a direct result of public works programs of the state and to minimize the hardship on such affected persons. If a person displaced by state action qualifies pursuant to law, then the person is entitled to Relocation Assistance pursuant to the applicable section of RCW 8.26.

Appellant asserts that he is entitled to the statutory maximum of \$22,500 pursuant to RCW 8.26.045(1).² That statute authorizes relocation assistance to “any displaced person who is displaced from a dwelling **actually owned** and occupied by the displaced person”. (Emphasis added). In this case, Appellant was not displaced from any property that he actually owned. Appellant’s RV was never acquired by WDFW. Rather, the Appellant was required to move his travel trailer from the RV site that he rented.

Appellant’s arguments about the character of his dwelling are to no avail. By its plain terms, RCW 8.20.045 applies only when a person is “displaced from” some dwelling that he or she own. Because Appellant’s dwelling is mobile, remains his property, and was relocated to another location, the provisions of RCW 8.26.045 simply cannot apply. In these circumstances, the Appellant was only entitled to relocation assistance in moving his dwelling to another RV site.³ *See* RCW 8.26.055.

² Even assuming that the Housing of Last Resort Provision applied, Appellant has not provided any argument or factual basis in the record why \$22,500 would be a suitable and reasonable payment.

³ Appellant appears to be under the mistaken notion that WDFW’s order determined that his trailer is not a dwelling. That is incorrect. WDFW’s determination was that the Appellant did not qualify for benefits under RCW 8.26.045 because WDFW did not displace him from any dwelling that he owned. Instead, WDFW determined that the Appellant was eligible for relocation benefits under RCW 8.26.055 dealing with tenancies as a renter of the RV site that WDFW acquired.

C. WDFW properly identified Sunshine RV Park as a Comparable Replacement Property for purposes of computing Relocation Benefits.

Under RCW 8.26.055, displaced tenants are provided relocation benefits. Under that statute, WDFW must evaluate comparable properties in order to calculate the Relocation Benefit that a displaced tenant is entitled to receive. The statute provides for a maximum benefit of \$5,250.

Because an agency cannot require a person to move without ensuring that comparable replacement housing is available, RCW 8.26.075 contains an exception to the statutory limits on replacement housing payments. RCW 8.26.075 enables an agency to proceed with a project on a timely basis by granting the agency authority to exceed the statutory limits in certain, limited situations, at the option of the agency.⁴

RCW 8.26.075 provides, in relevant part:

Assurance of availability of housing-Exceptions.

(1) If a program or project undertaken by a displacing agency cannot proceed on a timely basis because comparable replacement dwellings are not available, and the head of the displacing agency determines that the dwellings cannot otherwise be made available, the head of the displacing agency may take such action as is necessary or appropriate to provide the dwellings by use of funds authorized for the project. The

⁴ Referred to as "housing of last resort" this reflects the heading in the applicable WAC, which implements RCW 8.26.075. See WAC 468-100-403(2).

displacing agency may use this section to exceed the maximum amounts that may be paid under RCW 8.26.045 and RCW 8.26.055 on a case-by-case basis for good cause as determined in accordance with the rules adopted by the lead agency.

Thus, RCW 8.26.075 provides an exception to the maximum amount of \$5,250 for rental assistance. In order for the exception to apply, the head of the displacing agency must make a determination that there is no comparable replacement housing for the displaced person to move. *See also* WAC 468-100-403(2). When such a determination is made, the agency may use funds authorized by the project to exceed the \$5,250 limit. *Id.*

Appellant argues that WDFW did not identify a true comparable replacement property because of the differing commuting distances. He appears to argue that the lack of a comparable property required WDFW to implement the “Last Resort Housing” provisions of RCW 8.26.075, and provide for an increased benefit, prior to requiring him to vacate the RV facility WDFW had acquired. Because substantial evidence supports WDFW’s identification of comparable RV rental sites, the Appellant’s argument should be rejected.

RCW 8.26.020(7) and WAC 468-100-002(5) set forth the criteria for determining comparable replacement properties. The definition of “comparable replacement dwelling” is found in RCW 8.26.020(7) and WAC 468-100-002. The definition in statute contains six elements that

must be considered in determining if a property is a comparable replacement. RCW 8.26.020(7) provides:

The term "comparable replacement dwelling" means any dwelling that is (a) decent, safe, and sanitary; (b) adequate in size to accommodate the occupants; (c) within the financial means of the displaced persons; (d) functionally equivalent; (e) in an area not subject to unreasonably adverse environmental conditions; (f) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

The evidence demonstrates that the comparable RV facility identified by WDFW – Sunshine RV park – is "in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment". Appellant's wife works in Sequim. With a move to the Sunshine RV Park, her commute may have increased by a mile. AR 17. Moving to Sunshine RV Park increased the Appellant's commuting distance to Poulsbo by 12 miles. Given the fact that Appellant was already commuting 38 miles, this increase in mileage was not unreasonable, especially in light of the fact that within four to five months after leaving the South Sequim Bay RV Park, the Appellant and his family opted to move to Sunshine RV Park. AR 30.

Additionally, WAC 468-100-301(7) provides that a person may claim moving expenses for moves of up to 50 miles, and in some cases more than 50 miles, thus contemplating that displaced persons would commute that far. AR 18.

In these circumstances, the superior court correctly concluded that substantial evidence supports the Department's identification of Sunshine RV Park as a comparable property. The additional commuting distances for the Appellant and his wife are not unreasonable and there is nothing in the record, besides the Appellant's conclusory statements, that tends to negate this conclusion.

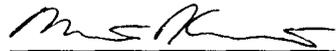
Because the Appellant received the statutory maximum amount of relocation assistance provided to displaced tenants, there is also no genuine issue regarding WDFW's computation of the actual benefit under the comparable property that was selected. In these circumstances the Department was allowed to require the Appellant to vacate the RV Park it had acquired and the "Housing of Last Resort provisions are inapplicable".

III. CONCLUSION

WDFW respectfully requests this Court sustain the judgment of the superior court affirming WDFW's Final Order regarding the relocation assistance due to the Appellant.

RESPECTFULLY SUBMITTED this 18th day of June, 2007.

ROBERT M. MCKENNA
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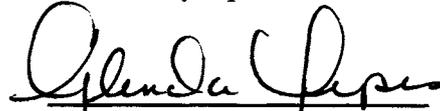
CERTIFICATE OF
SERVICE

I certify I served a copy by U. S. Mail Postage Prepaid a copy of Washington State Department of Fish and Wildlife's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

Neil Triebenbach
191 Hodis Ln
Sequim, WA 98382

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of June, 2007, at Olympia, WA.



GLENDAL. YEPES
Legal Assistant to
Matthew R. Kernutt