

NO. 36756-4-II

FILED
COURT OF APPEALS
DIVISION II

09 SEP 22 PM 2:07

WASHINGTON STATE COURT OF APPEALS

STATE OF WASHINGTON

BY cm
DEPUTY

DIVISION TWO

ROBERT OLSON and SANDRA OLSON, a marital community,

Appellant/Cross-Respondent,

v.

CITY OF TACOMA,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S
REPLY BRIEF

ELIZABETH A. PAULI, City Attorney

JEAN P. HOMAN
WSB# 27084
Attorney for Respondents

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

ORIGINAL

TABLE OF CONTENTS

I. The Olsons concede that their claim of “arbitrary and capricious” action is based on the nuisance violations; thus, there is no question that their RCW 64.40 claim was rendered moot when the nuisance violations were dismissed.....	1
II. The temporary driveway approach permit did not authorize either the structure actually built or construction (<i>of any kind</i>) on the City’s property.	2
III. The City’s decision to stop the Olsons construction in the right-of-way was not arbitrary and capricious.....	7
IV. Conclusion	13

TABLE OF AUTHORITIES

CASES:

Hayes v. City of Seattle,
131 Wn.2d 706, 934 P.2d 1179 (1997).....13

Landmark Development, Inc. v. City of Roy,
138 Wn.2d 561, 980 P.2d 1234 (1999).....13

STATUTES:

RCW 64.401, 2, 14

RCW 64.40.0301

OTHER AUTHORITIES:

TMC 10.145, 6, 8

TMC 10.14.020.F4

TMC 10.14.030.B.33

TMC 10.14.030.C6

TMC 10.14.050.A.24

TMC 10.14.050.A.44

TMC 10.14.050.B.54

TMC 10.14.050.B.6.e4

TMC 10.14.050.C.24

- I. The Olsons concede that their claim of “arbitrary and capricious” action is based on the nuisance violations; thus, there is no question that their RCW 64.40 claim was rendered moot when the nuisance violations were dismissed.

RCW 64.40 requires that before a party can commence an action under that chapter, he must exhaust his administrative remedies. See RCW 64.40.030. In this case, the Olsons did exhaust their administrative remedies and in so doing, obtained the exact relief they were seeking. Thus, their claims are moot under RCW 64.40.

As outlined in the City's opening memorandum, after the City issued the notice of violation for nuisance, the Olsons sought review of the violations from the City Building Official. CP 225-232. After the Building Official upheld the nuisance violations, the Olsons then filed an appeal with the City's Hearing Examiner. CP 234-244. The Olsons specifically asked the City Hearing Examiner to “grant the appeal and rescind the faulty Notice.” CP 244.

In fact, the Olsons concede in their brief to this court that they obtained the relief they sought. In their brief, the Olsons state that their “claim of City arbitrary and capricious action is based not on a stop work order...but rather on the City's pursuit of nuisance enforcement action against the Olsons.” Appellant's Response, p.

22. Given that the nuisance violations were the “arbitrary and capricious” conduct upon which their RCW 64.40 claims are based, the dismissal of those violations rendered any claim of “arbitrary and capricious action” moot.

II. The temporary driveway approach permit did not authorize either the structure actually built or construction (of any kind) on the City’s property.

In their response, the Olsons argue that “the City continues to impermissibly attack the Olsons’ driveway permit.” Response Brief of Appellants, p. 10. The Olsons’ argument misses the point. The City does not now, and has never, challenged the permit itself. The temporary driveway approach permit is what it is. The crux of this case, however, is the fact that the Olsons undertook construction not authorized by the permit and they did so on property that they did not own.

The temporary driveway approach issued by the permit counter – by its express terms – only authorized construction on the Olsons’ private property and did not authorize construction of any type on the undeveloped Crystal Springs right-of-way. CP 217. At the top of the permit, the Site Address for which the permit was

issued is identified as “1616 Crystal Springs Road¹.” Id. Similarly, the “Project Description” on the permit also identifies the subject property as “1616 Crystal Springs Road.” Id. Mr. Olson conceded during his deposition that 1616 Crystal Springs Road is the address for his private property and not the address for the undeveloped Crystal Springs right-of-way. CP 477, lines 4-6 (“Q: Isn’t that correct. The right-of-way isn’t part of 1616 Crystal Springs Road? That’s your property? A: That’s right.”) Thus, contrary to the Olsons’ repeated protests to the contrary, Mr. Olson did not obtain a permit authorizing the construction of a temporary driveway approach – or anything else - on the undeveloped Crystal Springs right-of-way, property owned in fee by the City of Tacoma². Mr. Olson only obtained a permit authorizing construction of a temporary driveway approach on his own property.

Moreover, as previously outlined in the City’s opening brief, the structure built by Mr. Olson on the undeveloped Crystal Springs

¹ TMC 10.14.030.B.3 requires that the permittee provide the City of Tacoma with the “exact location of the proposed work, giving the street address or legal description of the property involved.”

² In their response brief, the Olsons point out that the City did not provide a citation to the record to support the fact that the City owns the undeveloped Crystal Springs right-of-way in fee. The City apologizes for the oversight and would direct the Court’s attention to the title report and litigation guarantee issued by Ticor Title Company, found at CP 196-215, which establishes the City’s fee ownership of the undeveloped right-of-way.

right-of-way does not meet the definition of or requirements for a driveway as set forth in Chapter 10.14 of the Tacoma Municipal Code. TMC 10.14.020.F defines “driveway” as “any area, construction or facility between the roadway of a street to private property.” “Roadway” is expressly defined in the statute as “the paved, improved or proper driving portion of a street, designed or ordinarily used for vehicular travel.” TMA 10.14.020.B. The Code further provides that “[e]very driveway must provide access to an off-street parking area located on private property[,]” and that “all driveways, including returns, shall be confirmed within lines perpendicular to the curb line and passing through the property corners.” (emphasis added) TMC 10.14.050.A.2 and A.4. See also TMC 1.14.050.C.2 (which states that where concrete curbs and gutters are not pre-existing and are not being constructed in conjunction with a driveway, a temporary driveway “may be constructed from the line of the street roadway to the property line.” (emphasis added)) Finally, the Code allows for a maximum of two driveways for any one ownership unless the single ownership is developed into more than one unit or operation. TMC 10.14.050.B.5 and .6.e.

Nothing about the structure built by the Olsons on the undeveloped Crystal Springs right-of-way satisfies the requirements of Tacoma's Code. The structure built by the Olsons in the right-of-way is not even a driveway, as that term is defined by the Code, because: 1) the purpose of the proposed construction was not to provide access from the "roadway" of a street to the Olson's private property as the structure does not connect to the Olson's private property; 2) the Crystal Springs right-of-way is undeveloped (not paved or otherwise improved), and thus, there is no roadway or street at that location to connect to private property; and 3) the proposed construction was and is running parallel to the curb line (if there were one), not perpendicular. Further, the Olsons' property already had the maximum number of driveways allowed under the Code for a single family residence built on a single ownership. CP 468 - 469. The structure built by the Olsons on the Crystal Springs right-of-way does not and cannot meet the requirements of Chapter 10.14 TMC. Consequently, the temporary driveway approach permit issued is not valid for and does not authorize construction of the structure actually built³.

³ The Olsons repeatedly assert that they were simply operating pursuant to a valid and legal permit. Their assertions in this regard are conclusory and self serving. Moreover, this assertion ignores that the Olsons had already been told

Finally, and most importantly, the issue is not whether the structure built by the Olsons meets the requirements of TMC 10.14. The issue is whether the structure built by the Olsons required a wetland/stream development permit under City's critical areas preservation ordinance. It did and the Olsons knew it. The Olsons keep saying that because they got a permit for a temporary driveway approach, they were entitled to build what they did, without any other permits or approval. This position is directly contrary to the City's driveway ordinance and to the express language on the permit itself. TMC 10.14.030.C expressly states that "[n]o plan shall be approved nor permit issued where it appears that the proposed work, or any part thereof, conflicts with the provisions of this chapter or any other ordinance of the City of Tacoma; *nor shall issuance of a permit be construed as a waiver of the Zoning Ordinance* or any other ordinance requirements concerning the plan." (emphasis added) TMC 10.14.030.C. Similarly, the permit itself contains the following admonition and qualification:

by the Land Use Administrator (both orally and in writing) that they needed to obtain a wetland/stream development permit in order to undertake any activity in the right of way. See Katich Affidavit, CP 121 – 136, and Exhibit 3 thereto.

PERMISSION IS HEREBY GIVEN TO DO THE DESCRIBED WORK, AS NOTED ON THE REVERSE SIDE, ACCORDING TO THE CONDITIONS HEREON AND ACCORDING TO THE APPROVED PLANS AND SPECIFICATIONS PERTAINING THERETO, SUBJECT TO COMPLIANCE WITH THE ORDINANCES OF THE CITY OF TACOMA.

(emphasis added; capitalization in original) Exhibit 2 to Homan Affidavit, p. 2. Thus, the Olsons could not simply negate the need for a wetland/stream development permit by getting an over-the-counter permit for a temporary driveway approach.

III. The City's decision to stop the Olsons construction in the right-of-way was not arbitrary and capricious.

The Olsons contend that the City's "post permit" actions were arbitrary and capricious and offer four arguments in support of their contention: 1) that the City never issued a "stop work order;" 2) that the City's nuisance enforcement action was based on unpermitted activity and they had a permit; 3) that the City did not pursue wetland violations as part of the nuisance action; and 4) there is no evidence that the Olsons actually filled a wetland. All of these contentions are without merit.

First, while the Olsons complain that the City did not issue a written stop work order, they cite to no authority in support of their

contention that a written stop work order was necessary. As discussed at length above, the structure built by the Olsons in the right of way were not authorized by the temporary driveway approach permit. The permit in question authorized only the construction of a temporary driveway approach on the Olsons' private property and did not authorize any construction on the undeveloped right-of-way. Moreover, the structure built by the Olsons did not meet the definition or requirements of a driveway approach as set forth in TMC 10.14. More importantly, however, the City did take all necessary steps to stop the Olsons unauthorized construction in the right of way. As Mr. Olson admitted in his deposition, at least two City employees – Victor Workman and Kris McColeman – verbally told him to stop his work in the right-of-way. CP 464, lines 1-7; CP 465, lines 20-25; CP 479 - 480. Thereafter, another City official issued the Nuisance violation and Nuisance Inspection Code Report, dated May 20, 2004. CP 221 - 223. See also CP 452 – 454 (Solverson Affidavit). After the City became aware that the Olsons had continued their illegal activity in the right-of-way, even after being told by two City employees to stop and receiving a written nuisance notice, the City then placed cement barriers in the right-of-way to prevent any

further activity. CP 452 - 454. Thus, there is no basis for contending that the City did not issue a stop work order. The City did so through its employees and plaintiffs cite nothing to support their contention that a verbal order was not sufficient.

Third, the Olsons' contention that the City did not pursue the wetlands impact as part of the nuisance action is misleading and wrong. The very first nuisance violation sent to the Olsons – on May 20, 2004 - specifically referenced the wetlands violation. CP 221 (see Box "F"). When a second nuisance violation was sent to the Olsons in June of 2004, Daniel McConaughy forgot to check the wetland box, an error he admitted during his testimony before the Hearing Examiner. See CP 359 (Excerpts from the testimony of Daniel McConaughy), lines 3-16, wherein Mr. McConaughy acknowledged that the failure to check Box "F" was his fault and that the nuisance report on which Box "F" was omitted was the second report). Moreover, plaintiffs had been advised as early as July of 2003 that their work in the right-of-way was illegally impacting the wetland and required a permit. See CP121 - 136. For the Olsons to contend now that they did not know they were impacting the wetland or required a permit defies credibility.

Finally, the Olsons contend that there is no proof that they have actually filled any recognized wetland. Again, plaintiffs' arguments come perilously close to intentionally misleading the court. Mr. Olson admitted in his deposition that he filled the wetland in the right-of-way:

Q Did you add any fill to the right-of way?

A I did some construction out there with landscaping, basically. I mean, what is your definition of fill? I mean, is it –

Q Did you add any type of –

A I put down some sand.

Q Okay, so you added sand. Did you add any gravel?

A Not at that point.

Q At any point have you added gravel to that portion of the right-of-way?

A We never got that I don't believe. We may have, you know...

Q Did you add dirt to that portion of the right-of-way?

A It was graded. It was pretty well established when they put the sewer line in.

Q **So where did you add the sand?**

A **Over the area that the culvert was in.**

(emphasis added) Exhibit 9 to Supplemental Homan Affidavit, p. 10, lines 14-25; p. 11, lines 1-5. While plaintiffs contend that the addition of sand did not impede the flow of water through the culvert in any way, their contention misses the point. The culvert services the stream. The wetlands are attendant to the stream, but are a separate environmental element. In adding fill over the culvert, the Olsons unquestionably filled in an existing and recognized wetland. See CP 137 – 141 (Shiu Affidavit); CP 455 – 458 (Dusek Affidavit). *In fact, the very existence of the wetland that Mr. Olson filled was established by the Olsons' own expert and the uncontroverted testimony in the record establishes the specific boundaries of the fill placed in the wetland:*

From Shiu Affidavit: "I also overlaid survey points from John Wesley Jennings's wetland report for this area. The report contained a map of the wetland boundary. The wetland boundary was scaled and transferred from a paper copy of the Jennings's report to the AutoCAD map I was creating." CP 138, lines 21 – 25;

From Dusek Affidavit: "As to the issue of whether fill was placed on any wetland on the property, having

viewed the property and assisted with the preparation of an "Existing Conditions Map" (attached) which show figures provided by the Olsons' own experts, I can say with a certainty that there is fill on the wetlands surrounding the stream under the Crystal Springs Road right of way." CP 456, lines 1-5.

From Dusek Affidavit: "I completed an overlay on the map which shows where fill was placed. That overlay shows that fill was placed in wetland area abutting the stream and culvert. Specifically, using the map for reference, there is fill located on at least the following wetland areas: the west side of the Crystal Springs right-of-way between the Jennings flags A11A and A12A, extending to the west to the toe of the fill slope that extends onto the Olson property, beyond the west right of way. This is located under the northern two-thirds of the western rock wall." CP 456, lines 14 – 21.

As outlined in the City's opening memorandum, arbitrary and capricious action is defined as "willful and unreasonable action, without consideration and regard for the facts and circumstances.'

‘Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration.’” Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). The courts generally find an action to be arbitrary and capricious where there is no rational basis for the decision. See, e.g., Hayes v. City of Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997). Given that there is no reasonable contention that the Olsons did not negatively impact the wetland or were acting in accordance with the permit, there is also no reasonable basis for finding the City’s actions to stop the Olsons’ illegal activity to be arbitrary and capricious.

IV. CONCLUSION

During the appeal before the Hearing Examiner, the City learned that a construction inspector had given the Olsons incorrect advice regarding the driveway approach permit. Although the inspector’s advice had no legal significance and could not negate the requirements of the City’s ordinances, and although the Olsons were not entitled to rely on this advice, the City acknowledged the error and graciously attempted to resolve the situation. The City dismissed the nuisance action and gave the Olsons an opportunity

to apply for the appropriate permits in order to make legal what they had been doing illegally on the City's property. See CP 342-345. Rather than take advantage of the opportunity provided to them, the Olsons chose not to apply for the necessary permits, but instead, sued for money damages.

On the City's motion for summary judgment, the superior court correctly held that, because the Olsons were building on property that they did not own and had no rights to, the Olsons lacked standing to bring an action under RCW 64.40. The court's grant of summary judgment should be affirmed on that basis. Finally, if necessary, this court should reverse the superior court's denial of summary judgment on the alternative bases as stated in the City's cross appeal.

RESPECTFULLY SUBMITTED this 19th day of September, 2008.

ELIZABETH A. PAULI, City Attorney

By: 
JEAN P. HOMAN
WSBA# 27084
Assistant City Attorney
Attorney for City of Tacoma

FILED
COURT OF APPEALS
DIVISION II

08 SEP 22 PM 2:07

STATE OF WASHINGTON
BY cm
DEPUTY

NO. 36756-4-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

ROBERT OLSON and SANDRA OLSON, a marital community,

Appellant/Cross-Respondent,

v.

CITY OF TACOMA,

Respondent/Cross-Appellant.

AFFIDAVIT OF SERVICE OF
RESPONDENT/CROSS-APPELLANT'S
REPLY BRIEF

ELIZABETH A. PAULI, City Attorney

JEAN P. HOMAN
WSB# 27084
Attorney for Respondents

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

ORIGINAL

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Jin H. Yi, being first duly sworn on oath, deposes and states:

I am a citizen of the United States, over the age of eighteen and competent to be a witness herein.

On the 19th day of September, 2008, I delivered, via ABC Legal Messengers, a copy of *Respondent/Cross-Appellant's Reply Brief*, the original of which was filed herein, and this *Affidavit of Service* to:

Carolyn A. Lake, WSBA#13980
Goodstein Law Group, PLLC
1001 Pacific Avenue, Suite 400
Tacoma, WA 98402

Jin H. Yi
JIN H. YI

SUBSCRIBED AND SWORN to before me this 19th day of September, 2008.

Barbara S. Nord
Printed name: BARBARA S. NORD
NOTARY PUBLIC in and for the State of Washington, Residing at TACOMA
My commission expires: 2-19-09

