

COURT OF APPEALS
DIVISION II

NO. 38361-6-II

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STATE OF WASHINGTON

BY JW
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

PIERCE COUNTY, a Washington municipal corporation, and
NEIGHBORS UNITED FOR THE LOOP (Intervenors),

Appellants,

v.

ALLAN and MARIJKE DEUTSCHER,

Respondents.

REPLY BRIEF BY APPELLANT PIERCE COUNTY

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I. INTRODUCTION

The central issue in this land use case is whether the Deuschers met their burden of proving that **all** of the criteria for a conditional use permit had been met with respect to their application for a conditional use permit for a 100 child/10,000 square foot child care facility. Specifically, the Deuschers had and continue to have the burden of proving that their proposed commercial child care center was compatible with the existing and established residential neighborhood. In their brief the Deuschers advance several arguments but fail to adequately address the issue of compatibility with the established residential neighborhood. For this reason, their arguments fail.

Judicial appeals of land use decisions do not provide an opportunity to retry the case, or to substitute the judgment of reviewing courts for that of the fact-finder. Such appeals are limited by *RCW 36.70C.130(1)* to a review of the record made

before the fact-finder, with an eye toward whether the decision-maker's factual determinations were supported by substantial evidence and supported by the law.

In this case substantial evidence supports the findings made by the Hearing Examiner, particularly as the findings relate to compatibility with the neighborhood. The Examiner's decision complies with the law in all respects and therefore should be upheld.

II. ARGUMENT IN REPLY

A. The Burden of Proving That the Proposed Use Meets the Criteria for a Conditional Use Permit Remains on the Project Proponents.

Pierce County Code 18A.75.030(B)(2) requires that the project proponents prove that the proposed use meets **all** of the criteria for a conditional use permit:

2. **Burden of Proof.** The applicant has the burden of proving that the proposed conditional use meets all of the criteria in Section 18A.75.030 B.1., Required Findings.

The Hearing Examiner found that the Deuschers failed to meet their burden for the proposed project, specifically as to the second criteria, that the project not adversely affect the established character of the surrounding vicinity.

Without benefit of citation, the Deuschers argue that “[t]hough the burden of proof with regard to conditional use permit criteria generally lies with the applicant, such is not the case when a jurisdiction opts to deny a project as proposed, based upon general standards such as compatibility.”¹

Respondents are incorrect. *PCC 18A.75.030(B)(2)* clearly provides that the burden of proving all of the criteria for a conditional use permit rests with the applicant.

Furthermore, while not citing *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995) directly as authority for their position, the Deuschers suggest that the *Sunderland* decision supports

¹ Brief of Respondent Deutscher, p. 32.

shifting the burden of proof. The Deutchers' reliance on the *Sunderland* decision is misplaced.

Unlike the facts in the *Sunderland* case, in the present case the County Code sets forth multiple standards or criteria by which to judge an application for a conditional use permit. See criteria set forth in *PCC 18A.75.030(B)(1)(a - f)*. Clearly where the applicable regulations set forth criteria that must be met, there is no justification for shifting the burden of proof. This is particularly true where regulations specify that the burden of proof is on the developer.

B. The Burden of Proving One or More of the Grounds for Reversal Set Forth in RCW 36.70C.130(1) Have Been Met Remains on the Project Proponents.

In their LUPA appeal to Superior Court the Deutchers had the burden of proving that the Hearing Examiner erred based upon one or more of the standards set forth in *RCW 36.70C.130(1)*. The Deutchers continue to have the burden of proving that the Examiner erred as this Court stands in the same

“shoes” as Superior Court in its review of the record made before the Hearing Examiner. *Sylvester v. Pierce County*, ___ Wn. App. ___, 201 P.3d 381 (2009).

While the Deuschers devote considerable effort discussing various cases which have addressed the standard of review in LUPA cases, nowhere in their brief do they advise this Court which of the standards set forth in *RCW 36.70C.130(1)* they are relying upon.

Similarly, the Deuschers devote numerous pages to the history of land use permits and conclude with the statement that in Washington “[t]he issuing authority must grant a conditional use permit as proposed if the applicant has satisfied the standards of the ordinance.”² As authority for their conclusion the Deuschers footnote *RCW 36.70B.030(1) - (2)*. The Deuschers’ conclusion ignores subsection (5) of *RCW 36.70B.030*, which provides that the decision-maker may

² Brief of Respondents Deutscher, p. 29.

approve, condition, or deny a project as necessary to ensure compliance with the local jurisdiction's development regulations and SEPA policies:

(5) Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under RCW 43.21C.060. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if applicable.

RCW 36.70B.030(5).

It is clear that the burden remains on the Deuschers to prove that their proposed project meets all of the criteria set forth in the Pierce County Code for conditional use permits. *See PCC 18A.75.030.* Here the fact-finder found that they met that burden only if the project was reduced to ensure its compatibility with the established residential neighborhood. To overcome the Examiner's decision, the Deuschers must

prove to this Court that one or more of the standards set forth in *RCW 36.70C.130(1)* have been met.

The Deuschers arguments can be summarized as (1) commercial child care facilities are authorized in this zone, and therefore it should have been approved as proposed;³ (2) the Examiner improperly considered traffic;⁴ (3) neither building size nor intensity of use could be considered by the Examiner;⁵ (4) community displeasure alone was the basis for the Examiner's decision;⁶ and (5) the decision ignored the Deuschers' vested rights.⁷ It is remarkable that none of the Deuschers' arguments address the issue of whether there was substantial factual evidence to support the Examiner's finding that this project, as proposed, was not compatible with the established character of the neighborhood. Put another way, the

³ Brief of Respondents Deutscher, pp. 36-37.

⁴ Brief of Respondents Deutscher, p 38.

⁵ Brief of Respondents Deutscher, pp. 39-41.

⁶ Brief of Respondents Deutscher, pp. 41-43.

⁷ Brief of Respondents Deutscher, pp. 43-45

proponents failed to prove how a commercial use with 100 children is compatible with single-family residential homes.

As set forth in the Appellants' opening brief and summarized in this brief, substantial factual evidence was presented to support the Examiner's finding that this commercial child care facility was compatible with the neighborhood character **only if modified**.

C. Substantial Evidence Supports the Examiner's Finding That the Project, as Proposed, Is Incompatible With the Established Residential Neighborhood.

The central issue in this case is whether substantial evidence supports the Examiner's finding that to meet the second criteria for a conditional use permit, compatibility with the established character of the surrounding vicinity, the proposal must be modified. *See PCC 18A.75.030(B)*.

The Court of Appeals, Division II, addressed the issue of compatibility with an existing neighborhood in *Cingular Wireless v. Thurston County*, 131 Wn.App. 756, 129 P.3d 300

(2006). In the *Cingular* case, the proponent sought to place a cell tower in the Boston Harbor area of unincorporated Thurston County, an area primarily zoned for agricultural, single family homes, and home businesses. Cell towers were allowed in the zone, subject to the granting of a special use permit.

Several area residents testified, describing their neighborhood as marked by scenic views of Mt. Rainier and adjacent farmlands, home-based businesses, outdoor recreational opportunities, and abundant wildlife. In the *Cingular* case the Hearing Examiner and Board of County Commissioners denied *Cingular's* request because the proposed tower would have an adverse visual impact on the character of the neighborhood. In particular, the tower would impact the residents' scenic views of Mt. Rainier and nearby farmlands.

Similarly, in the present case evidence was presented as to the character of the area as a neighborhood with large lots

and established single-family residences and, significantly, an absence of commercial development within the neighborhood. While the intrusion of a commercial child care facility into an established residential neighborhood may not be as obviously incompatible as a cell tower in the Boston Harbor area, it nevertheless is a significant change to the character of the neighborhood.

Moreover, the placement of a commercial use in a residential area raises the issue of intensity of the use within the neighborhood. *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 782, 793, 903 P.2d 986 (1995). Unlike the facts in the *Sunderland* case, evidence was presented that the proposed commercial child care facility was a more intense use than single-family residential use. Specifically, evidence was presented that a child care facility with up to 100 children, staff and service personnel would involve more people coming and

going to and from the site than if developed with single-family residences.⁸

The appropriateness of the intrusion and the determination of the compatibility or incompatibility of the proposed use is appropriately left to the judgment of the fact-finder in both cases. *See Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995) (compatibility of a proposal with the surrounding area is a factual determination).

Moreover, contrary to the Deuschers' arguments, the cases do not hold that the fact-finder cannot consider neighborhood opposition. *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795, 801 P.2d 985 (1990) and other cases cited in Respondents' brief simply prohibit community displeasure alone as the basis for denial of a land use permit. There is no support for the argument that neighborhood

⁸ See AR 32, FOF 14.

opposition cannot be considered by the fact-finder; it simply cannot be the sole basis for denial of the permit.

Finally, the Examiner reviewed the proposed project under the regulations in effect at the time the Deutchers' application was filed. Had he applied subsequently enacted regulations, he would have limited the proposal to not more than 24 children and not addressed other issues. This argument is nothing more than a "red herring" and should be rejected as unfounded.

III. CONCLUSION

All of the parties recognize that balancing the concerns of long-time residents in an established single-family neighborhood with a property owner's desire to build and operate a commercial child care facility is difficult. On the one hand there is a single-family neighborhood with many long-time residents. On the other hand the zoning of the subject property allows the proposed use subject to the granting of a

conditional use permit to ensure the project is compatible with the neighborhood.

The Deutchers, the property owners and project proponents, had the burden of proving all of the criteria for a conditional use permit, including compatibility with the neighborhood. After hearing all of the evidence and arguments both for and against the proposed project, the Examiner found that in order to meet the criteria regarding compatibility with the neighborhood, the project had to be modified. His decision was clearly based on evidence properly before him and supported by substantial evidence.

Appellants respectfully request that the Examiner's decision be upheld in its entirety.

DATED: April 3, 2009

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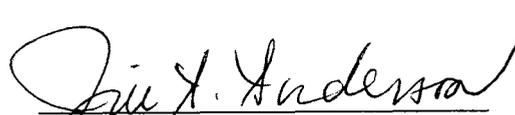
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant Pierce County's Reply Brief was delivered this 3rd day of April, 2009, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

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