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STATE OF WASHINGTON

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No. 40277-7-II

IN THE COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

ALEXANDER MACKENZIE LLC, Appellant,

vs.

TOWN OF STEILACOOM, Respondent.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

This case involves a land-use decision promulgated by the Town Council for the Town of Steilacoom. The Appellant, Alexander Mackenzie LLC d/b/a "The Inn at Saltar's Point" (hereinafter "The Inn") was granted a development permit to build a two-story accessory structure, along with twelve off-street parking spaces. The purpose of the building and off-street parking, was to operate a two-room bed and breakfast, in conjunction with a conference room. After construction of the building and parking lot were completed, The Inn applied for a conditional use permit to operate its business, as required by the Steilacoom Municipal Code. The Steilacoom Town Council approved the bed and breakfast, but twice denied the conditional use permit as applied to the conference room. This land-use appeal followed, to allow operation of the conference room, in conjunction with The Inn's bed & breakfast business.

ASSIGMENTS OF ERROR¹

1. In considering The Inn's application for a conditional use permit to operate a conference room in conjunction with The Inn's bed &

¹ Under the Land Use Petition Act, RCW 36.70C *et seq.*, the Court of Appeals stands in the shoes of the superior court and limits its review to the record before the local jurisdiction's body or officer with the highest level of authority to make the land use decision at issue. Mower v. King County, 130 Wn. App. 707, 712-13, 125 P.3d 148 (2005); *see also*, Abbey Road Group, LLC v. City of Bonney Lake, 141 Wn. App. 184, 192, 167 P.3d 1213 (2007).

breakfast business, the Town Council for the Town of Steilacoom failed to follow the procedure required by the Steilacoom Municipal Code, in violation of RCW 36.70C.130(1)(a).

ISSUE PRESENTED: Did the Town of Steilacoom follow municipal code requirements for consideration of conditional use permit applications, when the Town denied The Inn's application to operate a conference room in conjunction with its bed & breakfast business?

2. The land-use decision at issue was not supported by evidence that is substantial when viewed in context with the entire record before the Town Council for the Town of Steilacoom, in violation of RCW 36.70C.130(1)(c).

ISSUE PRESENTED: Was the land-use decision of the Town Council for the Town of Steilacoom supported by substantial evidence when viewed in context with the entire record before the Town Council?

3. The land-use decision at issue is the result of an erroneous interpretation of law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise, in violation of RCW 36.70C.130(1)(b).

ISSUE PRESENTED: Did the Town Council for the Town of Steilacoom apply an erroneous interpretation of the Steilacoom Municipal Code, when it denied The Inn's application for a conditional use permit to

operate a conference room in conjunction with its bed & breakfast business?

4. The land-use decision at issue does not have the "appearance of fairness" required of municipal actions. The trial court failed to address this issue.

ISSUE PRESENTED: Does the denial of The Inn's conditional use permit application by the Town Council for the Town of Steilacoom have the appearance of fairness, which is required of all municipal actions?

5. At the review hearing on December 17, 2009, the trial court improperly considered factual issues that were not before the Town Council for the Town of Steilacoom, nor contained in the record on review, in violation of RCW 39.70C.120.

ISSUE PRESENTED: Was it improper for the trial court to consider new factual issues at the review hearing, which were not part of the record on review, nor otherwise properly admitted into evidence at the trial court, pursuant to RCW 39.70C.120?²

² The Inn respectfully reserves argument on this assignment of error. The Court of Appeals has required The Inn to file its opening brief prior to availability of the report of proceedings in the trial court. Therefore, this issue cannot be referenced in The Inn's opening brief, as the report of proceedings is not currently available.

6. The Inn's copy of the verbatim recording of the Steilacoom Town Council's February 3, 2009, hearing on The Inn's conditional use permit amendment application was inaudible and, therefore, could not be transcribed.

ISSUE PRESENTED: Is the Steilacoom Town Council's land-use decision void in this case, because the Town Council failed to provide a verbatim record of the proceedings with respect to the land-use decision at issue?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY IN THE TRIAL COURT

This land use appeal, filed pursuant to the Land Use Petition Act ("LUPA"), Revised Code of Washington 36.70C, *et seq.*, was originally filed in the Pierce County Superior Court on March 25, 2009. An Order setting the original case schedule was also filed on March 25, 2009 (CP 1) and later amended on May 8, 2009. CP 23.³

Pursuant to the amended case schedule, Respondent Town of Steilacoom was required to file a complete copy of the local jurisdiction record subject to review, on June 3, 2009. CP 23 (*citing* RCW 36.70C.110). The Town of Steilacoom was unable to file the record by

³ References to the Clerk's Papers herein are references to the "corrected" Clerk's Papers, dated March 9, 2010, and the Supplemental Clerk's Papers dated March 16, 2010.

June 3, 2009, and later filed the record on June 26, 2009.⁴ Due to Steilacoom's late filing, the Parties agreed to a second amended case schedule, which was filed on July 2, 2009. CP 25-26.

According to the second amended / final case schedule, the LUPA review hearing for this matter was to be held on December 16, 2009, before the Hon. Vicki L. Hogan, Pierce County Superior Court Department 05. CP 25. At 10:24 A.M., on the day of the review hearing, December 16, 2009, the case was reassigned to be heard by the Hon. Stephanie Arend, Pierce County Superior Court Department 12. CP 102.

After reassignment, the review hearing was scheduled for the *next* day, December 17, 2009, at 10:00 A.M. CP 102. Judge Arend had very little time to review the entire record prior to the review hearing, which included sixty one (61) pages of briefing, a one hundred forty three (143) page municipal record, and forty two (42) pages of municipal code provisions. At the conclusion of the review hearing on December 17, 2009, the Order and Judgment denying The Inn's land-use petition was entered, without further review and without findings of fact, or conclusions of law. CP 103-106. This appeal followed.

⁴ The Inn designated the 143 page local jurisdiction record to be part of the Clerk's Papers. See CP 114 at no. 4. The Superior Court Clerk's office sent the record to the Court of Appeals; however, the record was listed as an "attachment" to the Clerk's Papers, and sent under separate cover. The record apparently was not numbered among the Clerk's Papers for reference. For the purpose of referencing the record, The Inn will refer to CP 139-275, which is a supplemental copy of the record filed as an attachment to Respondent's brief in the trial court.

II. FACTUAL BACKGROUND

Alexander Mackenzie, LLC, d/b/a "The Inn at Saltar's Point," is a bed and breakfast business located in Steilacoom, Washington. The Inn consists of two guest-suites, situated on the second floor of a two-story building, above a kitchen and conference room. There are also 12 off-street parking spaces for guests of the Inn and conference room. CP 61; *see also*, CP 145-147.

The Inn at Saltar's Point was built as an "accessory structure," next-door to the residence of The Inn's proprietors, Jack and Joanne Brake. The Inn is located at 86 Jackson Street, in the Town of Steilacoom, which is located in the "R-7.2 residential zoning district." CP 183. The intent of the residential zoning districts in Steilacoom is stated in part as "allowing short-term lodging, group care facilities, accessory dwelling units and similar nontraditional housing units and providing for home occupations in residential neighborhoods." Steilacoom Municipal Code ("SMC") 18.12.020 (1st paragraph) (CP 74).

The R-7.2 residential zoning district allows for "[a]ccessory structures and uses, including home occupations, which are incidental and not detrimental to the residential environment," among other things. SMC 18.12.020(A) (CP 74). Specifically permitted uses within the R-7.2 zoning district include group-care facilities, accessory structures, and home occupations. Uses also permitted, but which require a "conditional

use permit," include assisted-living facilities, bed and breakfasts, day care centers, and halfway houses. SMC 18.12.030 (CP 75).

The Inn originally filed a request for a conditional use permit (hereinafter "CUP") to operate a bed & breakfast business on their property, in an accessory building, in 2006. The 2006 CUP application included a request to operate the conference room as a use secondary, or ancillary to the bed & breakfast business. CP 157 ¶ 2 ("Current Status"). Based on the evaluation criteria set forth in SMC 18.28.020(4) (CP 81-82), the Steilacoom Town Planning Commission recommended approval of the CUP application as a whole. Despite the recommendation of the Planning Commission, on October 3, 2006, the Town Council approved the CUP for the bed & breakfast, but denied the CUP as applied to the conference room. CP 157 ¶ 2; *see also*, CP 181-184.

The Inn's 2006 application to operate a conference room as part of their bed & breakfast was not denied by the Town Council "with prejudice." Thus, pursuant to SMC 14.20.040(b)(1)(iv),⁵ The Inn reapplied by filing a request for an amendment to their existing CUP, on June 8, 2008. CP 140. The Town required The Inn to pay a second CUP application fee, in the amount of \$1,900.00. CP 32.⁶

⁵ CP 65; *See also*, SMC 14.20.040(b)(1)(v).

⁶ Although record of this payment was not included in the local jurisdiction record submitted by Respondent, the fact that this payment was issued to Respondent for The Inn's CUP amendment application was not subject to dispute in the trial court.

The Inn generated considerable community support for the use of a conference room in conjunction with its bed & breakfast business. In fact, nearly every single neighbor of The Inn, residing within the area that would be directly impacted by the conference room, in addition to local business owners and the Steilacoom Historical Museum Association, submitted statements of support to the Steilacoom Town Council. CP 191-199; CP 202-203; CP 206; CP 242.⁷

According to SMC 18.28.020(1), "[a] request for a conditional use permit may be denied **only** if the expected impacts cannot be mitigated by assigned conditions." (emphasis added) (CP 81). The "required findings" and "evaluation criteria" for consideration of CUP applications is set forth in SMC 18.28.020(3)-(4) (CP 81-82).

The Steilacoom Town Planning Commission again reviewed The Inn's CUP application according to the evaluation criteria set forth in SMC 18.28.020(4). CP 158-160 ("Regulatory Framework Analysis"). Upon reviewing each of the nine (9) evaluation criteria required in SMC 18.28.020(4), the 2008 Planning Commission report indicated that the conference room would have very little impact on the surrounding neighborhood, and that any expected impact would be mitigated by

⁷ Additional neighbors and community members testified in support of the CUP, at the Town Council land-use hearing on February 3, 2009. CP 271-274. The recording of the hearing could not be transcribed, however, because the recording provided to The Inn, for the most part, is inaudible. The CD-ROM recording of the hearing was transmitted to the Court of Appeals by the trial court, along with the local jurisdiction record.

assigned conditions.⁸ Regardless of the Planning Commission's report, and despite substantial neighborhood support, the clear requirements of SMC 18.28.020(1) (CP 81), and every indication that assigned conditions would mitigate expected impacts, the Town Council denied The Inn's CUP amendment application to operate a conference room in conjunction with its bed & breakfast business, following a public hearing on February 3, 2009. CP 274.

The only basis for the Town Council's denial of the 2008 application, was that the conference room "is inconsistent with the purposes of the Town of Steilacoom zoning ordinance and is not a permitted use in the residential zoning district set forth in the application." The Town Council concluded that "a commercial conference room / seminar room is not a permitted use in a residential zone under the Town of Steilacoom zoning code," and therefore, "a Conditional Use Permit cannot be granted." CP 232-233 (Conclusions of Law ¶¶ 3-5).⁹

⁸ Of the nine (9) evaluation criteria required pursuant to SMC 18.28.020(4), the Town Planning Commission identified only three (3) that would have any potential impact, thus requiring assigned conditions: (E)- hours of operation- the assigned condition was restricting use of the conference room to certain hours; (F)- ability to provide adequate parking in compliance with municipal code- the conference room included 12 off-street parking spaces; and (G)- traffic impacts- no apparent concerns or complaints resulting from use of the conference room on a non-fee basis for nearly two years. The Planning Commission also recommended annual review. Thus, each assigned condition was expected to mitigate any potential impact on the surrounding neighborhood. CP 159-160; *See also*, "Analysis," CP 160.

⁹ The Town Council's 2006 denial was essentially the same, except that the Town Council also found in 2006 that use of a conference room was "inconsistent with the Comprehensive Plan." CP 158 ("Conclusions"). It should also be noted that "conference

The Inn received an undated "Notice of Decision" denying its CUP amendment application on February 5, 2009. CP 231. In order to exhaust administrative remedies, pursuant to SMC 14.20.090¹⁰ and SMC 14.24.030(b),¹¹ The Inn filed a request for reconsideration with the Town of Steilacoom on February 9, 2009, and paid the applicable \$200 fee. CP 226-230. The Town's denial of The Inn's request for reconsideration was mailed by the Town on March 4, 2009. CP 275. Thereafter, the Town's denial of The Inn's application for a CUP to operate a conference room as part of their bed & breakfast business became a "final decision." SMC 14.20.090 (CP 67).

LEGAL ANALYSIS AND ARGUMENT

I. FOUNDATIONAL PRINCIPALS UNDERLYING MUNICIPAL ZONING AUTHORITY.

According to the Washington Supreme Court:

It must ... be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

rooms," "conference centers," "meeting rooms," nor anything similar is specifically referenced as a permitted use, anywhere in the Steilacoom Municipal Code. *See*, CP 75-79.

¹⁰ CP 67.

¹¹ CP 68.

Therefore, if a land-use ordinance is unclear, or ambiguous, the ordinance must be construed *strictly* in favor of the land-owner. Sleasman v. City of Lacey, 159 Wn.2d 639, 643 n.4, 151 P.3d 990 (2007) (*citing, Morin*, 49 Wn.2d at 279); *see also, Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 385, 739 P.2d 668 (1987).

II. STANDARDS FOR LEGAL ANALYSIS PURSUANT TO LUPA, RCW 36.70C, et seq.

Judicial review of municipal land use decisions is governed by the Land Use Petition Act (LUPA), RCW 36.70C, *et seq.* Griffin v. Thurston County Board of Health, 165 Wn.2d 50, 54 (2008). In order to grant the relief requested by a petitioner, pursuant to LUPA, "it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct." RCW 36.70C.130(2). Upon review of the municipal record, and any appropriate supplemental evidence, LUPA allows the court to grant relief, if one of the standards in RCW 36.70C.130(1) have been met. Those standards include:

- (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 law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is

substantial when viewed in context
with the entire record before the
court;

RCW 36.70C.130(1); *see also*, Griffin, 165 Wn.2d at 55.

With respect to the standard set forth in subsection (b), it should be noted that interpretation of local ordinances is an issue of law, which the court reviews *de novo*. Griffin, 165 Wn.2d at 55 (*citing*, Isla Verde Intern'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002)). With respect to the standard set forth in subsection (c), "substantial" evidence means "evidence sufficient to convince a rational, unprejudiced person." Griffin, 165 Wn.2d at 55 (*citing*, Isla Verde, 146 Wn.2d at 751-52).

This brief will demonstrate that the land-use decision at issue in this case violates every LUPA standard set forth, above. It is based on a clearly erroneous interpretation of law, *i.e.*, the Steilacoom Municipal Code. This issues will be discussed in detail, below. However, the procedural and evidentiary aspects of this case, although perhaps less significant, warrant some discussion.

Upon issuing the land-use decision at issue, the Town Council for Steilacoom failed to follow procedures specifically required in the Steilacoom Municipal Code, in violation of RCW 36.70C.130(1)(a). Moreover, the land-use decision at issue is not supported by substantial evidence, in light of the record as a whole, because the Town Council did

not consider any of the material evidence presented by The Inn, or the Town Planning Commission, contrary to the requirement of RCW 36.70C.130(1)(c).

III. THE STEILACOOM TOWN COUNCIL FAILED TO FOLLOW THE PROCEDURE REQUIRED BY THE STEILACOOM MUNICIPAL CODE, FOR CONSIDERATION OF CUP APPLICATIONS, IN VIOLATION OF RCW 36.70C.130(1)(a).

- A. The Town Council's denial of The Inn's CUP application was not based on a finding that assigned conditions would fail to mitigate expected impacts on the surrounding neighborhood, as required by the Steilacoom Municipal Code.

According to SMC 18.28.020(1), "[a] request for a conditional use permit may be denied **only** if the expected impacts cannot be mitigated by assigned conditions." (emphasis added) CP 81. Neither upon consideration of The Inn's 2006 CUP application, nor in considering the 2008 CUP amendment application, did the Town Council make any findings that proposed conditions assigned to The Inn's conference room would fail to mitigate expected impacts on the surrounding neighborhood, as specifically *required* by SMC 18.28.020(1) for denial of a CUP application. CP 232-233 (2009); CP 157-158 (2006).¹² Therefore, the Town Council denial of The Inn's conference room CUP can be overturned pursuant to RCW 36.70C.130(1)(a), for failure to follow prescribed procedure.

¹² Only the 2009 Town Council denial of The Inn's 2008 CUP application is subject to review in this case. The 2006 denial is only referenced for the purpose of context, and to compare/contrast both decisions.

- B. The Town Council failed to consider the nine factors required for consideration of any CUP application, in violation of the procedural requirements of the Steilacoom Municipal Code.

According to SMC 18.28.020(4), "in any review of an application for a conditional use permit," a prescribed minimum list of nine factors relevant to the public interest "shall be considered." CP 82. The code goes on to list nine issues required for consideration, none of which were considered by the Steilacoom Town Council in their findings and conclusions. CP 232-233 (2009); CP 157-158 (2006). However, these specific issues were evaluated and presented to the Town Council for consideration, by the Planning Commission in 2006, and by the Town Planner in 2009. CP 158-160.

Based on the analysis required for consideration of conditional use permit applications, it is clear that the Town of Steilacoom land-use decision at issue violates RCW 36.70C.130(1)(a). There is no indication in the record that the Town Council considered the Staff report provided to it, in compliance with SMC 18.28.020(4). Instead, the clearly stated basis of the Town Council's decision was simply that conference rooms are not itemized as a permissible use in the zoning code. CP 233.¹³

Had the Town Council considered the Staff report (CP 157-160), and the statements of support issued by practically all affected neighbors,

¹³ This issue is discussed in more detail, below, in the context of whether the Town Council's interpretation of the Steilacoom Municipal Code was proper.

the Council would have had to conclude that assigned conditions would mitigate expected negative impacts. Thus, once again, the Town Council's denial of The Inn's conference room CUP can be overturned pursuant to RCW 36.70C.130(1)(a), for failure to follow prescribed procedure.

IV. THE TOWN COUNCIL'S DENIAL OF THE INN'S CONFERENCE ROOM CUP IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, VIEWED IN CONTEXT WITH THE ENTIRE RECORD, IN VIOLATION OF RCW 36.70C.130(1)(c).

If the Town Council had considered the issues required for consideration by SMC 18.28.020(4), the Town Council would have had a much more difficult time denying The Inn's CUP amendment application. However, the Town Council did not even *reference* a single issue required for consideration by SMC 18.28.020(4), in its findings and conclusions. CP 232-233. Those issues were reviewed by the Town Planning Commission, submitted to the Town Council for consideration, and are part of the record in this case. CP 158-160. Therefore, it cannot be said that the Town Council's denial of the Brake conference-room CUP is supported by substantial evidence in light of the record as a whole.

In response to both The Inn's 2006 and 2008 CUP applications, the Town Planning Commission and Staff applied material facts to analyze whether conditions assigned to the proposed conference room would

mitigate expected impacts to the surrounding neighborhood.¹⁴ As required by SMC 18.28.020(4), the Town Planning Commission and Staff analyzed nine separate issues respecting the impact of the conference room. CP 158-160.

Only *three* of the nine issues reviewed by the Commission and Staff required assigned conditions to mitigate expected impacts. According to the Planning Commission and Staff, all three assigned conditions would effectively mitigate any expected negative impacts of the Brake conference room. Nevertheless, and contrary to the requirement of SMC 18.28.020(4) (CP 82), the Town Council did not include these considerations in its findings and conclusions. CP 232-233. Therefore, the Town Council's denial of The Inn's conference room CUP can be overturned pursuant to RCW 39.70C.130(1)(c), because it is not supported by substantial evidence contained within the record.

V. THE LAND USE DECISION AT ISSUE IS BASED ON A CLEARLY ERRONEOUS INTERPRETATION OF LAW, IN VIOLATION OF RCW 39.70C.130(1)(b).

A. Rules for Interpretation of Local Ordinances

¹⁴ The Inn also presented evidence that operation of the conference room on a non-fee basis for nearly two years did not result in any neighborhood complaints, or disturbances. CP 158; CP 161 ¶ 3. In addition, The Inn presented statements of support by nearly every single member of the immediate neighborhood, *i.e.*, those most likely to be impacted by the operation of a conference room at the Inn. CP 191-199; CP 202-203; CP 206; CP 242. There was a single objection statement sent to the Town Council, by a person who does not reside anywhere near The Inn. Her objection statement appears to be an objection to the issuance of CUPs altogether. CP 255-256.

"Interpretation of local ordinances is governed by the same rules of construction as state statutes." HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003).¹⁵ Interpretation of local ordinances is an issue of law, which the court reviews *de novo*. Griffin, 165 Wn.2d at 55 (*citing, Isla Verde*, 146 Wn.2d at 751).¹⁶ "The Courts have ultimate authority to determine a statute's meaning and purpose." Tahoma Audubon Society v. Park Junction Partners, 128 Wn. App. 671, 682, 116 P.3d 1046 (Div. II 2005).¹⁷

Statutes and local ordinances must be construed to avoid strained or absurd results. Id. (*citing, Strain v. W. Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003)). "In interpreting statutes and ordinances, definitions contained within the act control the meaning of words used in the act." HJS Development, 148 Wn.2d at 472.¹⁸ Undefined terms are construed by viewing the statute, or ordinance as a whole, "to give meaning to the term in harmony with other statutory provisions." Id. at 471 (*citing, Heinsma v. City of Vancouver*, 144 Wn.2d 556, 563, 29 P.3d 709 (2001)).

¹⁵ *citing, World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991).

¹⁶ *See also, Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 682, 116 P.3d 1046 (Div. II 2005): "We interpret ordinances using statutory construction principles. As a question of law, we interpret statutes *de novo*." (citations omitted).

¹⁷ *citing, Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

¹⁸ *citing, Burley Lagoon Improvement Ass'n v. Pierce County*, 38 Wn. App. 534, 536, 686 P.2d 503 (1984).

"Zoning ordinances are to be construed as a whole, and any unreasonable construction must be rejected." State of Washington ex rel. Catholic Family & Children's Services v. City of Bellingham, 25 Wn. App. 33, 36, 605 P.2d 788 (1979).¹⁹ A zoning code "must be construed so that each part is given effect with every other part; each provision must be considered in relation to the others and, if possible, harmoniously construed." Id. at 38, (*citing*, Publisher's Forrest Products Co. v. State, 81 Wn.2d 814, 505 P.2d 453 (1973)).

B. The Steilacoom Town Council land use decision at issue does not follow the rules required for municipal code interpretation.

In Catholic Family & Children's Services v. Bellingham, *supra*, the Court of Appeals considered an appeal from a City's denial of a conditional use permit for operation of a children's residence facility. 25 Wn. App. at 34. Applying definitions in the City zoning code, the City defined the children's residence facility as a "juvenile home," requiring a conditional use permit. The petitioner applied for a conditional use permit, and the conditional use permit was denied. Id. at 35.

The Court of Appeals agreed that the proposed children's residence facility fit the definition of a "juvenile home" under the City zoning code. However, *upon review of other defined terms within the code*, and based on the rules of construction for zoning ordinances, stated above, the Court

¹⁹ *citing*, Bartz v. Board of Adjustment, 80 Wn.2d 209, 492 P.2d 1374 (1972).

of Appeals found that the children's residence facility *also* fit the definition of a "family" with "foster children." Therefore, the Court of Appeals held that the children's residence also qualified as a "single family home," which did not require a conditional use permit in the City's residential zoning district. *Id.* at 36-38. Due to the ambiguity in the code, the Court of Appeals ruled in favor of the proposed land-use, concluding that no conditional use permit was required. *See, e.g., Sleasman*, 159 Wn.2d at 643 n.4 (*where zoning code is ambiguous, it must be construed in favor of property owner*).²⁰

In the case at bar, the Steilacoom Town Council's land-use decision is primarily predicated on the Council's finding that a "conference room" is not specifically itemized as a permitted use within the R-7.2 zoning district. Therefore, the Council concluded that a conference room cannot be allowed to operate within the R-7.2 zoning district. CP 233. The Council's conclusion on this issue is inherently flawed for two primary reasons, discussed in turn, below.²¹ Like the municipality in the

²⁰ *citing, Morin*, 49 Wn.2d at 279 (*zoning ordinances are contrary to common law right of property owner to use private property to highest utility and, therefore, such ordinances must be strictly construed in favor of property owner, not to be extended by implication to cases not clearly within their scope and purpose.*)

²¹ A third reason is that a conference room fits squarely within the definition of a "class II home occupation," and home occupations are specifically permitted uses within the R-7.2 zoning district. *See, SMC 18.08.375* (CP 71); *see also SMC 18.12.030* (CP 75). The SMC specifically excludes five "prohibited home occupations" within residential zoning districts, none of which are conference rooms. *SMC 18.16.050(C)* (CP 80). Pursuant to the doctrine of *expressio unis est exclusio alterius*, therefore, a conference room cannot be excluded as a permissible "home occupation" in residential zones, because conference

Catholic Family case, *supra*, Steilacoom fails to apply its municipal zoning code as a whole, ignoring germane code definitions, which leads to an unreasonable code interpretation.

1. A conference room fits neatly within the SMC definition of a "secondary use" as applied to The Inn's bed & breakfast business, and a conference room is a customary ancillary feature of many short-term lodging facilities.

Under SMC 18.08.910, a "use" is defined as "the purpose which land or buildings or structures now serve, or for which they are occupied, maintained, arranged, designed, or intended." CP 72. A "secondary use" is defined by SMC 18.08.910(F) as:

a use of property or of a building or portion thereof customarily incidental and subordinate to the principal use of the land or building and located on the same lot with the principal use.

(CP 72).

The Inn's bed & breakfast business, consisting of two guest lodging suites, is the primary purpose intended for the building that houses the bed & breakfast. CP 140. Therefore, the bed & breakfast is a "use" according to SMC 18.08.910. The conference room, located on the first floor of the same building as the two guest suites, is a use of the same

rooms are not listed among the five specifically prohibited home occupations in SMC 18.16.050(C).

building or a portion thereof, customarily incidental and subordinate to the bed & breakfast. CP 61; CP 145-147.

Uses of property that are secondary, or ancillary to specifically permitted uses within municipal zoning codes, have long been regarded as permissible uses, although such secondary uses are not specifically permitted within a particular zone. For instance, in Anchich v. Turner, 35 Wn. App. 487, 667 P.2d 1112 (1983), the property at issue in that case was zoned "Forest Land" for tax purposes. The property owners built a home with trees taken from the land. Thereafter, the municipal authority changed the property tax classification from "Forest Land" to "General Use," because the house built by the property owners rendered less than 20 acres of the land as occupied by forestry.

The trial court overturned the zoning reclassification, holding that the home qualified as a valid "secondary use," simply because the zoning code in question required that "Forest Land" be "primarily," rather than "exclusively" devoted to harvesting timber. Therefore, a secondary and complimentary use was *implied*. The Court of Appeals affirmed the decision.

The fact that conference rooms are widely regarded as valid secondary uses for short-term lodging facilities, is recognized in case law. In a case analogous to the instant case, albeit much more complex, a Pierce County hearings examiner granted a land-use permit for operation

of a conference-center, in conjunction with a resort lodge. Tahoma Audubon Society v. Park Junction Partners, 128 Wn. App. 671, 116 P.3d 1046 (Div. II 2005). The hearing examiner's decision was ultimately upheld by the Court of Appeals (Div II), in part because the conference center was determined to be an important "secondary occupancy" of the lodge. The hotel function of the lodge was determined to be the "primary occupancy." Tahoma Audubon Society, 128 Wn. App. at 684-85.

In a case directly on-point, albeit from another jurisdiction, the Washington D.C. Court of Appeals upheld a land-use decision allowing a bed & breakfast to host conferences and social gatherings in a largely residential zone. The use was determined to be "accessory," or secondary to the primary function of the bed & breakfast. Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment, 749 A.2d 1258, 1261-63 (D.C. 2000). The opponents argued that the owner of the bed & breakfast was "stacking uses," by providing the conference room in addition to the bed & breakfast. The D.C. Court of Appeals rejected this argument, reasoning in part that conference rooms are generally considered standard features for bed & breakfasts and other short-term lodging facilities.

Of course, in the instant case, it is reasonable to infer that guests of the Inn at Saltar's Point may be visiting from out-of-town and wish to hold conferences, or social gatherings at a convenient location. It would only

be a customary, secondary accommodation for the Inn to provide such a facility. Since conference rooms are widely regarded as secondary uses accompanying short-term lodging facilities, and a conference room fits squarely within the definition of a "secondary use" under the Steilacoom Municipal Code, it would be unreasonable to prohibit The Inn from operating a conference room in conjunction with its bed & breakfast business.

The R-7.2 zoning district in Steilacoom, where the Inn is situated, specifically allows for conditional uses, such as assisted living facilities, day care centers, halfway houses, and group care facilities. SMC 18.12.030 (CP 75). By way of analogy, a valid secondary use for a daycare center, would be to have a playground. Valid secondary uses for assisted living facilities, halfway houses, and group care facilities, may include a recreation room, where friends and family of residents are allowed to visit and engage in recreation, such as weight lifting, ping-pong, fuzzi-ball, Wii, billiards, or any number of conceivable recreational activities.

Like a playground is a secondary use to a daycare, or a recreation room is a secondary use to a group care facility, halfway house, or assisted living facility, so a conference room is a standard secondary use for a bed & breakfast. A facility where guests of a bed & breakfast can accommodate meetings with friends, relatives, or business associates, is

only a natural secondary use for any bed & breakfast, or other short-term lodging facility. *See, e.g., Tahoma Audubon*, 128 Wn. App. at 684-85; *see also, Dupont Circle Citizens Ass'n*, 749 A.2d 1258 (D.C. 2000).²²

2. The Steilacoom Town Council's interpretation of the Steilacoom Municipal Code is unreasonable, because it leads to an absurd result.

The Court's goal in construing zoning ordinances is to determine legislative purpose and intent. *HJS Development*, 148 Wn.2d at 472.²³ To this end, "zoning ordinances should be given a reasonable construction and application." *Catholic Family & Children's Services*, 25 Wn. App. at 36.²⁴

The Court must "avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences. 'The spirit or purpose of an enactment should prevail over . . . express but inept wording.'"

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of

²²Respondent's attempted to distinguish these directly analogous cases on the basis that the municipal authorities involved in those cases were *in favor* of conference rooms as secondary uses for lodging facilities. CP 127-128. However, Respondent cited no legal authority for the proposition that the viability of a LUPA challenge depends on whether the municipality in question supports, or opposes the land use decision at issue. Logically, this supposed distinction works in favor of the Petitioners in this case. It demonstrates that Steilacoom's action is at odds with land-use decisions from other municipalities, on whether conference rooms are standard-secondary uses for short-term lodging facilities. It also lends credibility to Petitioners' argument that the Town's action in this case has a distinct appearance of unfairness, *i.e.*, unfair competition, if its action is not *in reality* unfair competition (discussed in more detail, below).

²³ *See also*, 8 E. McQuillin, *The Law of Municipal Corporations* § 25.71 at 224 (3d ed. 2000).

²⁴ *citing, State ex rei. Edmond Meany Hotel, Inc. v. Seattle*, 66 Wn.2d 329, 402 P.2d 486 (1965).

Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).²⁵

Moreover, "we do not infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion." Glasebrook v. Mutual of Omaha Ins. Co., 100 Wn. App. 538, 545, 997 P.2d 981 (2000).²⁶

The primary basis for the Steilacoom Town Council's denial of The Inn's CUP application to operate a conference room as part of its bed & breakfast business, was that operation of a conference room is not listed as a permitted use in the residential zoning district (R-7.2). CP 233. However, the Town Council fails to mention that neither "conference" rooms, "meeting" rooms, nor anything similar can be found as a specifically permitted use, *anywhere* within the Steilacoom zoning code.

Conference rooms are not listed as a permitted use in any Steilacoom zoning district. *See*, SMC 18.12.020 - 18.12.080 (CP 73-79). Thus, if the Steilacoom Town Council's method of code interpretation were applied uniformly, as is required, then conference rooms would not be permitted anywhere within the Town of Steilacoom. However, the Town of Steilacoom operates at least two conference rooms, termed "meeting rooms," within the Town of Steilacoom, on a fee-basis, within the public / quasi-public zoning district. CP 84-85; CP 210 ¶¶ 2-3; CP

²⁵ *citing*, State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992); and *quoting*, State v. Day, 96 Wn.2d 646, 648, 638 P.2d 546 (1981).

²⁶ *citing*, Troxel v. Granville, 527 U.S. 1069, 120 S. Ct. 11 (1999), *inter alia*.

222. Yet, conference rooms are not mentioned as a permitted use in the public / quasi-public zoning district. SMC 18.12.070 (CP 77-78).

Apparently, Steilacoom applies a different standard for code interpretation, depending on which code is being interpreted. Alternatively, it might appear that Steilacoom's disparate standards for code interpretation are actually intended to protect the Town's monopoly.

The absurd result here, is that the Town of Steilacoom can operate a for-profit conference room within the Town, but no one else can. Thus, the Town of Steilacoom maintains an exclusive monopoly, in derogation of the Steilacoom zoning code.²⁷ Does the Town Council contend that such a result is consistent with the legislative intent of enacting the zoning code? HJS Development, 148 Wn.2d at 472. Alternatively, is the Town Council's construction and interpretation of the zoning code unreasonable, given that there is no prohibition of conference rooms either specified, or implied in the zoning code? Catholic Family & Children's Services, 25 Wn. App. at 36; Glasebrook, 100 Wn. App. at 545 (*prohibitions not inferred absent specific statutory language, unless the statute as a whole directs the prohibition*).

²⁷ There are no other commercial conference rooms currently operating in the Town of Steilacoom. CP 29, *citing* Town of Steilacoom published local business directory at n.7, <http://www.steilacoom.org/default.asp>, *et seq.*

According to the Washington Supreme Court:

Economic protectionism which results in protecting a discrete interest group from economic competition is subject to a virtually *per se* rule of invalidity. See City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

Furthermore, municipal action that favors select enterprises, to the disadvantage of all competitors, is invalid unless the municipality can demonstrate that it has *no other means* to advance a legitimate local interest.

Government ordinances which restrain competition, create monopolies, or confer exclusive privileges should be generally condemned and have long been “ ‘considered a species of fraud within the police power.’ ” *Id.* Such ordinances have the unfortunate result of “discourag[ing] enterprise, paralyz[ing] progress, [are] deprivation[s] of liberty, and [are] entirely inconsistent with the true principles and the genius of our government.” Dencker, 58 Wash. at 511, 108 P. 1086. Thus, it follows that monopolies are “odious to the law,” and the law should concern itself to “restrain rather than to nourish them.” *Id.* at 510, 108 P. 1086.

Ventenbergs v. City of Seattle, 163 Wn.2d 92, 129-31, 178 P.3d 960 (2008).

The practical effect of the Steilacoom Town Council's land-use decision at issue in this case, is that it leads to an absurd and unlikely result. The Court cannot uphold a land-use decision that results in economic protection for a municipal monopoly, at the expense of private

enterprise. Therefore, the Steilacoom Town Council's denial of The Inn's conference room CUP should be overturned pursuant to RCW 36.70C.130(1)(b). It is an erroneous interpretation of law.

VI. THE LAND-USE DECISION IN THIS CASE LACKS THE "APPEARANCE OF FAIRNESS," REQUIRED OF ANY MUNICIPAL, OR QUASI-JUDICIAL ACTION.

Acting in a quasi-judicial function with respect to determination of property rights, such as the Steilacoom Town Council in this case, municipal authorities are required to be "open minded, objective, impartial and free of entangling influences or the taint thereof." Chrobuck v. Snohomish County, 78 Wn.2d 858, 869, 480 P.2d 489 (1971).²⁸ Due process requires fair and impartial hearings on land-use decisions, "not only fair in substance, but fair in appearance as well." Id.

The land-use decision at issue in this case has the distinct *appearance* of an unfair use of municipal and/or quasi-judicial authority, at best. At worst, the Steilacoom Town Council's decision is shocking, unreasonable, and an abuse of municipal authority. By all appearances, if not in reality as well, the Steilacoom Town Council's denial of The Inn's conference room CUP amounts to an untenable exercise of municipal authority, for the purpose of promoting unfair competition and maintaining an unlawful monopoly on behalf of the municipality.

²⁸ *citing*, State ex rel. Beam v. Fulwiler, 76 Wn.2d 471, 456 P.2d 322 (1969).

VII. ATTORNEY FEES AND COSTS SHOULD BE AWARDED TO PETITIONERS PURSUANT TO RCW 4.84.185.

According to RCW 4.84.185, "in any civil action," if the Court finds that a defense was frivolous and advanced without reasonable cause, the Court can award reasonable attorney fees and litigation costs to the prevailing party. In Zink v. City of Mesa, 137 Wn. App. 271, 275-76, 152 P.3d 1044 (2007), the Court of Appeals held that although LUPA does not contain a provision for attorney fees, an attorney fee award could be issued in a LUPA case, pursuant to RCW 4.84.185.

The trial court in Zink determined that the City's land-use decision preceding the petitioner's LUPA appeal was "groundless" and not supported by substantial evidence. Therefore, the trial court found that the City's defense in the LUPA action was frivolous and advanced without reasonable cause. Attorney fees were awarded to the petitioner pursuant to RCW 4.84.185. The Court of Appeals upheld the trial court's ruling on the issue.

The Town Council's decision in this case does not even come close to meeting the requirements of due process. The Town Council failed to follow the CUP review procedures required by the municipal code and failed to consider the criteria required for review under the code. The Town Council also failed to consider whether a conference room fit the definitions of a "secondary use" in relation to The Inn's bed & breakfast, or whether the conference room could be considered a "class II home

occupation." CP 71-72. Rather, the Town Council arbitrarily determined that a conference room cannot be permitted in R-7.2 zone, because it is not specifically mentioned as a use in the zoning code. CP 232-233.

However, the Town of Steilacoom operates its own conference rooms, within the Town of Steilacoom, in zoning districts where such use is not mentioned, on a fee-basis, for profit. Thus, Steilacoom applies disparate means of code interpretation, depending on which code is subject to interpretation, or perhaps depending on whether the Town's commercial interests are implicated. By all reasonable appearances, if not in reality, the action of the Town Council in this case was for the purpose of protecting its own business, to the exclusion and detriment of The Inn's interests.

Like the municipality in the Zink case, if the Steilacoom Town Council's land-use decision at issue here was groundless, unreasonable, and unsupported in the record, then the Town's LUPA defense is frivolous and advanced without reasonable cause. Attorney fees and costs, therefore, should be awarded to The Inn, pursuant to RCW 4.84.185. The Inn should also be refunded the \$1,900 cost for submitting the second CUP application, and the \$200 cost for filing a request for reconsideration.

VIII. THE STEILACOOM TOWN COUNCIL'S LAND USE DECISION IS VOID IN THIS CASE, BECAUSE THE TOWN FAILED TO PROVIDE A VERBATIM RECORD OF PROCEEDINGS FROM THE INN'S LAND USE HEARING, ON FEBRUARY 3, 2009.

The land-use hearing, concerning The Inn's CUP amendment application at issue, was held on February 3, 2009. CP 271-274. The hearing was recorded, *via* CD-ROM, but most of the recording is inaudible, such that production of a transcript was not possible.²⁹ A copy of the CD-ROM was sent by the Town, to counsel for The Inn, and filed in the trial court on June 26, 2009, as part of the local jurisdiction record. The local jurisdiction record, including the CD-ROM recording, were transmitted by the trial court clerk's office, to the Court of Appeals, under separate cover. *See*, "corrected" Clerk's Papers Index dated March 9, 2010, at p. 2.

In Capitol Neighborhood Ass'n v. City of Olympia, 23 Wn. App. 260, 595 P.2d 58 (1979), the Court of Appeals (Div. II) reversed a municipal land-use decision, because a verbatim recording of the land-use hearing which resulted in the decision subject to review, was not sufficiently provided by the municipality. The trial court was able to review a verbatim transcript of most of the municipal proceedings, but not all of the proceedings. Nonetheless, the Court of Appeals held that it is incumbent upon municipal agencies deciding land-use issues to provide a verbatim recording of land-use hearings, or the subject municipal land-use

²⁹ The Inn has no way of knowing whether the CD-ROM recording filed in the trial court was audible. There is no indication in the record that the trial court reviewed the CD-ROM recording. Nevertheless, the copy of the recording provided to The Inn is so inaudible, it could not be transcribed. Therefore, The Inn suspects that the copy of the recording provided to the trial court was inaudible as well.

decision will be void. Capital Neighborhood Ass'n, 23 Wn. App. at 264 (citing, Barrie v. Kitsap County, 84 Wn.2d 579, 586-87, 527 P.2d 1377 (1974) and Parkridge v. Seattle, 89 Wn.2d 454, 463-64, 573 P.2d 359 (1978)).

According to the Court of Appeals, "[t]his rule is stated unequivocally, and we can find in it no room for exceptions and certainly no basis for ignoring it, despite the asserted exaltation of form over substance" Id. (citing, Standow v. Spokane, 88 Wn.2d 624, 637, 564 P.2d 1145 (1977) and State Ferries v. Intern'l Org'n of Masters, Mates and Pilots, 20 Wn. App. 887, 890, 584 P.2d 397 (1978)). Notably, the rule requiring a complete verbatim record of proceedings on municipal land use decisions was enforced by the Court of Appeals in the Capitol Neighborhood case, despite the fact that the issue was not argued at the trial court level. 23 Wn. App. at 264-65. Thus, although this issue was not raised at the trial court level in this case, the Steilacoom land-use decision at issue must be reversed in favor of The Inn.

CONCLUSION

The Inn respectfully requests that the Court of Appeals reverse the land-use decision of the Town Council for the Town of Steilacoom and require the Town to issue an amendment to The Inn's CUP, to allow operation of a conference room in conjunction with The Inn's bed & breakfast business. If the Court of Appeals finds that the standard for a

frivolous LUPA defense has been met in this case, as set forth in Zink v. City of Mesa, 137 Wn. App. 271, 152 P.3d 1044 (2007), The Inn further requests an award of attorney fees and costs, pursuant to RCW 4.84.185.

RESPECTFULLY SUBMITTED THIS 26th day of April, 2010.


Justin D. Bristol, WSNB 29820
Attorney for Appellant

CERTIFICATE OF SERVICE

Above signed attorney hereby declares subject to penalty of perjury under the laws of the State of Washington that counsel for Respondents herein, below named, were served with a copy of this motion and attached Exhibits on this 26th day of April, 2010, via electronic mail, pursuant to agreement of counsel of record in this case. A hard-copy was also mailed to attorney Hoffman, at the mailing address indicated below, on April 27, 2010.

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