

No. 48308-4

THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MARK AND PATRICIA MAYKO,

Respondent,

v.

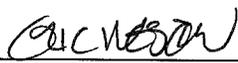
PACIFIC COUNTY

Appellant.

BRIEF OF APPELLANT

From Pacific County Superior Court No. 14-2-00350-3
The Hon. R. Mark McCauley

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INTRODUCTION, REQUEST FOR RELIEF

Pacific County asks this Court to reverse the superior court and affirm the county's denial of Mark and Patricia Maykos' request for a variance. Pacific County asks that the Maykos not be allowed to build because they would become the precedent for other similar variances that would in turn erase the zoning protections in this area of Willapa Bay. Pacific County asks this Court to reverse the superior court's award of statutory costs and fees to the Maykos. Pacific County asks this Court to deny the Maykos their request of this Court to award them costs and attorney's fees. Pacific County asks this Court for an award of costs.

ASSIGNMENTS OF ERROR

The reviewing superior court did not grant proper deference to the local officials who made the official determination. The superior court substituted its own judgment for that of the local County board. The superior court also erred in the following findings of fact and the conclusions of law:¹

¹ Though this list of errors in findings and conclusions is redundant to other sections of this brief, failure to identify the assignments of error could lead to dismissal of the appeal. *M/V La Conte, INC., v. Leisure*, 55 Wn.App. 396, 401, 777 P.2d 1061 (1989)

Contested finding of facts:²

16. Special circumstances. There was no comparison of how 'special' it was in comparison to neighboring parcels.

17. There was no credible testimony that the literal interpretation of the Ordinance would deprive the Maykos of rights enjoyed by other properties conforming to the terms of the Ordinance. The Report does not state that surrounding properties have wetlands and single family residences on site.

18. Mr. Reider's Staff Report does not provide credible testimony that the granting of the variance will not provide the Maykos with a special privilege that is denied by the Ordinance to other properties under similar circumstances. In other words, to remove the double negative, the Maykos will be granted a special privilege that is denied by the Ordinance to other properties under similar circumstances.

19. Mr. Reider's Staff Report does not provide credible testimony that, given the physical characteristics of the Maykos' property, the granting of the Variance was the minimum necessary to afford relief to the Maykos.

22. While it is true that as a county employee, Mr. Reider is in an unbiased position. However it is error that because of his neutrality

² The Findings of Fact and Conclusions of Law are found in the Clerk's Papers, Sub #31.

his testimony would be the most credible with the most probative value.

24. There were named citizens testifying at the hearing. Dick Sheldon and Anne LeFors did establish expertise and special knowledge regarding the application. Their information was neither speculative nor lacked probative value.

28. While the Administrative Decision incorporated considerable testimony from named informed interested citizens, it would be error to term the witnesses testifying for the Maykos as "scientific." There was no science presented.

31. While Mr. Reider testified that the proposed development did not impact the wetlands, he stated that the development would impact the wetland buffer in which the subject property would be built. (EH, p.12)

32. While Mr. Bogar's testimony may have had points of credibility, his opinion as to the so-called special circumstances and wetland mitigation were biased by his status as paid expert witness for the Maykos.

33. Mr. Bogar's testimony that the Maykos' property is special is contrasted with his testimony that they are trying to build a house on a plat that is even smaller than those surrounding it, with even

greater need to mitigate the placement of the on-site septic system.

34. Mr. Bogar's testimony concerning the driveway failed to note whether the driveway was paved or a path in the dirt. Mr. Bogar's testimony assumes that this is a wetland buffer that needs protection from development.

36. Mr. Bogar's testimony concerning another property that was granted a variance was not sufficiently similar to the Maykos' property to be relevant.

37. Mr. Bogar's testimony that this property was unique was not credible. A look at the map demonstrates that there is no relevant difference between the Maykos' property and all the other undeveloped and undevelopable properties surrounding it up and down the coast.

38. Mr. Bogar's testimony concerning the drainage of the property was not based on any cognizable basis worth considering.

39. Several named citizens testified at the hearing and their testimony established expertise and special knowledge. Their information was neither speculative nor trivial.

42. It is error to classify the Maykos' witnesses as providing "scientific" testimony.

43. There is no credible evidence that there is no practical use of the

property short of use as a single-family residence.

Errors in Conclusions of Law:

1. The Administrative Decision was supported by substantial evidence in light of the entire record. The conclusion that the Petitioners did not meet all criteria was not an erroneous interpretation of the law nor an erroneous application of the law to the facts.

2. The Board of County Commissioners' Findings of Fact/Conclusions of Law and Decision was supported by substantial evidence in light of the entire record. The conclusion that the Petitioners did not meet all criteria was not an erroneous interpretation of the law nor an erroneous application of the law to the facts.

3. The Petitioners did not provide substantial evidence at both hearings to show that:

- a. Special circumstances exist that are peculiar to this land;
- b. Literal interpretation of the CARL Ordinance deprived the Maykos of rights commonly enjoyed by other properties conforming to the terms of the Ordinance;
- c. Special conditions and circumstances do not result from the actions of the requestor;
- d. Granting the requested variance will confer no special privilege that is denied by the CARL Ordinance to other lands, structures or buildings under similar circumstances;
- e. The variance requested was the minimum necessary to afford relief; or
- f. The requested variance will not create significant impacts to

critical areas and resource lands and will not be materially detrimental to the public welfare of contrary to the public interest.

4. The Petitioners have not provided sufficient substantial evidence that they will adequately mitigate any impact to the critical area.

5. The Petitioners' plan to purchase wetland credits (in a commercial wetland bank that is under no threat of conversion from wetland to anything else) is inadequate mitigation of the potential impacts to the critical area.

6. While the property was in a legally conforming lot under the SMP, a variance is necessary to build the property in order to conform to the Critical Areas Ordinance.

7. A variance under Pacific County Ordinances 147 and 147A should not be granted.

The superior court failed to demonstrate proper deference to the local decision.

The superior court used the wrong standard of review by reviewing the evidence de novo and arriving at its own conclusion.

Because the superior court granted the Maykos statutory costs and attorney's fees, Pacific County asks this Court to reverse that order upon a finding that the superior court was in error in granting the variance.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Pacific County Board of County Commissioners (BOCC) denial of the variance based on a correct interpretation of the law, after allowing for such deference is due the construction of a law by a local jurisdiction with expertise?
2. Was the BOCC's denial of the variance supported by substantial evidence in light of the entire record?
3. Was the BOCC's denial of the variance a clearly correct application of the law to the facts?
4. Did the BOCC's denial of the variance violate the Maykos' Constitutional rights?

STATEMENT OF THE CASE

A. Procedural History

The Respondents, Mark and Patricia Mayko, sought a variance (application PL140013LB) under Pacific County's Critical Areas and Resource Land (CARL) Ordinance No. 147 and 147A to allow them to build a residence in a wetland buffer area. Hearings

Examiner Michael Turner held the variance hearing on July 3, 2014, and denied the application on July 12, 2014.³

The Maykos appealed this denial to the Pacific County Commissioners, who held a *de novo* hearing on September 23, 2014.⁴ At this hearing, the Commissioners admitted all written comments and oral testimony from the previous hearing. (CH, p.6) The Commissioners denied the variance on November 18, 2014.

The Maykos filed a Land Use Petition in Pacific County on December 11, 2014, and filed an affidavit of prejudice against Pacific County's sole elected judge. The Hon. Michael McCauley, visiting judge from Grays Harbor County, granted the Maykos' LUPA petition on October 27, 2015, reversing the Commissioner's decision and directing Pacific County to grant the variance.⁵ The Court also entered findings of fact and conclusions of law, and a judgment awarding costs and fees.⁶

B. Standard of Review and Applicable Law and Ordinances

This case is like a set of Russian nesting dolls. The Maykos sought a variance and it was denied by the hearings examiner

³ The transcript of this hearing is found in the Clerk's Papers Sub #16, cited herein as "EH" for "Examiner's Hearing."

⁴ The transcript of this hearing is found in the Clerk's Papers Sub #15, cited herein as "CH" for "Commissioners' Hearing."

⁵ The Order on Appeal can be found in the Clerk's Papers, Sub # 30.

⁶ The Judgment and Order on Judgment can be found in the Clerk's Papers, Sub # 32.

because they did not carry their burden of proof. The Maykos sought de novo review of the hearing examiner's order with the board of county commissioners. Again, the Maykos did not carry their burden of proof. The Maykos filed this LUPA action and prevailed with the superior court. Pacific County, hoping to preserve the undeveloped area, appealed this decision before this Court. Before this Court, the Maykos continue to have the burden.

We ask this Court to apply the LUPA standards of RCW 36.70C.130 to the County's application of its Critical Areas and Resource Lands (CARL) Ordinance 147.

This Court stands in the same position as the superior court. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 176, 4 P.3d 123 (2000).

The Land Use Petition Act (LUPA) governs judicial review of land use decisions. RCW 36.70. Under LUPA, a

court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(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 a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)

The parties agree that only (a) lawfulness of the procedure, (b) interpretation of law, (c) sufficiency of evidence, (d) application of law to facts, and (f) constitutional rights are at issue in this case (corresponding to the issues pertaining to the assignments of error).

RCW 36.70C.130(1) “reflects a clear legislative intention that this Court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation.” *City of Medina v. T-Mobile USA*, 123 Wn.App. 19, 24, 95 P.3d 377 (2004).

Standards (a), (b), (e), and (f) present questions of law this Court reviews *de novo*. *Freeburg v. City of Seattle*, 71 Wn.App. 367, 371, 859, P.2d 610 (1993). Standard (c) concerns a factual determination that this Court reviews for substantial evidence. *Schofield v. Spokane County*, 96 Wn.App. 581, 586, 980 P.2d 277 (1999).

Under the “substantial evidence” standard, there must be a “sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011). When reviewing a challenge to the sufficiency of the evidence under this standard, a court views facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Phoenix*, at 828-29. Doing so “necessarily entails accept[ing] the fact finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn.App. 555, 565, 309 P.3d 673 (2013).

Under the “clearly erroneous” test of standard (d) this Court is to determine whether it has a definite and firm conviction that a mistake has been committed. *Citizens to Conserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). This Court is to defer to factual determinations by the highest forum below that exercised fact-finding authority, the Commissioners. *Pioneer Park*, 106 Wn.App. at 474.

The Maykos sought review of a variance to Pacific County's Critical Areas and Resource Lands (CARL) ordinance 147A.

CARL Ordinance 147 and 147A - J Variances states:

1. The administrator shall process variance requests according to a Type II procedure delineated in Ordinance No. 145. The burden of proof shall be on the person requesting the variance to bring forth evidence in support of the variance.

2. The administrator shall grant a variance if the person requesting the variance demonstrates that the requested variance conforms to all of the criteria set forth below:

a. That special conditions and circumstances exist which are peculiar to the land;

b. That literal interpretation of the provisions of this Ordinance would deprive the person seeking the variance of rights commonly enjoyed by other properties conforming to the terms of this Ordinance;

c. That the special conditions and circumstances do not result from the actions of the person seeking the variance;

d. That the granting of the variance requested will not confer on the person seeking the variance any special privilege that is denied by this Ordinance to other lands, structures, or buildings under similar circumstances;

e. That the variance requested is the minimum necessary to afford relief; and

f. That to afford relief the requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.

3. In granting any variance, the Administrator shall prescribe such conditions and safeguards as are necessary to secure protection of critical areas from adverse impacts.

CARL Ordinance 147A D provides for Mitigation:

D. Critical Area Mitigation Standards: General Provisions

1. All proposed critical areas alterations shall include mitigation sufficient to maintain the functional values of the critical area or to prevent risk from a critical area hazard and shall give

adequate consideration to the economically viable use of the property. Mitigation of one critical area impact should not result in unmitigated impacts to another critical area. Mitigation may include, but is not limited to: increasing or enhancing buffers, increasing building setbacks, instituting limits on clearing and grading, implementing best management practices for erosion control and maintenance of water quality, or other conditions appropriate to avoid or mitigate identified adverse impacts. Subject to the viable use exception provisions of subsection 3.K, any proposed critical area alteration that cannot adequately mitigate its impacts to a critical area shall be denied.

2. Mitigation includes avoiding, minimizing, or compensating for adverse impacts to regulated critical areas or their buffers. The preferred sequence of mitigation is defined below:

a. Avoid the impact altogether by not taking a certain action or parts of an action.

b. Minimize the impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts.

c. Rectify the impact by repairing, rehabilitating, or restoring the affected environment to the conditions existing at the time of the initiation of the project.

d. Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.

e. Compensate for the impact by replacing, enhancing, or providing substitute resources or environments.

CARL Ordinance 147A, 5 states:

5. Wetland Mitigation Banks

Wetland Mitigation Bank credits and Demonstration Project Wetland Mitigation Bank credits shall only be awarded for projects that create new wetlands, or enhance or restore existing disturbed wetlands. Mitigation credits shall not be awarded for those portions of a Wetland Mitigation Bank or Demonstration Project Wetland Mitigation Bank for which preservation and/or set aside of existing undisturbed wetlands is proposed.

Aerial wetland mitigation rations for Wetland Mitigation Banks and Demonstration Project Wetland Banks shall not be less than

those required within Section 4.E.1., unless the applicant can demonstrate that the use of the mitigation bank is of greater value to the environment.

The record demonstrates that the Maykos failed to provide sufficient evidence to meet the standards of CARL Ordinance 147, which we shall review in order, and for each discuss the LUPA standards of review.

CARL 147(J)(2)(a). Special conditions and circumstances exist which are peculiar to the land

Interpretation of the law

The BOCC properly interpreted the law. They cite the relevant ordinance, 147 (3)(J)(1). In their Conclusions of Law 6(a), they state:

The applicants provided inadequate evidence that any special conditions and circumstances exist which is peculiar to the subject property. The subject property has no area available to develop which is not within wetlands or wetland buffers, but this is not a unique characteristic relative to other parcels on the Long Beach Peninsula.

Sufficiency of the facts:

Mr. Reider's report on this factor states:

Very little upland area is available for development. The majority of upland area lies within 50 feet from the delineated wetland, inside the wetland buffer. Due to the presence of wetlands to the west, North, and South, the applicant wishes to mitigate for the entire upland boundary.

Mr. Reider testified in the first hearing examiner hearing that the property had a 10-foot wide easement on the neighbor's property that allows access and a 30-foot wide easement that went from the subject property to the Willapa Bay to the east. (EH, P.11-12)

Mr. Bogar testified, referring to a Pacific County tax parcel map: ("Other" Sub 21, P. 92)

So Figure 1A of the documents that I submitted is a plat map of all the Espy – All the Espy plats or the Espy plats referred to by Ann LeFors in the prior meeting, but they are nine plats – nine parcels to the north and nine to the south of the project site.

They are all long, skinny. They are all similar except for there is three parcels that have been broken up and short-platted. Our parcel is one of the three short-platted, so they are – they are actually dissimilar. There is three out of 25 of the nearest parcels within a half a mile that have been short-platted.

Our – actually, the Mayko property is distinct from the other two short-platted properties in that there is a driveway that provides access to – to the site itself. That driveway would – if they didn't have that driveway, they would have to in all likelihood impact wetlands directly.

. . . The other two sites that have been short-platted the Espy area we don't know anything about. I don't know if there is any upland buildable. I don't know if they are similar to the project site. (1, P. 23-24)

The next figure, 7, and the last figure thankfully, is – is the – is an example that I brought in specifically to suggest that these things have been done before. It is a parcel that is nine miles from the project site, which isn't close. It is not in the subject area, but it has got some really interesting features that make it similar.

The features that make it similar are that it is right next to a Category I Willapa Bay wetland; that it is impacting only buffers; that on the west side of the building area is another wetland this is – that is associated with – there is a buffer associated with that and it is impacting that buffer. And this variance was allowed to go through and bought credits in the McHugh – the Joe McHugh mitigation bank.

It is a similar site. It was more complicated. I didn't do the delineation, but I came in after the fact. . . .

So Al Sheraton, who is the current owner of property and the person I worked with – all of this is public record – he doesn't know that this is an example, but it is public record so I thought – I felt okay to use it.

He also has a driveway – a preexisting driveway that was going through his property that he – he would have had to impact wetlands, but he didn't have to. And it is a similar situation to ours. In the Mayko property, the driveway has already been placed. (1, P. 25-27)

I think special – special circumstances do exist. Because of the shape and the form of the project site, we have no option to impact – but to impact buffers. (CH, P.28)

Mr. Sheldon testified in the examiner's hearing that he represented the Willapa Harbor Oyster Growers Association (EH, P.22) and that in 1983, Elsie Good was denied a building permit for a similar project. (EH, P.22-23). He said that when the Espy family sold off parcels of the land in 1984 that the county denied further development because of the flooding elevations. (EH, P.25)

Mr. Sheldon testified in the commissioners hearing:

Here is a picture of a house that is what Mr. Bogar is evidently referring to is built on a berm that Sidney Stevens constructed. After the fact, a whole passel of permits were required for the – with the County after that had done this thing. It was totally illegal. And – and rather than have them tear it down – and that house sits just – just a little south of where this – this project is. (CH, P.36)

Mr. Sheldon also testified at the examiner's hearing that this property differs from others in that it has a much gentler slope down

to the bay, but that this is more of a hazard because it subjects the property to potential flooding during extreme high tides. (EH, P.34)

Ann LeFors testified at the examiner's hearing that

The first variance criteria [sic] is that special circumstances exist peculiar to the property and all property owners are required by law to follow wetland and buffer rules and setbacks. This is the case all over this county. Because a wetland-filled property has a minimum of or no area to build is not a special or unique condition.

The entire bay (inaudible) on the east side of the peninsula has property similar to the subject parcel. In fact, all 18 bayside properties from the Espy plat were platted at the same time and have the same kind of topography.

But she added later that

Because of the join[t] easement adjacent to the property, the Applicant will not have to get a new road permit to reach its property. This easement is the only kind in the Espy development, and perhaps, on the entire bay side. Other properties are landlocked may be denied development because of lack of access. (EH, P.38)

Ms. LeFors agreed during the commissioner's hearing that his is among three short-platted tracts in the Espy area, but pointed out that the other two have direct access to the road. (CH, P.60) She also testified that what the Maykos have been calling an access road was in fact an easement that was granted not just to the Maykos' property but to at least eight and potentially 12 properties, so that each could have access to the bay. (CH, P.60-61)

Correct application of law to facts:

While every property has its own unique qualities, the Maykos' property is not sufficiently unique in any relevant manner to affect this decision. The Maykos argue that Matt Reider's report provides those unique features, "Very little upland area is available for development. The majority of upland area lies within 50 feet from the delineated wetland, inside the wetland buffer. Due to the presence of wetlands to the west, North, and South, the applicant wishes to mitigate for the entire upland boundary." (Other, Sub 21 P.188). This report makes no comparative statement. They provide the fact-finder with no basis for comparing against any other property.

The Maykos argue that their site is unique because, despite the aforementioned handicaps, "building would have no impact on the wetlands." (Respondent's brief, p. 17) This misses the point. This property is entirely within a wetland buffer. The discussion is not about wetlands, but wetland buffers.

The Maykos argue that their site is unique because Ann LeFors testified that it had a joint easement to the property for access. They also argue that it is unique because Ms.LeFors and Mr. Bogar testified that it is among a few legal nonconforming lots and short-platted. These unique features have no relevance to whether the

property should get a variance. In fact, this unique feature creates a problem for the Maykos to be discussed later.

The Maykos and Pacific County agree that the inability to develop because of wetland regulations is not unique to the Maykos. They argue that there is no credible evidence that the development would have any impact on the wetlands. Again, the Maykos miss the point. The concern and the controversy is that the Maykos' variance would allow building entirely within a wetland buffer. The standard is not whether this encroachment in the buffer would have an impact on the wetland, and so it was irrelevant to the lower tribunals and should be here as well.

The Maykos point to the peculiar topography of the parcel, that it is one of only three to be short platted in their plat, and the only one with a driveway. First of all, the Maykos have not provided evidence that the topography's peculiarity is unique. But more important, none of these features is relevant to the inquiry.

CARL 147(J)(2)b. Literal interpretation of the provisions of this Ordinance would not deprive the Maykos of rights commonly enjoyed by other properties conforming to the terms of this Ordinance.

Interpretation of the law:

The commissioners properly interpreted the code and the law.

Sufficiency of the facts:

Matt Reider's report states:

The literal interpretation of this ordinance (147) would prevent construction unless a variance was granted due to wetland buffer requirements. The property is zoned Rural residential (RR), which prohibits tent camping on vacant lots (section 21.j. Ordinance 162). Overnight stays are limited to Recreational Vehicle use only. Surrounding properties have single family residences on them even though surrounding properties have wetland communities on site. The constraint with Mr. Maykos' site is that the entire upland portion is covered by wetland buffer. (CP 188)

Mr. Sheldon testified in the first, examiner, hearing that a house just to the south was built illegally before 1984 and that there were "a ton of permits that had to be acquired after the fact." (EH, P.27-28)

Ms. LeFors testified at the examiner hearing that

The second [criterion] is literal interpretation of law will deprive owners of the rights normally enjoyed by other property owners. Many bay properties are landlocked and do not have the luxury of an adjacent access road and it makes the development of their properties more difficult and expensive. Yes, the Applicant is being denied some development rights, but not those commonly enjoyed by others who also have property inundated with wetlands. There are other existing nonbuilt properties that will never meet the requirements to build. (EH, P. 37-38)

Correct application of the law to the facts

Mr. Reider refers to "surrounding properties." Please refer to the Pacific County Tax Lot Map, (Other, Sub 21, P. 92) Sadly, this is the only map in evidence. It illustrates just how few developed properties

“surround” the Maykos’ property. There is one developed property adjacent to the Maykos’, out of 11 properties depicted. The Maykos claim, that “surrounding properties have single family residences on them even though surrounding properties have wetland communities on site,” is plainly in error. There is no citation in the record to any other property in which the owners enjoy benefits denied to the Maykos.

As the Maykos admit, they do not have as large a parcel and as large a buildable area as those properties. If at all relevant, this means that among all the properties available, the Maykos’ property is the least attractive site to grant a variance.

CARL 147(J)(2)(c) Special conditions and circumstances exist which do not result from the actions of the person seeking the variance.

The parties agree that the Maykos have not acted as to the land.

CARL 147(J)(2)(d). The granting of the variance requested will confer on the person seeking the variance a special privilege that is denied by the Ordinance to other lands, structures, or buildings under similar circumstances.

Interpretation of the law:

The commissioners properly interpreted the code and the law.

Sufficiency of the facts:

Ms. LeFors testified that “no other property along that bay has a 30-foot easement right next to it. And so he does have an advantage that other properties do not have along the bay in that he does have access to a strip further in. Everyone else who would develop along the bay would have to build a road and go through all the permit process for that.” (CH, P.65)

The hearing examiner, Mike Turner, asked Mr. Sheldon, “because you obviously have been following closely what is happening here on this land and land similar to this. Are you aware of any variances such as this that have been granted by the County on any of the properties in – in this vicinity?”

MR. SHELDON: No, I’m not. I know some that have been turned down. I know of one issue – I better show you that one, too.” And then he testified about a property owner about 250 yards to the south who put a pad down to move in a trailer house. This property owner was subsequently a denied a variance and had to destroy the pad and revegetate the area. (EH, P.33)

He later testified that to give the Maykos a variance would set a precedent that others would follow. (EH, P.34)

Correct application of law to facts:

The reason that Pacific County is contesting this variance is that if this Court grants the Maykos a variance on their property, there is

nothing to prevent the development of the other properties in the aforementioned tax map, and indeed properties up and down the west coast of Willapa Bay. There is no wonder that the hearings examiner and then the commissioners listened when the representative of the Willapa Bay Oystergrowers Association, Dick Sheldon, spoke against this development.

The Maykos' reasoning is specious. They argue that because Ordinance 147 requires the County to look at each request separately, this would prevent everyone from getting a variance. The County's concern is that the Maykos property has no relevant difference from other properties up and down the west side of Willapa Bay in the Rural Residential zone and in the wetland buffers. Once the Maykos get their variance, then their neighbor asks for a variance, arguing that their property is so similar to the Maykos that it would be inequitable if they did not also. And then the next neighbor points to those two properties. One of the reasons that the caselaw suggests deference to local authorities is because they have the knowledge of the local big picture into which this piece fits. If this Court grants the variance, you will be able to watch the CARL ordinance get so many variances as to be rendered null.

The Maykos cite their expert's referral to one other property on the peninsula as an example of a similarly situated property that got a variance. One does not make a pattern.

CARL 147(J)(2)(e) The variance requested is the minimum necessary to afford relief.

Interpretation of the law:

The commissioners properly interpreted the code and law.

Sufficiency of the facts:

As Ms. LeFors testified, "This property is not developable according to the critical areas ordinance and hence we are here at this variance hearing." (EH, P.38)

[A]s far as mitigation goes, the project does not attempt to follow any mitigation sequence. Avoidance and minimization must be considered before replacement. The application does not indicate how impacts might be minimized but instead leapfrogs to wetland banking. The impact of the septic and future building or road improvement will be permanent.

And the question I have is off-site banking a greater value to the environment than placing a – than placing a septic system and ultimately a 2,400 square foot home in a wetland?

It is only an assumption that mitigation cannot be done on-site because of limited area, that that off-site site is acceptable. Wetland banking is just a commitment to preserve existing wetlands under already such a commitment."

(EH, P. 39-40)

Correct application of law to facts:

The Maykos argue that granting them the variance is the minimum necessary to afford relief. The County agrees that, for

purposes of obtaining their building permit for a single-family residence with attached garage, this variance is the minimum necessary to afford relief. However, for purposes of having any use for that property this variance is not the minimum necessary to afford relief. As Mr. Reider stated in his report, they are permitted to park an RV on this spot and enjoy the magnificent view across the bay.

CARL 147(J)(2)(f) That to afford relief the requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.

Interpretation of the law:

The commissioners properly interpreted the code and law.

Sufficiency of the facts:

Mr. Sheldon testified extensively at both hearings that the subject property was in the wetland area, subject to flooding events at extreme high tides.

Mr. Reider testified that, "It does impact the wetland buffers that are required by our critical areas ordinance . . ." (EH, P.12)

Ms. LeFors testified:

The public may now be affected by a single permit. The conditions that are attached to an approved variance prove attractive to other property owners who are considering development

themselves. Approval of this permit may have a cumulative effect on the surrounding area and the peninsula as a whole.

The variance is only to be used if for a special unique property and unusual situations. Mr. Maykos' property is in a beautiful setting, but is not unlike many other properties along the bay. His situation is not unusual. (EH, P. 28-39)

Correct application of law to facts:

This Court can take judicial notice of the process involved in creating a critical areas ordinance. It requires review of the best available science, approval by the State Department of Ecology, extensive public comment, review by the County planning commission, and review and approval by the board of county commissioners. This process determined that the area in which the Maykos wish to gain a building permit would require a variance. The Maykos argue that their expert and the County planner both testified that this variance would have no significant effect on the wetland. The first issue is that the parties agree that they are not building in a wetland, but a wetland buffer. The greater issue with their conclusion is that it isolates the problem to just this parcel. Mr. Reider and Mr. Bogar were tasked with looking at individual houses and plans, not with the impact of many houses and plans nor with protecting one of the County's most valuable assets. They make no mention of whether this variance would enable similar variances. They make

no comment on whether these variances together would impact the protected environment.

The Maykos dismiss the testimony of Ms. LeFors. It is notable that Ms. LeFors provides the only testimony that refers to the legal standards. This indicates the sophistication of her analysis, and the likely reason for the commissioners finding her credible. Sadly, neither the hearings examiner nor the commissioners made much of a record for what they knew of the backgrounds of Mr. Sheldon and Ms. LeFors or of the commissioners' specialized knowledge of the area in question.⁷

Mr. Sheldon testified that:

I want to make it clear that I'm representing the Willapa Bay Oysters Association here. I'm not representing myself. And it has been our consistent policy and whatnot on bay shore development that we monitor it and try to make – have it consistent. And this consistency definitely will be broken here now. But it is kind of a stretch to go nine miles to pick out a piece of property that is similar. In this particular area, the question from Mr. Turner [the hearings examiner] was do you know of any – any lots or – in this area that – of this kind of variance has been given to – or a variance – and my answer was no. If there had been, we would have – we would have object to it in the past." (CH, P. 69 – 70)

He testified at the first, examiner, hearing that "[W]hat we are concerned about here, you know, and we – is that for the last 30, 40

⁷ Fn. Pacific County just changed the procedure to eliminate the commissioners from the process, allowing petitioners to appeal hearing examiner decisions directly to superior court.

years – and this predates – this predates the Shoreline Master Program. The shellfish growers have spent a lot of time and a lot of money and lots of effort and millions of dollars in the days to uphold the – the restriction of the Shoreline Master Program.” (EH, P.32)

Constitutional challenge

Pacific County has not inversely condemned the Maykos’ property and has done no unconstitutional taking.

Sufficiency of the Evidence

Mr. Bogar testified,

I think reasonable use of the property is single-family development by zoning, by any way you define. If you have got rural residential, reasonable use of the property is construction of a single-family residence. I mean, that – I don’t know how you get around that. If you deny us reasonable use of the property, then you are actually denying us any use of the property . . .” (CH, P.30)

Mr. Sheldon testified, “It doesn’t work on the Willapa. It doesn’t work. We are trying to protect the bay. We are not trying to – trying to put development in there where it is inappropriate and causes problems for the future.” (EH, P.39)

Mr. Mayko testified as to his use of the property, “We have cared for it. We enjoyed it. We have gone and collected oysters on it.” (EH, P.49)

The Maykos suggest that this is a 'take it or leave it' alternative. If they are not permitted to build a single-family residence, then they have no use for the property. However, they have not offered suggestions for uses of their property short of building a single-family residence. They have not met the threshold for proving that there is no other use because they have suggested no other use.

MAYKOS' LUPA GROUNDS FOR REVIEW OF COUNTY

In their LUPA petition, the Maykos allege that the County's findings of fact numbers 21 and 22 are factually incorrect. (Petition, 7 D)

Finding of fact #21 states, "The applicant offered his proposal for mitigation through purchase of credits from the LBMB [Long Beach Mitigation Bank] but provided no evidence that any effort was made to minimize the magnitude of mitigation needed." While Mr. Bogar testified that the Maykos would be willing to purchase greater mitigation credits from the Bank (CH 33, 11 – 22) he said that he "can't avoid" the purchase of mitigation credits as the sole mitigation. Nowhere is there testimony concerning scaling back the project. Nowhere is there an offer to purchase mitigation credits at a bank that will actually rehabilitate wetlands. The Maykos want to obtain a

building permit for a 2,000 square foot house (and sell it) and are unwilling to venture any other reasonable use of their property. The Petitioners can cite nothing in the record as mitigation other than the offer for purchase of credits.

Finding of fact #22 states, "The applicant provided inadequate evidence that the alternative of taking no action to avoid the need for mitigation is not available." I understand this inartfully phrased sentence to say, 'The Maykos have provided insufficient evidence that they can't leave the property alone to avoid the need for mitigation.' Again, the Maykos have offered one solution to this problem, let them build their house and let them mitigate the impact by buying credits at the bank. They have provided no evidence that their land has no use unless they are permitted to build, and the Petitioners cannot find otherwise in the record.

Petitioners allege that Conclusion of law 6a is factually incorrect, not supported by the evidence and is an erroneous interpretation of the law. (Petition, 7 E)

Conclusion of law 6a states: "The applicants provided inadequate evidence that any special conditions and circumstances exist which is peculiar to the subject property. The subject property has no area available to develop which is not within wetlands or

wetland buffers, but this is not a unique characteristic relative to other parcels on the Long Beach Peninsula.”

The Petitioners argue that Ordinance 147 does not require a showing of a “unique characteristic’ relative to other parcels on the Long Beach Peninsula, it requires a showing of ‘special conditions and circumstances’ relative to other parcels.” The Petitioners misstate or misunderstand this finding of law. The Commissioners used the correct standard, “special conditions and circumstances.” This is no error of law. The Commissioners instead cited the sole argument advanced by the Petitioners that their parcel had “special conditions and circumstances,” namely that unless they could build their house, they couldn’t develop anything on this parcel. The testimony of Dick Sheldon and Ann LeFors concerning the adjacent parcels provide ample evidence that being unable to develop because the property is in a wetland or wetland buffer was not unique to the Maykos but widespread on the Peninsula. This finding is factually correct and supported by the evidence.

The Petitioners alleges that Conclusion of Law 6b is factually incorrect, not supported by the evidence, and is an erroneous interpretation of the law. (Petition, 7 F)

Conclusion of Law 6.b. states, "The applicants provided no evidence that literal interpretation of the provisions of this Ordinance would deprive them of rights commonly enjoyed by other properties conforming to the terms of the CARL Ordinance No. 147. They testified that they will not be able to develop the property as they wished and as they expected to, but failed to provide evidence of any rights they are deprived of that is enjoyed by others who conform to the CARL Ordinance No. 147."

Petitioners argue that there was evidence of one other person whose property got a variance. Petitioners cite to nothing in the record as evidence that the Maykos were deprived of rights held by others who conform to the CARL ordinance. Petitioners either misstate or misunderstand this standard. The comparison is not to another who was granted a variance, but to all others. How are the Petitioners deprived when their neighbors without a variance are not? Even if this were the standard, there is insufficient evidence to demonstrate how the Maykos are so similarly situated to the other with a variance as to make the two comparable.

The Petitioners fail to demonstrate that this is an erroneous interpretation of the law.

The Petitioners allege that Conclusion of Law 6d is factually incorrect, not supported by the evidence, and is an erroneous interpretation of the law.

Conclusion of Law 6.d. states, "The applicants did not adequately demonstrate all options were exercised to minimize the impacts."

The Petitioners argue, "There was no evidence presented to show that the requested variance will confer on the Petitioners a special privilege that is denied by the CARL Ordinance 147 to other lands, structures, or buildings under certain circumstances. Petitioners provided evidence of similarly situated properties that were granted variances under this Ordinance." First, there was evidence of only one other variance granted, not plural. Second, this argument bears no relationship to the Petitioners' failure to demonstrate any attempt to minimize the impacts. As discussed above in regards to findings of fact # 21 and 22, the Maykos provided no evidence of mitigation options. They offered a house and a deposit in a mitigation bank.

The Petitioners allege that Conclusion of Law 6.e. is factually incorrect, not supported by the evidence, and is an erroneous interpretation of the law.

Conclusion of Law 6.e. states, "The applicants provided no evidence that the requested variance is the minimum necessary to afford relief. Other configurations requiring less encroachment, a smaller footprint, or other means of mitigation were not considered."

The Petitioners argue that the variance is the minimum necessary to afford relief, that they considered other configurations requiring less encroachment, a smaller footprint, or other means of mitigation, and provides the example of agreeing to allow building setbacks to exist as wetland buffers. The evidence demonstrates that the entire parcel is within a wetland buffer. There was no evidence that the Maykos offered a smaller house, or a cabin, or a pad for an RV, or a place to put their tent. The only mitigation they offered was purchasing credits in a bank. This bank creates no new wetland or wetland buffer. It merely agrees to keep existing wetland as wetland and not otherwise develop it. This solution is disfavored by the CARL ordinance.

The Petitioners allege that Conclusion of Law 6.f. is factually incorrect, not supported by the evidence, and is an erroneous interpretation of the law.

Conclusion of Law 6.f. states, "The applicants did not provide adequate evidence that the relief requested by the variance would

not create significant impacts to critical areas and resource lands.”

The Petitioners appears to agree in the petition.

There is nothing in evidence that the proposed house would not significantly impact the critical wetland buffer. The Petitioners’ proposed mitigation is to purchase a share in a wetland and keep it a wetland. The burden is on the person seeking the variance. The burden is on the appellant.

ARGUMENT

The petitioners argue that the Commissioners committed procedural error by allegedly allowing themselves to be persuaded by public opinion in opposition to the Maykos’ application. The Petitioners fail however to demonstrate that this was a procedural error, rather than their just being dissatisfied with the findings of fact. The standard is whether there is substantial evidence. As discussed above, for every one of the claimed errors, there was substantial evidence as the foundation of the Commissioners’ correct decisions. And this Court shall “accept the fact finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn.App. at 565.

The Petitioners attempt to relitigate the hearing and *de novo* appeal by the Commissioners, rather than stick to the standards on appeal. The Petitioners argue that their parcel was unique by describing the land. This provides no comparison by which to determine whether this plat is more special than others. There was no evidence offered to either of the *de novo* hearings that the Maykos' property was in any way different from the many other waterfront properties, equally situated concerning the variance.

The Petitioners argue that literal interpretation of the provisions of the ordinance would deprive the Maykos of rights commonly enjoyed by other properties conforming to the terms of the ordinance. But Petitioners' comparison is not with all the others who cannot build. The Petitioners cite Matt Reider's report that surrounding properties have single family residences on them and argue "why not the Maykos too?" This is factually incorrect, both as to Matt Reider's report and the actual situation. The maps and photos provided demonstrate that there is a sole residence nearby. It is not surrounded by residences.

The Petitioners argue that the granting of this variance will not confer on the Maykos a special privilege that is denied by the ordinance to other lands, structures, or buildings. Look again at the

maps and photos to see that everyone else is denied the ability to build on the wetland buffers. Why should the Maykos get this privilege? The Maykos want this privilege so that their as-yet undeveloped land will be more valuable when they sell it with the variance in place. The Petitioners have not met their burden, as the hearing examiner and Commissioners held.

The Petitioners argue that the requested variance is the minimum necessary to afford relief. There was no offer by the Petitioners for anything less than a building permit for a house, and no mitigation other the purchase of an existing wetland in a bank. The Petitioners made a 'take it or leave it' offer, and now complain that there were no other alternatives.

The Petitioners argue that the decision of the Commissioners deprives them of all economically viable uses of their property. However, the Commissioners ruled solely on the proposed house. Because the Petitioners did not propose any other solution, the Commissioners could not rule on other potential uses of the property. The Washington State Supreme Court looked at a similar case:

[T]he question before this court is whether the Board was 'clearly erroneous' or acted in an 'arbitrary or capricious' manner when it concluded that the landowner did not prove that he had been deprived of any reasonable use of his property. The board concluded that:

clearly these restrictions do not deprive appellant of any reasonable use of his property. Recreational use of small shoreline parcels without the presence of homes on Hood Canal in the vicinity of appellant's lot. Such use is available to appellant, and this situation, we conclude prevents him from meeting the threshold requirement for a variance under the MCSMP [Mason County Shoreline Master Program].

Clerk's Papers vol. 2, at 31. This conclusion is supported by the Board's finding:

Nearby waterfront parcels are used for recreational purposes, involving docks, floats, decks or boathouses, but without homes on the properties.

Clerk's Papers vol 2, at 27. This finding is supported by the record before the Board. In fact, the landowner testified that a residence would be more aesthetically pleasing to him than a trailer site for a mobile home or a recreational vehicle park or a boat shed. The landowner made no showing that he had no reasonable use of the property if he complied with the existing land use regulations.

We cannot conclude on this record that the Board's decision that the landowner had some reasonable uses for this particular piece of property when used in conformity with the building regulations is clearly erroneous. The Board's finding that water dependent recreational uses do constitute a reasonable use of this small sliver of property finds support in this record and in case law which holds that land may have some economic value where the uses allowed are recreational. The size, location, and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land."

Bueschel v. Department of Ecology, 125 Wn.2d 196, 208-09, 884 P.2d 910 (1994)

Finally, the Petitioners argue that the requested variance will not create significant impacts to the critical areas and will not be materially detrimental to the public welfare or contrary to the public interest. Mr. Sheldon testified concerning his long tenure in public

hearings on shoreline management with the Oystergrowers Association. The Petitioners dismisses his testimony as “unscientific.” In the hearing before the Commissioners, Mr. Mayko praised Mr. Sheldon’s historical understanding of the area. (CH P.49 line 4 *et seq.*) However, the Commissioners had the opportunity to listen to and review all the evidence provided, and found that the evidence demonstrated that this project would create a significant impact. The Petitioners have not met their burden.

ATTORNEY FEES AND COSTS

The Maykos have asked this Court for attorney fees and costs on appeal, pursuant to RCW 4.84.370 and 4.84.185 and RAP 14.2, arguing that Pacific County’s appeal is frivolous and unreasonable. Both the hearing examiner and the board of county commissioners have denied the Maykos’ request for a variance. The Makos were not the prevailing party before the county, and so do not qualify for such even if they were to prevail at this appeal. RCW 4.84.370. The Maykos did not seek attorney fees for an allegedly frivolous defense within 30 days of the entry of the order granting their LUPA decision and so do not qualify for such attorney fees. RCW 4.84.185. The County is again asking this Court to deny the variance, to protect the

Willapa Bay. This is neither frivolous nor unreasonable. Please deny their requests.

Pacific County asks this Court to grant costs pursuant to RCW 4.84.010 and RAP 14.2.

Pacific County asks this Court to vacate the superior court award of costs and fees, and judgment thereon, to the Maykos upon a reversal of that decision.

CONCLUSION

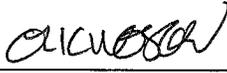
First the hearing examiner and then the board of county commissioners properly denied the Maykos' request for a variance to build a single-family residence with garage on a protected wetland buffer. There were no errors in the review procedure. The County's denial of the variance was based on a correct interpretation of the law. The County's denial of the variance was supported by substantial evidence in light of the entire record. The County's denial of the variance was clearly a correct application of the law to the facts. And the County's denial of the variance did not violate the Maykos' Constitutional rights.

The applicants did not meet each and every of the standards for the evaluation of proposed variances to the CARL ordinance. The

Petitioners have not demonstrated that the Commissioners made any procedural, factual, or legal errors. The Petitioners have not met their burden to establish one of the errors set forth in RCW 36.70C.130(1), and so this Court should reverse the decision of the superior court.

RESPECTFULLY submitted this 13th day of May, 2016.

MARK MCCLAIN
Pacific County Prosecuting Attorney

by: 

Eric Weston, WSBA 21357
Chief Deputy Prosecutor
Attorney for the Respondent.

PACIFIC COUNTY PROSECUTOR

May 13, 2016 - 4:32 PM

Transmittal Letter

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