

No. 49467-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

PACIFIC COUNTY

Appellant,

vs.

DANIEL A. DRISCOLL
DBA OYSTERVILLE SEA FARMS,

Respondent.

Appeal from the Superior Court of Washington for Pacific County

REPLY BRIEF OF APPELLANT

MARK McCLAIN
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By:



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June 6, 2017

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Argument

Pacific County needs to enforce its land use ordinances. Mr. Driscoll argues^{1 2} that there are two paths for enforcement, Land Use Petition Act (LUPA)³ appeals to superior court and district court citations, and that by choosing the second, the county is hamstrung by its own rules against appeals. The county argues that if Mr. Driscoll believed the zoning code did not apply to him as the county consistently told him that it did, he should have raised a LUPA appeal. Because he did not, we can enforce our ordinances in district court, like any other violation of county code.

Should this Court agree with Mr. Driscoll, the county must then amend its code to allow appeal of its district court losses. This would lead to the disfavored party raising a RALJ appeal, and that resultant disfavored party seeking discretionary review from this Court. The resultant path is against the plain spirit of the Land Use Petition Act, RCW 36.70C.010.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

¹ Brief of Respondent, p. 7

² Brief of Respondent, p. 34

³ RCW 36.70C

Mr. Driscoll also argues⁴ that double jeopardy attaches in these 'quasi-criminal actions.' If he is accurate, then the county would be completely denied the ability to find justice in the courts. This result is absurd.

Should this Court agree with Mr. Driscoll, then the county would be required to seek a LUPA petition every time there is a zoning violation if it wished to avoid the resultant procedural quagmire. This would clog the superior court with minor violations.

Mr. Driscoll has consistently argued that the county has been inconsistent in its approval and disapproval of his actions. However, as the district court's final decision⁵ narrates, it has been different arms of government addressing their respective jurisdictions. Yes, Monte Givens the building inspector told Mr. Driscoll that his building was up to code. Yes, Megan McNelly told Mr. Driscoll that his food handling passed health code. Yes, the state liquor board gave Mr. Driscoll a liquor license. But none had the authority to grant Mr. Driscoll the variances required to sell wine and spirits in the restricted residential zone nor to operate a food establishment in a Shoreline Master Plan urban zone. Just

⁴ Brief of Respondent, p. 27

⁵ CP 14

because the state issues a black-powder hunting license does not give the felon permission to possess a firearm.

Pursuant to RAP 2.3(e) the Court of Appeals determines the scope of its discretionary review. *Emily Lane Homeowners Ass'n v. Colonial Development, L.L.C.*, 139 Wn.App. 315, 318, 160 P.3d 1073 (2007), *aff'd in part, rev'd in part sub no.*, *Chadwick Farms Owners Ass'n v. FHC, L.L.C.*, 166 Wn.2d 178, 207 P.3d 1251 (2009).

In the ruling granting discretionary review⁶, this Court set the scope of this appeal:

The superior court's rulings appear to be de novo considerations of the factual issues before the district court, rather than considerations of whether the record supported the district court's findings. By making such de novo decisions, the superior court departed from the accepted and usual course of a court sitting in an appellate capacity. The superior court also appears to have sanctioned the district court's departure from the accepted and usual course of judicial proceedings when the district court ruled that Pacific County was equitably estopped from enforcing its ordinances as to the outdoor seating area and when the district court ruled that OSF [Oysterville Sea Farm] could operate a "small deli." The latter decision appears to be one to be made in the setting of a land use action, not an infraction hearing.

⁶ p. 7

Thus, this appeal has tracked the scope allowed by the order granting discretionary appeal. Assignment of error #1 concerns the superior court's de novo review of the facts contrary to its role as an appellate court in reviewing the legal sufficiency of the facts.

Assignment of error #2 concerns the superior court's sanction of the district court's determination that the county was collaterally estopped from enforcing land use regulations. And assignment of error #3 pertains to the superior court's sanction of the district court's error in allowing Mr. Driscoll to raise previously resolved land use issues in an infraction hearing.

Mr. Driscoll cannot now complain that Pacific County is addressing those issues in its appeal, nor complain that the county fails to address other issues not within the scope afforded by this Court.

RAP 2.4(b) does allow an expansion of the scope of the review when "1) the order or ruling prejudicially affects the decision designated in the notice. . . ." *Right-Price Recreation, L.L.C. v Connells Prairie Community Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

Mr. Driscoll repeatedly argues⁷ that the county has no ability to appeal the decision of the district court because the county's own ordinance prohibits it. This issue was not among those granted discretionary review by this court. Should this Court view this topic as an RAP 2.4(b) issue, then it needs addressed. The district court acted outside its jurisdiction when it made LUPA decisions. "The alleged existence of defects that will deprive the court of subject matter jurisdiction may be raised at any time. RAP 2.5(a)(1);" *Matter of Saltis*, 94 Wn.2d 889, 893, 621 P.2d 716 (1980). This issue of the extent of the district court's jurisdiction is central to this appeal.

Mr. Driscoll argues⁸ that in agreeing to the Superior Court's order of dismissal of the county's appeal, the county has agreed with the decision. This is error on its face, misconstruing the county's agreement that the written order comports with the court's oral ruling.

Mr. Driscoll wishes to limit this Court to a review of the superior court's RALJ decision.⁹ This is error. The proper object of

⁷ Brief of Respondent, p. 25

⁸ Brief of Respondent, p. 28

⁹ Brief of Respondent, p. 27

this Court's review is the legal sufficiency of the district court's decision.

RALJ 9.1 governs appellate review of a superior court decision reviewing a decision of a district court *State v. Ford*, 110 Wn.2d 827, 829, 755 P.2d 806 (1988); *State v. Hodgson*, 60 Wn.App. 12, 15, 802 P.2d 129 (1990).

Pursuant to RALJ 9.1(a), an appellate court shall review the decision of the district court to determine whether that court has committed any errors of law. A superior court reviews a district court decision under the same RALJ 9.1 appellate standards. *Ford*, 110 Wn.2d at 829–30, 755 P.2d 806.

State v. Brokman, 84 Wn.App. 848, 850, 930 P.2d 354 (1997)

This is comparable to discretionary review granted by the Supreme Court. The Supreme Court analyzes a court of appeals decision to the extent that such analysis illuminates the discussion, not to determine error by the courts of appeals.¹⁰

To the extent that it is relevant, that the superior court indulged in de novo review is evident from its lack of analysis of the findings of fact and conclusions of law. The superior court did not cite the record. There is no discussion of what amount of evidence would be sufficient nor how the evidence fails that standard. The superior court's sole discussion of the district court's findings of

¹⁰ Though some decisions may appear to be otherwise.

fact, in the superior court's findings 1 and 2, were conceded by the county. The RALJ court's failure is evident on the face of its ruling.

Mr. Driscoll is mistaken when asserting¹¹ that the amended citation, because it lacks any allegation of fact, must be read in conjunction with the original citation for it to be construed and understood. An amended citation stands or falls on its own, just as an amended information or amended complaint. The district court noted in its final decision that the amended citation lacked any factual accusation, and that Mr. Driscoll pursued no remedy¹². "The defendant did not object to the amended citation for vagueness or make a motion for a more definite statement." Both Mr. Driscoll and the superior court acting in its RALJ capacity err by their reference to the first complaint. The superior court's opinion refers solely to the irrelevant original complaint and not the relevant amended complaint.

Mr. Driscoll attempts to persuade this Court that the district court's finding that the county is estopped from preventing the operation of a restaurant is mere dicta, a footnote.¹³ This claim is belied by the fact that 75 percent of the district court's final decision

¹¹ Brief of Respondent, p. 14 – 15

¹² CP 14

¹³ Brief of Respondent, p. 28

of September 15, 2015,¹⁴ discusses Mr. Driscoll's estoppel defense. The district court concluded.¹⁵

Based on the foregoing it is clear the Defendant may not operate a restaurant which includes indoor seating or the service of wine or other spirits. It is also clear that the Defendant may operate a "small deli" which sells seafood as its primary product with incidental non-seafood products also available for sale. It also seems clear the Defendant can operate an outdoor seating area limited to the back where patrons may consume the product purchased on site including cereal, fruit, and fish because Pacific County is estopped to deny him that ability. (While there is no evidence of the exact cost of the reliance by Defendant it seems substantial.)

Conclusion

Pacific County asks this Court to hold that the RALJ court's decision is null and that the district court impermissibly allowed Mr. Driscoll to raise issues proper only in a LUPA appeal, including the defense that the county was estopped to deny him the necessary zoning variances.

Pacific County asks this Court to allow it to enforce its zoning code efficiently.

¹⁴ 1,648 words of the district court's 2,189-word decision

¹⁵ CP 14

RESPECTFULLY SUBMITTED this 7th day of June, 2017.



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington that on the date signed below, I caused the foregoing document to be sent via electronic transmission to be delivered to the Court for filing, and a true copy sent for delivery via United States Postal Service first-class mail upon the attorney for the respondent:

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SIGNED this 7th day of June, 2017, in South Bend, Washington.


Bonnie Walker

PACIFIC COUNTY PROSECUTING ATTORNEY

June 08, 2017 - 1:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49467-1
Appellate Court Case Title: Pacific County, Appellant v. Daniel A. Driscoll, d/b/a Oysterville Sea Farms, Respondent
Superior Court Case Number: 15-2-00276-9

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