

NO. 16-2-00673-21

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

DRP HOLDINGS LLC and KEANLAND PARK HOMEOWNERS'
ASSOCIATION,

Appellants,

v.

THURSTON COUNTY,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt

REPLY BRIEF OF APPELLANTS

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STATEMENT OF CASE IN REPLY

Appellants DRP Holdings LLC and Keanland Park Homeowners' Association (collectively, "DRP" or "Appellants") have no additional facts to add beyond those stated in their Opening Brief. DRP relies primarily on those facts for this Reply Brief.

Nonetheless, in its Response Brief, Thurston County makes two factual assertions that are patently false, and DRP must address each in turn in order to clarify the record and give this Court a clear understanding of the legal issues and relevant facts that are applicable in this appeal.

A. The County relied directly on the 2008 Policy to impose monitoring conditions on KPI.

In its Response Brief, Thurston County takes issue with DRP's factual statements concerning the timing and importance of Policy ONST.08.POL.606, adopted July 18, 2008 (the "Policy"), which was the basis for the additional effluent monitoring and sampling conditions the County sought to impose on the vested Keanland Park Planned Rural Residential Development ("KPI"), as outlined in Environmental Health Division's ("EHD") letter, dated January 7, 2015 (the "EHD Letter").

Specifically, the County states:

Respondent Thurston County disagrees with the factual assertion contained in Appellants' briefing at pages 11-12, that Thurston County relied upon a policy [AR 35-36] adopted four years after the submission of the completed preliminary plat application in making its monitoring

determination. This assertion by Appellants is not supported by any Findings contained in the record made by either the Hearing Officer, the Board of Health, or the Superior Court. This factual assertion is inaccurate, and should not be considered by the Court when making its determination.

Thurston County Response Brief (“Response Brief”), at 3.

The County does not elaborate on precisely what is “inaccurate” about DRP’s factual statements. In fact, the record is abundantly clear and, in several ways, patently contradicts the County on this point.

Foremost, the County enclosed the Policy with the EHD Letter that imposes the very conditions now under appeal. AR 35-36. The EHD Letter expressly states that the County is “willing to modify the requirements *as outlined in the attached department policy.*”¹ AR 35 (emphasis added). Second, County staff confirmed that the Policy was used as the basis for the conditions imposed under the EHD Letter. AR 536. Although the County modified the conditions from the Policy, the Policy was nonetheless the basis for the imposition of conditions appealed. *See* AR 537–538 (staff testifying that the conditions under the EHD Letter are different from the standards under the Policy, but that these were the standards that apply to KPI). Finally, County staff stated that the Policy was “developed as a direct result” of DRP’s proposed nitrogen systems. AR 586.

¹ The EHD Letter incorrectly stated that Policy ONST.13.POL.808 was enclosed, as clarified by the Hearing Officers finding No. 25. AR 494.

The record speaks for itself. The Policy, adopted on July 18, 2008, over four years after submission of complete preliminary plat application for KPI, was the basis for the conditions outlined in the EHD Letter. Confusingly, the County argues that this assertion is “not supported by any Findings contained in the record.” Response Brief, at 3. This assertion is patently false. The County is being disingenuous in its arguments and seeking to obfuscate the legal issues presented in this appeal.

B. The County’s monitoring conditions were not beneficial to KPI.

The County also states that the proposed monitoring conditions imposed by the EHD Letter “reduced Appellants financial burden for testing effluent by requiring that only one-third of systems were to be tested each year.” Response Brief, at 4. The County’s citations for this statement are off-point; County testimony only indicated that the proposed “modified” conditions from the 2008 Policy were a more “realistic attainable standard.” AR 494, 562. There is nothing in the record concerning the “financial burden” of testing. And more importantly, whether the novel conditions have a positive or negative financial impact is wholly irrelevant to whether the County can *legally* impose these conditions on the Project.

Again, the County’s factual statements attempt to cloud the preeminent issue in this case—that is, whether the EHD Letter imposes conditions beyond the scope of the vested KPI. Despite the County’s

attempt to change the facts of this case and obfuscate that legal question,
the record is clear and patently contradicts the County's contentions.

ARGUMENT IN REPLY

The primary legal issue on appeal is whether the County can impose effluent monitoring and sampling conditions on the vested KPI, even if those conditions were adopted after complete preliminary plat application and not included in the terms of final plat approval. By a plain application of the state vesting statutes concerning subdivisions (RCW 58.17.033 and RCW 58.17.170), DRP should prevail and be allowed to move forwards with the KPI project as approved, in accordance with the terms of its final plat.

As discussed above, the County's Response Brief contained factual inaccuracies, which DRP has clarified by highlighting the relevant portions of the record that refute the County's statements. Similarly, DRP will address two of the County's primary legal arguments, specifically the County's improper reliance on the parties' negotiated resolution to the nitrate-loading issue in 2008 and its interpretation of its authority under the 1999 Thurston County Sanitary Code (the "Sanitary Code").

A. The County improperly relies on the 2008 Agreement as justification that DRP agreed to potential additional monitoring conditions at operational certificate issuance.

In response, the County argues that the parties' negotiated resolution to the nitrate-loading issues in 2008, as evidenced in the February 18, 2008 letter authored by counsel for DRP (the "2008 Agreement") (AR 69-71,

225-227), indicates that DRP “conceded” and “acknowledge[d]” that the County could impose new monitoring conditions at the point of on-site septic (“OSS”) system operational certificate issuance. Response Brief, at 8, 11. Recall, in 2008, following several years of County review, DRP and the County “agree[d] to disagree” over the methodology for evaluating compliance with assimilative capacity, and reached an agreement to resolve the issue. AR 69-71, 225-227; AR 559-560. The County agreed to DRP’s use of the enhanced OSS systems on a plat-wide basis, so as long as there was a centralized monitoring and maintenance scheme through the homeowners’ association. AR 69-71, 225-227. This resolution was documented in the 2008 Agreement. AR 69-71, 225-227.

As previously discussed in DRP’s Opening Brief, the 2008 Agreement letter codifying the parties’ resolution is wholly irrelevant to the fundamental legal question presented of whether EHD can impose novel field performance monitoring conditions on the OSS systems within KPI following plat approval. Based on state vesting law under RCW 58.17.033 and RCW 58.17.170, EHD cannot impose new field performance monitoring conditions that were not in place at the time of complete preliminary plat application, are in direct conflict with the terms of final plat approval, and are without any other legal basis. Whether the 2008 Agreement discussed or implied EHD could impose later conditions (which

it clearly did not) is entirely beside the point and has no bearing on the outcome of this case. The existence of the 2008 Agreement letter—and what it says—is a distraction from the legal issues presented.

Nonetheless, the County’s persistent reliance on this letter requires DRP to address and clarify the substance of the 2008 Agreement, for purposes of informing this Court’s accurate and complete review of the present appeal.

First, to the extent that this letter acknowledged anything, it was strictly limited to changes and increased costs in the technology. The 2008 Agreement expressly states that the use of proprietary OSS systems (MicroFAST 0.5) were to “achieve compliance with assimilative capacity standards” and that compliance with state and local rules governing the “use and permitting” of said systems will occur at time of permitting and “there is therefore some risk . . . that the *proposed technology* might change or increase in cost” from plat approval to permit application. AR 69-71 (emphasis added). There is no express agreement or acknowledgment that the County can and would impose additional *field performance monitoring or sampling conditions* on the vested KPI. See AR 70 (limited to “technology”). Even EHD staff testified that the agreement was regarding the technology of OSS systems. AR 560. Mr. Hansen testified that he agreed to this resolution because he was concerned about the availability of

the *proprietary* systems at the time. AR 519-21. The record is ripe with evidence that EHD *never* represented to DRP that it would impose additional field performance monitoring conditions on KPI. *See* AR 519-521, 536, 559-560 (hearing testimony indicating parties proceeded with review without effluent sampling conditions); AR 586 (Policy later adopted as “direct result” of KPI proposal). The plain text of the 2008 Agreement and testimony of Mr. Hansen and EHD staff evince a clear understanding that nitrate-reducing technology and associated costs may change at a later date, not that additional conditions related to those systems would be imposed. AR 70; AR 516-21, 560.

Second, even assuming that DRP *would* elect to freely derogate its statutory vesting rights, it *could* not. The vested rights doctrine does not allow a developer to selectively waive its vested rights subject to any given project. *See East Cnty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 437, 105 P.3d 94 (2005) (rejecting developer’s selective waiver of vested rights). The very purpose of the vested rights doctrine is to provide certainty to developers and protect their expectations against fluctuating land use policy. *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997). Not only would a selective waiver of vested rights harm this fundamental purpose, but it would also cause harm to the administering jurisdiction and public since it would allow for “cherry picked” regulations

to apply to any given development project. *See id.* at 439. This state does not recognize selective waiver of vested rights, and it has never authorized this form of implied “concession” of certain rights, as the County argues with its reading of the 2008 Agreement. *See* Response Brief, at 8.

In sum, EHD seeks to impose conditions based on a Policy that was adopted long after complete preliminary plat application, the parties’ agreed-upon resolution to the nitrate-reducing issue, and in direct conflict with the terms of final plat approval. At best, the County offers the 2008 Agreement as evidence of DRP’s “conced[ing]” and “acknowledg[ing]” that the County would apply new monitoring conditions on the vested KPI at operational certificate issuance. Response Brief, at 8, 11. Not only is that 2008 Agreement incorrectly interpreted, but it is irrelevant and inapplicable to the primary legal question as to whether the County can impose new monitoring conditions on KPI after preliminary and final plat approval.

B. The Sanitary Code and WAC do not allow the County to impose monitoring conditions on a “subjective” basis at the time of OSS certificate issuance.

The County argues that Sections 5 and 16 of the Sanitary Code and WAC 246-272A grant the Thurston County health officer “broad powers” to require performance monitoring or sampling of OSS systems. Response Brief, at 9. The County goes so far as to argue that the language under the

Code is “subjective and authorizes the Health Officer to impose conditions on a case by case basis, dependent on the local conditions to ensure the health and safety of its citizens.” *Id.* Even if the Sanitary Code and WAC in fact granted such broad discretion, which the language clearly does not, the County’s extravagant reading is not supported by any legal authority in the State.

Section 5.2.1 plainly authorizes the County’s health officer to “require performance monitoring or sampling of any alternative system *in accordance with guidelines issued by the Washington state department of health or policies to be developed by the department.*” AR 364 (emphasis added). There are no state guidelines in place for monitoring or sampling of the MicroFAST .5 systems here. AR 555, 580-81, 585. Thus, performance monitoring conditions can *only* be based on “policies to be developed by the department.” The Policy, however, did not exist at the time of complete preliminary application. *See* AR 37-40, 344-347 (2008 Policy dated July 18, 2008); AR 200, 229 (preliminary plat application April 27, 2004). Nor was the Policy and its conditions made part of the terms of KPI’s final plat approval. *See* AR 104. Thus, Section 5.2.1 provides the County no authority to impose these novel monitoring conditions on the vested KPI.

Section 16 similarly does not provide the County any authority for “subjective” conditioning of a vested project. Section 16.2 requires the health officer to establish “recommended conditions, monitoring schedules and reporting schedules to assure proper on-going operation and maintenance of all OSS.” AR 396-397. These “conditions, monitoring schedules and reporting schedules” are found in the Petitioners’ proposed Third Party Monitoring Agreement (the “Monitoring Agreement”), as agreed to by the parties in 2008, and which became a condition of plat approval. AR 77-86, 214-223; AR 104. Nothing in the plain language of Section 16 grants the County “subjective” authority to impose additional “conditions, monitoring schedules and reporting schedules” on a case-by-case basis, especially after rejecting the Monitoring Agreement that contains those very conditions and monitoring schedules, which is consistent with state permitting and manufacturer specifications for operation and maintenance of the septic systems installed. AR 77-86, 214-223; AR 90-103; AR 137-164. Thus, Section 16 of the Sanitary Code provides no authority to the County to impose these novel monitoring conditions on the vested KPI.

Finally, the WAC 246-272A provisions that the County relies on for the baseline treatment levels for nitrogen under the Policy are plainly inapplicable to this vested project. AR 37-40, 344-347; AR 433; AR 544-

546; Response Brief, at 9. WAC 246-272A authorizes the local health officer to “require performance monitoring or sampling of any alternative system,” but according to the State Department of Health, the tables and values within WAC 246-272A are *not* to be applied as “field compliance standards.” AR 74; AR 433. The County attempts to sidestep this express statement by arguing that it was not entirely relying on the tables and values in WAC 246-272A because it “proposed a less stringent compliance level” for KPI. Response Brief, at 11. Regardless of the extent of reliance on WAC 246-272A to create these conditions for KPI, EHD nevertheless *misapplied these regulations as field compliance standards* for the vested KPI. See AR 544 (EHD staff testifying that it applied the conditions as a field performance standard).

In sum, reviewing the plain language at issue, Sections 5 and 16 of the Sanitary Code and WAC 246-272A provide no authority for the County to impose the novel monitoring conditions on the vested KPI. Therefore, the County’s even more absurd position that these provisions authorize EHD to impose “subjective” conditions is equally without merit. Even if the County’s construction of the health officer’s authority under the Sanitary Code or WAC 246-272A was based on the plain language at hand, the County points to no legal authority that would authorize it to impose subjective, arbitrary, and at-will conditions on a vested subdivision. Rather,

the County is limited to its codes, procedures, and policies in place at time of complete preliminary plat application and the terms of final plat approval. RCW 58.17.170(3)(a). State law plainly does not authorize the County to impose novel conditions on the vested plat of KPI on a “subjective” and ad hoc basis. *See Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn. 2d 737, 753, 317 P.3d 1037 (2014) (refusing to defer to the hearing board’s interpretation because the record showed that the interpretation of zoning regulations was not based on any preexisting policy but instead “entirely ad hoc”).

C. The County has not demonstrated that this Court should accord deference to the Board or EHD.

This Court should not accord deference to EHD based on its misunderstanding of state law (RCW 58.17.033 and 58.33.170), state department of health regulations (WAC 246-272), and the Thurston County Sanitary Code. *See Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 5151, 137 P.3d 31 (2006) (finding that appellate court is not bound to an agency’s interpretation, even if it has specialized expertise in relevant issues, especially if the interpretation is contrary to state law); *see also Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (stating that the duty of the judiciary branch is to say what the law is and need not defer to an agency’s interpretation contrary to law). Moreover, the County’s imposition of these novel effluent monitoring

conditions is not consistent with a pattern of past enforcement. AR 530, 536-538. Instead, as admitted in staff testimony, the conditions were developed as a direct result of the KPI project. AR 586. Thus, this Court owes no deference to EHD or the Board's decision. *See Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.,2d 737, 753, 317 P.3d 1037 (2014) (refusing to defer to the hearing board's interpretation because the record showed that the interpretation of zoning regulations was not based on any preexisting policy but instead "entirely ad hoc"); *see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 645-47, 151 P.3d 990 (2007) (finding that the City's interpretation of its ordinance was not entitled to deference because the City failed to show that the interpretation was "part of a pattern of past enforcement" and had instead applied the interpretation "only one or two instances in 30 years").

CONCLUSION

Under state law, the plat of KPI is governed strictly by the terms of the approved final plat, as well as the statutes, ordinances, and regulations in effect at the time of complete preliminary plat application. The record clearly demonstrates that EHD lacked regulatory authority under the Thurston County Sanitary Code in effect at the time of complete preliminary plat application to impose field performance monitoring conditions on the OSS systems. Similarly, no such monitoring requirements were imposed as conditions of KPI preliminary or final plat approval. The County's factual misstatements attempt to alter the underlying facts of this case, but the record on appeal and the law in the State is clear. The County cannot impose additional effluent monitoring and sampling conditions that were adopted after and in conflict with KPI's preliminary and final plat approval.

The Board's decision affirming the Hearing Officer's decision denying DRP's appeal of the conditions is a clearly erroneous application of state vesting law and the Sanitary Code, and the Board's deference to EHD's interpretation and application of the Sanitary Code under the facts and circumstances is not supported by substantial evidence in the record. Accordingly, this Court should reverse the Superior Court and Board of Health decisions, and remand the matter to the Board with direction to remove Conditions 4-7 of the challenged EHD decision requiring effluent

monitoring and performance standards for the installed OSS systems within
the plat of KPI.

Respectfully submitted this 8th day of June 2017.

PHILLIPS BURGESS PLLC

A handwritten signature in black ink, appearing to read "Heather L. Burgess", is written over a horizontal line.

HEATHER L. BURGESS

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DECLARATION OF SERVICE

I, Danielle Anderson, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

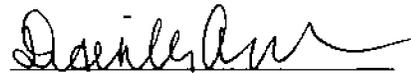
I am a resident of the State of Washington over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Phillips Burgess PLLC, whose address is 724 Columbia Street NW, Suite 320, Olympia, Washington 98501.

On June 8th 2017 I sent out for service upon the below-listed party at the address and in the manner described below, the following document:

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DATED at Olympia, Washington this 8th day of June, 2017.



 Danielle M. Anderson

PHILLIPS BURGESS PLLC

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