NO. 298639

FILED

JUL 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

ELIZABETH CRADDUCK,
d/b/a SUN - TIDES MOBILE HOME PARK,

Respondent,
v.

YAKIMA COUNTY, WASHINGTON, a political subdivision
of the STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellants.

BRIEF OF APPELLANT YAKIMA COUNTY

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I. INTRODUCTION

Yakima County, co-appellant with the Washington State Department of Ecology in this proceeding, submits the following brief in support of its appeal of the March 25th, 2011 Yakima County Superior Court decision in Cause No. 10-2-01984-6.

At the outset, Yakima County has had the opportunity to review a draft of Co-Appellant Washington State Department of Ecology's brief in this case and adopts the arguments it contains. The County's argument will focus on the Court's findings regarding the Building Official's responsibilities to the Respondent.

II. ASSIGNMENT OF ERRORS

A) Denial of a permit to replace a mobile home in a mobile home park that existed on a site prior to its designation as a statutory floodway is not unduly oppressive to the park owner and a violation of their substantive due process rights, where the park owner is not the applicant for the permit and where the remaining mobile homes can remain and rents can be collected for their use. (Findings/Conclusion 2f).

B) The County Building Code Official, administering the county's flood hazard laws, is not required to conduct a risk assessment or solicit additional information when a complete permit for the replacement of a mobile home in a mobile home park located in a designated floodway is submitted. (Findings/Conclusions 2h).

III. STATEMENT OF THE CASE:

On May 21, 2010, Yakima County received an application for a permit to place a new mobile home on Lot #17 of the Sun Tides Mobile Home Park, which is owned by the Respondent Elizabeth Cradduck. CP 38-41. The application for the permit was submitted by a mobile home placement contractor, Gatos Construction LLC, on behalf of the owner of the new mobile home unit, Mr.

Lloyd Johnson. Id. In the course of reviewing the application the county noted that Lot #17 was in a FEMA designated floodway. CP 73-74 and Tab B to CP 23-Declaration of David Saunders. The floodway was designated by FEMA in revised maps it issued on November 18, 2009. CP 75. The FEMA flood maps existing prior to the November 2009 revision had shown the Sun Tides development to be in a floodplain, but not a floodway. The Sun Tides development predates the existence of the state and county flood hazard regulations.

The County Building Official is the responsible official designated in the Yakima County Critical Areas ordinance (YCC 16C) to administer and enforce the Yakima County Code (YCC) Chapter 16C.05, which is the county's flood hazard regulations (CR 23). Upon receipt of the application, the building official sought an interpretation from the Washington State Department of Ecology's Floodplain Management Specialist, Mr. Charles Steele, as to whether a replacement mobile home could be installed in a floodway. CP 45. Washington Administrative Code (WAC) 173.159 states that the Washington State Department of Ecology (DOE) provides local jurisdictions technical assistance. On May 25, 2010 Mr. Steele confirmed to the county that RCW 86.16.041 would not allow a new mobile home in the floodway, regardless of whether or not it was a replacement. Id. On May 26, 2010 the Building Official issued a written decision in which he advised the property owner and applicant that their application for a permit was denied. CP 46-47. Under Yakima County law there is no administrative appeal process for a denial of a permit.

Respondent Elizabeth Cradduck filed an appeal pursuant to RCW 36.70B, the Land Use Petition Act (LUPA). CP 3-9. On January 7, 2011 the Superior Court, Hon. Ruth Ruekauf, heard oral argument from the Petitioners and Respondents. On March 25, 2011 the Court issued its findings and order. CP 498-504. In its Order, the Court analyzed the Respondent's constitutional takings arguments under the analysis contained in *Guimont v. Clarke*, 121 Wn2d. 586, 854 P2d.1 (1993). VRP 9. In finding that there was not a regulatory "takings", the Court determined that the plaintiff had not met their burden of proving that the flood hazard regulations deprived the property owner of all viable economic uses of the property. Further, balancing the state interest in regulating activities for flood control purposes, the Court held that the economic harm did not outweigh the state interest in protecting the public from flood hazards. Thus, the Court held that there was not a federal or state constitutional "takings" of private property for public benefit. Id.

The court next considered the petitioner's substantive due process argument. The court considered three elements: 1) Whether the regulation was aimed at a legitimate state interest; Verbatim Report of Proceedings, (VPR) P. 7. whether the regulation uses reasonably necessary means Id.; and 3) whether the regulation is "unduly oppressive" to the property owner. VRP 7-8, See also VRP 11. The court confirmed that the regulation was aimed at a legitimate state interest, but held that it was debatable whether the regulation used reasonable means necessary to effectuate its goals. Id. However, in looking to other economic uses available to the property owner, the Court held that enforcement of the state and

county flood hazard ordinances resulted, in this specific instance, in a negative economic impact to the property owner. The Court also held that the county did not discuss the matter directly with the respondent when it denied the applicant's permit application. The Court expressed concern about the county's failure to conduct a risk assessment as to the harm to the property owner prior to denying the applicant's permit. Id.

IV. ARGUMENT

Under well settled Washington law, the responsibility for the zoning of property lies with local government, not the courts. Our courts have repeatedly said that reversal of local governmental decision making is not appropriate just because the court might have reached a different result on the facts of the case. *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn. 2d 543, 561, 14 P.3d 133, 142 (2000).

The corollary to the broad discretion given local government to make zoning decisions is the limited review of these substantive zoning decisions under LUPA. Under RCW 36.70C.130(1)(c), the merits of land use decisions are reviewed under the "substantial evidence" test, which states that the court can grant relief only if: the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court. *Tahoma Audubon Soc'y v. Park Junction Partners,* 128 Wn. App. 671, 681, 116 P.3d 1046 (2005).

Under LUPA, the burden of proof to show the lack of evidence is on the challenging party. See RCW 36.70C.130 ("The 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.") On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1), even if that party prevailed on its LUPA claim in the Superior Court. *Id.* A reviewing Court will only overturn an agency's findings of fact if they are clearly erroneous and are definitely and firmly convinced that a mistake has been made. *Port of Seattle*, 151 Wn.2d at 588, 90 P.3d 659 (internal citation omitted) (quoting *Buechel v. Dep't of Ecology,* 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). "We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact." *Port of Seattle*, 151 Wn.2d at 588, 90 P.3d 659.

Washington State is one of the most flood-prone states in the United States. One of the first state flood plain laws in the U.S. was adopted by Washington in 1935, and amended in 1969, 1989 and 1999 [SEE Legislative History, Laws of 1999 c 9 § 2, adopted April 15, 1999]. Since 1969, new construction has been prohibited in floodways. (RCW 86.16.041(2)).

The state law pertaining to the management of flood hazards is codified at Chapter 86.16 RCW. This chapter provides that the state of Washington assumes control over state waters for flood management purposes. (RCW 86.16.010)

The State exercises floodplain management regulations through local governments' administration of the national flood insurance program and the establishment of minimum state requirements for floodplain management. (RCW 86.16.020)

Washington State requires that local government floodplain management ordinances be reviewed and approved by the Department of Ecology. (RCW 86.16.031 (1) and RCW 86.16.041)

Washington State further requires that the Department of Ecology may disapprove any ordinance or amendment submitted to it if it finds that an ordinance or amendment does not comply with any of the following:

> (a) Restriction of land uses within designated floodways including the prohibition of construction or reconstruction, repair, ***or replacement of residential structures***, except for:
>
> > (i) Repairs, reconstruction, or improvements to a structure which do not increase the ground floor area; and
> >
> > (ii) Repairs, reconstruction, or improvements to a structure, the cost of which does not exceed fifty percent of the market value of the structure either, (A) before the repair, reconstruction, or repair is started, or
>
> (b) if the structure has been damaged, and is being restored, before the damage occurred. Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications that have been identified by the local code or building enforcement official and which are the minimum necessary to ensure safe living conditions shall not be included in the fifty percent determination) (RCW 86.16.041, WAC 173-158-040, WAC 173-158-064, and WAC 173-158-070)

The parallel Yakima County Code provisions are contained at YCC Title 16C.05. Chapter 36.020 *Prohibited Uses,* which states that:

The following uses/developments are prohibited in the floodway:

(1) any structure, *including manufactured homes*, designed for, or to be used for human habitation of a permanent nature (including temporary dwellings authorized by Section 15.72.060). (Emphasis added).

The Washington Department of Ecology's statutorily-mandated involvement in the process of flood plain management is considerable. Among

other responsibilities, the Department (1) develops guidelines that provide criteria for developing local regulations; (2) reviews, revises, and approves local flood plain management ordinances to insure compliance with the minimum standards of the National Flood Insurance Program; (3) administers certain types of development in flood plain zones; and (4) enforces the state and national flood plain management laws (RCW 86.16.020, .031 and WAC 173-158-020). The state maintains its primacy because the interests of all Washington residents cannot be impliedly abdicated to local government. Thus, the state delegates only specified powers to local government. Yakima County's Flood Zone regulations are codified at Title 16A.05 of the Yakima County Code (YCC) and were initially adopted as Ord. 8-1995 and amended by Ordinance 1-2005. These code provisions were reviewed and approved by DOE as compliant with both RCW 86.16 and the National Flood Insurance program.

The statement of purpose in the flood plain management chapter of RCW 86.16.010 underscores the primacy of the state's authority by stating the following:

Statement of policy -- State control assumed.

The legislature finds that the alleviation of recurring flood damages to public and private property and to the public health and safety is a matter of public concern. As an aid in effecting such alleviation ***the state of Washington, in the exercise of its sovereign and police powers, hereby assumes full regulatory control over the navigable and non-navigable waters flowing or lying within the borders of the state*** subject always to the federal control of navigation, to the extent necessary to accomplish the objects of this chapter. In addition, in an effort to alleviate flood damage and expenditures of government funds, the federal government adopted the national flood insurance act of 1968 and subsequently the flood disaster protection act of 1973. The department of ecology is the state agency in Washington responsible for coordinating the floodplain management

regulation elements aspects of the national flood insurance program (Emphasis added).

As was stated earlier, and as specified in RCW 86.16.010, the DOE is required to review and approve all local flood damage prevention ordinances to insure that they comply with the requirements of RCW 86.16. WAC 173-158-084. This rule also provides that DOE may disapprove any county ordinance or amendment which does not comply with the requirements of the NFIP, or WAC 173-158-040, 173-158-064, or 173-158-070. Finally, the rules provide that DOE will provide guidance and assistance to communities in preparation and review of draft ordinances upon request by the community.

Yakima County's flood zone ordinances were reviewed and found compliant by the DOE. If Yakima County's flood zone regulations are deemed not compliant by DOE, the county's citizens would lose their right to obtain flood insurance and the county would be rendered unable to participate in many important federal programs. Thus, it is imperative that the county's flood regulations be found compliant by DOE. Indeed, the decision in denying the Gato /Johnson permit for placement of a new mobile home in Respondent Cradduck's mobile home park was done after consultation with the DOE. The county has no liability to the plaintiff for a substantive due process violation.

In 1977, the Washington State Supreme Court upheld the state's flood control laws as a proper exercise of the state's police powers, and held that the regulations prohibiting construction in a floodway did not represent a constitutionally invalid taking. *Maple Leaf Investors, Inc. v. the Department of Ecology*, 88 Wn.2d 726,734; 565 P.2d 1162, 1166 (1977). In *Maple Leaf,* a group

of developers had challenged the Department of Ecology's interpretation that RCW 86.16 prohibited any development within a flood-zone's floodway on the Cedar River in King County. The Court determined that the establishment of a flood control zone and the enactment of regulations restricting development within the floodway is not a public improvement in the usual sense of the term. The State did not propose to build any facilities or to take any action which would increase the flow of water over the developer's property, and the State neither acquired a property interest in the developer's land nor was it set aside for a public use. *Id.* at 733-734. The Supreme Court found that the purpose of the prohibition against building residential structures in a floodway was to ***prevent a public harm, not confer a public benefit***. Thus, floodway ordinances are not subject to a regulatory takings argument. *Id.*

Likewise, because of the great public benefit to the citizens of Yakima County in the regulation of development in the flood-prone floodways of the county, the Yakima County flood control ordinance, codified at Title 16C.05 YCC, is not unduly oppressive under a substantive due process analysis because it prevents harm to persons who might otherwise live in the floodway (YCC 16C.05.020.030), does not require the property owner to pay a fee, and does not mandate that an owner remove their property unless they choose to do so.

Washington courts have applied principles of substantive due process as an alternate inquiry where government action has an appreciable impact on property. A land use regulation that does not have the effect of taking private property may nonetheless be unconstitutional if it violates principles of

substantive due process. Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective. The doctrine of substantive due process is based on the recognition that the social compact upon which our government is founded provides protections beyond those that are expressly stated in the United States Constitution against the flagrant abuse of government power. *Calder v. Bull,* 3 U.S. 386 (1798).

The issue of "fairness" is one applied in two constitutional doctrines involving the relationship between government regulations and private property rights. The first is the takings doctrine; the second is the substantive due process doctrine. The fairness determination, however, serves different purposes under each doctrine. Under the takings analysis, excessive regulation beyond the protections afforded under the Fifth Amendment results in a takings, and the remedy is compensation. Under the substantive due process analysis, the remedy becomes invalidation of the regulation itself. Thus, the inquiry for substantive due process purposes is whether "the police power...has exceeded its constitutional limits.[1]

Washington Courts have articulated a three-prong test for a challenged regulation to withstand a claim that principles of substantive due process have been violated. Under this test, a government action must (1) serve a legitimate

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[1] *Between Scylla and Charybdis:* Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limits, Jeffrey Eustis, *16 Puget Sound L. Rev. 1181 (1993).*

governmental objective; (2) use means that are reasonably necessary to achieve that objective; and (3) not be unduly oppressive. *Guimont v. Clarke,* 121 Wn.2d 586, 609, 854 P.2d 1 (1993). As stated earlier, violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation.

Yakima County's local flood control ordinance, adopted pursuant to the mandate of the State Legislature, does serve a legitimate governmental objective and use means reasonably necessary to achieve that objective. And because the county does not prohibit residences that currently exist in a floodway, does not impose a cost to the continued use of the floodway, and only prohibits relocation when a property owner chooses to replace a mobile home, the ordinance is not unduly oppressive.

The courts that have considered the "third prong" of the substantive due process test have said that this prong is the most difficult, and the most often considered, of the three prongs. In the 1997 case *Christanson v. Snohomish, 133 Wn.2d 647, 664-667, (Wash. 1007),* and the Court observed the following:

> The court in *Presbytery* recognized that the unduly oppressive prong "will usually be the difficult and determinative one." *Presbytery*, 114 Wn.2d at 331. Courts have wide discretion in determining whether a regulation is unduly oppressive. Since the police power is inherent in the effective conduct and maintenance of government, it is to be upheld even though it adversely affects the property rights of some individuals. Ford, 16 Wn. App. at 712. Thus, the purpose of this prong is to prevent excessive police power regulations that require the landowner "to shoulder an economic burden, which in justice and fairness, the public should rightfully bear." Orion Corp. v. State, 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987); see also Guimont v. Clarke, 121 Wn.2d 586, 610-11, 854 P.2d 1 (1993); Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 22, 829 P.2d 765 (1992); Robinson v. City of Seattle, 119 Wn.2d 34, 55, 830 P.2d 318 (1992).

The Court in *Christanson* provided further guidance in the context of determining whether a regulation was "unduly burdensome" by looking at the relation between the public and private interests. The Court stated it as follows:

> In analyzing this element, the court must balance the public's interest against those of the regulated landowner. *Presbytery*, 114 Wn.2d at 331. The factors to be considered when determining if a regulation is unduly oppressive include: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner. See id. This court also provided a set of nonexclusive factors to aid in balancing the public's interests and those of the regulated landowner. See id. On the public side the court considers "the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant." Id. On the landowner's side, the court considers "the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses." Id.

In the matter before this court, the trial court relied upon the Washington State Supreme Court's decision in *Guimont v. Clarke, 121 Wn.2d 586, 610-613 (Wash. 1993)* to conclude that Yakima County's Flood Hazard Ordinance was unduly oppressive. In that case, the Supreme Court looked to a balance between the public's interest and the landowner's responsibility and impact. *Guimont* involved the imposition of a fee for each unit forced to relocate under an ordinance seeking to address the issue of affordable funding. The *Guimont* Court held that it was unduly burdensome to require the park owners to shoulder the burden for affordable housing. The Court stated the test as follows:

> We determine if a statute is unduly oppressive by examining a number of nonexclusive factors to weigh the fairness of the burden being placed on the property owner: On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses. *Presbytery*, 114 Wn.2d at 331 (citing *Stoebuck*, San Diego Gas: Problems, Pitfalls and a Better Way, 25 J. Urb. & Contemp. L. 3, 33 (1983)).

In this matter, Ms. Cradduck has not been subject to the imposition of a fee and she has not been asked to "shoulder" a burden that should be shared by all of society. The Yakima County Flood Hazard Ordinance impacts the owner of every structure that is located in the floodway, not just mobile home owners. It is applied equally across the floodways and floodplains of the county. Just because there are few other mobile home parks located in floodways does not indicate that Mrs. Cradduck was singled out. Indeed, the regulation was not even directly applied to her because she was not the applicant for the permit. Her impact is secondary, and only happens when there is the loss of revenue when one of her tenants chooses, for whatever reason, to take their mobile home away and replace it with another mobile home.

Further, the county's regulatory scheme offers the property owner the option of continuing the use of existing structures. Any burden is placed on the individual opting to remove their mobile home and is not because of a mandate from the County requiring them to move.

The loss of value came about because of the mobile home owner's choice, not the county's regulation. *Ventures Northwest Ltd. Partnership v. State,* 81 Wn. App. 353, 914 P.2d 1180 (1996). Cradduck has the ability to maintain the existing mobile home park.[2] The existing mobile home in Lot No. 17 mobile home could have been repaired and maintained as a rental property. Only its

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[2] SEE *Peste v. Mason County,* 133 Wn. App. 456, 136 P.3d 140 (2006) ["*To allege successfully that a statute on its face effects a taking by regulating the permissible uses of property, a landowner must show that the mere enactment of the regulation denies all economically viable use of the property."]*

replacement is prohibited, as long as the property remains designated in a floodway. It is possible that in the future there could be a change in the designation, just as there was in November 2009. The flooding potential is determined by many variables that will change in the future, and this regulation cannot be said to have destroyed all economic viability now and into the future.

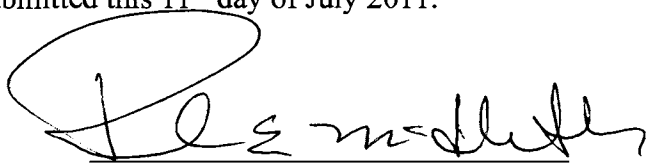
Finally, the County cannot be placed in the position of having to conduct a review of alternative uses for an applicant's land when the proposed use is prohibited by the floodway designation. The law is clear on its face: Residential structures are prohibited in the floodway. What other uses can be made of the property are provided for in the zoning codes and it is not feasible to expect the county to engage in an investigation of alternatives every time it is unable to process a permit application for a use not allowed by law. The Court's determination that there was no reasonable alternative economic value in the property is not supported by the record. Ms. Cradduck continues to manage a large mobile home park. CP 28. Further, the respondents did not provide the Court with any proof that they had actively pursued alternative uses that may have been allowed in the floodway. The Court's decision in that regard is conclusory.

V. CONCLUSION

The regulation of the regulatory floodways is necessary for the appropriate development and safety of all the citizens of Yakima County. Yakima County's enforcement of its valid regulations is not unduly oppressive to the Respondent and does not represent a violation of their substantive due process rights under the

state or federal constitution. For these reasons, Yakima County respectfully requests this Court to reverse the decision of the Superior Court.

Respectfully submitted this 11th day of July 2011.



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