

FILED

APR 19 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal Cause No. 305945

Benton County Superior Court Cause No. 11-2-01428-0

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DIVISION III, STATE OF WASHINGTON

DAVID SCHLOTFELDT and CHARLOTTE SCHLOTFELDT,
husband and wife,

Petitioners,

vs.

BENTON COUNTY, a Political Subdivision of the State of Washington,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellants, David and Charlotte (Missy) Schlotfeldt (“the Schlotfeldts”) applied to Respondent Benton County (“County”) for a conditional use permit to construct and operate a Recreational Vehicle Park. The application was approved with twenty-two conditions. (CP 0018-21).

The Benton County Code (“BCC”) does not regulate length of stay for RVs at RV Parks. (CP 0017). Nonetheless, Condition No. 14 provides that “no recreational vehicle shall remain in the RV Park for more than 180 days in any calendar year period.” (CP 0020) .

The BCC does not regulate RV Parks and provides for no length of stay limits or guidelines in its zoning code or business regulations which would provide any objective basis for imposing length of stay limits. Rather, the County asserts it has an inherent free floating authority to impose conditions of approval and that those conditions do not need to be tied to its zoning code objectives or conditional use permit conditions.

The Schlotfeldts maintain that the authority to restrict length of stay must come from an objective or goal of the applicable zoning designation (Light Industrial) or be imposed pursuant to achieving compliance with one of the County’s five conditional use permit approval criteria. In this instance, the length of stay is unrelated to an objective of the zoning code or the County’s conditional use criteria. Accordingly, it cannot be justified.

II. ASSIGNMENTS OF ERROR

Assignments of Error.

1. The County Board of Adjustment erred when it imposed a length of stay limitation unrelated to the CUP approval criteria. This constitutes a clearly erroneous application of the law to the facts.

2. The imposition of a length of stay limitation for recreational vehicles at the approved RV Park was not supported by evidence that is substantial when viewed in light of the whole record.

3. The length of stay condition imposed by the County is based upon an erroneous interpretation of the law, after allowing for such deference as is due the construction of the law by Benton County.

4. The length of stay condition is arbitrary and cannot be regulated in a manner that reasonably or practically achieves mitigation.

Issues Pertaining to the Assignments of Error.

1. The Benton County Code does not expressly regulate RV Parks. The imposition of conditions for approving conditional use permits must be related to (1) fulfillment of a zoning code objective or (2) mitigation of the impacts imposed to satisfy the County's approval criteria. In this instance, the length of stay limitation bears no relationship to either. (Assignment of Error 1).

2. No specific evidence was introduced regarding the “impacts” of unregulated length of stay. The only alleged impacts were the general displeasure of some neighboring property owners and concerns that the RV Park might turn into a trailer park. Neither justify a length of stay limitation. (Assignment of Error 2).

3. In response to the Schlotfeldt’s LUPA appeal to Benton County Superior Court, the County argued it possessed inherent authority outside of its zoning code or approval criteria to impose conditions on a conditional use permit. The appeal was denied based upon the Superior Court’s acceptance of this argument. The Schlotfeldt’s argue (1) the County never stated it possessed inherent authority outside its codified approval criteria during the open record hearing and (2) even if such authority exists, the County exceeded its authority because zoning authority cannot be used to regulate day-to-day business activities. (Assignment of Error 3).

4. The length of stay limitation provides that “no recreational vehicle shall remain in the RV Park for more than 180 days in any calendar year period.” Neighboring jurisdictions provide for a limitation within a 12 month period. The “calendar year” limitation is arbitrary and will not achieve any mitigation because depending upon the time of the month a visitor arrives, they can stay up to one year. (Assignment of Error 4).

III. STATEMENT OF THE CASE

The evidence before the Court consists of (1) the Staff report and pre-hearing records submitted by project opponents and proponents¹; (2) testimony submitted during the open record hearing; (3) the Board deliberations, and (4) the Findings of Fact and Conclusions of Law.

1. Relevant Documents Submitted into the Record.

On December 15, 2010, the Schlotfeldts submitted application SP 10-20 to Benton County for approval of a conditional use permit (“CUP”) to construct and operate a Recreational Vehicle Park (“RV Park”). (AR, BOAR 1.1, Special Use Permit Application). The application was deemed complete on December 21, 2010. (AR, BOAR 1.1, p. 7).

As part of their Application, the Schlotfeldts submitted an environmental checklist. On February 22, 2011 a determination of non-significance was issued by the lead agency, Benton County, stating that the proposal did not “have a probable significant adverse impact on the environment, that an environmental impact statement (EIS) was not required under RCW 43.21C.030(2)(c), and that the decision was made after review of a completed environmental checklist and other information on file with the lead agency.” (AR, BOAM 1.6, Determination of Non-Significance Issue February 22, 2011).

¹ For reference, the Administrative Record (“AR”) contains an index that contains a four-letter alpha designation of BOAR, BOAM, or BOAH followed by a 1, decimal point, then a record number. All other documents are referenced by Clerk’s Paper Designations.

Included in the environmental analysis J-U-B Engineers analyzed traffic impacts. (AR, BOAR 1.8 Badger Road RV Resort Traffic Impact Analysis – November 2010). This report concluded that the build scenario met acceptable levels of service for an unsignalized intersection. Thus further mitigation options were not completed. (*Id.* at p. 11)

In response to the application, and in anticipation of a public hearing before the Board of Adjustment, the County Planning Department Staff prepared a Staff Report and Proposed Findings of Fact. In the Staff Report, the Staff made the following assessment related to RV Park length of stay:

28. The application for the RV Park did not address the length of stay for the RVs. Several of the surrounding property owners have asked about and commented about the RV staying year around and the RV Park becoming a residential subdivision. *The Benton County Code does not have standards for length of stay in an RV Park.* The City of Richland provides that no RV shall remain in place in a RV park for more than 12 months in a 14-month period. The city of Kennewick only allows an RV to be in a RV Park for 120 days in a 12-month period. The Washington Administrative Code Section 296-150R-0020 and Revised Code of Washington Section 43.22.335 defines an RV as: “Recreational vehicle is a vehicular type unit primarily designed as temporary living quarters for recreational camping, travel, or seasonal use that either has its own motor power or is mounted on, or towed by, another vehicle. Recreational vehicles include: camping trailers, fifth-wheel trailers, motor homes, travel trailers, and truck campers.” Recreational vehicles are not considered as permanent dwellings and should not be allowed to stay in the RV Park year around. When they are allowed to remain in a RV Park long term they tend to store items such as freezers and other things outside. RVs should always have a current license. To assure the RV Park does not become a facility for long-term living, planning staff recommends that no recreational vehicle remain in the RV Park for more than 120 days in any calendar year. All RVs must have a current license.

(AR, BOAM 1.1, Staff Memo dated March 22, 2011, p. 8 & 9)(emphasis added).

The BCC does not regulate RV Parks. They are simply defined and the zoning code sets forth the zoning designations where RV Parks are permitted.

BCC 11.28.010(e) provides two relevant definitions:

(131) "Recreational Vehicle" means a motorized or non-motorized vehicle designed and manufactured for recreational use, including but not limited to boats, travel trailers, snowmobiles, go carts, motorcycles (including three and four wheelers), and dunebuggies.

(132) "Recreational Vehicle (R.V.) Park" means any site, lot or parcel of ground occupied or intended for occupancy by two (2) or more recreational vehicles for travel, recreational or vacation uses, whether or not a fee is charged. Storage of two (2) or more unoccupied recreational vehicles does not constitute an R.V. Park.

The Planning Department's pre-hearing Staff Report proposed conditions of approval, including Condition 14, which stated:

That no recreational vehicle shall remain in the RV Park for more than 120 days in any calendar year period. All recreational vehicles located in the RV Park must have a current license. The applicants shall continue to meet this requirement while Special Permit SP 10-20 is in effect.

(AR, BOAM 1.1, p.11).

The Staff Report is provided approximately one week prior to hearing. This report provides applicants such as the Schlotfeldts the opportunity to review staff comments, recommendations, proposed findings, and if necessary, address any areas of concern identified in the Staff Report.

Absent a Benton County Code provision regarding RV length of stay, Planning Staff concluded that no recreational vehicle shall remain in the RV park for more than 120 days in any calendar year. (AR, BOAM 1.1, p. 11). The Planning Staff apparently based their proposed condition on the City of Kennewick's 120 day length of stay provision. The County referenced but disregarded the City of Richland's 12 month out of any 14 month period length of stay requirement. No comment or explanation was given for requiring an RV owner to leave the park for the balance of the year versus returning at some other interval after the 120-day stay.

2. Testimony Introduced into the Record.

Benton County offers the applicant of a CUP on open record hearing to receive testimony from opponents and proponents. Below is the relevant testimony and deliberations related to the Schlotfeldt's application.

1. Length of Stay.

The majority of Applicant's testimony at the hearing was presented by Charlotte Schlotfeldt. Ms. Schlotfeldt testified that the RV Park would be designed to attract full time RV travelers, who typically spend six months in a northern climate during the summer, and six months in a southern climate during the winter. (CP 0069). Ms. Schlotfeldt testified that "to limit a campground to a hundred and twenty days would limit the use and income, including taxes that a campground would make, and make it almost impossible to run and make a reasonable profit." (CP 0069-70).

Ms. Schlotfeldt further stated that Horn Rapids RV Park, the nearest comparable park, has a length of stay of no more than 12 months out of a 14 month period. Imposition of a 120 day length of stay period would give a competitive advantage to neighboring parks such as Horn Rapids. Ms. Schlotfeldt concluded her testimony by requesting that the length of stay condition, if imposed, follow the City of Richland's 12 month in a 14 month period. (CP 0072-73).

The Schlotfeldts also presented testimony from consultant, Rich Stockwell. He testified that he had been in the RV park consulting business for 18 years, and had assisted with RV parks across the United States and Canada. (CP 0075).

Mr. Stockwell stated that he is involved with more than 400 RV parks and he is unaware of any length of stay conditions less than one year. (CP 0081). The

Schlotfeldts also suggested their site, while located in Benton County is closest to the City of Richland and could become part of Richland's urban growth area. (CP 0088-

89). It was a logical extension to model Benton County's RV Park length of stay

condition after the City of Richland, which provides that RVs can stay 12 months in a 14-month period rather than follow the City of Kennewick's 120 day length of stay. (CP

0089). It was pointed out that in absence of a standard, the Board should set a standard that's most tied to the community that might someday absorb the Schlotfeldt's RV Park

or which would apply to their competitors which would be Horn Rapids RV Park.

(0089).

In reference to this testimony, board member Burrows stated:

Related to the 120 days, I've heard six months mentioned, and I would be willing to say six months sounds like a reasonable amount of time. You know as he said a lot of the other jurisdictions are, four months and six months. Richland is the only one that has 12 months, and I did talk to the Richland Planner. He said basically that's because Horn Rapids is close to Hanford, and they specifically put it in as temporary housing for Hanford workers.

(CP 0091).

One resident commented, "One hundred-and-twenty days most of us in this room you'll find out, are not even okay with the hundred-twenty-days let alone a year."

(CP 0102).

In rebuttal, it was pointed out that the Board was required to compare the RV Park to authorized uses rather than what is out there presently in the nearby area. These authorized uses include uses permitted in the industrial zone and commercial district, including: automobile field repairs, auto sales service and storage, banks, business and professional office, billboard for advertising conforming with other laws and regulations, dry-cleaning and laundry businesses, fruit and vegetable markets, including plants, newspaper, retail bakeries, retail stores, taverns or beer parlors, theaters, dance halls, skating rinks, other lawful amusement enterprises, manufacturing not employing more than five persons, on-site hazardous waste treatment storage facilities accessory to permit or special uses. (CP 0129). Within the industrial district approved uses include any trade or industry not otherwise prohibited by law, including hotels. Each of these

uses are permitted without a conditional use permit. It was pointed out that the RV Parks are most analogous to hotels. (CP 0130).

Finally, it was emphasized that length of stay limitations were troubling because mitigation should be related to impact. (CP 0130). The following question was posed

. . . I ask, what are we mitigating? If you had a person stay there for twelve months versus a different person stay every night, you're going to have the same impact. There's still going to be an RV there. They're still gonna use the water. They're still gonna use the sewer. There's nothing in the Code about length of stay and there's nothing in your approval of criteria that addresses length of stay. So I guess I pose the question, why is the County determined that there needs to be a length of stay and what is it? I don't see it as a mitigation measure and if it is I guess I would like the staff to articulate that.

(CP 0130). This question was not answered on the record or in the findings issued by the County.

3. Board's Deliberations and Decision.

At the May 5, 2011 meeting the Board issued its decision. In doing so Herb Everett asked Benton County Planning Director Mike Shuttleworth, "Mike, in one of the exhibits, it caught my eye, in a couple of them, you've indicated that they'd like to have a limit of 12 and 14 months. Could you explain that to me? Do you have a handle on how that would work? Where does the 14 play into it or do you know?" (CP 0152).

Mr. Shuttleworth responded, "When I discussed it with Rick at the City of Richland, the idea was in a 14-month period, the RV would only be there for 12 months and then at the end of the 14th, it would start another 14-month period and it could only be there for 12 months. How they enforce it I do not know." (CP 0152-53).

Board member Burrows responded, "Well, for the... I mean, I'm not arguing about their business plan because you know whether they make a profit or not is not my concern, it's just the use of the property, but if it is an RV park, 120 days sounds adequate to me. If it's an actual trailer park, then I need to go somewhere else." (CP 0153).

Board member Bestebreuer then responded, "I guess the definition of 120 days and they go somewhere, park somewhere and park somewhere for one day and they come back, that's the definition, isn't it?" (*Id.*).

Mike Shuttleworth responded, "Yeah, that's a possibility, I mean, you know, most of the ones where, you know, have memberships, usually its two weeks in and out. I mean, if you want to say that, make it 120 days with at least a one week out, then you could put that in there also." (*Id.*).

Board member Everett indicated that some people may be staying there while they build houses. "Is it usually what four to six months to build a house?" (CP 0157). Apparently based upon this observation he suggested it might be reasonable to go with 180 days. (CP 0157).

Board member Burrows commented, "I just don't want to see it turn into a trailer park and not an RV park." (*Id.*).

Board member Bestebreuer replied, "I don't have an issue with going half a year, I don't have a problem with that. I think that's fair." (*Id.*).

Based on the foregoing exchange at the May meeting, Board member Bestebreur made a motion which stated: “Item number fourteen change from a hundred-and-twenty days to a hundred-and-eighty days.” (CP 0162).

4. Findings of Fact.

The relevant Findings of Fact demonstrate there will be little impact from this application. Examples include:

- Most of the surrounding houses are more than one thousand feet from the RV Park site. (Finding No. 18, CP 0016).
- The surrounding area within 1000 feet is mostly undeveloped. (Finding of Fact 22, CP 0016).
- Other permitted uses in the Light Industrial Zoning District are schools, warehouses, trucking operations, metal fabrication operation, churches, libraries, community clubhouses, stills and pack sheds. Some of these uses would impact the surrounding community more than an RV Park, but they are allowed outright in the Light Industrial Zoning District. (Finding No. 23, CP 0017).
- Several of the surrounding property owners have asked about and commented about the RV’s staying year around and the RV Park becoming a residential subdivision.

Recreational vehicle (sic) are not considered as permanent dwellings and should not be allowed to stay in the RV Park year around. When they are allowed to remain in the RV Park long term they tend to store items such as freezers and other things outside. . . (Finding of Fact 26, CP 0017).

5. Conclusions of Law.

The relevant conclusions of law issued by the Board provide:

- B. The requested use is compatible with other uses in the surrounding area, and there was no evidence that any outright permitted uses in the Light Industrial District is as incompatible with the existing uses in the surrounding area s the requested use.
- C. The requested use would not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the Light Industrial zoning district.
- D. The requested use would not cause the pedestrian and vehicle traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater than that associated with any other permitted uses in the Light Industrial zoning district.
- E. The requested use will be supported by adequate service facilities and would not adversely affect public services to the surrounding area;
- F. The requested use would not hinder or discourage the development of permitted uses on the neighboring properties in the Light Industrial zoning district as a result of the location, size, or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in the applicable zoning district.

(CP 0018)

6. Appeal to Superior Court.

The Schlotfeldt's appealed to Superior Court under the Land Use Petition Action, RCW 36.70C, alleging in their petition:

- (1) The County engaged in an unlawful procedure or failed to follow a prescribed process by seeking ex parte clarification from the Board or Board members regarding Condition of Approval No. 14 that recreational vehicles shall remain in the RV Park for no more than 180 days in any calendar year;
- (2) The land use decision is not supported by the evidence that is substantial and viewed in light of the whole record before the Court, including, but not limited to, imposing a 180 day minimum stay, which is not supported by any Benton County codified standard, is not consistent with any comparable neighboring community standards, and not supported by testimony or evidence justifying such a limitation; and
- (3) The land use decision is a clearly erroneous application of law to facts, including, but not limited to the 180 day stay was not supported by the BCC or evidence.

The Schlotfeldts have abandoned their claims related to engaging in unlawful procedures through ex parte contacts. However, by arguing to Superior Court it possessed inherent authority to impose conditions of approval, the County has functionally raised an additional question as to whether it erroneously interpreted the law. This argument was cited in Superior Court Judge Runge's written ruling which states, in relevant part:

Schlotfeldts argue that a condition imposed on a special permit must be related to impact and the 180 day length of stay limitation is excessive and not related to impact. I agree with the County that while impact may be one reason for the Board to impose conditions, it is not the only reason the Board can impose conditions on a special permit.

As the County points out, the Board has both the implicit and explicit authority under the Benton County Code to impose reasonable conditions that are necessary for the issuance of a special permit that protect the integrity of the zoning district. I further adopt the argument and reasoning set forth in Benton County's Memorandum in Opposition to Land Use Petition at pages 21-24.

(CP 0209).

IV. ARGUMENT

The Schlotfeldts ask this Court to hold Benton County to the BCC. If no authority exists in the BCC to justify length of stay or if the condition was not imposed to enable to Board to satisfy one of its five conditions of approval, this appeal must be granted.

Under the County's theory of its authority, a CUP applicant could meet all of the BCC's codified criteria as the Schlotfeldt's have but be left to cross their fingers and hope that the County does not exercise its "inherent" authority to condition or deny the application.

The 180-day stay limitation is based upon subjective and personal concerns rather than an objective concern related to the BCC. Whether the same RV is parked in the RV Park or a different RV is parked in the same RV slip each day, the imposition of this condition does not keep the park from looking like a mobile home park.

1. STANDARD OF REVIEW.

On review of a land use decision under RCW 36.70C, the Court of Appeals stands in the shoes of the Superior Court and reviews the action on the basis of the administrative record. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004).

Under RCW 36.70C.130(1)(a)-(f), an appellant must establish one of the six standards of appeal have been met. These standards include:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of the 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 records 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.

In their LUPA Petition, the Schlotfeldts asserted that criterion (c) and (d) were met and required reversal of the limitation on stays at the RV Park. For the first time at Superior Court, the County argued it possessed inherent authority to impose length of stay standards. This position is an erroneous interpretation of the law, criterion (b).

A petitioner shall prevail if any one of the six standards is established on appeal. *Benchmark Land Company v. City of Battleground*, 146 Wn.2d 685, 49 P.3d 860 (2002).²

Issues raised under RCW 36.70C.130(1)(c) challenge the sufficiency of the evidence in the record. The adopted standard for substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the finding.” *Benchmark Land Company*, 146 Wn.2d at 694.

The clearly erroneous test for challenges under RCW 36.70C.130(1)(d) is whether “the court is left with a definite and firm conviction that a mistake had been committed.” *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).

² See also *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); and *Willapa Grays Harbor Oyster Grower's Association v. Moby Dick Corporation*, 115 Wn. App. 417, 62 P.3d 912 (2003).

2. IMPOSITION OF THE LENGTH OF STAY LIMITATION IS A CLEARLY ERRONEOUS APPLICATION OF LAW TO THE FACTS.

It is clear that a mistake has been committed by imposing a length of stay limitation because (1) the limitation is not authorized under the BCC and (2) no factual evidence, only opinions were introduced of alleged impacts, to justify mitigation in the form of a length of stay limitation.

A. Length of Stay is Not Based Upon Application of the BCC.

Finding No. 27 specifically states, in part, that “The Benton County Code does not have standards for length of stay in an RV Park.” (BOAM 1.1:12). In fact, reference to RVs within the BCC is limited to the purpose and definition section of the zoning code. BCC 11.28.010(e) provides the only two relevant definitions:

- (131) “Recreational Vehicle” means a motorized or non-motorized vehicle designed and manufactured for recreational use, including but not limited to boats, travel trailers, snowmobiles, go carts, motorcycles (including three and four wheelers), and dunebuggies.
- (132) “Recreational Vehicle (R.V.) Park” means any site, lot or parcel of ground occupied or intended for occupancy by two (2) or more recreational vehicles for travel, recreational or vacation uses, whether or not a fee is charged. Storage of two (2) or more unoccupied recreational vehicles does not constitute an R.V. Park.

From these two definitions, the County suggests a regulatory scheme for RV Parks exists. This is simply inaccurate. Absent specific guidelines for RV Parks, the County is left with policies within the zoning code or its CUP approval criteria.

The Schlotfeldt's property is zoned Light Industrial. Finding of Fact 21 acknowledges this zoning designation but fails to cite any governing policies within this zoning designation that might justify conditions. BCC Section 11.28³, which governed at the time of the hearing, provided:

And in general those uses which have been declared nuisances in any court of record, or which may be obnoxious or offensive by reason of emission of odor, dust, smoke, gas, or noise; provided that any of the foregoing prohibited uses may be allowed by special permit issue by the Board of Adjustment after notice an public hearing as provided in this title.

BCC 11.28.010

The Schlotfeldt's recognized the lack of a regulatory scheme within the BCC and made the following request to for the County to explain the basis for length of stay limitations:

There's nothing in the Code about length of stay and there's nothing in your approval of criteria that addresses length of stay. So I guess I pose the question, why is the County determined that there needs to be a length of stay and what is it? I don't see it as a mitigation measure and if it is I guess I would like the staff to articulate that.

In absence of a regulatory scheme for RV Parks, the Board was required to demonstrate a basis for the length of stay. No response to this inquiry was provided. Absent a nexus between the length of stay limitation and the BCC, the decision of the Board constitutes a clearly erroneous application of law to facts.

Under the erroneous interpretation of law standard, RCW 36.70C.130(1)(b), deference is due to the construction of law by a local jurisdiction with expertise.

³ (See AR, BOAM 1.2, BCC 11.18). The Benton County Zoning Code was amended in September, 2011 after this matter had been heard by the Board of Adjustment.

Quality Rock Products, Inc. v. Thurston County, 139 Wn. App. 125, 142, 159 P.3d 1 (2007). However, no construction of law occurred and no LUPA case stands for the proposition that when a zoning code is inadequate on a particular subject that the local jurisdiction is free to make up its own rules.

Under the BCC, the only articulated concern for businesses located in the Light Industrial zoning designation is related to nuisances created through the emission of odor, dust, smoke, gas, or noise. Concerns for these issues are not cited by the County in any manner on the record under consideration by the Court. Thus, a legitimate objective zoning concern is not addressed by the length of stay. The only remaining code provision that can justify a length of stay limitation is the CUP approval criteria.

B. Length of Stay Was Not Imposed so the Application Could Meet the County Approval Criteria.

Since the County approved the RV Park, the only conclusion that can be drawn is that the Schlotfeldt's met each of the five criteria. The County made no effort to articulate how length of stay applied to any of its approval criteria. An examination of each demonstrates that had the Board undertaken such review, length of stay could not be supported.

The five criteria include:

1. The use is compatible with other uses in the surrounding area or is no more incompatible than are any other outright permitted uses in the applicable zoning district;
2. The use will not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that

associated with any other permitted uses in the applicable zoning district;

3. The use would not cause the pedestrian and vehicle traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater than that associated with any other permitted uses in the applicable zoning district;

4. The use will be supported by adequate service facilities and would not adversely affect public services to the surrounding area;

5. The use would not hinder or discourage the development of permitted uses on the neighboring properties in the applicable zoning district as a result of the location, size, or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in the applicable zoning district.

BCC 11.52.090(d).

Further, if reasonable conditions cannot be imposed to allow the Board of Adjustment to make the conclusions *required above*, the conditional/special use permit application shall be denied. (BCC 11.52.090) (emphasis added).

BCC 11.52 is the only true authority found within the BCC that grants authority to the Board to impose conditions of approval. However, the condition must be imposed to *allow the Board to make* one of the five conclusions. A review of the record and findings show that length of stay is unrelated to the County's approval criteria. This is all but conceded by the County.

i. Length of stay does not make the RV Park more compatible.

Conclusion of Law “B” states:

The requested use is compatible with the other uses in the surrounding area and there is no evidence that any outright permitted use in the Light Industrial Zoning District is as incompatible with the existing uses in the surrounding area as the requested use.

By its express terms, this conclusion makes clear that length of stay is unrelated to compatibility. The finding is not qualified that “as conditioned” the RV Park is compatible and no finding of fact suggests that a limit on length of stay is required to make a finding of compatibility.

ii. Length of stay is unrelated to materially endangering the health, safety, and welfare of the surrounding community.

Conclusion of Law “C” states:

The requested use would not materially endanger health, safety, and welfare of the surrounding community to an extent greater than an outright permitted use in the zoning district.

Length of stay is not a pivotal factor in assessing health, safety, or welfare of the surrounding community. There is no fact in the record that length of stay was a safety factor. Rather, the only comments related to length of stay were fears of the RV Park becoming a trailer park.

iii. Length of stay is unrelated to pedestrian or vehicular traffic.

Conclusion of Law “D” states:

The granting of the requested use would not cause the pedestrian and vehicular traffic associated with the use to conflict with the existing and anticipated traffic in the neighborhood to an extent greater than the associated with any other permitted use . . .

The Schlotfeldts retained J-U-B Engineering to prepare and submit a traffic study. The study revealed no significant impacts and no finding was made that length of stay had any nexus to the impact on vehicular or pedestrian traffic. This conclusion confirms that no traffic impacts existed and length of stay could not be justified due to traffic impacts.

iv. Length of stay is unrelated to adequacy of public services.

Conclusion of Law “E” states:

The granting of the requested use would be supported by adequate service facilities and would not adversely affect public services in the surrounding area.

Length of stay cannot be tied to this criterion. This is confirmed by the County’s determination that this project did not “have a probable significant adverse impact” in response to its SEPA review where water, sewer, and traffic were evaluated.

v. Length of stay is would not hinder or discourage development of neighboring properties.

Conclusion of Law “F” states:

The granting of the requested use would not hinder or discourage the development of permitted uses on neighboring properties . . .

Condition No. 12 required a combination of fencing and landscaping to provide a visual barrier. While such a condition might apply to this criterion, length of stay is unrelated to the development of neighboring properties.

At the same time, if appearance of the RV Park or fear of it looking like a trailer park was legitimate, the visual screen condition alleviates the perceived impact.

The findings and record do not demonstrate how length of stay relates to any of the five conclusions. Given (1) the lack of a regulatory scheme in the BCC for RVs, (2) the lack of a relationship between the length of stay requirement a zoning code, and (3) the failure to tie length of stay to one of the five conclusions, compels a finding that the length of stay condition constitutes an clearly erroneous application of law to facts.

3. THE LENGTH OF STAY CONDITION IS NOT SUPPORTED BY ANY EVIDENCE, LET ALONE SUBSTANTIAL EVIDENCE.

The Schlotfeldts argued and common sense dictates that if a customer left on the one hundred and eightieth day only to be replaced by a new customer, the impact remains identical. It is merely generated by another source. The County has not and cannot refute this basic concept.

A. No True Facts Demonstrated an Impact Justifying a Length of Stay Limitation.

The Staff Report, Finding No. 27 states, among other things,

Several of the surrounding property owners have asked about and commented about the RV staying year around and the RV Park becoming a residential subdivision.

Recreational vehicle (sic) are not considered as permanent dwellings and should not be allowed to stay in the RV Park year around. When they are allowed to remain in the RV Park long term they tend to store items such as freezers and other things outside. . .

First, this is not accurate. The surrounding property owners simply opposed the RV Park. It was opposed for fear of crime, pedophiles, and impact on property values. Length of stay was hardly mentioned.

Second, neighbors “asking” and “commenting” about length of stay is not evidence of an impact but an opinion. In the context of conditional permit approval, there is an important distinction between well-grounded fears and neighborhood opposition versus objective evidence. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 794, 903 P.2d 986 (1995). While the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision. *Id.* at 798. In *Sunderland*, where the Court concluded denial appeared to rest upon neighborhood options, held, “the City’s action in denying the permit was not based upon competent and substantial evidence required by RCW 7.16.120. *Id.*

B. In Absence of Facts Justifying Length of Stay Limits, Generalized Fears and Community Displeasure are the Only Justification for Length of Stay Limits.

In *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 799, 801, P.2d 985 (1990), property owners opposed an application for gravel mining and asphalt manufacturing. Several area residents spoke against the application but offered little concrete evidence and no expert testimony. *Id.* at 798. In denying the permit, one Council member spoke out about her knowledge of the site, her personal feelings that the permit application should be denied, and her concerns about Maranatha’s ability to

comply with the conditions proposed by the hearings examiner. *Id.* at 799. The County Council denied the permit and Maranatha appealed.

The County argued, among other things, it had a broad constitutional grant of police power to implement and enforce zoning regulations. *Id.* at 800. The Court of Appeals, Division II found the Council's decision was a textbook example of arbitrary and capricious action without consideration and regard of the facts. *Id.* at 804. In so finding, the Court observed:

The Council seems to have heard clearly the citizen complaints and the comments of one of its own members which disregard the record. We cannot escape the conclusion, in view of the evidence in support of Maranatha's application, the council based its decision on community displeasure and not on reasons back by policies and standards the law requires.

Id. at 805. On the record before this Court, neighboring property owners made generalized complaints regarding safety for the children at the nearby elementary school and impacts on property values. One resident specifically commented he was not ok with 120 days let alone a year but gave no explanation as to why he took issue with the proposed length of stay. The only other comment was made by Board member Burrrows who commented, "I just don't want to see it turn into a trailer park and not an RV park." That is the sum of evidence in opposition other than the Staff's comment on neighboring jurisdictions and their length of stay requirements. This case is no different than *Maranatha Mining* and requires the same result.

4. THE LENGTH OF STAY LIMITATION IS BASED UPON AN ERRONEOUS INTERPRETATION OF THE LAW.

The record demonstrates the County Planning Staff nor the Board of Adjustment stated the County possessed an inherent authority, in addition to its CUP approval criteria, to justify length of stay. This was argued for the first time by the County in its reply brief filed in Superior Court. This authority does not exist. It is an erroneous interpretation of the law to: (1) find such authority exists or (2) find that the County relied upon such authority at the Board of Adjustment level.

a. Inherent Authority, Even if it Exists, is not Limitless.

In Superior Court, the County defended the Board's decision by arguing the County possess an inherent authority to impose conditions it sees fit citing *State ex rel. Standard Mining & Development Corp. v. City of Auburn*, 82 Wn.2d 321, 510 P.2s 647 (1973). (CP 0180-81). The County argued that "there is no objective length of stay standard in the BCC specifically because the County has determined it is in its discretion in imposing length of stay conditions after analyzing the circumstances surrounding the permit and the general standards set forth in the BCC." (CP 0181). However, this argument was made without citation to a single code provision or legislative history.

Standard Mining makes clear the authority to impose conditions is not limitless.

A condition is properly imposed where (1) it does not offend any provision of the ordinance and (2) where it is reasonably calculated to protect adjacent land and to achieve some *legitimate objective* of the zoning ordinance.

Id. at 328, 329 (emphasis added). The County fails this test because (1) there is no statement in the record as to how the length of stay condition protects adjacent land and (2) it does not identify how length of stay achieves a legitimate objective of the zoning ordinance.

b. Inherent Zoning Authority Cannot Regulate the Conduct of Business.

The County's ad lib imposition of conditions resulted in unlawfully using its zoning authority to regulate business activities.

The general rule is that a municipality may not impose conditions on land use permits that relate to the *detailed conduct of the applicant's business rather than to zoning limitations on the use of land*. . . A condition that regulates the conduct of the applicant's business may be annulled because such regulation is not the function of land use controls.

Woodinville Water Dist. v. King Co., 105 Wn. App. 897, 905-06, 21 P.3d 309 (2001) (emphasis added). The length of stay condition relates to the detailed conduct of business rather than zoning authority. Thus, the condition must be annulled.

Woodinville Water also cites *Schlosser v. Michaelis*, 18 A.D.2d 940, 238 N.Y.S2d 433 (1963) as an example of how a permit condition regulated a business versus a legitimate zoning objective. In *Schlosser*, the court struck down permit conditions that limited the number of employees, restricted hours of operation, imposed additional weekend restrictions, and limited the number and tonnage of trucks that could be stored at a floral shop. That court observed that "even though the local zoning ordinance granted the board authority to impose such conditions and safeguards deemed appropriate to "preserve and protect the spirit and objectives of the zoning

ordinance” these conditions were invalidated. *Woodinville Water*, 105 Wn. App. at 906, 907. Specifically, the court held:

The Board of Appeals has no power to impose conditions which apply to the details of operation of the business . . . [or] to impose standards, requirements or conditions which are not set forth in the zoning ordinance [.]. . . The business would still be operated as a wholesale florist business whether there were eleven employees or twenty-one, or whether it operated after 2 P.M. on Saturdays or not, etc.

Id. at 907.

The Schlotfeldt’s property is zoned Light Industrial. The only articulated zoning concern in the zoning code is related to significant pollution. Therefore, length of stay cannot be tied to any articulated zoning issue or regulation. The 180 length of stay limitation fails because (1) it has no legitimate zoning purpose as required by *Woodinville Water*, (2) the 180-day length of stay is tied to no objective or policy of the Light Industrial zoning code, and (3) the stay limitation is an impermissive limitation on a detail of the Schlotfeldt’s business just like in *Schlosser* since the Schlotfeldt’s RV Park will operate as an RV Park whether there is a 120-day stay, 180-day stay, or no maximum stay.

Not only is the BCC void of a regulatory scheme, in its attempt to make up for a deficient scheme, the County violated the general rule that it cannot condition the conduct of the Schlotfeldt’s business through zoning controls. On this basis, the appeal must be granted.

5. THE LENGTH OF STAY REQUIRMENT IS RANDOM AND ARBITRARY.

The length of stay, whether it was 120 days or 180 *in a calendar year period* was pulled out of thin air. Equally important, there is no explanation as to how the additional limitation that once a guest reached the limit for their stay they must not return for the balance of calendar year. Courts attempt to give effect to a statute's clear and plain meaning. *Vance v. Department of Retirement Systems*, 114 Wn. App. 572, 577, 59 P.3d 130 (2002). The duty of the court is to ascertain and give effect to legislative intent and purpose. *Nisqually Delta Ass'n v City of Dupont*, 103 Wn.2d 720, 730, 696 P.2d 1222 (1985). The act must be construed as a whole and, if possible, the provisions of the act should be harmonized to insure proper construction. *Id.* Neighboring jurisdictions in Kennewick and Pasco provide for a limit in a twelve month period rather than within a calendar year. Clearly, the County's departure was intentional. However, this condition leads to an absurd application of the condition.

A plain reading of this condition would show that if a guest took occupancy on January 1st, they would be required to leave at the end of June and could not return until the following January or calendar year. However, if the guest arrived July 1st, their calendar year period would expire December 31st and they would be entitled to stay January through June of the following year.

Thus, in addition to being arbitrary and unrelated to an impact, it is unclear what the County desires to achieve through limiting stays by "calendar year" versus regulated a stay over a 365 day period. Neither the Staff, nor any opponent articulated

how limiting the length of stay to six months in a calendar year addresses any impact. This constitutes an erroneous interpretation of law and an erroneous application of law to the facts.

V. CONCLUSION

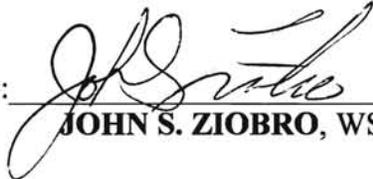
There is no justification for the length of stay condition in the BCC because it does not regulate RV Parks. There is no justification for length of stay based upon lay or expert witness testimony. There is no evidence as to what the length of stay, be it 120 or 180 days in a calendar year, is designed to achieve. There is no relationship between an alleged impact associated with an RV Park and how length of stay alleviates this impact.

Applicants for conditional use permits should be entitled to rely upon the code that governs the approval process. The Schlotfeldt's followed the BCC. They demonstrated there was no impact associated with their RV Park. Nonetheless, they are faced with a limitation on stay without any factual basis, only scant public comments on impact based on length of stay and Board of Adjustment member's concern that the RV Park might become a trailer park.

When confronted with the lack of a nexus between its CUP approval criteria, findings, and the condition, the County asserts it possesses inherent authority to impose conditions based upon undefined factors. This would render its codified approval criteria and process meaningless. Such a result must not be validated. Accordingly, this appeal must be granted.

DONE AND DATED this 16th day of April, 2012.

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