FILED

JUN 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

Appeal Cause No. 305945

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

COURT OF APPEALS

DIVISION III, STATE OF WASHINGTON

DAVID SCHLOTFELDT and CHARLOTTE SCHLOTFELDT,
husband and wife,

Appellants

vs.

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

Respondent.

APPELLANTS' REPLY BRIEF

JOHN S. ZIOBRO
TELQUIST ZIOBRO McMILLEN, PLLC
Attorneys for Appellant
1333 Columbia Park Trail, Suite 110
Richland, WA 99352
Phone: (509) 737-8500
Fax: (509) 737-9500

TABLE OF CONTENTS

I. SUMMARY OF REBUTTAL 2
II. SUPPLMENT STATEMENT OF CASE 2
III. ARGUMENT 3
1. No regulatory scheme exists for RV Parks 3
2. The Benton County Code does not require a limitation on length of stay 7
3. 180 day length of stay is wholly unsupported 13
4. If this is appeal is denied, the County is not entitled to attorney fees 14
IV. CONCLUSION 15

TABLE OF AUTHORITIES

Anderson v. City of Issaquah, 70 Wn. App. 64, 76, 851 P.2d 744 (1993)..... 5

Anderson v. Pierce County, 86 Wn. App. 290, 302, 936 P.2 432 (1997)..... 6

Benchmark Land Co. v. The City of Battleground, 94 Wn. App. 537, 551, 972 P.2d 944 (1999)..... 15

Cradduck v. Yakima County, 166 Wn. App. 435, 443, 271 P.3d 289 (2012)..... 9

Gerla v. City of Tacoma, 12 Wn. App. 883, 533 P.2d 416 (1975)..... 8

Habitat Watch v. Skagit County, 155 Wn.2d 397, 415, 120 P.3d 56 (2005)..... 14

Hauser v. Arness, 44 Wn.2d 358, 367, 267 P.2d 691 (1954). 9

Kysar v. Lambert, 76 Wn. App. 470, 493, 887 P.2d 431 (1995)..... 14

Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 794, 903 P.2d 986 (1995)..... 13

Woodinville Water Dist. v. King Co., 105 Wn. App. 897, 21 P.3d 309 (2001).. 7

I. SUMMARY OF REBUTTAL

Benton County's (County's) position presents the ultimate danger of the quasi-judicial and closed-record process. The Schlotfeldts followed the Benton County Code ("BCC"). The applicable zoning code gave no indication an RV Park presented any conflict with approved uses. The County's CUP criteria were met. At no time did the Staff Report or Findings of Fact/Conclusions of Law reference an inherent authority possessed or being exercised by the County to impose a length of stay requirement.

Upon appeal, recognizing the length of stay maximum is unsupported by the record or the BCC, the County now argues it possessed an inherent authority. This is a closed record process. The County's argument should be rejected in total as there is no indication the Staff or Board relied upon its inherent authority to impose this condition.

II. SUPPLEMENT STATEMENT OF THE CASE

The surrounding area within 1,000 feet of the RV Park site is mostly undeveloped. (CP 0016). The Comprehensive Plan shows the property as Light Industrial. *Id.* Thus, there are no "adjacent" neighboring properties facing an impact from this project. Any sophisticated future adjacent property would understand uses associated with the Light Industrial zoning designation and be well aware of the fact the RV Park lawfully exists.

The articulated concern of the staff is approving the RV Park was simple:

> 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 open items such as freezers and other things outside.

(Finding of Fact No. 27, CP 0017). This finding fails to tie the two concerns to the Comprehensive Plan or the controlling zoning ordinance. Storage of equipment is not resolved by the length of stay limitation. This "concern" should be completely disregarded.

Condition of Approval 14, related to length of stay, does not state the County's authority for imposing this condition. (CP 0020). The Conclusions of Law are silent on the County's basis or authority for imposing this condition.

Equally important, the County has miss-stated a key Finding. The County has referenced Finding 28 and implied it was adopted by the Board. (Respondent's Brief P. 4-5, reference to CP 433-34)[1]. Finding No. 28 was not adopted by the Board. Rather, this Finding was proposed in the Staff Report. The Board adopted Finding No. 27. (CP 0017). This finding omits the reference to WAC 296-150R-0020 and RCW 43.22.335 which defines recreational vehicles. That is the only definition which makes reference to "temporary living quarters for recreational camping, travel, or seasonal use." Thus, in its final decision, concerns related to ensuring the RV Park only provided temporary living quarters were not tied to any legal definition or standard. This is no more than a post-hearing rationalization offered by the County.

III. ARGUMENT

1. NO REGULATORY SCHEME EXISTS FOR RV PARKS.

---

[1] Clerk's Papers provided by Superior Court end at 419.

It defies logic for the County to argue it regulates RV Parks based upon two definitions. Upon closer look, the County's "regulation" consists of approximately ten words. The County cites the phrase "two (2) or more recreational vehicles for travel, recreational or vacation uses, . . ." as its regulation. From this, the County concludes the Board was "mandated . . . to impose conditions that would ensure that the proposed RV park would not turn into a mobile home park." (See Respondent's Brief, P. 12). The Board members may have subjectively believed that a length of stay requirement would prevent the RV Park from becoming a mobile home park but this was not the analysis the BCC required of the Board. Specific reference to a definition of an RV Park consisting of temporary living quarters was eliminated. The length of stay condition is not supported by any definition or policy found within BCC nor cited in the Findings of Fact or Conclusions of Law.

Further, the very definition of "regulate" requires more from the County. "Regulate" means:

a. To govern or direct according to rule;

b. (1): to bring under control of law or constituted authority (2): to make regulations for or concerning the industries of a country;

c. To bring order, method, or uniformity;

Merriam-Webster, On-line Dictionary.

The County does not bring order, method, or uniformity by stating an RV park is for "travel, recreational or vacation uses." This term does not govern the appearance of

the park, required infrastructure, spacing, minimum turning radii for the vehicles, or any other facet of regulating an RV Park. Rather, the County's five CUP approval criteria grants the County limited authority to "regulate" based upon impact. By the County's logic, in the name of the ensuring the RV park is for "travel, recreational or vacation uses" it can do anything. This is not true.

Code sections need to give applicants effective or meaningful guidance. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 76, 851 P.2d 744 (1993). In *Anderson*, the Issaquah Code imposed, among other things, the following building design standards:

1. Building and structure shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
2. Harmony in texture, lines and masses shall be encouraged.
3. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.
4. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.
5. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project buy use of complimentary details, functional orientation of buildings, . . .

Id. at 67.

The Court of Appeals concluded these code sections did not give effective or meaningful guidance to applicants, to design professionals, or to public officials of Issaquah who were responsible to enforce the code. *Id.* at 76. In attempting to interpret and apply the Issaquah code, the Court of Appeals held the commissioners charged with the task were left with only their own individual subjective feelings about the image of Issaquah. *Id.* at 76, 77.

The County argues that when a Board member stated "I just don't want to see it turn into a trailer park and not a RV park" he was just applying the BCC. This position has two fatal flaws. First, the record does not demonstrate the Board member was applying the BCC. More important, this comment underscores that the Board had nothing but their subjective feelings on RV Parks. This is not permitted under *Anderson* and provides this Court with additional grounds to grant this appeal.

The County suggests that the Schlotfeldt's position logically drawn out "would mean the Board does not have the authority to impose a condition that RVs not be permanent fixtures on the land . . ." (Respondent's Brief, P. 13). This is an effort by the County to avoid any accountability. If this was a concern to the County it could have done several things. For example, the County could have: (1) adopted true regulations within its code just like the municipalities within the County have done; (2) cited to the WAC and RCWs that suggest RVs are for temporary dwelling rather than omitting these definitions from their adopted Findings of Fact; (3) cited to actual examples within its

jurisdiction where RVs are used as a permanent residence; (4) provided studies that show negative impacts related to the long term occupation of an RV within an RV Park; and/or (5) demonstrated how limiting a stay to six months out of a year addresses any if its concerns.

2. THE BENTON COUNTY CODE DOES NOT REQUIRE A LIMITIATION ON LENGTH OF STAY.

a. The County has Miss-Stated its Authority to Impose Conditions.

The County alleges the Schlotfeldts have failed to set forth the appropriate test for evaluating the length of stay limitation, citing *Woodinville Water Dist. v. King Co.*, 105 Wn. App. 897, 21 P.3d 309 (2001). This is untrue and based upon the County's incomplete analysis of that opinion. There is a five-part test in *Woodinville*[2]. However, the County has ignored key facts and legal analysis related to this test.

In *Woodinville*, the King County Code granted authority to the hearing examiner that is non-existent in this case. KCC 20.24.080B authorized the hearing examiner to impose:

> such conditions, modifications and restrictions as the examiner finds necessary to make the application . . . compatible with the environment and carry out . . . the regulations, policies, and objectives and goals of the comprehensive plan, the community plans, subarea or neighborhood plans, zoning code . . . and other official law, policies and objectives of King County.

---

[2] The conditions must (1) not offend any provision of the zoning ordinance, (2) not require illegal conduct on the part of the permittee; (3) be in the public interest, (4) be reasonably calculated to achieve some legitimate objective of the zoning ordinance, and (5) not be unnecessarily burdensome or onerous to the landowner.

Id. 905. The County has not cited to any analogous authority for its Board of Adjustment. BCC 17.10.120, related to the Board of Adjustment actions, provides no grant of authority similar to King County. Hearing examiners only have the authority delegated to them. *Id.* at 906. The Board's authority under Benton County's scheme is limited to imposing conditions to ensure its five approval criteria are met. The length of stay limitation was not imposed through evaluating and applying its approval criteria and the County all but concedes this point.

Second, *Woodinville* cites to a general rule in *Gerla v. City of Tacoma*, 12 Wn. App. 883, 533 P.2d 416 (1975) that provides:

> 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.

Woodinville, 105 Wn. App., at 905. Under this general rule in *Gerla*, the five-part test in *Woodinville* is immaterial because the length of stay limitation relates to detailed conduct of the business. Notwithstanding the above factual and legal differences, the County cannot meet the five-part test.

1. *Length of Stay Offends the BCC.*

As previously stated in the Schlotfledt's Opening Brief, the BCC for Light Industrial only addresses those uses which have been declared nuisances. (See Petitioner's Opening Brief at P. 19). Additionally, the CUP approval criteria have been met and the County has all but conceded that application of its five criteria did not justify

a length of stay limitation. In summary, length of stay is unrelated to a zoning policy and is unrelated to the County's approval criteria. This offends the BCC.

2. *Length of Stay Must not Require Illegal Conduct.*

The Schlotfeldt's concede that length of stay limitations do not apply to this test.

3. *Length of Stay Must be in the Public Interest.*

Neither *Woodinville* nor *Gerla* indicate what is intended by a condition being in the public interest. A public purpose or interest in the context of zoning must tend to promote public health, safety, morals, or welfare. *Cradduck v. Yakima County*, 166 Wn. App. 435, 443, 271 P.3d 289 (2012). Zoning measures must find their justification in the police power exerted in the interest of the public. *Hauser v. Arness*, 44 Wn.2d 358, 367, 267 P.2d 691 (1954). The governmental power to interfere by zoning regulations with the general rights of the landowner is not unlimited and cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Id.*

The Schlotfeldts met each of the County's five approval criteria. Criterion "C" required the Board to analyze whether the project would materially endanger the health, safety, and welfare of the surrounding community. The Staff and Board concluded the application did not endanger the public. This criterion and finding specifically addressed the public's interest. The length of stay limitation cannot be deemed to be in the public interest under *Woodinville* when the County has specific criteria to protect the public interest and failed to find an impact when it analyzed the public's interest under criterion "C". The County wants this Court to ignore that the County specifically found the

project would not endanger the public and substitute that finding through application of the rule in *Woodinville* even through the Findings and Conclusions make no reference to *Woodinvill*e or *Gerla*. This logic must be rejected.

Further, the Findings of Fact and Conclusions of law do not point to (1) inherent authority of the Board or (2) protecting the public interest through imposition of the length of stay requirement. It is only County's attorney, after the fact, who states it is in the public's interest to deny or condition the application. Finally, the County did not see fit to adopt a true regulatory scheme for RV Parks. Thus, County officials have not in any manner documented a public interest in RV Parks or length of stay.

4. *The Condition must be Reasonably Calculated to Achieve some Legitimate Objective of the Zoning Ordinance.*

Finding No. 27 specifically states, in part, that "The Benton County Code does not have standards for length of stay in an RV Park." Thus, the only authority outside of the approval criteria are those police found in the Light Industrial zoning code. Finding of Fact 21 acknowledges this zoning designation but fails to cite any governing policies within this zoning designation that might justify a length of stay condition. BCC Section 11.28, 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. No objective from the BCC 11.28.010 is served by length of stay. The County argues the condition is necessary to "protect the integrity of the district." (See Respondent's Brief, P. 22). However, this assertion cannot be reconciled upon a review of the Light Industrial zoning ordinance. The County Staff, the Board, nor it attorneys have made any reference to the Light Industrial zoning code language or policies because these code provisions cannot show an impact in this zoning designation let alone mitigation of an impact through limiting length of stay.

5. *The Condition must not be unnecessarily burdensome or onerous.*

The Schlotfeldts maintain the length of stay requirement is not necessary. The property is zoned Light Industrial, there are no immediate neighbors, more intense uses are allowed in the area, and their property will be screened so that no-one can see into it. Under these circumstances, the length of stay condition meets the definition of unnecessarily burdensome.

b. The County has Overstated its Inherent Authority.

The County concedes that if it possesses inherent authority it may do so if (1) it is reasonably calculated to protect adjacent land and (2) achieves some legitimate objective of the zoning ordinance. (Respondents Brief, P. 18). While citing this rule the County points to the testimony of Dean Burrows who expressed a concern about the RV Park becoming a trailer park. First, the record shows there are no adjacent business, no adjacent property owner appeared and protested the RV Park in any manner, and no

Finding was made specific to an impact to adjacent land. The property will be surrounded by a fence and trees. This reaffirms that Mr. Burrows' concerns were subjective and had nothing to do with the adjacent property owners but his personal general concern.

As previously stated, the County has not tied the length of stay restriction to its zoning code. Thus, the County's continued attempt to argue the length of stay limitation is justified under the umbrella of inherent authority is contrary to the law or facts before this Court. No objective of the zoning code is achieved by limiting length of stay.

c. There is No Express Authority Under the Code.

Finally, the County argues "the BCC expressly grants the Board with the discretion to impose conditions to ensure the consistency with its zoning ordinance," and cites to several code sections suggesting these provide authority to limit the length of stay (Respondent's Brief, P. 20). None of the cited code provisions justify the length of stay limitation.

The County cites BCC 11.52.089(c)(2). A plain reading shows that code section merely states what shall be included in a permit approved by the Board. This provides no help to the County.

The County next cites BCC 11.52.090(a) emphasizing that the application process allows the Board to ensure that the development in each district protects the integrity of that district. The application process or reference to it provides no specific grant of authority.

The County then cites BCC 11.52.090(d), its approval criteria. The Schlotfeldts agree that this Code section grants the County authority to impose Conditions. However, the conditions must be imposed to allow the County to make the findings. The County found the Schlotfeldts met the five criteria. The County did not tie length of stay to any of the five criteria. The County had an opportunity to explain to this Court how length of stay was expressly or implicitly tied to one of the five criteria and failed to do so.

The five criteria should be the foundation for the Staff, the Board, and now the County's legal counsel to show the County followed its Code and imposed the length of stay requirement to "allow the Board of Adjustment to make" the conclusion that the permit be approved. Having failed to do so, this appeal must be granted.

3. THE 180 DAY LENGTH OF STAY IS WHOLLY UNSUPPORTED.

Neighbors "asking" and "commenting" about length of stay is not evidence of an impact. Likewise, Board Member Burrows not wanting to see the RV Park become a trailer park is his subjective concern. That opinion is not based upon any a well-grounded fear as required by *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 794, 903 P.2d 986 (1995). In *Sunderland*, where the Court concluded denial appeared to rest upon neighborhood opinions, held, "the City's action in denying the permit was not based upon competent and substantial evidence required by RCW 7.16.120. *Id.*

The County has failed to produce any competent evidence that the Schlotfeldt's RV Park is going to or could become a trailer park. This, and the fear of a freezers being

placed outside an RV are all that is before this Court. Assuming this fear is well grounded, the County fails to explain how the 180 day limit or the requirement for an RV user to remain absent for up to 180 days before returning addresses these fears.

4. IF THIS APPEAL IS DENIED, THE COUNTY IS NOT ENTITLED TO ATTORNEY FEES.

The County has miss-stated the standard if review for attorney fees. RCW 4.84. 370 provides, in relevant part:

> (1) Notwithstanding any other provision of this chapter, reasonable attorney's fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by the county, . . . involving a . . . conditional use, . . or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing party or <u>substantially</u> prevailing party before the county, . . . ; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

The Schlotfeldts were granted their conditional use permit. They appealed one element related to length of stay. If a party receives their permit application, they have substantially prevailed because there is no further opportunity for review within the local government. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 415, 120 P.3d 56 (2005). The Schlotfeldts were the substantially prevailing party before the County.

Various cases hold that the prevailing party is the one who receives an affirmative judgment in its favor. *Kysar v. Lambert*, 76 Wn. App. 470, 493, 887 P.2d 431 (1995). The prevailing party need not prevail on his or her entire claim but must substantially

prevail. *Benchmark Land Co. v. The City of Battleground*, 94 Wn. App. 537, 551, 972 P.2d 944 (1999). If both parties prevail on major issues, there may be no prevailing party. *Id.* The Schlotfledts substantially prevailed before the Board of Adjustment. They have appealed one condition on an approved permit. The County filed no cross appeal on the RV approval. Accordingly, the County cannot now take the position it substantially prevailed before the Board of Adjustment. Thus, the County cannot make the requisite showing that they are entitled to attorney fees.

IV. CONCLUSION

Denial of this appeal sets a dangerous precedent. A denial would allow a CUP applicant to meet every code requirement but have their permit denied. A denial would allow conditions of approval to be imposed on a CUP application unrelated to the jurisdictions zoning code, comprehensive plan, or actual impact. A denial of this appeals sets a precedent that when a jurisdiction's code is weak the jurisdiction can rely upon "inherent authority" to take action that is impossible to predict. Finally, denial of this appeal would allow a jurisdiction to change the basis for the decision long after the Findings of Fact and Conclusions of Law have been signed. The Schlotfeldts and all CUP applicants are entitled to more. Accordingly, this appeal must be granted.

DATED this 20th day of June, 2012.

TELQUIST ■ ZIOBRO ■ MCMILLEN, PLLC
Attorneys for Appellants

By: _____
JOHN S. ZIOBRO, WSBA #25991