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Court of Appeals
Division III
State of Washington

NO. 305945-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DAVID SCHLOTFELDT, et ux, Appellant,

v.

BENTON COUNTY, Respondent

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-2-01428-0

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. BACKGROUND

Plaintiffs are David and Charlotte Schlotfeldt (collectively “Schlotfeldt”). On December 15, 2010, Schlotfeldt submitted their Special Use Permit Application (“SP 10-20”) to the Benton County Planning Department. (CP 422-24). The subject of SP 10-20 is a 25 acre parcel Schlotfeldt owns in Benton County zoned Light Industrial. (CP 422-24). The two lots to the east of the subject property are zoned Light Industrial and the remaining surrounding properties are zoned for Agriculture. (CP 426-38). The Board of Adjustment (“Board”) held public hearings with respect to SP 10-20 on April 7, 2011, and May 5, 2011. (CP 491-505). After reviewing the entire record for the matter, including the staff report dated March 22, 2011, the Board approved SP 10-20 subject to several conditions. (CP 502-05).

B. BENTON COUNTY CODE AND BOARD DECISION

Permitted uses within the Light Industrial zone are: “Any use permitted in the residential district, agricultural district, or commercial district provided that the ‘building site’ and ‘yard’ requirements of the suburban district shall apply to all single family dwellings, manufactured homes (mobile homes), and multiple family dwellings.” *See* Benton County Code (“BCC”) 11.28.010 (repealed effective 09/01/11); (CP 507-

509). In addition, on-site hazardous waste treatment and storage facilities are permitted as an accessory use to a permitted or special permitted use, as well as all other uses which are not expressly disallowed under Benton County Code 11.28.010(b). Furthermore, any of the following uses may be allowed within the Light Industrial District by a special permit issued by the Benton County Board of Adjustment after notice and public hearing as provided in BCC 11.52.090:

- (1) Manufactured (mobile) home parks.
- (2) Recreational vehicle parks.
- (3) Offsite hazardous waste treatment and storage facilities. . . .
- (4) Day care centers.

BCC 11.28.010(e); (CP 509).

In the Industrial District, as in all other Benton County zoning districts, a special permit may only be obtained as follows:

(d) *Conditional Use/Special Permit–Permit Granted or Denied.* A conditional use/special permit shall be granted only if the Board of Adjustment can make findings of fact based on the evidence presented sufficient to allow the Board of Adjustment to conclude that, as conditioned, the proposed use:

- (1) 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) 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) would not cause the pedestrian and vehicular 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) will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and
- (5) would not hinder or discourage the development of permitted uses on 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.

If reasonable conditions cannot be imposed so as to allow the Board of Adjustment to make the conclusions required above, the conditional use/special permit application shall be denied.

BCC 11.52.090(d) (emphasis added). By this provision, the Board is authorized to instill reasonable conditions prior to approval of a special use. *Id.*

The Benton County Code does regulate RV parks by its definition, which was cited specifically in the Planning Staff's report provided to the Board. (CP 427-28). RV 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." Former BCC 11.04.020(123) (now codified at BCC 11.04.020(132)) (emphasis added); (CP 511).

Mindful of the definition of an RV Park, and consistent with the restriction of an RV Park being only for travel, recreational, or vacation use, the Planning Staff Findings of Facts noted the following:

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 vehicle(s) 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 a calendar year. All RVs must have a current license.

(CP 433-34) (emphasis added).

Accordingly, the Planning Staff's Findings of Fact recommended the following condition of approval to Schlotfeldt's application:

14. 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.

(CP 436).

The Board consists of five members: Brent Chigbrow (Chairman), Bob Page, Dean Burrows, Glen Bestebreur, and Herb Everett. (CP 513).

With the Planning Staff's recommendation in mind, the Board deliberated on the 180 day stay limitation condition of approval for SP 10-20 as follows:

HERB EVERETT: 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 twelve and fourteen months, and could you explain that to me? Do you have a handle on how that would work? Where does the fourteen play into it? Or do you know?

MIKE SHUTTLEWORTH: When I discussed it with Rick at the City of Richland, the idea was in a fourteen month period that RV would only be there for twelve months and then at the end of fourteenth it would start another fourteen month period and it could only be there for twelve months. How they enforce it, I do not know.

GLEN BESTEBREUR: All right, now you're permit is for a hundred-and-twenty days. Yeah a hundred-and-twenty days.

MIKE SHUTTLEWORTH: And that's consistent with the City of Kennewick's requirements.

DEAN BURROWS: 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 a RV park, a hundred-and-twenty days sounds adequate to me. If it's an actual trailer park then I need to go somewhere else.**

GLEN BESTEBREUR: I guess the definition of a hundred and twenty days and they go somewhere, park somewhere and park somewhere for one day and they come back, that's the definition isn't it?

MIKE SHUTTLEWORTH: Yeah that's a possibility. I mean you know, most of the ones where you know have memberships usually its two weeks in and a week out. I mean if you want to say that, make it a hundred twenty days with at least a one week out then you can put that in there also.

(CP 481-83) (emphasis added).

HERB EVERETT: The conversation indicated that some people would be staying there while they build houses, is it usually what four to six months to build a house?

BOARD MEMBER: Yeah.

HERB EVERETT: It might be more reasonable to go with a hundred-and-eighty day.

BOARD MEMBER: It's possible.

DEAN BURROWS: **I just don't want to see it turn into a trailer park and not a RV park.**

GLEN BESTEBREUR: I don't have an issue going with half a year, I don't have a problem with that. I think that's fair.

(CP 484) (emphasis added).

After these deliberations regarding the length of stay condition, the Board unanimously voted to approve SP 10-20 subject to the below cited conditions:

GLEN BESTEBREUR: Mr. Chairman, the Board of Adjustment pursuant to the aforementioned controlling factors find that the **application** of David and Charlotte Schlotfeldt or assignee SP 10-20 **should be approved with the conditions as outlined in the staff report dated March 22nd, 2011 and modified herein** that item number eleven, change that the campfire pits turn to gas. That on number twelve that a landscaping plan as submitted to staff for staff approval to meet the needs of the requirements of the fencing and the landscaping. **Item number fourteen change from a hundred-and-twenty days to a hundred-and-eighty days.** I believe that is it.

(CP 486) (emphasis added).

This is consistent with the Board's final written approval of the Schlotfeldt's application SP-10-20 which imposed the following relevant condition:

14. That no recreational vehicle shall remain in the RV Park for more than 180 days in any calendar year period. All recreational vehicle(s) 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.

(CP 504).

II. ARGUMENT

A. STANDARD OF REVIEW UNDER LUPA

Schlotfeldt correctly invokes this Court's jurisdiction pursuant to the Land Use Petition Act ("LUPA"). *See* RCW 36.70C.130; *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 524-25, 94 P.3d 366 (2004). LUPA was adopted in 1995 to replace the writ of certiorari as the exclusive means of judicial review of a land use decision. RCW 36.70C.030(1). It mandates that this Court stand in the shoes of the superior court and review the Board's decision based on the administrative record. *Pavlina*, 122 Wn. App. at 525. Schlotfeldt also correctly states that LUPA provides six independent basis for relief from a land use decision. *See* RCW 36.70C.130.

Schlotfeldt only asserts the following three of those statutory basis for relief¹: (1) that the Board erroneously interpreted the law;² (2) the

¹Schlotfeldt argues that there are no standards in the code for the condition of 180 day stay requirement imposed by the board. (Appellant Brief at 18-19). Schlotfeldt has not explicitly alleged the land use decision by the

Board made a decision not supported by substantial evidence;³ and (3) the Board erroneously applied the law to the facts.⁴ (Appellant Brief at 16-17). Unfortunately, Schlotfeldt's Petition only cites the latter two of the three now stated basis for statutory relief: (2) the BOA made a decision not supported by substantial evidence and (3) the BOA erroneously applied the law to the facts. (CP 515-16). The County previously brought this issue to the superior court's attention in its memorandum in opposition to Schlotfeldt's petition. (CP 373). Schlotfeldt now argues that because in addition to pointing this fact out to the superior court, the County responded to the merits of his claim that the land use decision was an erroneous interpretation of the law, somehow this fact cures

Board is *ultra vires* or unconstitutional, and nothing in the record would support said argument to the extent it has been made.

²A local jurisdiction's interpretation of a local ordinance is entitled to deference due to that jurisdiction's expertise in interpreting local law. See *City of Federal Way v. Town & County Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011).

³Factual determinations regarding SP 10-20 rest with the Board in this case. See *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *Review denied*, 120 Wn.2d 1008 (1992).

⁴To prevail on this basis, Schlotfeldt would need to leave the court "with a definite and firm conviction that a mistake has been committed" in applying the law to its findings. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 133, 159, P.3d 1 (2007), *Review denied*, 163 Wn.2d 1018, 180 P.3d 1292 (2008).

Schlotfeldt's failure to assert this ground in his Petition. (Appellant Brief at 17). This position is nonsensical and without merit. Schlotfeldt failed to cite the alleged erroneous interpretation of law in his Petition. Any counterargument the County has to the merits of his claim for relief in no way changes that fact. As such, Schlotfeldt should be barred from any argument based on the Board's alleged erroneous interpretation of the law based on his failure to raise that ground in his Petition.

Schlotfeldt also fails to inform the Court that he has the burden of proof under LUPA. Under LUPA, the burden of proof is clearly on Schlotfeldt. RCW 36.70C.130(1) states that "[t]he court may grant relief only if the party seeking relief has carried the burden of establishing" one of these six bases for relief. *See* RCW 36.70C.130(1) (emphasis added); *see also Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 249, 218 P.3d 180 (2009) (applicant bears burden of proving one of six bases for relief under LUPA).

Finally, the Board's interpretation of the ordinance should be given substantial weight.⁵ The rationale for this deference is that local

⁵*Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 836 P.2d 235 (1992); *Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 823 P.2d 1132 (1992); *Buechel v. State Dept of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 536, P.2d 157 (1975).

administrators have special expertise that is valuable in interpreting an ambiguous term in a manner harmonious with local legislative policies. Administrative agencies are able to “fill in the gaps” via interpretive construction in order to give effect to the general statutory scheme. *Hama Hama*, 85 Wn.2d at 448.

B. THE UNDERLYING ERROR IN SCHLOTFELDT’S ARGUMENT IS HIS FAILURE TO ACKNOWLEDGE THE COUNTY CODE DOES IN FACT REGULATE RV PARKS BY THE GENERAL STANDARDS SET FORTH IN ITS DEFINITION. ACCORDINGLY, THE LENGTH OF STAY CONDITION OF APPROVAL IS NOT DIRECTLY TIED TO THE POTENTIAL IMPACT OF THE LAND USE, BUT RATHER ENSURES THE USE COMPLIES WITH THE GENERAL STANDARDS SET FORTH IN THE ZONING ORDINANCE.

The rationale for requiring a special use permit is that these uses are deemed to require special review on a case by case basis due to their potential impact on the surrounding area. *See Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 796, 903 P.2d 986 (1995). Although the majority of jurisdictions require the municipal legislative authority to adopt specific standards for disapproval or the imposition of conditions, **Washington only requires general standards with respect to the imposition of conditions on a special use permit.** *Id.* at 796-97; *see also Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 772, 129 P.3d 300 (2006) (emphasis added). Furthermore,

Washington courts have expressly held that there is no presumption of approval for special uses under Washington law. *Cingular Wireless*, 131 Wn. App. at 781.

Schlotfeldt is incorrect in his assertion that RV Parks are not regulated by the BCC. (Appellant Brief at 18). In fact, by its express definition, RV Parks are regulated by the BCC. RV parks are permitted on Schlotfeldt's property with a special permit issued by the Benton County Board of Adjustment after notice and public hearing. *See* BCC 11.28.010(e). RV park is defined as:

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.

Former BCC 11.04.020(123) (emphasis added); (CP 511).

The Board in approving the Schlotfeldt special permit noted that, "I just don't want to see it turn into a trailer park and not a RV park." (CP 484). The Board was mandated by the definition in the code to impose conditions that would ensure that the proposed RV park would not turn into a mobile home park, which entails entirely different special use conditions. Schlotfeldt did not apply for a mobile home park special use permit specifically because he could not, or would not, have met all of the requirements under the code for that particular use.

Schlotfeldt continues to focus on tying the length of stay condition to the five criteria related to impact of the proposed use cited in BCC 11.52.090(d). (Appellant Brief at 20-24). Because the condition was not imposed to address any of the five conclusions cited in BCC 11.52.090(d), Schlotfeldt's argument is irrelevant to this matter. As stated *ad nauseum*, the condition imposed by the Board in this matter was imposed to ensure that the RV Park was used for travel, recreation, or vacation use as mandated by its definition. Schlotfeldt's argument, if drawn out to its logical conclusion, would mean the Board does not have the authority to impose a condition that RVs not be permanent fixtures on the land, like mobile homes, because there is no express fixed number of days for length of stay stated in the code. Other than impose a time limit on the number of days an RV may stay in the park, there is no way to ensure that the use will comply with the terms of its definition for recreation, vacation, and travel use. These terms by their plain meaning are meant for stays of a short-term duration. Without a length of stay condition imposed by the Board, Schlotfeldt's permit would have to have been denied as failing to comply with the express definition of an RV Park. The Board in this matter did nothing more than simply impose a condition consistent with that definition. Schlotfeldt's unhappiness with the length of stay condition

in comparison with neighboring jurisdictions is irrelevant to this matter given the discretion granted to the Board in interpreting the BCC.

C. THE BENTON COUNTY CODE DOES REQUIRE A LIMITATION ON LENGTH OF STAY FOR RV PARKS .

Curiously, though Schlotfeldt is challenging a condition imposed by the Board on SP 10-20, he has failed to set forth the appropriate test in challenging such conditions.

To be valid, such 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.

Woodinville Water Dist. v. King Co., 105 Wn. App. 897, 905-06, 21 P.3d 309 (2001) (citing *Gerla v. City of Tacoma*, 12 Wn. App. 883, 533 P.2d 416 (1975)).

The Board's condition of approval meets the strict test set forth in *Woodinville*. The condition (1) not only does not offend any provision of the zoning ordinance, without the condition, the use would be specifically prohibited by the ordinance, (2) Schlotfeldt has not alleged, and the condition does not require, illegal conduct on the part of Schlotfeldt, (3) the condition forwards the public interest in ensuring that RVs are used only for travel, recreational, or vacation uses consistent with the BCC, (4)

the condition is reasonably calculated to achieve the legitimate objective of complying with the definition set forth in the zoning ordinance, and (5) Schlotfeldt has provided no evidence that the condition is unnecessarily burdensome or onerous.

Furthermore, as stated *supra* in section II B, Washington only requires general standards with respect to the imposition of conditions on a special use permit. *Sunderland*, 127 Wn.2d at 797. The general standards within the definition of an RV Park set forth in the BCC are a sufficient basis for the Board to impose reasonable conditions on Schlotfeldt in approving his application.

Factual determinations regarding SP 10-20 rest with the Board in this case. Deference to these factual determinations require the court to view the evidence and inferences there from in the light most favorable to the Board, which is a process that necessarily entails acceptance of a fact-finder's views regarding the credibility of witnesses and the weight to be given to reasonable but competing inferences. *State ex rel. v. County of Pierce*, 65 Wn. App. at 614, 618. The court may not substitute its own judgment for that of the fact-finder. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). Instead, the court must merely be satisfied that there is sufficient evidence to persuade a fair-minded, rational person of the finding. *Id.*

The Board consists of five members who are experts in their field and the BCC. In imposing the length of stay condition on SP 10-20, the Board relied on that expertise, as well as the report prepared by planning staff. The planning staff report specifically cites the definition of an RV Park contained in the BCC and additionally notes that RCW 43.22.335 defines an RV as a unit primarily designed as temporary living quarters for recreational camping, travel, or seasonal use. (CP 427-28, 433). Consistent with the BCC definition, and the relevant RCW, the Planning staff stated, "Recreational vehicle(s) are not considered as permanent dwellings and should not be allowed to stay in the RV Park year round." (CP 434). In fact, the Planning staff only recommended a length of stay condition of 120 days. (CP 436). The Board, after considering all the facts in the Staff Report and testimony at the hearings, deliberated on the matter and imposed an even more generous length of stay condition than that recommended by planning staff of 180 days. (CP 504). The Board's length of stay condition of 180 days is far in excess of what is reasonable for travel, recreational, or vacation use, and ensures the RV Park will not become a permanent residence in direct violation of the code. The Board had a duty to make a factual determination based on the evidence presented to ensure that the RV park was only used **for travel, recreational, or vacation uses**. The condition they imposed did just that.

Schlotfeldt cites no case law to support his argument that Benton County must have a specific length of stay requirement memorialized in its code. See Appellant Brief at 20. In *State ex rel. Standard Mining & Development Corp. v. City of Auburn*, 82 Wn.2d 321, 328, 510 P.2d 647 (1973), the Court analyzed a challenge to conditions placed upon a gravel mining operation and specifically noted that they were provided with no authority holding that a zoning ordinance must specify standards for imposing the conditions under which a special use permit will be issued⁶. To this point the Court cited Professor Anderson's treatise 3 R. Anderson, *American Law of Zoning*, s 15.29, 15.30 (1968) with approval. The treatise notes in part the following:

[A] board with authority to grant a special permit has inherent power to attach conditions designed to carry out the purposes for which the permit requirement was imposed. One court upholding a board decision which conditioned a special permit said:

'It is clear that a Zoning Board of Appeals has the inherent power, in connection with the granting of a special permit, to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property and which are not inconsistent with the provisions of the local ordinance.'

⁶The Court found that "if the conditions imposed were reasonably calculated to achieve the purposes set forth in the comprehensive plan and were not unnecessarily burdensome, the court should not set them aside." *State ex rel. Standard Mining & Development Corp*, 82 Wn.2d at 332.

....

Assuming authority to attach conditions to a special permit, a condition is properly imposed where it does not offend any provision of the ordinance, and where it is reasonably calculated to protect adjacent land and to achieve some legitimate objective of the zoning ordinance.

State ex rel. Standard Mining & Development Corp., 82 Wn.2d at 328.

The County does not presume that it has the inherent authority to impose conditions without limit as Schlotfeldt contends. The conditions must be reasonably calculated to protect adjacent land and to achieve some legitimate objective of the zoning ordinance. Clearly, in this matter the Board had inherent authority to impose conditions that ensure the use meets the BCC definition of an RV Park. This was articulated by Board member Dean Burrows twice when he cited concern over this development becoming a trailer park, a use for which Schlotfeldt would not qualify based on the terms of his application. (*See* CP 482-84). There can't be a more legitimate objective of a zoning ordinance than making sure the use complies with the express definition in its code. Furthermore, from a logical perspective, if the Board did not have the inherent authority to impose conditions consistent with its code, there would be no need to have a Board in any of these matters. Everything in the code would have to be completely objective. Of course such a result is absurd and impracticable, given the very nature of the special permit review process

which is done on a case-by-case basis due to the potential externalities on the surrounding properties. *See Sunderland*, 127 Wn.2d at 796.

Under *Standard Mining*, the Board has authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. And in fact, there is no objective length of stay standard in the BCC, specifically because the County has determined it is in its best interest to give the Board discretion in imposing length of stay conditions after analyzing the circumstances surrounding the permit, and the general standards set forth in the BCC. In fact, when the Board decides whether to approve or deny a special permit, they must make findings of fact that satisfy the five general criteria outlined in the code. BCC 11.52.090(d). Schlotfeldt doesn't challenge those factors for lack of specificity for the very reason courts have held a land use decision granting a special use permit allows a use at the discretion of local government subject to any conditions the local decision maker deems appropriate. *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 181, 61 P.3d 332 (2002), *Review denied sub nom. Citizens for a Responsible Rural Area Dev. v. King County*, 149 Wn.2d 1013, 69 P.3d 874 (2003) (holding hearing examiner properly exercised its discretion in deciding what conditions to impose on the project in order to make it compatible with the comprehensive plan) *Id.* at

185-187. Apparently Schlotfeldt is comfortable “crossing his fingers” when the Board reviews his application for the five general criteria outlined in BCC 11.52.090(d), but finds it unacceptable for the Board to impose a condition to ensure the use is consistent with the express terms of its definition. *See* Appellant Brief at 16. Again, RV parks are regulated in Benton County by definition. Former BCC 11.04.020(123); (CP 511). Based on that definition, the Board imposed a condition that no recreational vehicle shall remain in the RV Park for more than **180** days in any calendar year period. (CP 504). If the Board failed to impose such a condition, the use would have become permanent and been denied under the express terms of its definition.

In addition to the Board’s inherent authority to impose conditions consistent with its code, the BCC also expressly grants the Board with the discretion to impose conditions to ensure consistency with its zoning ordinance. The code grants authority to the Board to impose conditions as follows:

Each conditional use/special permit approved by the Board of Adjustment shall specify the location, nature and extent of conditional use, **together with all conditions that are imposed and any other information deemed necessary for the issuance of the permit.**

BCC 11.52.089(c)(2) (emphasis added).

The conditional use/special permit application process allows the Board of Adjustment to review the location and design of certain proposed uses, the configuration of improvements, and the potential impacts on the surrounding area. **The application process allows the Board of Adjustment to ensure that development in each zoning district protects the integrity of that district.**

BCC 11.52.090(a) (emphasis added).

(d) *Conditional Use/Special Permit–Permit Granted Denied.* A conditional use/special permit shall be granted only if the Board of Adjustment can make findings of fact based on the evidence presented sufficient to allow the Board of Adjustment to conclude that, as conditioned, the proposed use:

- (1) 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) 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) would not cause the pedestrian and vehicular 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) will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and
- (5) would not hinder or discourage the development of permitted uses on 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.

If reasonable conditions cannot be imposed so as to allow the Board of Adjustment to make the conclusions required above, the conditional use/special permit application shall be denied.

BCC 11.52.090(d) (emphasis added).

Based on that authority, the Board may impose reasonable conditions necessary for the issuance of the permit and that protect the integrity of the district. Clearly, if the Board had not imposed a length of stay requirement with respect to the RV Park consistent with its definition, they would not have protected the integrity of the district, or imposed conditions necessary for the issuance of the permit. Without that condition, Schlotfeldt's special use would not have complied with its express definition, and would have to have been denied by the Board. Given the discretion lawfully granted to the Board by the code and the expertise of the Board members, a fair minded person would, and in fact should, impose a length of stay condition in compliance with the general standards set forth in the BCC definition of an RV Park.

The County agrees with Schlotfeldt that it may not impose conditions solely for the purpose of regulating the detailed conduct of his business. *See* Appellant Brief at 28. However, the length of stay

condition is nowhere close to the condition imposed by the County, and ultimately upheld by the Court in *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 21 P.3d 309 (2001), and cases cited therein. In *Woodinville*, the conditions at issue were restricting the number of employees in the applicant's workforce. Regardless of the fact the Court upheld the condition in *Woodinville*, that condition is hardly analogous to the condition imposed in this matter to ensure that the RV Park at issue is used for travel, recreation, and vacation use. If the Board had imposed conditions on how many employees Schlotfeldt could have, the County concedes that clearly would not have had any relation to whether the use was for travel, recreation, or vacation use. Like all conditions imposed by the Board, whether related to impact, or to achieve some legitimate objective of the zoning ordinance, there will be some indirect impact to Schlotfeldt's business. However, this in and of itself, in no way invalidates the legitimacy of the condition imposed.

Schlotfeldt challenges the Board's length of stay condition as an erroneous interpretation of law⁷ and an erroneous application of law to the facts. Appellant Brief at 16-17. However, as to the allegation of

⁷See *supra* at pages 9-10. Schlotfeldt is barred from making any argument that the Board's condition is an erroneous interpretation of law as he failed to cite this as a statutory basis for relief in his Petition

erroneous interpretation of the law, cited *supra* at footnote 2, the Board's interpretation of the zoning ordinance definition is entitled to deference due to the Board's expertise in interpreting local law. As to the erroneous application of law to the fact challenge, for Schlotfeldt to prevail on this basis, he would need to leave the court "with a definite and firm conviction that a mistake has been committed" in applying the law to its findings. For the reasons stated above, Schlotfeldt fails as to both challenges. Accordingly, the Court must defer to the board's expertise in this matter, and the decision of the Board should be affirmed.

D. THE 180 DAY LENGTH OF STAY CONDITION WAS NOT BASED ON NEIGHBORHOOD FEARS, AND THE REQUIREMENT IS NEITHER RANDOM NOR ARBITRARY.

Schlotfeldt relies on *Marantha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 799, 801 P.2d 985 (1990) to support his proposition that the Board cannot apply conditions based solely on neighborhood opposition. The County agrees that a special permit cannot be denied based solely on general displeasure of neighbors and unsubstantiated fears. Although Schlotfeldt cites to neighborhood testimony of concerns over the project, he fails to cite anything in the record to reflect the decision of the Board was based on those fears. Under his theory, any negative comments by the public at land use hearings would invalidate any conditions imposed

by the Board. As stated *supra* in sections II B and C, the record reflects the length of stay condition was imposed to protect the integrity of the district by complying with the definition of an RV Park, and not on community fears. Again, the record reflects the Board in approving the Schlotfeldt special permit noted among other things that: “I just don’t want to see it turn into a trailer park and not a RV park.” (CP 484). The Board applied the condition specifically because the general standards within the code definition for RV Parks required them to do so.

Schlotfeldt apparently would like his proposed RV Park to be considered as a permanent dwelling on the land, such as a mobile home park, which is also permitted via a special permit process in the Industrial District. *See* BCC 11.28.010(e). Mobile home parks are defined in the code as a:

site, lot or tract of land under the ownership or management of one person, firm or corporation, intended for occupancy by five (5) or more manufactured (mobile) homes/FAS for dwelling or sleeping purposes. **This definition shall not include parks for the location of recreational vehicles for travel or recreation.**

BCC 11.04.020(99) (now codified at BCC 11.04.020(104)) (emphasis added); (CP 518). Although a mobile home park is permitted in Light Industrial by way of a special permit, there are numerous conditions that follow such use that the Schlotfeldt application did not address. Dwellings

such as mobile homes have “building site” and “yard” requirements which mandate a multitude of conditions from depth and width of the front yard to minimum lot size not required for RV parks. *See* BCC 3.22.050; BCC 11.28.020; BCC 11.28.030. By definition, RV parks are not to be used as permanent dwellings like mobile homes parks. Former BCC 11.04.020(123) (now codified at BCC 11.04.020(132)); (CP 511). In addition, the Schlotfeldt special permit at issue was for a recreational vehicle park, not a mobile home park. (CP 422-25). Accordingly, the Board as cited herein, had authority and was mandated by the code to impose conditions to ensure the use by Schlotfeldt was consistent with the Benton County zoning ordinance.

Schlotfeldt further argues that the impact on the land is identical irrespective of an RV’s length of stay. Appellant Brief at 24. Regardless of the fact that the planning staff noted concern with externalities of long term RV storage such as “freezers and other things outside,” whether there is any impact by the longer length of stay is irrelevant to the analysis in this matter. (CP 434). The definition of an RV Park mandates the short-term temporal nature of RVs in the park. The Board had no discretion but to impose a condition on length of stay. Without doing so, the use would have allowed RVs located within the park to become permanent dwellings

on the land, such as mobile homes, a use for which Schlotfeldt's application would not have met the conditions for.

Schlotfeldt argues that the length of stay condition is not supported by substantial evidence. As stated above, factual determinations regarding Schlotfeldt's application rest with the Board. Schlotfeldt has completely ignored the fact the Board articulated its concern regarding the RV park turning into a mobile home park, a use Schlotfeldt's application unquestionably would not comply with. Schlotfeldt's appeal involves nothing more than an attempt to substitute his own judgment for that of the Board in imposing a length of stay condition that better fits his business model. He considers the Board's condition arbitrary because it limits the stay to a calendar year versus a 365-day period, even though this requirement is to his benefit. *See* Appellant Brief at 30. The same arbitrary allegation could be said about any condition imposed by the Board in any land use matter. The Board had to draw the line somewhere, and after reviewing the facts provided and given the code provisions at issue, the Board determined that a 180 day length of stay condition in a calendar year period was most appropriate to ensure the RV park would be used for travel, recreation, and vacation use. Schlotfeldt conveniently would like to ignore the fact that RV Parks are mandated by the BCC to be used for recreational, vacation, and travel use, and instead would like to

impose a condition that better fits his needs like that of the City of Richland's 12 month out of every 14 month length-of-stay requirement. Arguably, if the Board had imposed such a condition, they would be in direct violation of the BCC definition for RV Parks, and as such, the neighbors would have a cause of action against the County. Given that Schlotfeldt's application was not for a mobile home, and as stated above would not have even qualified for such a use, the Board granted the Schlotfeldt application with the generous condition of allowing the RVs to remain for 180 day consecutive period in any calendar year, for travel, recreational, or vacation use.

III. ATTORNEY'S FEES

RCW 4.84.370(1) states in part:

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party ... on appeal before the court of appeals ... of a decision by a county... to issue, condition, or deny a development permit involving a ... conditional use.

To receive costs and attorneys' fees under that provision, the prevailing party on appeal must have prevailed in all prior proceedings. *See* RCW 4.84.370(1)(a)-(b). Counties whose land use decisions are appealed are considered prevailing parties and entitled to recover fees and costs if their decisions are upheld at superior court and on appeal. *See* RCW 4.84.370(2).

The County's decision has already been affirmed at superior court, and for the reasons set forth above, this Court should affirm that decision. Consequently, the County asks that Schlotfeldt be ordered to pay the County's reasonable attorneys' fees and other costs incurred at the trial court level and the subsequent appeal to this Court that are associated with Schlotfeldt's LUPA petition.

Schlotfeldt is not entitled to attorneys' fees at this time. Schlotfeldt did not prevail at any of the lower levels as required by RCW 4.84.370.

IV. CONCLUSION

It is not the Court's role to determine whether the Board could have devised a better means of achieving the legitimate goal of complying with the zoning ordinance. *See Woodinville Water Dist.*, 105 Wn. App. 897. The Board deemed a 180-day stay limitation was appropriate to keep the RV park in compliance with the zoning ordinance. Accordingly, the Court must defer to the Board's condition based on the general standards set forth in the zoning ordinance definition.

RESPECTFULLY SUBMITTED this 18th day of May 2012.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read 'RLUKSON', with a long horizontal flourish extending to the right.

RYAN L. LUKSON, Deputy

Prosecuting Attorney

Bar No. 43377

OFC ID No. 91004

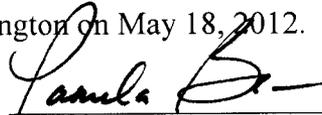
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

John Ziobro
1333 Columbia Park Trail, Suite 110
Richland, WA 99352

U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on May 18, 2012.



Pamela Bradshaw
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