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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

81855-0

NO. 253783

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

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JEFF KEELY, in his individual capacity, and  
DAVID DORSEY and NANCY DORSEY,  
a marital community, Respondent

v.

COUNTY OF CHELAN, a municipal Corporation  
Acting through its hearing examiner;  
and ROBERT CULP, P.E.,  
MUNSON ENGINEERS, INC; and  
ANTON ROECKL, Dba WICO, Appellant

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APPELLANTS REPLY BRIEF  
REVISED JULY 25, 2007

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A. SUPPLEMENTAL STATEMENT OF THE CASE

The 1994 application for WICO's project included the relocation of South Lake Shore Drive and a pedestrian underpass. Even though the county planning staff that had changed several times during the course of the project may have believed at the time of the 2005 hearing that those specific traffic mitigation measures were not a part of the application as argued in the Brief of Respondents, Dorsey and Kelly, the mitigation measures were contained in and required in the staff report for the 2005 hearing. (AR 33, Supplemental Staff Report, at pages 9 and 10, paragraphs 8a. - c.).

Each and every MDNS and mitigation agreement and amendments thereto issued by Chelan County and signed by and agreed to by WICO from 1993 through the last one on July 13, 2005 (Administrative Record document #33, Supplementary Staff Report, Administrative Record document #133, Missouri Harbor Environmental Checklist dated 08/14/03 and Administrative Record document #135, Agreement between WICO and Chelan County dated 02/03/05) contained precisely those mitigation measures.

The hearing examiner, presumably in reliance on the Chelan County planning staff's report and recommendation, adopted and required those very same mitigation measures and the conditions of approval at paragraph 15 of the decision by not only generally incorporating all conditions of the MDNS but also then by reciting those specific conditions at sub paragraphs VII c and d (Administrative Record document #30, Findings of Fact, Conclusions of Law and Decision dated August 19, 2005, page 19).

Chelan County and WICO, by the written agreements and actions, if not always in oral testimony, consistently from 1994 through 2005 considered the traffic mitigation measures adopted by the hearing examiner as part of the application for WICO's project. WICO did not appeal the Hearing Examiner's decision that specifically required those measures and is bound by those conditions, as part of the application for WICO's project.

## B. ARGUMENT

### **I. The Hearing Examiner's Vesting Date was appropriate considering relation back or the Hearing Examiner's alternate date should be considered as a vesting date.**

The Hearing Examiner considered April 1994 as the vesting date. However, a complete reading of the Hearing Examiner's decision indicates that the Hearing Examiner correctly concluded certain amendments filed subsequent to the April 1994 date related back to the 1992 application and therefore were in place as of the April 1994 vesting date. WICO has suggested to the Court of Appeals that if the Court were to consider the relation back theory, a generally acceptable theory, not to apply, that the Court, utilizing the Hearing Examiner's reasoning should select the dates provided by the Hearing Examiner and the documentation that related back as the correct vesting date.

Contrary to the arguments of Respondents, Dorsey and Kelly, in Respondent's Brief, WICO is not asking the Court of Appeals to search for an alternate vesting date. WICO has and is arguing that the Court read the Hearing Examiner's decision in its entirety and either accept the

vesting date using the concept of relation back or use the later dates stated by the Hearing Examiner, June 13, 1994 or February 3, 1995 as the vesting date.

**II. WICO's application was complete.**

A. Application complete when sent out for comment.

Chelan County did not have a definition of "complete application" prior to the implementation of the Growth Management Act in the year 2000. Prior to the implementation of the Growth Management Act, the applications in Chelan County were deemed complete when the application was "substantially complete" and considered complete enough to send out for comments from the various responding agencies. Therefore, even though planning staff member Walters, the thirteenth or fourteenth planning staff member to work on the file, testified that it was difficult to determine when the application was deemed complete as quoted in Respondent's Brief, the planning staff continued to process the substantially complete application and send the application to the various responding agencies to obtain comments. Planning staff's actions speak

louder than the last planning staff's member's words. Clearly all the planning staff, including the last planning staff member to work on the file, Walters, agreed that the application was complete enough to send the application to various responding agencies for comment at numerous times between 1989 through 2005. The fact that several revisions were made to the plan to comply with the requests of planning staff and responding agencies, and new studies were required with the passage of time, does not render a previously complete application incomplete as of the date the Hearing Examiner determined that vesting had been completed, April 1994.

B. Disclosure of all uses.

Hearing Examiner Kottkamp correctly concluded that as of 1992 all of the uses ultimately approved had been disclosed in the application filed by WICO. Thus as of April 1994, the application was complete and vested since the application disclosed all uses ultimately approved, see Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 943 P.2d 1978 (1977) at pages 283-284.

C. Prior Decision.

Respondents, Dorsey and Kelly, rely heavily on the 2002 Hearing Examiner's decision. However, as noted by Hearing Examiner Kottkamp, the same Hearing Examiner at both hearings, the issue of completeness and vesting was not decided in the 2002 hearing, since Hearing Examiner Kottkamp found that additional SEPA work needed to be completed regarding the 1994 plan as subsequently revised. Additional SEPA work was performed and Hearing Examiner Kottkamp concluded, based on the Chelan County staff report, that the concerns raised at the 2002 hearing and specifically found by Hearing Examiner's Kottkamp at the 2002 hearing had been adequately addressed.

**III. WICO's application did comply with applicable codes.**

A. Zoning.

The zoning for WICO's project was General Use (GU) prior to Chelan County adopting the Growth Management Act in 2000. The April 1994 application had a typographical error with the incorrect acreage, however, the acreage was amended by WICO immediately after the April

1994 date and the amendment related back to the pre April 1994 applications to supply the correct acreage and correct density (see Section C, III of Appellant's Brief). Furthermore, even assuming that Respondent's technical reading of the applications and the code is somehow correct, which WICO does not concede or ever remotely agree with, the project was approved based on a twenty-three (23) acre site. Twenty-three (23) is more than double the acreage needed to comply with the density requirements.

B. Comprehensive Plan.

Furthermore, as discussed in Appellant's Brief at Paragraph C, II the implementation recommendation of the LLCBCP, a recommendation only, is not controlling over the specific zoning (GU). Allowing the project to vest in 1994 is consistent with Washington vesting policy. Washington's State vesting policy requires that all the uses of an application be disclosed at the time the application is complete (see Section C, IV of Appellant's Brief).

C. No Permit Speculation.

To allow Respondent's argument that because the application took several years it is therefore is a case of permit speculation would be contrary to Washington State vesting policy.

The administrative record is replete with request from various State agencies and Chelan County Planning for revisions and/or supplemental studies that WICO engaged in, in order to satisfy the concerns of neighbors, such as Respondents, Chelan County Planning and the responding State Agencies. In fact a few are recited in Respondent's Brief. The requests for changes resulted in fifteen (15) different SEPA check lists, four SEPA determinations and numerous plan revisions in order to comply with the requests of the State and Local Agencies. In order to comply with various requests WICO was required to expend a considerable amount of time, effort and money, and ultimately, complied with the requests. WICO requested a hearing in 2002 only to find that additional SEPA documentation was necessary. As of the 2005 hearing the planning staff and the Hearing Examiner agreed that the pending issues had been addressed with the exception of the completion of the

conditions of approval. Conditions of approval are uniformly applied and acceptable to approving projects in Chelan County and throughout the State of Washington.

D. Density.

The Chelan County code in effect in 1994 and at all times prior to 2000 allowed duplexes on a lot of ten thousand square feet (10,000 sq. ft.) (see C. II of Appellant's Brief). The code therefore allowed a density of one unit per five thousand square feet (5,000 sq. ft). Contrary to Respondents argument, the gratuitous written notes of an unidentified Chelan County Planner about irrelevancy of the duplexes because that was not what was proposed does not in any way affect the code's density allowances.

Obviously, if WICO had proposed duplexes, the use was allowed outright and no Conditional Use Permit (CUP) would have been required. Therefore the question became what is the allowable density for a CUP for this project.

Chelan County did and still does prefer cluster development over sprawling development. Cluster development uses the same number of

units for the acreage in a tighter more restricted area rather than having the units sprawled over the entire acreage. Thus, WICO could have placed duplexes every ten thousand square feet (10,000 sq. ft.) over the ten (10) acres and had the same number of units as proposed and approved and would have not needed a CUP. However, in compliance with the modern and preferred cluster approach, WICO "clustered" the same number of units into less buildings using the maximum permitted density under the code. WICO's use of the cluster approach did not alter the density allowed of one (1) unit per five thousand square feet (5,000 sq. ft.).

The project approved by the Hearing Examiner provides for more than ten thousand square feet (10,000 sq. ft.) per unit all placed in a cluster. The amendments to the acreage having related back to the 1992 application provides for more than ten thousand square feet (10,000 sq. ft.) per unit all placed in a cluster. The amendments to the acreage having related back to the 1992 application, per Hearing Examiner Kottkamp's rational, there is absolutely no doubt that the approved project more than satisfies the most restrictive density requirement argued by Respondents.

**IV. No Violation of RCW 36.70B.050 Occurred.**

A. The Hearing Examiner Was Incapable of Violating RCW 36.70B.050.

RCW 36.70B.050 states:

Not later than March 31, 1996, each local government shall provide by ordinance or resolution for review of project permit applications to achieve the following objectives:

...

(2)...provide for no more than one open record hearing and one closed record appeal.

This statute placed a duty of local governments; it placed no duty on a local land use decision maker. Chelan county complied with the statute, implementing an ordinance using language substantially similar to that of the statute. The only party in this matter capable of violating RCW 36.70B.050 was Chelan County. The Chelan County Hearing Examiner was incapable of violating the statute. Therefore, there is no possible remedy for the Respondents for the wrongfully alleged violation of RCW 36.70B.050.

B. The Respondents' Allegation Regarding The Possibility Of A Second Hearing Is Not Ripe.

Where the consequence of a challenged condition is merely potential, rather than actual, the condition is not ripe for adjudication. State v. J.B., 102 Wn.App. 583, 585, 9 P.3d 890 (Div. 1, 2000), see Primark Inc. v. Burien Gardens Ass'n., 63 Wn.App. 900, 907, 823 P.2d 1116 (Div. 1, 1992).

Here, Respondents challenge the possibility of a second hearing on the traffic study (Administrative Record document #30, Findings of Fact, Conclusions of Law and Decisions, Condition of Approval #12 at page 16) and cultural resources survey (Administrative Record document #30, Findings of Fact, Conclusions of Law and Decision dated August 19, 2005, Condition of Approval #13 at pages 16-17), which potential hearing has not actually occurred and may very well not occur. Respondents have suffered no actual harm. Therefore, such a challenge is not ripe for adjudication.

As noted herein and in Appellant's Brief, county planning staff, WICO, and the Hearing Examiner imposed and agreed to the very traffic mitigation measures that Respondents stridently argue must be required. (Administrative Record document #33, Supplementary Staff Report,

Administrative Record document #133, Missouri Harbor Environmental Check list dated 08/14/03, and Administrative Record document #135, Agreement between WICO and Chelan County dated 02/03/05). Since the approved project contains the very traffic mitigation measures that the Respondent's cry is necessary for a safe project, the likelihood of and even the probability of any need for a second hearing is eliminated.

C. Respondents Erroneously Allege That A Hearing Could Potentially Be Held On The Stream Typing Analysis.

Respondents allege that the stream typing analysis was a condition of approval. It was actually Finding of Fact #32 of the Findings of Fact, Conclusions of Law and Decision dated August 19, 2005, Administrative Record document #30, hereinafter referred to as Finding of Fact #32, and contemplated no future hearing on the stream typing analysis. Rather, Finding of Fact #32 indicated that the untyped streams needed to be typed and identified for appropriate setbacks on the site plan of record.

D. Respondents Erroneously Allege That A Potential Variance Application Should Have Been Heard At The Hearing On The Conditional Use Permit.

Finding of Fact #16 states:

The parking adjacent to the public right-of-way on both sides of the road will need to be relocated outside of the front yard setback or a variance will need to be applied to deviate from the adopted design standards.

Finding of Fact #16 of the Findings of Fact, Conclusions of Law and Decision dated August 19, 2005, Administrative Record document #30, at page 3, does not require that a second hearing take place on the Conditional Use Permit application. Rather, it requires that either the parking be moved or a variance application be submitted. Even if a potential variance is applied for, a hearing on such variance application is a separate application from the conditional use permit application. RCW 36.70B.050 speaks to one open record hearing per application. Thus, a separate hearing on the variance application would be entirely appropriate.

E. Remedy for Violating Procedures.

Should the court disagree and find that the Hearing Examiner did violate procedure, then the remedy is to remand to continue the hearing pursuant to Chelan County Code 11.93.030, not to overturn the decision.

**V. Typographical Errors.**

Respondent's attempt to cast doubt upon the rational of the Hearing Examiner by pointing to a reference in the decision to wineries should not be well taken. WICO's application contained incorrect acreage in a typographical error, Respondent's brief contains typographical errors, i.e. page 3 – April 2004 instead of April 1994 and page 17 – CU rather than GU, and undoubtedly Appellant's Brief and this Brief contain typographical errors. The error that should have been eliminated by proof reading does not cast doubt upon the rational of the Hearing Examiner and should be disregarded.

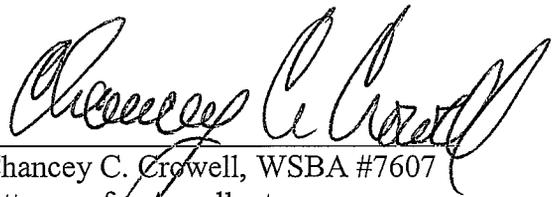
C. CONCLUSION

The Hearing Examiner's approval was based on staff reports and years of research, professional studies and reports and a sustained effort by

WICO to meet the concerns of Chelan County Planning, the neighbors and the various agencies of the State of Washington. Respondents strident arguments and incorrect representations of fact or erroneous application of law are insufficient to meet the burden of Respondents to establish that the Hearing Examiner's approval was either in error factually or a result of a legal error.

The Superior Court Judge's decision should be reversed and the case remanded with directions to uphold the Hearing Examiner's decision. Alternatively, the Superior Court decision should be reversed and remanded to the Superior Court with direction to remand the case to the Hearing Examiner to strike that portion of the conditions requiring subsequent hearings and simply rely on the conditions of approval.

Respectfully submitted,



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