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Division-I
State of Washington

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

NO. 74039-3-I

MICHAEL DURLAND, KATHLEEN FENNELL,
and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WESLEY HEINMILLER,
ALAN STAMEISEN, and SUNSET COVE LLC,

Respondents.

BRIEF OF RESPONDENT SAN JUAN COUNTY

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I. INTRODUCTION

This is the fourth appeal to the Court of Appeals involving Petitioners Michael Durland, Kathleen Fennel, and Deer Harbor Boatworks (“Durland”), Respondents Wes Heinmiller and Alan Stameisen (“Heinmiller”) and San Juan County (“County”). This case involves an appeal of after-the-fact permits issued by the County for an Accessory Dwelling Unit (“ADU”) on property owned by Heinmiller. The ADU permits, originally issued in November 2009, were appealed by Durland to the San Juan County Hearing Examiner. That case was eventually heard by the Court of Appeals, which remanded the matter back to the Hearing Examiner.

On Remand, the Hearing Examiner denied the appeal and approved the issuance of the permits subject to minor modifications as proposed by Heinmiller during the remand process. The Whatcom County Superior Court affirmed the Hearing Examiner decision and this appeal follows.

II. ISSUES PERTAINING TO PETITIONERS' ASSIGNMENTS OF ERROR

1. Is the Hearing Examiner's decision supported by substantial evidence?
2. Did the Hearing Examiner properly exclude supplemental evidence?
3. In the event this Court determines the Hearing Examiner erred, should the matter be remanded?

III. STATEMENT OF THE CASE

The Heinmiller property contains a barn constructed in 1981 approximately 18 inches from the property line. CP 180. On December 7, 1990, the owners of the Heinmiller and Durland properties recorded a "Boundary Line Agreement and Easement" which prevented the owner of the Durland property from building within 20 feet of the barn. CP 234.

Several years later, a portion of the barn was converted to an ADU without permits. CP 185. The County commenced code enforcement on the Heinmiller property which resulted in an agreed compliance plan between the County and Heinmiller. CP 185. Permits were issued for the ADU in 2009. CP 178. Durland appealed to the Hearing Examiner. CP 174.

The Hearing Examiner dismissed the appeal finding that most of the issues raised were time barred. CP 139-170. The remaining issues involved how to calculate "living area" and the roof pitch for the ADU. CP 139-170; 399-400. The Hearing Examiner's decision was appealed to Skagit County Superior Court and ultimately to the Court of Appeals. CP 399-423.

The Court of Appeals, in an unpublished decision ("*Durland I*"), affirmed the superior court's ruling on the roof pitch and living area issues but reversed the ruling that the remaining issues were time barred. CP 423.

The case was remanded to the Hearing Examiner for further proceedings.
CP 423.

Despite Durland's enthusiastic assertions to the contrary, *Durland I* did not establish that a setback was required when the barn was built in 1981, nor did the Court "rule" with respect the 1986/1987 agreement. In fact, the only mention of these matters is contained in the "Facts" section of the decision. CP 401.

On remand the Hearing Examiner held a closed record hearing on November 12, 2015. CP 36. The record was left open until January 30, 2015 to allow Heinmillers to investigate potential new evidence raised by Durland at the hearing. CP 36. On January 26, 2015, San Juan County building official John Geniuch, emailed a "Supplemental Staff Report" to the Hearing Examiner and the parties. CP 902. This action by Mr. Geniuch was not authorized, contained inaccurate statements, and did not represent the position of San Juan County. CP 858. Mr. Geniuch followed this first unauthorized activity with a second unauthorized communication to the Hearing Examiner and the parties on February 3, 2015, in which he revises his earlier report. CP 892. To clear up San Juan County's position, Mr. Geniuch's supervisor, Planning Director Sam Gibboney, filed a response with the Hearing Examiner on February 6, 2015, addressing the unauthorized submittals and the parties' dispute regarding whether they

should be added to the record. CP 858-860. Ms. Gibboney asked that the “supplemental report” not be admitted into the record and stated that San Juan County believed the existing record to be accurate. CP 860.

On March 15, 2015, the Hearing Examiner issued a written decision denying Durland’s appeal and stating that the ADU permits were validly issued, with the proviso that interior living space must be reduced as proposed by Heinmiller during remand proceedings. CP 1408. The Hearing Examiner decision denied both Heinmiller and Durlands’ motions to supplement the record. CP 1414. The denial included the unauthorized Geniuch report. CP 1415.

Durland appealed the Hearing Examiner decision to Whatcom County Superior Court. CP 01-29. A hearing on the merits was conducted on August 31, 2015. At the conclusion of the hearing, Judge Deborra Garrett issued a decision from the bench affirming the Hearing Examiner’s decision. TR 60. This appeal follows.

IV. STANDARD OF REVIEW

When reviewing a superior court’s decision on a land use petition, the appellate court stands in the shoes of the superior court. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001). In a LUPA case, the court may grant relief only

if the moving party satisfies statutory standards for relief. RCW 36.70C.130(1). The statute provides that:

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

...

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;...

(d) The land use decision is a clearly erroneous application of the law to the facts; [or]

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision[.]

RCW 36.70C.130(1).

These statutory standards of LUPA reflect a clear legislative intention that the Court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). On appeal of an administrative decision, the review is of the record before the hearing examiner, including the hearing examiner's findings of fact and conclusions of law. *Id.*

V. ARGUMENT

As stated by Judge Garrett at the hearing on the merits, Durland had a “structured argument and a theme, which is easy to follow ... [Durlands’] argument is that the building was [sic] illegal now and it was illegal then

and has remained illegal.” TR 56. This holds true to Durlands’ argument to this Court as well, yet Durlands’ interpretation of the facts and the law in this case, are simply not reflected in the record before the Court or established Washington case law. The Hearing Examiner and Judge Garrett did not adopt Durland’s argument because, as stated by Judge Garrett, “I’m not persuaded that the building was illegal from its inception.” TR 56.

A. Hearing Examiner’s Decision is Supported by Substantial Evidence in the Record.

In reviewing an administrative decision, an appellate court stands in the same position as the superior court. *Wenatchee Sportsmen Ass’n v. Chelan Cty.*, 141 Wn.2d 169, 175-176, 4 P.3d 123 (2000). The appellate court reviews an agency’s factual findings under the substantial evidence standard and conclusions of law de novo. *Id.* at 176. Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Id.*

It is the legal status of the barn when built, not the passage of time, that the Hearing Examiner and the Superior Court relied on in determining that the barn is a lawful structure. TR 59. This conclusion is supported by the record outlined above. Given that over 35 years have elapsed since the barn was built, it is not surprising that the records regarding the permit are

unclear. This uncertainty, however, does not change the result in this case because the record establishes that no permit was required.

The flaw in Durland's logic is the notion that in 1977 in San Juan County there were separate building and land use regulations. In fact, in 1977 in San Juan County, land use performance standards were contained in the Building Code. CP 647-48. The barn was a Class J structure and any setback requirements for Class J structures in San Juan County were contained in the Building Code. Resolution 58-1977 clearly exempts Class J structures from Uniform Building Code requirements, including setbacks. CP 343.

The record before the Court meets the substantial evidence standard and supports the decisions of the Hearing Examiner and the Superior Court.

B. The Permit was Issued in Compliance with San Juan County Code.

Legal nonconforming structures and uses are structures and uses that lawfully existed at the time they were built or commenced but that do not comply with current regulations. *King County, Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013). Because the barn in this case was legal when constructed in 1981, Durland's argument regarding nonconforming structures is inapplicable. Durland's argument hinges on his contention that the barn was "illegal" when

constructed. Petitioners' brief, pg. 31. This assertion, however, is not supported by either the record or land use law in the state of Washington.

C. The Hearing Examiner Correctly Excluded Supplemental Evidence.

No evidence was "withheld" by the County. Indeed, Durland appears to be arguing that it was error for the Hearing Examiner to not allow responses to items not considered by the Hearing Examiner. Petitioners' Brief, pg. 30. As discussed above, the Hearing Examiner properly excluded the unauthorized Geniuch report from the closed record appeal and denied both parties' motions to supplement the record. This is within the discretion of the Hearing Examiner under SJCC 2.22.210 and SJCC 2.22.230

D. In the Event the Court Finds the Hearing Examiner Erred, the Case Should be Remanded.

Durland's bold statement that the County is not "entitled" to a remand, is factually and legally unsupportable. Durland bases this preposterous assertion on *Levine v. Jefferson*, 116 Wn.2d 575, 807 P.2d 363 (1991). In *Levine*, Jefferson County imposed mitigative restrictions on a building permit as part of the SEPA review. *Id.* at 576. The court held that the record did not support the restrictions and the permit should be issued. *Id.* at 582.

Levine is distinguishable from this case where the record clearly supports the issuance of the permits. Whereas in *Levine* the permit applicant

faced potential prejudice by further delay if the case was remanded, in this case the permit applicant would be prejudiced by the summary reversal of their permit. Both the County and Heinmiller are entitled to remand to address any potential errors the Court finds with the Hearing Examiner and Superior Court decisions. For example, Durland's second assignment of error alleges that the Hearing Examiner erred in refusing to consider supplemental evidence. Clearly, if the Court were to agree, the remedy is to remand the matter to the Hearing Examiner to consider the evidence that was previously excluded.

E. Uncited Statements by Durland Should Be Disregarded.

Finally, Durland's rants regarding the Prosecuting Attorney (Petitioner's brief, pgs. 40-42) were not a part of the decision of the Hearing Examiner or of the appeal to the Superior Court and should not be a part of the decision here. Where a party fails to cite to authority, this court may assume that none was found. *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007).

VI. CONCLUSION

Durland's heedless quest to vindicate perceived injustices is based not on the evidence and law before the Court, but on emotional and irrational, prejudices, personal beliefs, and grudges that span decades. The Court should remain in the reality of the evidence presented and the well-

reasoned decisions of the Hearing Examiner and the Superior Court applying the law to that evidence.

For the reasons stated above, San Juan County respectfully requests the Court affirm the decisions of the Superior Court and the Hearing Examiner.

Respectfully submitted this 4th day of March, 2016.

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CERTIFICATE OF
SERVICE

Cari A. Wilson declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on March 4, 2016, I caused to be delivered in the manner indicated below a true and correct copy of San Juan County's Motion to Extend in the above-entitled cause to:

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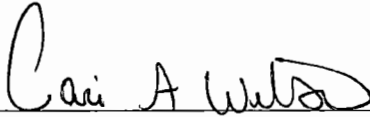
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I make the foregoing statement under penalty of perjury of the
laws of the state of Washington.

Dated this 4th day of March 2016, at Friday Harbor, Washington.



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