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No. 67429-3-I

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

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER
HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN
STAMEISEN,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS WES
HEINMILLER AND ALAN STAMEISEN

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Respondents Wes Heinmiller and Alan Stameisen (“Heinmiller”) respectfully submit this Reply on their Cross-Appeal in this matter.

A. INTRODUCTION

The Hearing Examiner below rejected the argument by Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (“Durland”) that Heinmiller’s proposed alternative dwelling unit (ADU) violated the living area square footage requirements set forth in the San Juan County Code (SJCC). The Examiner made several findings in support of that decision.

In particular, the Examiner found that Durland’s interpretation would force the County to include all of the floor space of an entire structure containing an ADU, which would be an absurd result. The Examiner found that Durland’s interpretation would lead to the nonsensical result of including storage areas and ignoring ceiling heights and slopes in the ADU square footage calculations. Further, the Examiner found that the SJCC should not be interpreted in a manner that would lead to such results. Additionally, the Examiner found that mandatory provisions of the International Residential Code (IRC) applied to the County’s square footage calculations, and that considering both codes together was required and logical. Under the IRC, areas with a ceiling height of less than five feet are to logically be excluded from the square footage calculations. Ultimately, the Examiner found that Heinmiller’s proposed ADU complied with the size requirements of the

SJCC. As is set forth in the Opening Briefs in this matter, the Examiner also rejected the other elements of Durland's appeal.

In Durland's appeal to the Superior Court under the Land Use Petition Act (LUPA), the Court reversed the Examiner's decision with respect to the method of calculating ADU square footage, finding that it was an erroneous interpretation of the law (or erroneous application of the law to the facts) to exclude areas of the ADU with a ceiling height of less than five feet. The Superior Court affirmed the Examiner on all other issues.

In this appeal, Heinmiller cross-appealed on the issue of the ADU square footage calculation, and asserts that the Court erred in reversing the Examiner on this issue. Heinmiller also appealed the Superior Court's award of taxable costs to Durland.

B. ARGUMENT

1. Standard of Review

The question before this Court is whether the superior court erred in interpreting the law and in reversing the Hearing Examiner with respect to the living area square footage computation. RCW 36.70C.130(1)(b), (d). Under the "erroneous interpretation of law" standard, there must still be a proper measure of deference accorded to the local jurisdiction with expertise in interpreting local land use requirements. RCW 36.70C.130(b); Cingular Wireless, LLC v. Thurston Cnty., 131 Wn.App. 756, 768, 129 P.3d 300 (2006) (citation omitted). An

appellate court “... must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations.” Lanzce C. Douglass, Inc. v. City of Spokane Valley, 154 Wn.App. 408, 415-16, 225 P.3d 448 (2010), *review denied*, 169 Wn.2d 1014 (2010) (citation omitted). It is the “clear legislative intention” that deference also be accorded the local jurisdiction, which has expertise in regulating land use. City of Medina v. T-Mobile USA, Inc., 123 Wn.App. 19, 24, 95 P.3d 377 (2004).

2. Application of the IRC in San Juan County is Mandatory

Durland argues that the SJCC provision at issue applies by itself, in a vacuum, without reference to the IRC. Yet Durland ignores provisions in the law which show that application of the IRC is mandatory.

First, conspicuously absent from Durland’s Response is any reference to RCW 19.27.031(1)(b), which states:

Except as otherwise provided in this chapter, *there shall be in effect in all counties* and cities the state building code which shall consist of *the following codes* which are hereby adopted by reference:... (b) *The International Residential Code*, published by the International Code Council, Inc.:... .

RCW 19.27.031(1)(b) (emphasis added). Notably, WAC 51-51-003 also adopts the IRC. Durland asserts that the IRC does not apply, but yet does not even bother to address the statute which explicitly makes the IRC mandatory in all counties. By the clear terms of this statute, the IRC

does apply.

Second, Durland fails to address SJCC 15.04.050 (a provision of the San Juan County Building Code), which states:

The following codes, copies of which... are on file with the San Juan County auditor, are hereby adopted, together with all of the regulations, provisions, penalties, conditions and terms included in those codes, as if fully set out in this article... .B. International Residential Code (IRC), 2003 Edition, published by the International Code Council...

SJCC 15.04.050(B) (emphasis added). Indeed, a closely related provision of the Building Code, SJCC 15.04.020, explicitly references RCW 19.27.031 in stating that the regulations of Title 15 are authorized by that statute. Thus, not only does RCW 19.27.031 say the IRC applies in San Juan County, but San Juan County's own regulations expressly adopt the IRC.

Other provisions of the SJCC also confirm that the IRC applies. The square footage definitions relied upon by Durland appear in Title 18 of the SJCC, which is the Unified Development Code, or UDC. The UDC applies to all buildings and structures erected in San Juan County, and to all land uses in the County. SJCC 18.10.020(C), 18.10.050(A). The UDC states that where it references the Building Code, "... the intent is to require only the minimum standards for new construction allowed under state law unless such standards conflict with other provisions of this code or Title 15 SJCC." SJCC 18.10.060. Additionally,

SJCC 18.20.005(B) references the RCW, WAC, and UBC; states that all definitions which refer to the same “... are intended to mirror the definitions in these codes...”; and further states that “If the definition in this code conflicts with a definition under state law or regulation, the state definition shall control over this definition.” Taken together, it is clear that the UBC and UDC are intended by the County Council to be considered together, and that provisions of state law apply as well.

Durland’s argument that SJCC 18.40.240(F)/SJCC 18.20.120 should be read in isolation and without reference to state law is simply wrong.

3. The SJCC Provision and IRC Must Be Read as Complementary

Durland suggests that state law controls over County Code only where the code provision references state law. This is incorrect.

First, Durland provides no authority which stands for the proposition that a County Code provision must be read in isolation despite the existence of state law. Nor does Durland cite any authority standing for the proposition that state law -- when it exists and concerns the same subject matter as a County regulation -- can be ignored.

Second, Washington law requires that state and valid local laws be considered together and harmonized, if possible. A number of Washington cases analyze local code provisions against state law in

settings where the parties argue that a local ordinance is invalid or unconstitutional, or has been preempted. Neither party in this proceeding is making those particular arguments; however, the analyses of these cases informs the analysis at issue here by explaining how state law controls in these settings and that state and local laws are to be read in harmony, where possible.

For example, in Brown v. City of Yakima, 116 Wn.2d 556, 807 P.2d 353 (1991), appellants Brown challenged the constitutionality of a Yakima City ordinance,¹ contending that it was either preempted by, or was in direct conflict with, a state fireworks law -- RCW 70.77 *et seq.* The trial court upheld the ordinance, and Brown appealed. The matter was then transferred to the Washington Supreme Court for review.

The state law at issue in that case, RCW 70.77.395, allowed the sale and discharge of fireworks between 12:00 noon between June 28th and 12:00 noon on July 6th of each year. Brown, 116 Wn.2d at 558. The Yakima City ordinance, however, allowed the sale of fireworks between 12:00 noon on June 28th to 11:00 p.m. on July 4th of each year, and stated

¹ The authority of county commissioners to enact ordinances is legislative in nature and derives from Const. Art. 11, which states: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." The power of counties and cities to enact regulations "...comes from the same source"; thus cases construing City versus County regulations in this context are comparable and analogous. See State ex rel Schillberg v. Everett Dist. Justice Court, 92 Wn.2d 106, 108, 594 P.2d 448 (1979) (finding that County ordinance prohibiting motor

that fireworks could not be sold or discharged between the hours of 11:00 p.m. and 9:00 a.m. Id. The ordinance also stated that it was unlawful to discharge fireworks except between 9:00 a.m. and 11:00 p.m. on July 4th. Id. at 559. The court observed: “Thus, the ordinance is more restrictive than the statute as to the dates and times fireworks may be sold or used.” Id.

Brown argued that the more restrictive language of the ordinance rendered it unconstitutional. Id. In regard to that argument, the court noted that cities have the right to enact ordinances prohibiting the same acts as state law as long as the state enactment “... was not intended to be exclusive and the city ordinance does not conflict with the general law of the state.” Id. (citation omitted). The court explained: “Thus, the ordinance must yield to a statute on the same subject either if the statute preempts the field, leaving no room for concurrent jurisdiction... or if a conflict exists such that the two cannot be harmonized.” Id. (citations omitted).

In analyzing these issues, the court found that the legislature had not expressed an intent to preempt in the entire field of fireworks regulation. Id. at 560-61. Further, the court found that the ordinance did not directly and irreconcilably conflict with the statute because the court

boats on Lake Bosworth did not conflict with state legislation concerned with the safe operation of motor boats, so the County ordinance was valid).

found that the ordinance and statute could be harmonized when read together. Id. at 561. The court further noted:

Finally, this court has repeatedly stated that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity...Where both the ordinance and the statute are prohibitory, and the difference between them is that the ordinance goes further in its prohibition, they are not deemed inconsistent because of mere lack of uniformity in detail.

Id. at 562. The court went further in describing this holding as follows: “Further, because the ordinance and the statute can be harmonized, there is no direct or irreconcilable conflict.” Id. at 563.

This same rule has been applied in cases involving regulatory, rather than prohibitory, local and state laws. In Lenci v. City of Seattle, 63 Wn.2d 664, 388 P.2d 926 (1964), plaintiffs owned wrecking yards in Seattle, and brought a challenge to the constitutionality of a Seattle ordinance requiring a 6-foot high fence enclosure rather than an 8-foot high fence enclosure as specified by statute. Lenci, 63 Wn.2d at 666-69. The wrecking yard owners argued that the local 8-foot requirement conflicted with the state 6-foot requirement and that the state rule preempted the local rule. The City, on the other hand, argued that the legislature did not intend to preempt, and that “...the questioned provisions are consistent with and complementary to the state statute and administrative regulations.” Id. at 669.

The court, in analyzing the issues before it, found that the state

did not preempt the field of motor vehicle wrecking yard regulation by the statute. Id. at 670. The court further found that there was no conflict between the two provisions:

The next question, then, is whether there be a conflict between RCW 46.80.130, requiring a wrecking yard to be enclosed 'by a wall, fence or wire enclosure,' the administrative rule, supra, specifying 'fence enclosures must be six (6) feet high, composed of at least six (6) strands of barb wire * * * or wire mesh * * * or a solid fence of boards or metal subject to the zoning regulations,' and that portion of § 338 requiring 'a view obscuring, firm and substantial fence or a solid wall, at least eight (8) feet high.'

It is at once apparent that the provisions of § 338 add to, rather than subtract from, the state requirements. Neither the statute nor the administrative regulation expressly limits the requirements to those specified. Section 338 being regulatory, not prohibitory, the rule applicable is stated in State ex rel. Isham v. Spokane, 2 Wash.2d 392, 398, 98 P.2d 306, 308:

'* * * It is well-settled that a city may enact local legislation upon subjects already covered by state legislation so long as its enactments do not conflict with the state legislation; In re Ferguson, 80 Wash. 102, 141 P. 322; and the fact that a city charter provision or ordinance enlarges upon the provisions of a statute, by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements. 43 C.J. 219; Bellingham v. Cissna, 44 Wash. 397, 87 P. 481; Seattle v. Proctor, 183 Wash. 299 48 P.2d 241.'

We conclude there is no conflict.

Id. at 670-71.

While the current appeal does not involve a question of constitutionality or preemption, several important principles can be drawn from these cases. First, where a County regulation and state law reference the same subject matter, they are to be read together and

harmonized. Implicit in this idea is the obvious precept that state law is not to be ignored; indeed, state law has the power to preempt local regulations or render them void and invalid. But under the same analysis, a local regulation can go further in prohibiting or regulating the subject matter encompassed by a statute, without necessarily being inconsistent with the statute.

Thus, San Juan County could theoretically require an 8-foot wrecking yard wall despite the State of Washington requiring a 6-foot wall. In other words, San Juan County can enlarge and add to the state requirements. In this case, San Juan County can also (by local ordinance or code) exclude from its ADU square footage calculations “decks, overhangs, unenclosed porches or unheated enclosed porches, and the stairwell on one level of a two-story structure”; that merely adds to the state requirement under the IRC of also excluding low-ceilinged areas from these computations.

4. The Statute and the SJCC Provision Can Be Read in Harmony

SJCC 18.20.120 and the cited IRC provisions relate to the same subject matter: construction requirements for living areas/spaces and/or places intended for habitation. It is beyond dispute that generally speaking, an area is a space and a space is an area,² and that an area

² Roget’s Thesaurus lists as synonyms the words “area” and “space.” For the word “habitation,” Roget’s Thesaurus refers to a “living place.” Dictionary definitions

meant for living is an area meant for habitation.

Durland does not argue otherwise; he merely asserts that the phrase “living area” is different from “living space” or “habitable space,” so the definitions for these terms cannot reference the same subject matter. However, the IRC and SJCC are clearly referencing the same subject matter in these provisions -- a structure in which a person may live, or habitate. The provisions also clearly reference a three-dimensional space (e.g., internal space between walls excluding a stairwell; and an area with a low ceiling). As argued in Heinmiller’s Opening Brief, statutes relating to the same subject matter are to be read together as a whole, to the end that a harmonious total statutory scheme evolves. Waste Mgmt. of Seattle, Inc. v. Util. and Transp. Comm’n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Statutes are thus to be read as complementary, rather than in conflict (Id.); and in determining the plain meaning of regulation, terms are not to be read in isolation but rather within the context of the regulatory scheme as a whole. Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002).

Durland has failed to show that these provisions do not reference the same subject matter, and has failed to articulate any reason that they

are in accord. “Habitable” means “capable of being inhabited”; “area” means “any particular extent of space or surface”; “space” includes various types of “area.”

should not be read as complementary. Because these provisions reference the same subject matter in the same type of regulatory scheme, and because they are not exclusive and are not in irreconcilable conflict, they must be read as complementary and in harmony.

5. Statutes Must Be Interpreted in a Manner that Does Not Lead to Absurd Results

Statutes should be construed to avoid strained or absurd consequences resulting from a literal reading. *See, e.g., State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Durland argues that Heinmiller seeks to impermissibly “supplant” the SJCC with the IRC, and that his reading of the SJCC does not produce absurd results. But Durland does not actually address the points raised by Heinmiller with respect to this issue.

Heinmiller previously argued, for example, that by reading the SJCC as Durland suggests, without reference to the IRC, such reading would lead to absurd results such as forcing the County to count all interior space of any structure in which an ADU is situated. Thus, the floor space of an ADU installed inside or on top of a garage, or in only a portion of a house, would have to be measured by counting every square foot of the garage or house, in addition to the square feet of the ADU. That is an absurd reading of SJCC 18.40.240(F)/18.20.120, where the

See Thesaurus.com; Dictionary.com.

County Code clearly envisions (in other portions of the Code) that an ADU is often only part of a structure. In addition, the absurdity extends to Durland's literal and restrictive interpretation with regard to ceiling height as well. Under Durland's strained interpretation, "living area" could be an area of an ADU with as little as two feet and seven inches of ceiling height, such as areas of the barn structure at issue.

The Hearing Examiner expressed that such an interpretation would lead to absurd or strained results, which would be an improper reading of the County Code. *CP 62-63*. The County's Chief Building Inspector reached the same conclusion. Their findings are entitled to deference, as the local experts in construing the County's own regulations. Indeed, the fact that this particular issue was one of first impression, and that the Chief Building Inspector testified that this interpretation accorded with other such interpretations by the County in the past, further support this construction and application of the County regulations in question.

6. Durland's Assertion Regarding Differences in IRC Provisions is Immaterial

In Footnote 12 to Durland's response, he asserts that the IRC definitions for "habitable space" and "living space" are in conflict, as for example, one includes bathroom and/or utility space and one does not. This is not at issue in this appeal, and even if it were, the point is

irrelevant, because expert Bonnie Ward conservatively included such spaces in her living area calculations. *CP 223; CP 431-432/VT at 161-162*. Thus, the ADU's bathroom space is included in the square footage calculations at issue and it is immaterial how one might calculate the same based on exclusion of such areas. Further, there is no separate utility room at issue to be counted (or not counted) for purposes of calculating square footage, so that issue is also immaterial³. *See CP 223*.

7. An Award of Reasonable Attorneys' Fees to Heinmiller is Appropriate Because Heinmiller has Substantially Prevailed, and May Maintain the ADU Upon Modified Conditions

Heinmiller previously argued that he is entitled to an award of attorneys' fees because he has prevailed on the majority of issues in defending against Durland's appeal. Durland has failed to respond to the majority of arguments made by Heinmiller in this regard, and has failed to comment on the cases cited by Heinmiller on this issue. Instead, Durland maintains that Heinmiller is not entitled to fees because Durland

³ Durland also makes other assertions to the effect that certain measurements, etc. must be wrong. These arguments are immaterial for purposes of this appeal; any such issues are for the County to address as a part of its permitting process. Beyond that, some of Durland's assertions are not even correct. For example, he asserts that the roof of the barn structure would be lowered an entire foot, from 17 to 16 feet. This is immaterial because it is undisputed that the proposed roof modification would be to 16 feet or slightly less. *See CP 224*. Further, the As-Built drawings detailing the proposed modification show a proposed modification of 6 ½ inches, and that the height of the barn would be brought down to 15 feet, 7 ½ inches -- indicating that Durland has incorrectly referenced these measurements. In addition, Durland's Footnote 10 states that Heinmiller's expert incorrectly calculated ceiling height due to the type of purlins/insulation; yet the County clearly took note of the type of purlins/insulation (see notes on CP 211b-c) and thus considered the same in the permitting process. Again, Durland's assertion on this issue is therefore immaterial.

won on a single major issue: invalidation of the ADU permit and a remand for further consideration by the County.

Durland's assertion fails. It is undisputed that Heinmiller prevailed on the majority of issues appealed to Superior Court, and that the Superior Court reversed only on the issue of excluding areas with a ceiling height of less than five feet. This does not destroy Heinmiller's ability to maintain the ADU; it only causes the matter to be remanded to the County for further proceedings, in which all Heinmiller needs to do is reconfigure the size of the proposed ADU consistent with the Superior Court's ruling. Heinmiller's ability to maintain an ADU has not been invalidated. As in Julian v. City of Vancouver, 161 Wn.App. 614, 255 P.3d 763 (2011), despite the fact of there being modified conditions for maintenance of the ADU, Heinmiller's right to maintain it has not been obliterated, and he prevailed on all other issues. Durland cannot be said to have won the relief he sought.

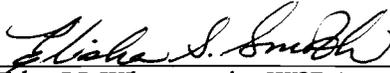
Additionally, and as previously briefed by Heinmiller, one need not prevail on his entire claim to be a "prevailing party," and the determination of who substantially prevails turns on the substance of the relief accorded to the parties. See, e.g., Marine Enters., Inc. v. Sec. P. Trading Corp., 50 Wn.App. 768, 750 P.2d 1290 (1988); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 677 P.2d 773 (1984).

For these reasons, and the reasons set forth in Heinmiller's Opening Brief, an award of reasonable attorneys' fees to Heinmiller is appropriate.

C. CONCLUSION

For the foregoing reasons and those stated in Heinmiller's Opening Brief, the Superior Court's ruling with respect to the calculation of the ADU square footage should be reversed, and reasonable attorneys' fees should be awarded to Heinmiller.

Respectfully Submitted this 29th day of February, 2012.



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NO. 67429-3-I

(Skagit County Superior Court
Cause No. 10-2-01536-4)

CERTIFICATE OF SERVICE

I, Monica Roberts, certify that on March 1, 2012, I caused a copy of the following documents to be served on the parties listed below, in the manner indicated for each:

1. Reply Brief of Respondents/Cross-Appellants Wes Heinmiller and Alan Stameisen; and
2. Certificate of Service.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 1st day of March, 2012, at Edmonds, Washington.



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