

No. 29204-5-III

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

WILLIAM DAVIS, et al.,

Appellants,

v.

CITY OF SPOKANE, and KONSTANTIN VASILENKO,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

For the most part Appellants are presenting the same arguments to this court which were rejected: first, by the Planning Department; second, by the Hearing Examiner; and, third, by the Superior Court. To the extent Appellants are presenting new arguments and/or new evidence in this appeal same must be disregarded by this Court as this is a closed record appeal. RCW 36.70.120(1).

Cottage Housing is permitted in the RSF zone in which the project under review is located. Cottage Housing consists of small detached single-family housing units. Building design variety is required by SMC 17C.110.350.E.1.a-n. A minimum of 4 variants between buildings is required. RP 207. The project will be a beautiful addition to the neighborhood. See, pictures of examples of cottage housing RP 267-295.

City Staff and the Hearing Examiner have particular and special expertise in interpreting and applying the comprehensive plan and zoning ordinances. Both Staff and the Hearing Examiner have found this project to meet all applicable criteria necessary to approval. Accordingly, this Court should affirm the decision of the Superior Court which upheld the Hearing Examiner's affirmation of the issuance of the Conditional Use Permit at issue on appeal in all respects.

II. STATEMENT OF CASE

The record on appeal consists of the Appeal Packet filed herein and Clerk's Papers from the Superior Court Land Use Appeal. The Appeal Packet is numbered page 000001 thru page 000451 and will be cited in this brief as RP. Clerk's Papers will be cited as CP.

On May 8, 2009, City Planner, David Compton, granted an Administrative Conditional Use Permit to Konstantin Vasilenko for a 24 unit Cottage Housing development on property located at 3405 and 3431 South Cook Street in the City of Spokane, State of Washington. RP 18. The project is to be located on two separate parcels with each parcel being approximately one acre in area (i.e. 43,560 square feet) and each parcel to contain 12 Cottage Style Housing Units as authorized by SMC 17C.110.350. RP 18-19 and RP 120. The minimum lot size for a Cottage Housing project is one half acre (i.e., 21,780 square feet). RP 19.

Pertinent to this appeal Vasilenko will be required to comply with the following conditions:

3. A Homeowners' Association is required to be created for the maintenance of the open space, parking area, and common use area buildings.

....

5. The site plan, if approved, is required to be recorded at the Spokane county auditor's office including deed restrictions for the subject property that enforces the elements of the cottage housing ordinance.

....
8. No access will be allowed for residents of this proposal via Mt. Vernon. Applicant is required to construct at a minimum 24 feet of this street with approved roadway materials and maintained all seasons. Access control devices must be acceptable to Engineering Services and to the Fire Department.

....
10. Adhere to any additional performance and development standards documented in comment or required by City of Spokane, Spokane County, Washington State, and any Federal Agency.
....

RP 124. Of note, the required Homeowners' Association has been formed. CP 90-96.

Thereafter, William Davis and others appealed the foregoing conditional use permit to Spokane County Hearing Examiner, Greg Smith. RP 16. The hearing of the appeal was held on June 25, 2009. RP 17. Mr. Smith considered the testimony of eleven witnesses, as well as, seventeen exhibits. RP 17-18. After giving due consideration to the evidence and arguments presented the Hearing Examiner filed a decision on July 9, 2009, upholding the approval of the Administrative Conditional Use Permit. RP 16-21. Evidence presented and considered by the Hearing Examiner which is relevant to this appeal is summarized below.

Originally Vasilenko owned five adjoining lots. RP 306. Staff required a boundary line adjustment. RP 196. The boundary line adjustment was performed and approved. RP 306-310. The boundary line

adjustment did not create additional lots; rather it reduced the number of lots from five to three. RP 306-310. The two lots which are the subject of the Conditional Use Permit at issue are located at 3405 and 3431 South Cook Street in the City of Spokane, State of Washington. RP 18. The third Vasilenko lot located at 3403 S. Cook is not part of the Cottage Housing project. RP 371.

In its undeveloped state the Vasilenko property has been used as a neighborhood dump site and a place for neighbors to walk their dogs which in turn deposit their droppings on Vasilenko's property. RP 104-114. Development of the Vasilenko property will eliminate the neighborhood dump and improve the neighborhood according to Architect, Christopher Morlan. RP 93.

A rental house owned by former Appellants Fowler and Smith adjoins the Vasilenko property to the south and is located at 2607 E. 35th Avenue. RP 116. A large multi-family apartment complex consisting of four three story buildings is located in the 2300 block of 35th Avenue. RP 240. Other multi-family zoned R 10-20 and R 15-30 are located within 250-300 feet to the south of the Vasilenko property. RP 120.

Traffic Engineer, Ann L. Winkler, P.E. submitted a trip generation letter to Staff which found that: "Due to the size of the project, it is

unlikely to have impacts on the intersections surrounding it. . . .” RP 313.

Senior Engineer for the City of Spokane Developer Services submitted a Memorandum dated March 26, 2009, in which she found that:

The Trip Distribution Letter, dated 5 March 2009, provides enough information in order to certify transportation concurrency for this project. Site design, to accommodate vehicle and pedestrian traffic, will be reviewed during the Construction Permit Review process. Traffic Engineering certifies transportation concurrency for this proposal.

RP 210.

Concurrency of the project has also been certified for sewer, water and storm-water. RP 210. Avista is on record with no objections to the project. RP 216.

Staff evaluated the decision criteria provided for in SMC 17G.060.170 and determined that all criteria were met by the Vasilenko Cottage Housing proposal. RP 121-123. Staff found that the proposal is consistent with the comprehensive plan designation for the property as well as the goals, objectives and policies for the property’s designation in the Comprehensive Plan. RP 121. Staff noted that land use planning goal LU 3.12 discusses:

the need to use the remaining usable land more efficiently by increasing the overall housing density within the city limits. By permitting increased densities, it in turn promotes efficient and cost-effective provision of city facilities, services, and

transportation systems and enables the provision of affordable housing.

RP 122. In addition, Staff observed that the proposal was consistent with goals LU 5.5 and 3.8 which: “urge that infill and redevelopment projects are well-designed and compatible with surrounding uses and building types.” RP 122. Staff also noted that the proposal is consistent with land use goal N 2.6 which encourages housing options within neighborhoods “through a mixture of low, moderate and high-income housing.” RP 122.

Staff found that:

The proposal does not conflict substantially with adjacent land uses, is readily accessible to adequate transportation, utility, and service systems as well as convenient to the labor force.

RP 122. Staff also determined that the proposal will not have a significant adverse impact on surrounding properties. RP 123.

The finder of fact below, Hearing Examiner Greg Smith, made a number of findings of fact pertinent to this appeal. RP 19-21. He found that the boundary line adjustment did not create additional lots and that the lots created contained sufficient area to meet the Cottage Housing requirements. RP 19.

The Hearing Examiner determined that the easement reservations on the Vasilenko property would not adversely affect development of the property. RP 20. He also noted that: “If the reservation of right-of-way

by the City adjacent to Southeast Boulevard affects the overall size of the site then density may also have to be recalculated.” RP 20.

The Hearing Examiner adopted the findings of the City Traffic Engineer and the trip generation report prepared by Traffic Engineer, Ann L. Winkler, P.E. RP 20. He also noted that: “No testimony was offered by any other traffic experts to refute that claim.” RP 20.

The Hearing Examiner found the project to be compatible with the neighborhood noting that: “By allowing the development of Cottage Housing in RFS zones, the City Council, through the zoning code has determined that it is a compatible use and appropriate for that zone.” RP 20. He also found that the houses to be constructed will be: “detached single-family dwelling units.” RP 20.

The decision of the Hearing Examiner requires Vasilenko to comply with the conditions of approval set forth in the Planning Department’s decision and with the requirements of the Cottage Housing section of the Zoning Code. RP 21. The Hearing Examiner also noted that many details of the project will be determined as part of the construction permitting process as building permits and other permits are applied for and additional requirements for such permits are determined. RP 20.

Pursuant to the provisions of the RCW 36.70C, et seq., Appellants appealed the decision of the Hearing Examiner to the Superior Court. In a Memorandum Decision dated June 21, 2010, Superior Court Judge Kathleen M. O'Connor affirmed the Hearing Examiner in all respects. CP 63-68.

III. ARGUMENT

[A] STANDARD OF REVIEW.

With certain exceptions which do not apply in this case, a Land Use Planning Appeal (LUPA) is the exclusive means for judicial review of land use decisions in the State of Washington. RCW 36.70.030. On appeal the court reviews the administrative record. Pavlina v. City of Vancouver, 122 Wn. App. 520, 525 (2004). Also see, RCW 36.60.120(1) which provides in relevant part that:

When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

As subsections (2) through (4) have no application in the present case, this is a closed record appeal based upon the administrative record created before the Hearing Examiner.

This court may grant relief to the Appellants only if they carry their burden to establish that one of the standards set forth in RCW 36.70C.130(1)(a)-(f) has been met. In the present appeal Appellants rely only upon standards (b), (c) and (d). The pertinent statute provides in relevant part 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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

....

Standard (b) presents questions of law which this court reviews de novo.

Standard (c) requires the court to review challenged factual findings to determine whether they are supported by substantial evidence in the record. Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge and as long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575 (1959). “Substantial evidence exists if the record contains

evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” In re Marriage of Griswold, 112 Wn. App. 333, 339 (2002). As stated in a recent court of appeals opinion:

Our deferential review requires us to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.

Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768 (2006). Where the trial court has weighed the evidence, the reviewing court’s role is to simply determine whether substantial evidence supports the Findings of Fact, and if so, whether the Findings of Fact in turn support the trial court’s Conclusions of Law. In re Marriage of Greene, 97 Wn. App. 708 (1999). Appellate courts do not substitute their judgment for the trial court’s, weigh the evidence, or adjudge witness credibility. *Id.* at 714 (citing In re Marriage of Rich, 80 Wn. App. 252, 259 (1996)).

Standard (d) requires the reviewing court to apply the clearly erroneous standard of review. Appellate courts in this State typically explain this standard of review as follows:

The clearly erroneous standard (d) test involves applying the law to the facts. *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001). Under that test, we determine whether we are left with a definite and firm conviction that a mistake has been committed. *Citizens to Preserve*, 106 Wn. App. at 473. Again, we defer to factual

determinations made by the highest forum below that exercised fact-finding authority. *Citizens to Preserve*, 106 Wn. App. at 473.

Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768 (2006).

[B] APPLICABLE LAW DOES NOT REQUIRE THAT VASILENKO SELL THE COTTAGES HE DEVELOPS.

1. Low income housing is not only a permitted use under the Cottage Housing section of Spokane’s Zoning Code but it is also consistent with the land use goals of the Zoning Code.

Appellants misinterpret the Hearing Examiner’s decision when they argue that he permitted “a unified multi-family rental development.” Appellants’ Brief, p 6. Consistent with the Conditional Use Permit at issue, the Staff Report and the Plans submitted by Vasilenko (RP 126-133), the Hearing Examiner found that the project consisted of “detached single-family dwelling units.” RP 20. Clearly, Appellants create the false premise from which they argue from thin air and it finds no support in the record on review.

Appellants next compound their error by arguing without citation of any applicable authority, that low income rental units is not a permitted use under “Cottage Housing Code”. Appellants’ Brief p 6. Appellants

cite no provision of the zoning code which prohibits Vasilenko from retaining ownership of the cottage units and renting them to tenants. As a matter of law no provision of the Cottage Housing section of the zoning code prohibits the developer from retaining ownership of the Cottages and renting them to qualified individual families. SMC 17C.110.350.

Appellants essentially argue that one cannot rent a house one owns if it is located in the RSF zone. This is obviously not the law. Such a discriminatory law would no doubt be unconstitutional under the 14th Amendment to the U.S. Constitution. Also, recall that former Appellants Smith and Fowler own a home which adjoins the Vasilenko property and that home is rented to a tenant. RP 116. Appellants fall well short of carrying their burden under the clearly erroneous standard.

2. The proposal under review is not multi-family housing.

Based upon the false premise that Vasilenko's project consists of multi-family housing, Appellants argue that multi-family housing is not permitted in the subject RSF zone. Staff evaluated the decision criteria for Cottage Housing provided for in SMC 17G.060.170 and determined that all criteria were met by the Vasilenko cottage housing proposal. RP 121-123. This determination was affirmed by the Hearing Examiner. RP 16-21.

The Spokane Zoning Code defines a Multi-Family Residential Building to be: “A common wall dwelling or apartment house that consists of three or more dwelling units.” SMC 17A.020.130R. Vasilenko’s project consists of “detached single-family dwelling units.” RP 20. Thus, Appellants multi-family housing argument is irrelevant since the project under consideration is not multi-family housing. Again Appellants fail to establish the decision under review is clearly erroneous.

3. The Homeowners’ Association requirement does not require an interpretation of the Cottage Housing Zoning Code provision as requiring multiple owners of the Cottage Homes.

Appellants cite no authority in support of their contention that a “fundamental precept of cottage housing is that units will be “owner occupied”. Appellants’ Brief, p 9. No such requirement exists anywhere in the Spokane Zoning Code and would be unconstitutional in any event. The purpose of the Homeowners’ Association requirement is to insure that someone will be responsible for maintaining the Cottage Housing project’s “open space, parking area and common use buildings.” SMC 17C.110.350C(2) and RP 124.

Appellants’ argument that there is no finding that a Homeowners’ Association has been formed does absolutely nothing to advance their

cause. First, and foremost, note that the Hearing Examiner's Decision requires among other things that:

The Applicant must comply with the conditions of approval set forth in the Planning Department's decision and with the requirements of the Cottage Housing section of the Zoning Code.

RP 21. Clearly, the Hearing Examiner's decision requires Vasilenko to cause a Homeowners' Association to be formed. This is also a requirement of the Conditional Use Permit. RP 124. Thus, there is no error of law.

The issue is moot in any event. Vasilenko has formed a Homeowners' Association. See, CP 90-96.

Strangely enough, Appellants present their next argument by quoting an email from John Martin which contains no citation of authority. See, Appellants' Brief, p 10. Mr. Martin opines in his email that: "you cannot have a homeowner's association if there are no homeowners". Appellants' Brief, page 10. Mr. Vasilenko is the owner and initially will be the sole member of the Homeowners' Association. If, and when, Cottage Units are sold to third parties, the owners of sold Units will also become members of the Homeowners' Association. There is no law, ordinance or statute which requires a Homeowners' Association to have more than one member.

Appellants' citation of RCW 46.61.419 fails to advance their cause. This statute does not govern the formation of Homeowners' Associations. Nor, does this statute prohibit a Homeowners' Association with only one member. Finally, there is nothing in the statute which would prevent a Homeowners' Association with one member and a board consisting of one director from authorizing the issuance of speeding infractions on its private roads.

Appellants also cite RCW 36.70A.165 and RCW 61.34.020; however, neither statute states that a Homeowners' Association must have more than one Homeowner. The later statute contains definitions of "equity skimming" one of which is contained in RCW 61.34.020(a)(xi) which states: "Arrange for the distressed homeowner to have an option to repurchase the distressed homeowner's residence". This, of course, has nothing to do with whether a Homeowners' Association must have more than one Homeowner. Appellants fail to show an error of law or a clearly erroneous interpretation of law.

[C] VASILENKO HAS NOT IMPROPERLY SUBDIVIDED HIS LAND.

- 1. Vasilenko's boundary line adjustment is not an illegal subdivision of land under RCW 58.17, et seq.**

Appellants' argument relating to their Assignment of Error No. 2 is very difficult to understand and follow. However, the gist of the first argument appears to be that one cannot legally accomplish a subdivision of land via a boundary line adjustment. Appellants rely upon RCW 58.17. et seq. as authority for their argument.

RCW 58.17.040 provides in relevant part that:

The provisions of this chapter shall not apply to:

....

(6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site. . . .

The boundary line adjustment did not create additional lots; rather it reduced the number of lots from five to three. RP 306-310. Moreover, the three lots created all contain sufficient area and dimensions to meet minimum requirements for width and area for a building site. Note that the two lots at issue are each one acre in size whereas the minimum lot size required for a Cottage Housing development is one half acre. SMC 17C.110.350.

SMC 17C.110.350B provides that: "Cottage housing developments are allowed on sites of one-half acre or larger with a minimum of six units and a maximum of twelve units." The record clearly shows that 12 units

are to be located on a one acre lot and an additional 12 units are to be located on an adjacent one acre lot. RP 19. Appellants again fail to establish an error of law or an erroneous interpretation of law.

2. The Conditional Use Permit at issue in this case does not need to include individual legal descriptions for the individual Cottage Housing detached dwelling units.

Appellants' second argument in support of their Assignment of Error No. 2 appears to be that the Conditional Use Permit cannot properly issue until Vasilenko surveys and provides legal descriptions for the individual detached dwelling units which will comprise the cottage housing project. Appellants are simply wrong.

Such legal descriptions are clearly not required at this stage of the development process. Again, note that the hearing examiner ordered:

The Applicant must comply with the conditions of approval set forth in the Planning Department's decision and with the requirements of the Cottage Housing section of the Zoning Code.

RP 21. Obviously, before units are issued certificates of occupancy such legal descriptions will be established. The conditions applicable to final approval of this project require individual legal descriptions and that these be recorded in the Spokane County Auditor's office. RP 124 and 203-204.

Appellants fail to carry their burden to meet the clearly erroneous standard.

[D] THE HEARING EXAMINER’S FINDING THAT VASILENKO’S COTTAGE HOUSING PROJECT IS COMPATIBLE WITH THE NEIGHBORHOOD AND WILL HAVE NO SIGNIFICANT ADVERSE IMPACT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. Cottage Housing is compatible with the neighborhood.

As observed by the Hearing Examiner, the legislative body for the City of Spokane has determined that Cottage Housing is appropriate in the RSF zone when it passed zoning code provisions allowing this use. RP 20. In addition, Staff received Memorandums from all affected agencies certifying concurrency. For example traffic, sewer, water and storm-water concurrency were all certified. RP 210.

Evidence showed that the project meets all the applicable decision criteria for the conditional use permit set forth in SMC 17G.060.170. RP 121-123. The proposal is consistent with the Comprehensive Plan. RP 121. The project meets all applicable land use planning goals including LU 3.12, 5.5, 3.8 and N 2.6. RP 122. The project does not conflict substantially with adjacent land uses. RP 122. The project “is readily

accessible to adequate transportation, utility and service systems, as well, as convenient to the labor force.” RP 122.

The foregoing represents substantial evidence which supports the Hearing Examiner’s finding that the project is compatible with the neighborhood. The law does not require the absence of contrary evidence; however, the law does require this court to defer to the finder of fact particularly where the finder of fact has particular expertise in interpreting and applying the zoning code. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575 (1959); and, Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768 (2006).

2. Collateral estoppel has no application in this case because it was not plead below and because the required elements have not been shown.

Appellants apparently believe they can use the doctrine of collateral estoppel to argue that substantial evidence does not support the Hearing Examiner’s findings of compatibility and no significant adverse impact. Appellants’ Brief, page 21. Neither the record nor the law support Appellants’ argument.

Pursuant to RCW 36.70.120(1) this is a closed record appeal. The record of the prior Vasilenko zoning change application is not before this

court. Without that record this court has no basis to determine whether the requisite collateral estoppel elements can be shown by Appellants.

Moreover, it has long been the law that an appellate court will not consider claims and defenses first raised on appeal. Orkney v. Valley Cement Co., 43 Wn.2d 338, 344 (1953). Appellant's grounds for appeal were stated in the Application for Appeal they filed with the Spokane Planning Department. RP 41-44. Collateral estoppel was not listed as a basis for the appeal heard by the Hearing Examiner. Furthermore, Appellants did not plead collateral estoppel in their appeal to the Superior Court. CP 5-13.

In any event Appellants cannot establish the requisite elements of collateral estoppel. Appellants correctly set forth the elements of collateral estoppel as stated by our Supreme Court in City of Arlington v. Central Puget Sound Growth Management Hearings Bd., 164 Wn.2d 768 (2008). Interestingly enough in the cited case the Supreme Court held the issues were not identical and the trial court erred in dismissing the case based upon collateral estoppel.

Although it dehors the record to say so, Vasilenko's previous application was to change the zoning of his land to RMF 15-30 whereas the present case concerns a conditional use permit for Cottage Housing.

Clearly, different legal and factual issues are presented. Accordingly, collateral estoppel does not apply in this case.

3. Substantial evidence supports the Hearing Examiner's finding that the project will have no significant adverse affect on the neighborhood.

Here Appellants seize upon the Hearing Examiner's finding that: "No evidence was submitted to show that there will be any adverse affect on property values." RP 20. Neither Ms. Hilderbrand's speculation nor that of Ms. Chernikov constitute competent evidence.

Ms. Chernikov's testimony does not even address property values. As Judge O'Connor points out in the superior court's memorandum decision:

The problem with Ms. Hilderbrand's testimony is that she never identifies where she got her home values of \$200,000 and \$350,000; never states the value of the cottage house or the aggregate value of the development; and never state [sic] how or why the development will lower the existing home values. General and unsubstantiated opinion testimony such as this was not persuasive to the Hearing Examiner. Cottage housing is not incompatible with the neighborhood.

CP 67.

Moreover, property values are only one of many factors which apply to determinations of compatibility and non-significant impact. As set forth in the Statement of Case and the preceding section of this

argument, substantial evidence supports the findings of compatibility and non-significant impact.

4. Substantial evidence supports the Hearing

Examiner's determination of no substantial impact to open spaces or traffic.

Note that the Hearing Examiner's decision requires Vasilenko to comply with all requirements of the Cottage Housing ordinances and to comply with all conditions attached to the Conditional Use permit. The Cottage Housing ordinance requires 250 square feet of open space per Unit. SMC 17C.110.350. Condition 10 of the Conditional Use Permit also requires compliance with all requirements of the Cottage Housing ordinance. RP 124. Also, See condition G, RP 194. Clearly, no site plan will be approved; and, no construction or building permits will be issued unless the required open space is provided for in the site plan. Appellants' speculation based upon preliminary site plans which have not yet been approved is of no assistance to their cause and should be rejected by this court.

Traffic concurrency is discussed in preceding sections of this brief. The record includes substantial evidence to support the traffic finding. Again the law only requires substantial evidence to support the finding

which was made. There is no requirement that the record be devoid of contrary evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575 (1959); and, Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768 (2006).

**[E] THE HEARING EXAMINER CORRECTLY
DETERMINED THAT THE BOUNDARY LINE ADJUSTMENT
COMPLIED WITH ALL APPLICABLE LAWS.**

Vasilenko references and incorporates the discussion of the boundary line adjustment set forth in section [C](1) of this argument. It should also be noted that the easements and right of way discussed by Appellants existed before the boundary line adjustment and were not changed by the boundary line adjustment. These easements and right of ways are really not issues.

When the City vacated 34th Avenue through the middle of the site and extended Southeast Boulevard along the north boundary:

The City retained an easement in vacated 34th Avenue to allow for utilities, specifically cable service. They also retained certain right-of-ways adjacent to Southeast Boulevard and for a cul-de-sac in Cook Street. The only one of these reservations which appears to affect the development is the easement in 34th Avenue for the cable service.

RP 20. As the Hearing Examiner correctly observed this is an issue for Vasilenko to negotiate with the cable company. RP 20. In addition, the

City Engineer's Department testimony at the hearing was that the foregoing reservations on Vasilenko's title do not adversely affect the project. RP 20 and 33. As a final matter on this topic the Hearing Examiner also held that:

If the reservation of right-of-way by the City adjacent to Southeast Boulevard affects the overall size of the site then density may also have to be recalculated.

Obviously, the reservations to Vasilenko's title do not render the boundary line adjustment illegal and they do not render the project unviable.

Furthermore, the development standards which have been established for this project provide for maximum lot coverage of 40%; minimum lot size of 21,780 square feet; minimum of 6 units and maximum of 12; open space of 250 feet per Cottage; building separation of a minimum of 10 feet; set back from property line an average of 10 and not less than 5 feet with a 15 foot setback from the front property line. RP 194-195. It is beyond question that the boundary line adjustment was legal and had no adverse impact upon the neighborhood. Appellants' arguments to the contrary amount to mere bagatelle and are supported by neither the record nor the law.

**[F] THE HEARING EXAMINER CORRECTLY
DETERMINED THAT THE AGGREGATION RULE DOES NOT
APPLY TO COTTAGE HOUSING.**

Based upon a confusing quote of testimony given by Dwight Hume (a land use consultant Appellants hired to try and block the Cottage Housing developments at issue), Appellants argue that two Cottage Housing developments cannot be located adjacent to one another and must be aggregated. The argument also seems to be that if adjacent projects share drainage or are connected by pathways that they must be treated as one project and are limited to 12 units. This is a creative argument but it finds no support in the zoning code.

SMC 17C.110.350B provides that: “Cottage Housing developments are allowed on sites of one-half acre or larger with a minimum of six units and a maximum of twelve units.” The record clearly shows that 12 units are to be located on a one acre lot and an additional 12 units are to be located on an adjacent one acre lot. Manifestly, the issue is not the number of projects; rather, it is whether the lots involved have sufficient area to allow the proposed density. Both lots at issue meet the requirements of the zoning code.

Two separate one acre sites are being developed and each must be considered on its own merits. The Hearing Examiner correctly ruled that:

There are no separation requirements in the code for different cottage housing developments so there is nothing which prevents two cottage housing developments from being side by side. These two developments are on separate sites and would be allowed if separate owners chose to develop them. The fact that they have a common access point and some common amenities and utilities does not limit each site from being developed with cottage housing.

RP 19. Appellants have cited no applicable authority to the contrary; and, therefore, fail to meet the clearly erroneous standard.

G. BECAUSE APPELLANTS' FAILED TO SUPERSEDE THE SUPERIOR COURT'S DECISION THEIR APPEAL IS MOOT AS TO CONSTRUCTION COMPLETED THROUGH THE DATE OF THIS COURT'S DECISION.

Appellants' failed to supersede the Superior Court's decision by filing a \$250,000 bond. Accordingly the trial court entered an Order Exonerating Bond and Denying Stay on September 28, 2010. Vasilenko has filed a Supplemental Designation of Clerk's Papers to make the Order Denying Stay a part of the record before this court.

Because Appellants have not superseded the Superior Court Decision, Vasilenko is free to proceed with the development and indeed commenced construction last summer. Vasilenko's actions are legal and

in accordance with proper building permits and the conditional use permit affirmed by the Superior Court. Thus, based upon the case of Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates, 151 Wn.2d 279 (2004) Appellants' appeal is moot.

Cloninger argued to the Court of Appeals that Pinecrest's failure to supersede the superior court's judgment rendered Pinecrest's further appeals moot. The Court of Appeals correctly concluded that RCW 36.70C.100 did not require Pinecrest to request a stay. The statute provides in part that "[a] petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review." RCW 36.70C.100(1) (emphasis added). While Pinecrest's failure to seek a stay did not compromise its right to appeal the superior court decision, the failure permitted Cloninger to act on the superior court decision; the hearing examiner's subsequent approval of the rezone and the city's granting of a building permit were thus legal actions.

Homeowners Ass'n v. Glen A. Cloninger & Associates, 151 Wn.2d 279, 287-288 (2004).

Accordingly, Vasilenko's actions in building out the Cottage Housing have been legal. This in turn renders the current appeal moot as to Vasilenko's right to build out the Cottage Housing at issue.

**H. PURSUANT TO RAP 18.1 AND RCW 4.84.370
VASILENKO REQUESTS AN AWARD OF REASONABLE
ATTORNEY FEES AND COSTS.**

Based upon RCW 4.84.370, if Vasilenko is the prevailing party or substantially prevailing party in this appeal, he is entitled to recover reasonable attorney fees and costs from the Appellants because he also prevailed before the Hearing Examiner and in the Superior Court. RCW 4.84.370 provides that:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Based upon the authority of the foregoing statute Vasilenko is entitled to recover reasonable attorney fees and costs from Appellants if he is the prevailing party or substantially prevailing party in this appeal.

Accordingly, pursuant to RAP 18.1 and based upon RCW 4.84.370,

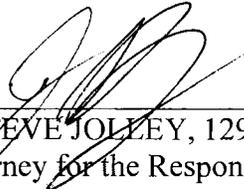
Vasilenko requests that the Court of Appeals award reasonable attorney fees and costs to Vasilenko and against Appellants.

IV CONCLUSION

As shown by the foregoing points and authorities Appellants have failed to carry their burden to show that the Conditional Use Permit allowing the Vasilenko Cottage Housing was: an erroneous interpretation of law; not supported by substantial evidence; or, a clearly erroneous application of law. Accordingly, Vasilenko respectfully requests that the Court of Appeals affirm the Superior Court in all respects. In addition, Vasilenko should be awarded his reasonable attorney fees and costs against the Appellants.

Dated this 6th day of January, 2011,

HERMAN, HERMAN & JOLLEY P.S.

By: 

J. STEVE JOLLEY, 12982

Attorney for the Respondent, Vasilenko

CERTIFICATE OF MAILING

J. STEVE JOLLEY, hereby certifies under penalty of perjury that
on January 6, 2011, I deposited a copy of the preceding Notice of
Appearance in the U.S. Mail postage prepaid and addressed as follows:

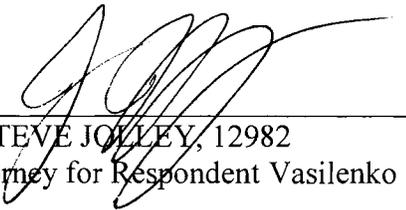
JOHN F. BURY, ESQ.
MURPHY BANTZ & BURY, P.S.
818 W. RIVERSIDE AVE., #631
SPOKANE, WA 99201

And to:

CITY OF SPOKANE
DAVE COMPTON, PLANNING Serv. Dept.
808 W. SPOKANE FALLS BLVD.
SPOKANE, WA 99201

Dated this 6th day of January, 2011

HERMAN, HERMAN & JOLLEY P.S.

By: 

J. STEVE JOLLEY, 12982
Attorney for Respondent Vasilenko