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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 298639

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

ELIZABETH CRADDUCK, d/b/a
SUN-TIDES MOBILE HOME PARK,

Respondent,

v.

YAKIMA COUNTY, WASHINGTON, a political subdivision of the State of Washington, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellants.

OPENING BRIEF OF APPELLANT STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

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I. INTRODUCTION

Elizabeth Cradduck owns a mobile home park located in the floodway of the Naches River ("the River") in Yakima County. Under RCW 86.16.041, residential construction is prohibited in the floodway. Pursuant to this statute, Yakima County (County) denied a prospective tenant of Ms. Cradduck's a building permit to place a mobile home on Lot 17 in the Sun-Tides Mobile Home Park (Sun-Tides). The County concluded that placement of a mobile home constituted residential construction that was prohibited in the floodway by the statute. Ms. Cradduck appealed the County's decision, arguing among other things that the decision was "unduly oppressive" and violated her substantive due process rights. The trial court rejected Ms. Cradduck's other claims but granted relief on her substantive due process claim.

The trial court's decision on substantive due process was error and should be reversed. Ms. Cradduck's due process claim was without merit because she failed to demonstrate that any of the prongs of the due process test established in Washington law were met in her case. Her argument was premised on the fact that, under the statute and the County's implementing regulations, her uses of the property are limited. This allegation, however, does not by itself establish a due process violation. The harm to Ms. Cradduck must be weighed against the public purpose

served by the statute. The purpose here is protection of public health and safety. The floodway is hazardous and allowing residential construction to occur there would put those living there, as well as those living downstream, at significant risk of injury or death in a large flood. Under a proper weighing of the due process factors, the Court should conclude that the statute is reasonable and does not violate due process.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by overturning the decision of Yakima County to deny a building permit for placement of a mobile home on Lot 17 in Sun-Tides.

2. The trial court erred in concluding that petitioner's substantive due process rights were violated.

3. The trial court erred in entering Conclusions of Law 2e through 2i, in which the court concluded that because Ms. Cradduck's uses of her property are limited, her substantive due process rights were violated.

III. STATEMENT OF ISSUES

Under Washington law, the courts apply a three part test to determine whether a land use regulation is consistent with substantive due process. This test requires that the regulation (1) serve a legitimate public purpose, (2) use means reasonably necessary to achieve that purpose, and

(3) not be unduly oppressive on the landowner. *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990). In this case, the regulation at issue is RCW 86.16.041, which prohibits residential construction in floodways.

1. Does RCW 86.16.041, as applied to Ms. Cradduck's property, pass the first two prongs of the substantive due process test, when the statute serves the legitimate purpose of protecting public health and safety and it uses means reasonably necessary to achieve that purpose? (Assignments of Error Nos. 1–3.)

2. Does RCW 86.16.041, as applied to Ms. Cradduck's property, pass the unduly oppressive prong of the test, when the present impact of the regulation on her use of the property is minimal, and that impact is outweighed by the public purpose sought to be achieved by the statute? (Assignments of Error Nos. 1–3.)

IV. STATEMENT OF THE CASE

A. The Naches River Has A History Of Flooding

Elizabeth Cradduck is the owner of Sun-Tides. CP 391. She does not live in the park herself, but rents out spaces in the park to tenants. *Id.* Sun-Tides is located in Yakima County adjacent to the Naches River. CP 72. The River has a long history of flooding. CP 159–176. In 1996, a severe flood occurred that washed out bridges and damaged homes and

businesses in several areas along the River including in the area known as Ramblers Park. CP 164–167. The flood forced the evacuation of approximately 10 homes in Ramblers Park, damaged two businesses in that area, and overall caused approximately $4 million in damages in the County. *Id.* Ramblers Park is located across Highway 12 from Sun-Tides. CP 171.

As a result of the 1996 flood, the County determined that its flood mapping was inaccurate. *See* CP 239 (recommending update of Flood Insurance Rate Maps (FIRM)). The County's existing maps, adopted in the 1980s, were severely outdated. Areas of the County flooded in 1996 that were outside the mapped 100 year and 500 year floodplain boundaries, even though the 1996 flood was a 50 year event. CP 169–171. To correct the errors, the County participated with FEMA in a remapping of the floodway and floodplain of the Naches River. CP 67–68. As a result of this remapping effort, the County and FEMA redrew the boundaries of the floodway to more accurately account for the River's actual flooding. This remapping resulted in the County including Sun-Tides in the floodway. CP 73–74. The new map became final and took effect on November 18, 2009. CP 75.

B. Yakima County Denied The Permit Application Because The Property Is In The Floodway

On or about May 21, 2010, Gato's Construction filed an application with the County to install a manufactured home on Lot 17 in Sun-Tides. CP 38–41. The Sun-Tides park consists of approximately 50 lots, almost all of which are occupied except for Lot 17. CP 392. Apparently, the previous resident of Lot 17 moved away, and a new prospective tenant sought to place a mobile home in the vacancy. On May 26, 2010, the Yakima County Building Official (Building Official) denied the application regarding Lot 17. CP 46–47. The Building Official denied the application because placement of a manufactured home constitutes "new construction" under state regulations, and new residential construction is prohibited in the floodway under RCW 86.16.041 and Yakima County's regulations. *Id.* This appeal under the Land Use Petition Act (LUPA) followed.

C. The Trial Court Reversed The County's Decision Based On A Substantive Due Process Violation

On appeal, Ms. Cradduck alleged that the County's decision denying the building permit constituted a taking of her property without just compensation, a violation of substantive due process, a violation of her nonconforming use rights, and that it was unsupported by substantial evidence, among other claims. CP 498–499. The County named the

Department of Ecology (Ecology) as a necessary party respondent pursuant to RCW 36.70C.050 because the County made its decision based on state law and based on advice from state officials. The County filed its record in the matter and both Ecology and Ms. Cradduck supplemented the record with additional materials. *See* CP 292–294 (Order Granting Ecology's Motion to Supplement); CP 496–497 (Order Granting Petitioner's Motion to Supplement).

The court heard oral argument on the petition on January 7, 2011, and then ruled from the bench. Regarding substantive due process, the court structured its ruling in terms of the three part test articulated by the supreme court in *Guimont v. Clarke*, 121 Wn.2d 586, 609, 854 P.2d 1 (1993). First, the court concluded that the statute, RCW 86.16.041, serves a legitimate public purpose. Verbatim Report of Proceedings (VRP) at 7. Second, the court concluded that it was debatable whether the statute used means reasonably necessary to achieve its purpose. *Id.* Regarding the third prong—which is whether the land use restriction is "unduly oppressive"—the court stated:

> What is solid to me is prong three and that was . . . there is not much that this landowner is going to be able to do with the property. And I do find that it would be unduly oppressive to the landowner if this permit were not granted. . . . [T]hey [sic] are not reasonably economically viable uses for the property that I can find based upon the record that I've – do have for today.

VRP at 7–8; *see also*, VRP at 11.

Based on this conclusion that application of the statute to Ms. Cradduck's property was "unduly oppressive," the court reversed the County's denial of the permit application. VRP at 9. The court did not expressly weigh all the due process factors set out in Washington case law nor did it weigh the harm incurred by Ms. Cradduck against the public benefits sought to be achieved by the statute.

V. AUTHORITY AND ARGUMENT

A. On Appeal, Ms. Cradduck Has The Heavy Burden To Demonstrate Constitutional Error

Under LUPA, the party challenging a land use decision has the burden of demonstrating one of the grounds for relief in the statute. RCW 36.70C.130. On appeal, the appellate court stands in the shoes of the superior court and reviews the administrative record for factual or legal error under the statutory standards. *HJS Dev., Inc. v. Pierce Cy.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *Satsop Valley Homeowners Ass'n v. Nw. Rock*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005).

The appellate court does not review the findings of fact or conclusions of law entered by the superior court. *Humbert/Birch Creek Constr. v. Walla Walla Cy.,* 145 Wn. App. 185, 192 n.3, 185 P.3d 660 (2008). The petitioner has the same burden on appeal to demonstrate error

under the statutory standards as she had at the trial court, notwithstanding that she prevailed at the trial court. *Quality Rock Products, Inc. v. Thurston Cy.*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007).

In the present case, Ms. Cradduck alleged that she was entitled to relief under RCW 36.70C.130(f), which authorizes the court to reverse a land use decision if it violates the constitutional rights of the petitioner. Statutes are presumed constitutional, and one who alleges they are unconstitutional carries a heavy burden to demonstrate otherwise. *Orion Corp. v. State*, 109 Wn.2d 621, 658, 747 P.2d 1062 (1987); *Thurston Cy. Rental Owners Ass'n v. Thurston Cy.*, 85 Wn. App. 171, 181, 931 P.2d 208 (1997). As set forth below, Ms. Cradduck failed to carry her burden in this case of demonstrating that the application of RCW 86.16.041 to her property is unconstitutional.

B. The Floodplain Statute, RCW 86.16, Requires Local Governments To Adopt Flood Ordinances To Protect The Public From Flood Damages

For the purpose of alleviating recurring flood damages, and to protect public health and safety, the state requires local governments to regulate their floodplains to certain minimum standards. RCW 86.16.010. In particular, RCW 86.16.041 requires local governments to adopt flood

ordinances that prohibit residential construction in the floodway.[1] The statute requires "prohibition of construction or reconstruction, repair, or replacement of residential structures" within the floodway. The statute includes two exceptions, one for improvements which do not increase the ground floor area and one for repairs less than 50% of the value of the structure. RCW 86.16.041(2)(a)(i) and (ii). In addition, the prohibition does not apply to certain farmhouses, and it may be waived for certain damaged structures after an analysis of risks to life and property posed by the specific conditions of the floodway. RCW 86.16.041(3) and (4).

The statute provides that "[t]he basis for state and local floodplain management regulation shall be the areas designated as special flood hazard areas on the most recent maps provided by the federal emergency management agency for the national flood insurance program." RCW 86.16.051.

Yakima County has adopted a flood ordinance consistent with these requirements. Yakima County Code (YCC) § 16C.05.36.020(1) prohibits in the floodway "[a]ny structure, including manufactured homes,

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[1] The "floodway" is defined in state regulation as "the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot." WAC 173-158-030. The "base flood" is the 100 year flood. *Id.* In non-technical terms, the floodway is that portion of the floodplain in which flood waters achieve hazardous depths and velocities. *See Maple Leaf Investors, Inc. v. Dep't of Ecology*, 88 Wn.2d 726, 733–734, 565 P.2d 1162 (1977).

designed for, or to be used for human habitation of a permanent nature . . . ." Similarly, subsection (3) of that section prohibits "[c]onstruction or reconstruction of residential structures within designated floodways" except for the repair and other exceptions in the statute. YCC § 16C.05.20.010 identifies the special flood hazard areas as those identified by FEMA on Flood Insurance Rate Maps adopted in 1998, and flood boundary and floodway maps, "and any amendments which may thereafter be made by the [FEMA]."

State rules implementing RCW 86.16 define "[s]tart of construction" to include "the placement of a manufactured home on a foundation." WAC 173-158-030. The state rules reiterate the prohibition on residential construction in the floodway, WAC 173-158-070, and reiterate that the regulatory area is the area designated as the special flood hazard area on the most recent FEMA map. WAC 173-158-040.

In the present case, the County Building Official correctly cited and applied these statutes and regulations. CP 46–47. He correctly determined under RCW 86.16.051, WAC 173-158-040, and YCC § 16C.05.20.010 that the basis for regulation is "the most recent map" provided by FEMA. He correctly determined that Sun-Tides is located in the floodway on the most recent map. CP 73–74. He correctly determined that placement of a manufactured home on a foundation

constituted new construction under WAC 173-158-030 and that it constituted a prohibited residential use under YCC § 16C.05.36.020(1) and (3). He therefore correctly denied the application.

C. The Floodplain Statute Aims To Achieve A Legitimate Public Purpose And Uses Means Reasonably Necessary To Achieve That Purpose

On appeal in superior court, Ms. Cradduck did not focus her challenge on the correctness of the Yakima County Building Official's decision under the applicable statutes and regulations. Instead, her primary argument was that the decision, even if correct under those statutes and regulations, denied her constitutional rights. Her substantive due process claim, however, is without merit and should be rejected.

Under Washington law, the courts apply a three part test to determine whether a land use regulation violates substantive due process. This test is (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. *Presbytery*, 114 Wn.2d at 330–331; *Guimont*, 121 Wn.2d at 609; *see also, Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). In other words, there must be a public problem or evil, the regulation must tend to solve the problem, and the regulation must not be unduly oppressive upon the person regulated. *Presbytery*, 114 Wn.2d at 330–31.

Under the unduly oppressive prong, the court must balance the public interest against those of the regulated landowner. *Presbytery,* 114 Wn.2d at 331; *see also Powers v. Skagit Cy.*, 67 Wn. App. 180, 195, 835 P.2d 230 (1992). The courts have established a set of nonexclusive factors to aid in this inquiry:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Guimont, 121 Wn.2d at 610.

Washington courts have twice before considered whether the prohibition on residential construction in the floodway in RCW 86.16.041 violates a landowner's constitutional rights. *Maple Leaf Investors, Inc. v. Dep't of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977); *Powers*, 67 Wn. App. 180. In both cases, the court determined that the statute served a legitimate public purpose and used means reasonably necessary to achieve that purpose.

In *Maple Leaf*, the court considered and rejected the plaintiff's claim that the statute caused a regulatory taking of his property. The court

noted that the purpose of the law is to protect public health and safety. The court found that there is a rational relationship between the law and that purpose: "[t]estimony indicated there was not only danger to persons living on a floodway, but structures built in a floodway could also endanger life and property downstream." *Maple Leaf*, 88 Wn.2d at 733–34. The court further noted the law did not prohibit all use of the property, but only residential use, and that it was "not the State which placed appellant's property in the path of floods. Nature has placed it where it is and, if respondent had done nothing with respect to flood-plain zoning, the property would still be subject to physical realities." *Id.* at 734.

In *Powers*, the court reversed a summary judgment granted in favor of the county, and remanded for further factual findings regarding Powers' claim that the prohibition deprived his property of all economic value. The court noted that Powers conceded the "floodway regulations were enacted for purposes of safeguarding the public interest and health." *Powers*, 67 Wn. App. at 193. The court further concluded that the prohibition did not deprive Powers of any fundamental attribute of ownership. However, the court remanded Powers' substantive due process claim, holding that it could not determine as a matter of law that the regulation was not unduly oppressive. *Powers,* 67 Wn. App. at 195.

Under these cases, Ms. Cradduck cannot carry her burden of demonstrating either the first or second prong of the due process test. RCW 86.16.041, and the corresponding County regulations, serve the legitimate purpose of protecting public health and safety. In addition, the statute and regulations use means that are reasonably necessary to achieve that purpose. It is reasonably necessary to prohibit residential construction in the floodway because, if residential construction were allowed, people would be placed at high risk of injury or death during a flood. Residential construction and subsequent use involves the constant presence of people, and often includes children, the elderly and infirm, who are especially vulnerable.[2] As the *Maple Leaf* court held, the state reasonably concluded that residential construction within the floodway creates an unacceptable risk of harm not only to those living there but to those downstream as well, who are at risk of injury, death, or property damage from debris washed downstream.

For these reasons, Ms. Cradduck cannot carry her burden as to the first two prongs of the substantive due process test.

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[2] In this case, for example, most of the residents in the Sun-Tides park are elderly or live on fixed incomes. CP 392.

D. The Prohibition On Residential Construction In The Floodway Is Not Unduly Oppressive

As noted above, the third prong of the substantive due process test is essentially a balancing of the public interest sought to be achieved against the harm caused to the landowner.[3] In performing this balancing, the courts repeatedly have emphasized that the mere fact that a regulation limits a landowner's use of his property does not by itself establish a due process violation:

> "[M]ere regulation on the use of land has never constituted a 'taking' or a violation of due process under federal or state law." . . . In the exercise of the police power regarding property use, such as in zoning and building permit requirements, government may legitimately impose many types of restrictions or development conditions on a landowner.

Robinson v. Seattle, 119 Wn.2d at 56 (citation omitted); *see also Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 664, 946 P.2d 768 (1997) ("the police power is inherent in the effective conduct and

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[3] Ecology notes that this third prong of the substantive due process test may not be valid in light of *Lingle v. Chevron, U.S.A., Inc.,* 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). In that case, the supreme court made clear that due process analysis is not properly part of a takings claim. The origin of the undue oppression prong in Washington law lies in prior federal cases that blended substantive due process with takings. *See Guimont*, 121 Wn.2d at 609 n.10. If these two types of claims are separate, the undue oppression prong, as interpreted by the Washington courts, may no longer apply. *See Amunrud v. Board of Appeals*, 158 Wn.2d 208, 226 n.5, 143 P.3d 571 (2006) (noting that undue oppression is not recognized under federal law outside the land use context and has "limited applicability even in land use cases."). In the present case, for example, the legislature presumably already weighed the benefits and burdens of the residential construction prohibition in RCW 86.16.041 and concluded, by enacting it, that the statute is in the overall public interest.

maintenance of government, [and] it is to be upheld even though it adversely effects the property rights of some individuals.").

The court must give due deference to legislative judgments regarding the benefits and burdens of a particular statute and must not substitute its judgment for that of the legislature. *See Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 544–45, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) ("[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . ."). The proper inquiry is whether application of the statute is so unreasonable as to be irrational or arbitrary. *Robinson,* 119 Wn.2d at 60–61; *Brown v. City of Seattle*, 117 Wn. App. 781, 796, 72 P.3d 764 (2003); *see also Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring) (noting that it is a "rare instance" when a regulation violates such a "permissive standard").

In those cases where courts have found a regulation to be unduly oppressive, they have relied on the fact that the regulation transferred to private property owners "an economic burden which in justice and fairness the public should rightfully bear." *Weden v. San Juan Cy.*, 135 Wn.2d 678, 706, 958 P.2d 273 (1998) quoting *Orion Corp. v. State*, 109 Wn.2d at 648–49; *see also* Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 Wash. L. Rev. 495, 516 (2000). For example, in

Guimont, 121 Wn.2d at 611, the court struck down an ordinance that essentially shifted to private property owners the burden of providing adequate housing for low income people. By contrast, the courts have stated that when a regulation does no more than regulate an activity that is directly responsible for the harm, it is not unduly oppressive. *Weden*, 135 Wn.2d at 707; *see also Edmonds Shopping Center Assoc. v. City of Edmonds*, 117 Wn. App. 344, 366, 71 P.3d 233 (2003).

In the present case, the court should uphold the application of RCW 86.16.041 to Lot 17. Application of the statute does not transfer to Ms. Cradduck the economic burden of a larger social problem; instead, it simply regulates an activity—residential construction in the floodway—that causes the harm, namely, injury or death to the public during a flood. Furthermore, as set forth below, the present harm to Ms. Cradduck from application of the statute is minimal, while the public interest sought to be achieved by the statute is substantial.

1. The present harm to Ms. Cradduck is minimal.

Ms. Cradduck's primary contention of undue oppression is that the statutory prohibition on residential construction in the floodway will eventually render her property unusable as a mobile home park. According to her, as mobile home park tenants gradually move away over time—and take their mobile homes with them—she will not be able to rent

to new tenants, and eventually the mobile home park will become empty and have to be converted to another use. CP 393. Furthermore, she contends, none of the uses currently allowed under the Yakima County floodway zoning are feasible for her. *Id.*

This argument fails to establish undue oppression for three reasons. First, the argument establishes, at best, only a potential future impact, not an actual present one. The present decision affects only Lot 17. The present impact of the decision is actually minimal because the other 50 or so lots in the park remain rented and are unaffected by the decision. Those lots will continue to be used for mobile home park purposes indefinitely. *See* CP 392 ("it is rare that mobile homes are ever transported elsewhere."). The loss of rental income from Lot 17 is $315.00 per month, which is less than two percent of the total monthly rental income from the park (CP 392), and is not the kind of severe economic impact sufficient to establish an undue burden. *See Guimont v. City of Seattle*, 77 Wn. App. 74, 88–89, 896 P.2d 70 (1995) (decrease in rental income from mobile home park not sufficient to establish due process violation, in light of other factors).

Second, the more severe impact Ms. Cradduck predicts—eventual loss of use of the property as a mobile home park—may never occur. Ms. Cradduck's contention that the park will eventually become empty

will not come true, if it ever does, for many years. In the interim, Ms. Cradduck may sell the park, the floodway may be revised again, the County may change its floodway zoning, or any number of other events may occur that would render a decision of undue oppression today erroneous. *See* CP 69–70 (discussing possible infrastructure changes that may result in revisions to the floodway in the future). Ms. Cradduck's speculation about possible future harm she may incur is insufficient to establish a constitutional violation. *See Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 761–63, 43 P.3d 471 (2002) (rejecting takings and substantive due process claims on grounds that evidence of future harm was speculative).

Third, even if her prediction does come true, the mere fact that one particular use is prohibited does not establish a due process violation. *See Ventures Nw. Ltd. P'ship v. State*, 87 Wn. App. 353, 366, 914 P.2d 1180 (1996). There is no fundamental right to use the property as a mobile home park. *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 614, 124 P.3d 324 (2005). Ms. Cradduck's use of the property for mobile home park purposes has been rendered non-conforming by the new floodway designation. However, the courts have long recognized that nonconforming uses may be phased out over time consistent with due process. *E.g,. City of University Place v. McGuire*, 144 Wn.2d 640, 648–

49, 30 P.3d 453 (2001); *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cy.*, 136 Wn.2d 1, 8, 959 P.2d 1024 (1998); *see also City of Des Moines,* 130 Wn. App. at 613 (fact that ordinance causes mobile home park to phase out over time does not violate substantive due process, where owner failed to comply with the ordinance).[4]

Ms. Cradduck submitted no evidence that other uses of the property are infeasible, other than her own conclusory allegation to that effect. CP 393. The state, however, submitted evidence that at least one other use was allowable under the state floodway statute. *See* CP 70–71 (use of the property by recreational vehicles allowed under state regulations during non-flood season). Ms. Cradduck did not rebut the state's evidence or claim that use by recreational vehicles is not feasible. A prohibition on use of mobile home parks by recreational vehicles in Seattle was itself challenged as a substantive due process violation in *Guimont v. Seattle*, 77 Wn. App. at 78, indicating that this use is certainly feasible and even desired by some park owners. Ms. Cradduck's conclusory allegation that no other uses are feasible is insufficient to carry

[4] These cases require a reasonable amortization period prior to phasing out the use, so that the landowner may recoup his investment. Here, Ms. Cradduck submitted no evidence regarding the rate at which vacancies occur at Sun-Tides, nor did she give any estimate of the time it would take for the park to become empty, as she fears may occur. *See* CP 391–393. She also gave no evidence of the value of her investment. Thus, she failed to carry her burden of demonstrating that the phasing out of Sun-Tides, if it ever occurs, will occur in an unreasonably short time.

her burden of demonstrating a due process violation. *See Powers v. Skagit Cy.*, 67 Wn. App. at 194–95.

2. The public interest is substantial.

In contrast to the minimal impact on Ms. Cradduck of preventing residential construction on a tiny fraction of her property, the public interest here in protecting the public from property damage, injury or death from flood damages is substantial. Past flooding of the Naches River has caused considerable damage in the area near Sun-Tides. CP 164–167. The area known as Ramblers Park immediately across Highway 12 from Sun-Tides had to be evacuated in 1996:

> Residents in Ramblers Park were engulfed by floodwaters for the second time in three months (see November/December 1995 Flood). Approximately 10 families in Ramblers Park were forced to evacuate their homes and businesses located there were shut down for more than a month.

CP 164.

This same area previously flooded in 1933. CP 175. On that occasion, according to contemporary newspapers, "[t]he water rose nine inches in Ramblers Park . . . and late in the day was up to the level of the floors in the cabin . . . ." CP 175–176. After the 1933 flood, the Corps of Engineers constructed levees along the river bank to protect the area. The Ramblers Park levee, however, washed out in the 1996 flood and had to be

repaired. CP 151, 168. The River also flooded in 1948 and 1990. CP 174–175.

The record clearly reveals the dangers posed by flooding:

> Deep, fast moving water in the floodplain poses a safety risk to buildings, people and livestock. Even shallow, fast moving water flowing across a roadway can wash a car off the road, and as little as 6 inches of moving water can knock people off their feet . . . . Downed utility lines along roads and submerged utility equipment in buildings poses a fire hazard and the threat of electrocution. Wood framed building walls can be severely damaged by the hydrostatic pressure exerted by water depths exceeding 3 feet.

CP 161.[5]

The recent delineation of the floodway done by FEMA and the County, that caused the Sun-Tides park to be included in the floodway, utilized the best science currently available. CP 69. Thus it is reasonable to expect that the Sun-Tides park will experience severe, dangerous, flooding in the future. Given this danger, the County's decision to prohibit new residential construction at Lot 17 in Sun-Tides is clearly appropriate and consistent with the statute.

If the trial court decision is affirmed, the County will be forced to allow residential construction directly in the path of hazardous and

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[5] Based on this history of flooding, the County reviewed a variety of options for flood hazard management along the Naches River. CP 248. The County adopted an action plan that identified as high priorities remapping the floodway more accurately and revising existing regulations to prohibit new construction in areas of high flood hazard, among other things. *See* CP 250, 258.

potentially lethal flooding. This will not only jeopardize the safety of those living there, it will also increase the danger to those living downstream, who will be at risk of injury or property damage from debris washed downstream.

The superior court did not properly weigh the due process factors before concluding that a violation occurred. Instead, the court treated the mere fact that the County designated the Sun-Tides property in the floodway, thereby preventing Ms. Craddduck from renting Lot 17, as a basis for setting aside the Building Official's decision. Ms. Cradduck submitted no evidence, and the superior court made no findings, that the floodway designation was unusually or particularly harmful in her case. Nor did the superior court make any findings or articulate any basis for concluding that the harm alleged by Ms. Cradduck outweighed the benefits sought to be achieved by the statute. The superior court did not weigh the public interest served by the statute at all. *See* VRP at 7–11.

If the superior court's decision is correct, the County and state likely cannot enforce the residential construction prohibition in RCW 86.16.041 in many other places throughout the County, wherever there are existing residential uses that might be impacted by the new designation. This result substantially undermines the public interest sought to be achieved by the statute and substantially undermines the County's efforts

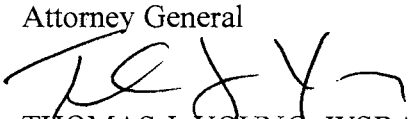
to improve its flood hazard management in the wake of prior floods. It is also inconsistent with the cases holding that state and local governments may legitimately exercise their police powers to protect public health and safety, notwithstanding an adverse impact on some landowners. *See, e.g., Christianson,* 133 Wn.2d at 664–66. Under a proper evaluation of the due process factors, the Court should conclude that application of the statute to Lot 17 is a legitimate and proper exercise of the police power and it should reinstate the decision of the Building Official.

VI. CONCLUSION

For the reasons stated above, the Court should reverse the decision of the superior court and reinstate the decision of the Yakima County Building Official denying a building permit for Lot 17 in Sun-Tides Mobile Home Park.

RESPECTFULLY SUBMITTED this 22 day of June, 2011.

ROBERT M. MCKENNA
Attorney General



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