

NO. 304175

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

FAMILIES OF MANITO, ANN BEREGMAN, TODD STECHER and
SADIE LAKE,

Respondents/ Cross-Appellants,

vs.

ST. MARK'S LUTHERAN CHURCH,

Appellant/ Cross- Respondent.

and

CITY OF SPOKANE, a first class city of the State of Washington,

Respondent/ Cross- Respondent.

REPLY BRIEF OF ST. MARK'S LUTHERAN CHURCH

MICHAEL F. CONNELLY
KOEGEN EDWARDS LLP
601 W. Riverside Ave., Suite 1700
Spokane, WA 99201
(509) 747-4040

NO. 304175

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

FAMILIES OF MANITO, ANN BEREGMAN, TODD STECHER and
SADIE LAKE,

Respondents/ Cross-Appellants,

vs.

ST. MARK'S LUTHERAN CHURCH,

Appellant/ Cross- Respondent.

and

CITY OF SPOKANE, a first class city of the State of Washington,

Respondent/ Cross- Respondent.

REPLY BRIEF OF ST. MARK'S LUTHERAN CHURCH

MICHAEL F. CONNELLY
KOEGEN EDWARDS LLP
601 W. Riverside Ave., Suite 1700
Spokane, WA 99201
(509) 747-4040

Table of Contents

| | |
|---|----|
| A. Introduction | 1 |
| B. Counter Statement of Facts | 4 |
| C. Reply to Argument in Response to Opening Brief..... | 5 |
| 1. The Hearing Examiner Properly Modified the Administrative Decision. | 5 |
| 2. Substantial Evidence Exists to Support the Hearing Examiner’s Interpretation of “Main Assembly Area.” | 9 |
| D. Conclusion..... | 13 |

Table of Authorities

Cases

| | |
|--|--------|
| <i>Amburn v. Daly</i> , 81 Wn.2d 241 (1972)..... | 10 |
| <i>Biermann v. City of Spokane</i> , 90 Wn. App. 816, 821 (1998) | 12 |
| <i>Bradley v. Department of Labor and Indus.</i> , 52 Wn.2d 780 (1958)..... | 10 |
| <i>In Re Marriage of Blickenstaff</i> , 71 Wn. App 489 (1993) | 10, 11 |
| <i>McClure v. United States</i> , 305 U.S. 472 (1939) | 11 |
| <i>Port of Seattle v. Pollution Control Hearings BD</i> , 151 Wn.2d 568, 587 (2004)..... | 8, 9 |
| <i>Ravsten v. Department of Labor and Industries</i> , 108 Wn.2d 143 (1987). | 10 |
| <i>Yakima Police Patrolmen's Ass'n v. City of Yakima</i> , 153 Wn. App. 541, 561, 222 P.3d 1217 (2009)..... | 12 |

Statutes

| | |
|----------------------------|------|
| Chapter 34.05 RCW | 8 |
| RCW 36.70C.130(1)(b) | 10 |
| SMC 17G.060.230 | 5, 9 |

St. Marks, Lutheran Church (“St. Marks”) concurs and joins the arguments and analysis set forth in the City of Spokane’s Brief in Response to St. Mark’s Opening Brief.

In this Reply Brief, St. Mark’s responds to the Families of Manito, Anne Bergeman, Todd Stecher and Sadie Lake’s, (“Families of Manito”) Response/Opening Cross–Appeal Brief, (“Families of Manito’s Brief”), specifically arguments set forth in Section E(1), (2) and (3).

The City of Spokane (the “City”) is responding to Families of Manito’s Cross-Appeal and St. Mark’s also concurs and joins in the argument and analysis set forth therein.

A. Introduction

St. Mark’s had a simple request. It wished to expand its parking lot to allow it to be connected with 25th Ave, an arterial street. There is no question that such an expansion is allowed by a conditional use permit, Record, p. 31, or that the new access would enhance safety and traffic circulation in the immediate neighborhood. Record¹, p 152-153 and 182.

¹ The Original Certified Appeal Board Record.

The process of approval for the application was extensive. All interested parties had ample opportunities to express their views at both the administrative level where the application was approved, and at the appeal hearing before the Hearing Examiner where literally days of testimony was given and hundreds of pages of documentation submitted.

The Hearing Examiner, after hearing detailed and substantive testimony as to the impacts of the proposal and alternate mitigation measures, upheld the administrative decision, but as he is authorized to do, modified that decision by imposing certain specific conditions of approval. These conditions included changes to the layout of the approved plan and were made to minimize the impact of the proposed development on the neighborhood. The specific condition at issue was the requirement that the layout of the parking lot conform to a drawing submitted as an exhibit by St. Marks. Record, 1181. Such a modification to a plan that had been approved administratively, and that further minimized impacts to the neighborhood, exactly fulfills the purpose of having such an appeal hearing in the first place.

St. Mark's further sought guidance from the City and ultimately the Hearing Examiner, as to exactly what space within the church should be counted towards calculating the number of parking spaces. Initially,

the City included a portion of the sanctuary and the fellowship hall in its calculations. After the administrative decision was made the City further agreed that the area where the choir sat, which is behind the altar, should be included. The number of parking spaces ultimately allocated St. Mark's was at issue in the appeal hearing before the Hearing Examiner. The Hearing Examiner concurred in the City's analysis.

The Families of Manito suggests that this process was ridden with procedural error that in some fashion deprived the Families of Manito of an opportunity to have a decision made in an impartial, quasi-judicial manner. Just the opposite is true. The record practically explodes with evidence of due process and an opportunity to play a substantive and meaningful part in decision making from the time the application was filed through the final decision made by the Hearing Examiner.

The Court should note that while objections are made to the process and procedures followed, and questions raised as to compliance with various rules and regulations, there is not, nor has there been, any substantive evidence proffered that supports the contention that the Families of Manito were not afforded due process or that the decision to approve the expanded parking lot was not consistent with all applicable zoning and land use regulations.

B. Counter Statement of Facts

A detailed rendition of the facts felt to be material are set forth in St. Mark's Opening Brief. There are, however, two statements contained within Families of Manito's "Statement of Fact" that are in error.

On page 4 of the Families of Manito's Brief it is asserted that, "*the Fellowship Hall and Sanctuary are not used at the same time. See e.g. AR 3.,*" This statement is at best misleading. If the Court reviews the record cited, the very next sentence states, "*[t]he church, however, presented testimony from its pastor, stating that the two spaces were used at the same time on different occasions.*" See Record p. 30. See also Record pp. 31, 151, 152, and 154.

Page 5 of the Families of Manito's Brief also described the alternative layout submitted by St. Mark's, Record p.1181, as follows:

At the hearing on September 29, 2009, a new site plan was introduced by St. Mark's, which made substantial changes to the original site plan. AR 1181. The revised proposal was not a result of action or modification by the Hearing Examiner.

In fact, the revised drawing was submitted during the hearing as evidence in an attempt to respond to concerns raised by the Families of Manito and their attorney and to provide guidance to the Hearing Examiner when

making his decision. It was marked as an exhibit and made part of the record. It was never submitted as anything other than an alternative layout that would minimize impact to the neighborhood. Record pp. 160-161.

The Hearing Examiner then conditioned his final approval on the modifications identified in that exhibit. Record, pp. 160-161

C. Reply to Argument in Response to Opening Brief

1. The Hearing Examiner Properly Modified the Administrative Decision.

The Families of Manito attempt to manufacture a violation of law by mischaracterizing the events and submittals that occurred at the hearing in question.

This exhibit in question, Record, p. 1181, was offered by St. Mark's as a means to minimize impacts identified in certain neighbors' testimony. Significantly, the modification represented no change in use, density of the site area, or modification of traffic patterns. All criteria necessary before such a modification would be considered a "new application" pursuant to Spokane Municipal Code ("SMC") 17G.060.230. In the case at hand, the code provision simply does not apply.

The number of parking spaces was at issue before the Hearing Examiner, the total number would not be determined until after the

Examiner ruled. That number was not increased by the submission of this exhibit.

The Families of Manito list a series of distinctions between the layout approved administratively. They identify a number of technical differences but identify nothing that would meet the criteria of the code provisions cited above or that would impact, in any significant way, the neighbors in a manner that is different from the impact of the application itself. If anything the submitted exhibit further minimized the impact of the expanded parking lot. Record, p. 160-173.

The alternative layout was not submitted in some secretive or last minute fashion. Further, there was no objection to this exhibit being introduced into evidence. Representatives from the Families of Manito had the right to, and did comment, on the alternative proposal. In fact, Mr. Theil from St. Mark's, who introduced this specific exhibit, was then cross-examined by Mr. Schwartz, counsel for the Families of Manito. Mr. Schwartz explored a number of topics including the drawing in question. He questioned the number of parking spaces and impervious surface, the location of the swale, the proximity of the parking to the neighbors homes, and a number of questions concerning parking stalls, all of which were appropriate and intended to help guide the Hearing Examiner in making

his decisions, and if he were to approve the project, provide sufficient knowledge to appropriately condition that approval. Record pp. 162-173.

Interestingly, in the Families of Manito's Final Brief submitted after the close of testimony Mr. Schwartz made the following contention:

Because the Examiner may modify the Decision, the Examiner may also substitute findings and thus impose conditions "consistent with the [CUP] criteria." Id. In the context of special or conditional use permits, it is well recognized that [a municipality] may apply reasonable conditions to insure that the grant of a special exception will be in harmony with the zoning regulations and will not tend to adversely affect the use of neighboring property. Am. Ju. 2d Zoning and Planning, Section 905, p.747.

Record p. 1788

Mr. Schwartz also cites SMC 17C.320.010 as follows:

The conditional use review provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address identified impacts or to deny the use if the impacts can not be resolved. (His 'emphasis added' not mine).

Record p.1799.

The Hearing Examiner, in his decision, did exactly what he is authorized to do. He modified the proposal to mitigate impacts that he perceived existed.

The Families of Manito also misstates the process that actually occurred. The decision in this matter was made administratively to approve the application. That decision was appealed to the Hearing Examiner by both parties. The decision was then, in fact, modified by the Hearing Examiner as a result of evidence presented on appeal. There is no violation of the City of Spokane's Municipal Code.

The Families of Manito further cite *Port of Seattle v. Pollution Control Hearings BD*, 151 Wn.2d 568, 587 (2004), in support of the proposition the Hearing Examiner is not entitled to deference, stating that "*courts grant 'such deference as is due the construction of a law by a local jurisdiction with expertise,' so long as that interpretation is not contrary to the code's plain language.*" See Families of Manito Brief at p. 13. *Port of Seattle* was a review of a decision by the Pollution Control Hearings Board, under the Administrative Procedures Act. (chapter 34.05 RCW) While the facts of that case are unrelated to the issues before this Court, its underlying principle, stated in full is as follows:

However, if an ambiguous statute falls within the agencies expertise, the agency's interpretation of the statute is "accorded great weight", provided it does not conflict with the statute.

Id. at 587.

Here, the decision of the Hearing Examiner is not contrary to SMC 17G.060.230 (there is no substantial modification to this application, simply a modification to the administrative decision rendered). The interpretation and implementation of these code provisions clearly falls within the expertise of both the Planning Department and the Hearing Examiner. Their interpretation is accorded "*great weight.*"

2. Substantial Evidence Exists to Support the Hearing Examiner's Interpretation of "Main Assembly Area."

There is substantial evidence in the record to support the Hearing Examiner's conclusion that both the fellowship hall and the sanctuary fall within the definition of "*main assembly area.*" This conclusion was also reached administratively when the initial application was approved. The Families of Manito would have this Court substitute it's independent judgment for that of two individuals charged with the appropriate expertise to interpret and apply land use code provisions for the City of Spokane. As detailed more specifically in St. Mark's Opening Brief, and as also addressed by the City of Spokane in its Response Brief, it is not the Court's role in an appeal of this nature to so substitute it's independent

judgment. The Hearing Examiner listened to the live testimony of the witnesses and the exhibits they introduced, as well as the cross-examination of those witnesses, and cross-examination pertaining to those exhibits. That evidence was weighed and discretion was exercised.

That exercise of discretion should not be revisited now on the basis of argument by the Families of Manito or source documents such as Wikipedia as suggested by counsel. See RCW 36.70C.130(1)(b).

The Families of Manito's reliance upon *In Re Marriage of Blickenstaff*, 71 Wn. App 489 (1993) is also not persuasive. As mentioned in St. Mark's Opening Brief, *Blickenstaff* also held that the first important principle in determining legislative intent is, "that the legislature's intent may be discerned from administrative interpretations of the statute". *Id* at 347.

Ravsten v. Department of Labor and Industries, 108 Wn.2d 143 (1987), and the cases cited by *Ravsten*, *Amburn v. Daly*, 81 Wn.2d 241 (1972); and *Bradley v. Department of Labor and Indus.*, 52 Wn.2d 780 (1958), in support of this proposition, are also inapposite. All were employment law cases interpreting significant changes to Workman Compensation laws where the wording of the subsequent laws did provide some insight into the original intent of the legislators. The initial case

cited in Bradley in support of this rule, *McClure v. United States*, 305 U.S. 472 (1939) interpreted a portion of the World War Veteran's Act and a significant change to that law. In the circumstances set forth in these cases, the court was able to draw some reasonable inferences from the subsequent legislation.

Application of this principle to the legislative acts of a prior City Council is, however, problematic. The current City Council may well have the present intent to restrict the definition of "*main assembly area*" to a single room. We can assume that the new words reflect that current intent and the existing political will of the City Council. A prior City Council may not have shared this perspective. The amendment could be viewed either as evidence of intent to change the existing code or as clarification of the intent of the original enacting body. The words themselves, as distinguished from the cases cited above, do not provide us with any clue as to which interpretation is correct.

The best evidence of intent in this circumstance; the indicia that provides at least a chance of consistency and predictability when administering a development code, is the principle of statutory interpretation recognized in *Blickenstaff, supra*. That is, that the intent of

the body can be discerned by administrative interpretations. Any other approach would be mere speculation.

Finally, Families of Manito rely upon *Biermann v. City of Spokane*, 90 Wn. App. 816, 821 (1998). The circumstances in *Biermann* differ from those at hand. At issue was whether or not sufficient evidence existed to support a certificate of compliance. The Hearing Examiner relied upon an unwritten policy to support a finding that a valid building permit existed; the Hearing Examiner further found that in the absence of evidence of bad faith, “*the omission shows that the Markham’s proceeded in good faith.*” The court rejected this test. In the case at hand, there is no issue of bad faith or the failure of St. Mark’s to comply with the City’s mandated procedures. St. Mark’s did everything they were asked to do. Evidence exists in the record both supporting and in conflict with the Hearing Examiner’s finding. The presence of conflicting evidence does not warrant reversal based upon a lack of sufficient evidence. See *Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wn. App. 541, 561, 222 P.3d 1217 (2009).

We are left then with this threshold question: Is there sufficient evidence to support the Hearing Examiner’s conclusion that both the

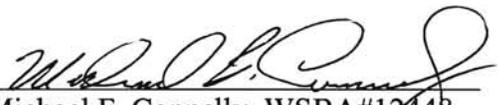
fellowship hall and the sanctuary fall within the meaning of “*main assembly area*”? The record clearly suggests that there is.

D. Conclusion

St. Mark’s filed an application to expand its parking lot. Such a request was allowed by the applicable zoning code provisions. Opponents actively participated and vigorously opposed this application at both the administrative and Hearing Examiner level. In both cases the application was approved. The Hearing Examiner’s actions were authorized and his decisions were supported by substantial evidence. This decision should be upheld.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.

KOEGEN EDWARDS LLP

By: 
Michael F. Connelly, WSBA#12448
Attorney for St. Mark’s Lutheran
Church
(509) 747-4040