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Court of Appeals No. 70141-0-I

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JEFFREY CONNELL and JOELLEN CONNELL, APPELLANTS

v.

CITY OF BOTHELL, RESPONDENT

OPENING BRIEF OF APPELLANTS

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COURT OF APPEALS
STATE OF WASHINGTON

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ORIGINAL

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I. INTRODUCTION

Appellants' Jeffrey and JoEllen Connell are the Owners of the Garden Grove Apartments located in Bothell, King County Washington. In 2007 Appellants', pursuant to a Puget Sound Energy efficiency program, hired a contractor who replaced all of the originally installed aluminum windows and doors of the Garden Grove Apartments with high efficiency vinyl windows and doors. The Appellants' contractor did not obtain a permit from Respondent City of Bothell for the replacement work. Thereafter, the City of Bothell advised Appellants' that a permit for such replacement was required. Appellants' contractor applied for a permit which was denied by the Respondent City. The Appellants' appealed the decision to the City of Bothell's Board of Appeals. Thereafter, the matter went to hearing before the Board of Appeals who entered a decision against Appellants, upholding the Respondent City's decision to deny the permit. The matter was further appealed to King County Superior Court under cause number 12-2-17110-6 SEA, and a LUPA hearing was held on March 1, 2013 wherein the Board of Appeals decision was affirmed by the Superior Court CP100-101. This appeal ensued.

II. ASSIGNMENTS OF ERROR

1. The Board of Appeals for the City of Bothell erred by allowing Michael Delack to participate in the underlying proceeding violating the appearance of fairness doctrine.

2. The underlying Board of Appeals decision is a clearly erroneous application of the law to the facts at issue in this case and therefore should be reversed.

3. The underlying Board of Appeals decision is not supported by substantial evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Does Respondent's representative's participation in the Board of Appeals hearing as a board member, witness and advocate for the Respondent City of Bothell violate the appearance of fairness doctrine?

B. Is the Board of Appeals decision which relies upon the alleged failures of the windows at issue an erroneous application of the City of Bothell Code resulting in the wrongful denial of the Appellants alternate methodology permit for installing the windows ?

C. Is the Board of Appeals decision supported by substantial evidence justifying the denial of Appellants' alternate methodology for installing the windows and doors at issue ?

IV. STATEMENT OF CASE

A. Background. Appellants' are the owners of the Glen Grove Apartments located at 10295 NE 189th Street, Bothell, WA 98011 ("Premises")CP 3. The Premises were built in 1969 and purchased by Appellants' in 1995. ROP 37.¹ The Premises consist of 24 rental apartment units. At the time the building was constructed in 1969, single pane aluminum framed windows and sliding glass doors were installed.CP 3. In 2007, Appellants' in response to a program sponsored by Puget Sound Energy ("PSE") to promote energy efficiency (Multifamily Weather Program), spent approximately \$32,000 out of pocket to remove and replace the existing windows with new insulated vinyl framed windows and sliding glass doors manufactured by Empire Pacific Windows ("Empire") ROP 38; CP 3. PSE's consultant ECOS evaluated the building and made recommendations with respect to the windows chosen. ROP 38. ECOS representatives also supervised the installation of the Windows. ROP 38.

¹ Reference to ROP ___ are references to the Report of Proceedings from the Board of Appeals hearing at issue which was transcribed and filed before the court.

The new windows and sliding glass doors were installed by collapsing the existing windows within the existing openings and installing the new windows and sliding glass doors within the existing openings with “finless” windows. (See Exhibit #20²). The existing opening, structure, and interior and exterior finishes were not altered or disturbed with the “collapse method” of installation and the new windows were simply set into the existing framed openings. Exhibit #20. The collapse method was widely used and approved by the American Architectural Manufacturers Association (“AAMA”) and the window manufacturer, Empire.ROP 58-59.

Appellants’ contracted with an independent contractor, Northwest Primeline Exteriors (“NPE”), to perform the work in a complete manner.Exhibit #19. Appellants’ relied entirely on the expertise of PSE, Ecos Constultants, and NPE and were told specifically that a permit was not required because the work did not alter or modify the structure.ROP 38-39. The work was completed in the early summer of 2008.

After the work was complete, the Respondent City informed Appellants’ that a building permit was needed for the work and sent Appellants a written notice June 30, 2008. (See Exhibit#5). Thereafter, a

² References to Exhibits are references to the tab/exhibits that were included by the Respondent City of Bothell in its certification and Filing of Record for Judicial Review dated October 24th 2012.

Notice of Violation (“Notice”), dated July 30, 2008 was forwarded by the Respondent to Appellants.(See Exhibit#6). Appellants’ contacted NPE about the Respondent’ s claim that a permit was needed. NPE assured the Appellants’ the notice was a mistake.ROP 39; CP 4.

The Respondent City’s initial reasoning was that the work was not an “ordinary repair” because, at least in part, it required the window openings be enlarged and lowered to comply with code.(CP 4) The Appellants’ maintained that the work was, and is, an “ordinary repair” under BMC 20.02.105³ and the City’s own definitions. Both parties consulted with the International Code Council, which later advised that the Respondent’s interpretation of the code was incorrect. (CP 4; See also Exhibit #24).

NPE worked with the Respondent City to resolve the situation and applied for the building permit required by the Respondent. However, the permit was denied. In late 2008, an appeal hearing was requested. (See Exhibit # 9). The hearing was calendared for early 2009, but was postponed to facilitate resolution of the matter.(See Exhibit#12). No resolution was reached and the appeal hearing was not re-calendared. Thereafter, NPE filed for bankruptcy and the Respondent City dropped the issue.

³ References to BMC are references to excerpts from the Bothell Municipal Code

In 2011, Appellants' attempted to refinance the Premises in order to install a new roof. CP 5 The loan was denied, however, because the Respondent City's original Notice was still of record. Appellants' immediately contacted the City and were put in touch with the Respondent's City's Deputy Director of Community Development, Building Official, Michael DeLack.CP 5. Mr. DeLack informed Appellants that the Respondent required them to obtain a building permit for the window replacement work.

B. Alternative Material Application. On October 21st 2011 Appellants' submitted a second Building Permit Application, which is the subject of the present appeal.(See Exhibit #13). As part of the application, Appellants' sought a permit for the Windows and Doors that had been installed in 2008 based upon an Alternative Materials, Design and Methods of Construction. The request for permit was denied on November 23rd 2011 by the Respondent City. (See Exhibit #14). On December 6th 2011 Appellants' Appealed the denial. (See Exhibit #15). The Appeal hearing at issue was held on April 17th 2012.

C. The Board of Appeals Hearing. As indicated above, the Board of Appeals hearing was held on April 17, 2012. The hearing was presided over by Greg Schrader, a Building Official from the City of Bellevue;

Trace Justice, a senior planning examiner with Snohomish County and Jim Tinner, a building official with the City of Bellingham. ROP p.3. Respondent's representative Michael Delack, the City Building official who denied the permit, acted as an "ex officio" member of the Board of Appeals as well as the Board's secretary. ROP 3. Mr. Delack not only acted as an ex officio of the Board and its secretary, he questioned witnesses on behalf of the Respondent City, advised the Members of the Board of the appropriate procedural process that should be followed and their legal limitations (See ROP 19-20) and testified at the hearing. ROP 20. At one point, Mr. Delack advised the Board that it should listen to his interpretation of the code, because he wrote it. ROP 19.

Mr. Delack testified that the applicable standard for the appeal included the following under BMC 20.02.225B.

- (1) The true intent of the Code or the rules legally adopted thereunder have been incorrectly interpreted;
 - (2) the provisions of the Code do not fully apply;
 - or (3) an equally good or better form of construction is proposed.
- ROP 4.

John Gasperik, the property manager for the building, testified that he had been the resident manager of the Glen Grove apartments since December of 2001. ROP 42. Mr. Gasperik testified to the extensive sweat

and humidity problems of the old single pane aluminum windows and that he personally had to purchase a dehumidifier to deal with the moisture and condensation. ROP 44. Mr. Gasperek further testified that since the new windows were installed the moisture issue had been much improved. ROP 46.

Appellant JoEllen Connell testified that there had been no reports of any leakage or moisture infiltration since the new windows had been installed. ROP 40. Appellants' expert, Mark Lawless testified before the Board that he found no evidence of any water infiltration. ROP 65, 69. Mr. Lawless also testified that in his opinion the windows and doors at issue had been installed per the manufactures instructions and specifications. ROP 65,79-80. Mr. Lawless further testified that the methodology used for the removal and installation at issue was common within the industry.ROP 58-59.

The Board Appeals below seemed to acknowledge that the code effectively defers to the Manufactures installation instructions – and that the critical point was and is whether or not the Respondent City should have granted the permit because the proposed method complied with Empire Pacific's instructions.ROP 90. The installation instructions relied upon by Appellants' contractor were before the Board. See (Exhibit #27)

D. Board of Appeals and Superior Court Decisions. On May 4, 2012, the Board issued its decision upon the Appellants' appeal ("Decision" – See Exhibit #1). All of Appellants' requests for relief were denied by the Board of Appeals. On May 14, 2012 Appellants' timely filed a Petition for Review of the Board of Appeals decision. CP 1-15.

Respondent City filed a Motion to Dismiss a portion of Appellants' claims and an order was entered on September 13, 2013. CP 98-99. Thereafter, the parties transcribed the Board of Appeals hearing (ROP) and it was filed with the Superior Court. On March 1, 2013 the Superior Court held a LUPA hearing and entered an order denying Appellants' LUPA Petition. CP 100-101.

In response to the Superior Court's decision, Appellants' timely filed a Motion for Reconsideration based upon their Appearance of Fairness argument. CP 103-111. The Superior Court denied Appellants' motion for reconsideration. CP 112-113. Thereafter, Appellants' filed this appeal. CP 114-119.

Compliance with the Respondent City's demands to replace the windows and doors at issue will mean that Appellants will pay approximately \$80,000 to tear out over \$40,000 worth of brand new windows and sliding glass doors that do not leak and have improved the

energy performance of the building. The City's demands will result in complete and unwarranted economic waste. Notably, since installed in the summer of 2008, the windows at issue have continued to perform without incident, leakage, or other failure.

V. ARGUMENT

A. Applicable Standard of Review.

As provided under RCW 36.70C.130(1), the Board of Appeals decision should be upheld unless –

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(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;

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

(f) The land use decision violates the constitutional rights of the party seeking relief.

It is not necessary for the Court to find that the decision was an arbitrary or capricious decision in order to grant Appellants' relief. RCW 36.70C.120 (2) Moreover, the Court has the authority to either (1) uphold the decision; (2) reverse the decision or (3) remand the decision for further proceedings. RCW 36.70C.140.

B. The Board of Appeals decision should be overturned because of Respondent representative Michael Delack's participation in the underlying Board of Appeals hearing violated Appellants' right to a fair hearing by impartial decision makers. Appellants' contend that the Board of Appeals decision should be reversed and remanded on the basis that Respondent City representative Michael Delack (the City of Bothell's building official) (1) acted as a ex-officio member of the Board of Appeals below, and advised the Board of Appeals on pertinent policies and procedures; (2) at the same time he represented the Respondent City of Bothell in questioning of witnesses in the proceeding below; and (3) when he also effectively acted as the primary witness for the Respondent City.

1. Mr. Delack acts as Board Member and advised the Board on policies, procedures and legal requirements. At the inception of the Board of Appeals hearing Mr. Delack advised the Board of Appeals of the

appropriate procedural and legal standards it was to apply in the underlying appeals hearing.(ROP 3) During the hearing, Respondent representative Delack also advised the Board directly of its authority as well as the scope and intent of the City of Bothell Code:

Mike Delack: If I may, since I was the author of these provisions [referring to the code] First of all, the city's position continues to be and the intent of this as written is that the board has no power to interpret administrative provisions of this chapter which is basically 20.02....ROP19

Respondent representative Delack further directed the Board on procedural aspects of the appeal. For example, at ROP 129 Delack advises the Board on the appropriate order of argument. In addition to advising the Board on proper process, legal requirements and procedure, on several occasions Respondent representative Delack testified to the Board on critical factual and legal issues.

2. Respondent representative Delack testifies as a witness on behalf of the Respondent City of Bothell. Not long after the commencement of the underlying Appeals proceedings, as Mr. Delack is advising the Board on the legal parameters of the proceeding he begins then to testify to factual issues (see ROP 19) upon which Appellants' counsel immediately objects.(See ROP 20). In response to the objection, the only action taken by the Board is to swear Respondent representative

Delack in as a witness. (See ROP 20). Thereafter throughout the proceeding Mr Delack openly testified at the same time he was acting as an advocate for the Respondent City. ROP p. 21; Respondent representative Delack testified to the meaning and intent of the Bothell Code ROP p. 30 and ROP 34; the factual basis for the notice that was purportedly provided to Appellants' in underlying violation process ROP 50,66; in several instances directly in response to Board member questions regarding City of Bothell exhibits and/or facts relating to Petition ROP 120; and finally Respondent Representative Delack testified with respect to Respondent's Exhibits offered at the hearing (See again ROP 120). At the same time as Mr. Delack is advising the Board of Appeals on process and testifying he then wears the hat of advocacy on behalf of the Respondent City.

3. Respondent representative Delak acts as attorney on behalf of the City of Bothell. In addition to sitting as an ex-officio member of the Board and testifying as a material witness, throughout the proceeding Mr. Delack also acted as the Respondent City's primary legal advocate, questioning witnesses on direct and cross examination as well as offering argument. ROP 51. Respondent representative Delack cross examined the property manager ROP 100-107 & 113-114; cross examined Appellants' expert Lawless ROP 115 & 123; directly questioned Respondent City

Witnesses ROP 129-132; and offered closing argument on behalf of the Respondent City.ROP 129.

4. Appellants' Counsel objects to Delack's actions. Appellants' counsel tried to prevent Respondent City's representative from his multi-faceted participation, without success. For example, when Respondent representative Delack went from advising the Board of Appeals on procedural issues to offering testimony and advocating on behalf of the City of Bothell, Appellants' counsel timely and immediately objected – pointing out to the Board of Appeals that “He [Mr. Delack] is not counsel” nor was he testifying as a witness. (See ROP 20) In response, the Board simply swore Mr. Delack in – recognizing at that point that Mr. Delack was offering substantive testimony.

A short time later, Respondent representative Delack stood and undertook to cross-examine Appellants' building manager and began questioning him. (See ROP 51) Appellants' Counsel again objected and raised the issue of Mr. Delack's ability to advocate (and ask questions) on behalf of the Respondent City. ROP 52. After considering the matter briefly, the Board of Appeals found that Respondent representative Delack was wearing his ex-officio Board Member hat and allowed him to question the witness just like any other Board member. (ROP 54) Notably, Respondent City's attorney inadvertently acknowledges the

appearance of fairness conflict by pointing out to the Board that “this is an informal proceeding” and that Mr. Delack is both a Board Member and “He’s also a party” to the proceeding. ROP 54-55.

RCW 42.36.010 states:

Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

There does not appear to be any dispute that the proceedings below were subject to the Appearance of Fairness doctrine as a quasi-judicial proceeding. The Respondent City recognized this in the proceeding below when counsel stated “every hearing participant shall have all rights essential to a fair hearing”. ROP 54. The underlying purpose of the doctrine is to insure that quasi-judicial proceedings are in fact fair as well as appearing fair. Smith v. Skagit County., 75 Wn.2d 715, 453 P.2d. 832(1969).

When a City official who was/is a Board member who recuses himself from a proceeding, but thereafter actively participates in that proceeding, advocating on behalf of a participant, questioning witnesses and advising the Board of proper process and procedure, a violation of the appearance of fairness doctrine occurs. Hayden v. Port Townsend, 28 Wn.App. 192, 622 P.2d.1291 (1981). In Hayden, a planning commission board member agreed not to vote or otherwise participate in a hearing before the planning commission in his official capacity. However, the same person then acting as a representative of the applicant questioned witnesses and advised the commission on procedural matters. The Hayden court held that such actions clearly violated the appearance of fairness doctrine. Hayden at p.196-197.

In Buell v. Bremerton, 80 Wn.2d 518, 495 P.2d. 1358 (1972) the court found a violation of the appearance of fairness doctrine when a planning commission board member, who had an indirect conflict of interest, continued to participate in a rezone application proceeding even though the requested action would have been approved without his vote. The Buell court held the self-interest of one member of the planning commission infects the actions of the other members regardless of their disinterestedness. Buell at p. 525.

In this case, it should not matter that Respondent representative Delack was a non-voting member of the Board, it was his decision as the building official that was being appealed. Like the Board member in Hayden, Respondent representative Delack should not have participated in the proceeding as both a member of the Board, an advocate of the City and a witness. By doing wearing all of these hats, the actual or apparent fairness of the underlying Board of Appeals decision was compromised.

As for the preservation of this issue, RCW 42.36.080 states:

Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is

known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.

As indicated above, counsel for Appellants' objected several times to Respondent representative Delack's multi-faceted participation in the underlying proceedings.(See ROP 20 and ROP 52). Counsel's first objection came literally at the outset of the hearing when it became evident of the intended scope and participation of the official in the underlying proceedings.

Respondent representative Delack, was the building official whose decision was the subject of the Board's review. The Appeals hearing required the Board to both appear and to act in a fair and impartial manner. Chrobuck v. Snohomish County, 78 Wn.2d 858,869,480 P.2d. 489 (1971). There simply was no way for Respondent representative Delack to advise the Board on procedure, question witnesses and act as an advocate for Respondent City all while sitting as an ex-officio member of the Board without violating the appearance of fairness doctrine.

C. The Board's of Appeals decision is a clearly erroneous application of the law to the facts at issue. A land use decision is a clearly erroneous application of the law to the facts, so as to warrant reversal of the decision under the Land Use Petition Act (LUPA), when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 256 P.3d 1150 (2011). In this case, the issue was not were the windows installed correctly nor was it did the windows leak. The issue was and is did the proposed method of installation advocated comply with the Bothell Building code in that it complied with an approved method of installation by the manufacturer, Empire Pacific Windows.

Everyone in the proceedings below acknowledged the fact that the contractor complied with his contract and installed the windows as represented. (See Exhibits 19 and 20) – consistent with industry practice. Respondent City went to great lengths to persuade the Board that the windows leaked and could not withstand certain testing procedures. Neither of which was relevant for the true matter at issue – are the Empire Pacific installation instructions in compliance with the Bothell code, if so the permit should have issued. Accordingly, the decision by the Board is a clearly erroneous application of the code to the facts and must be reversed.

D. The Board of Appeals Decision is not supported by substantial evidence. For the purpose of a review under the Land Use Petition Act (LUPA), “substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. Cingular Wireless, LLC v. Thurston County, 131 Wn.App. 756, 129 P.3d 300 (2006), amended on reconsideration. In this case, Appellants’ contended that the windows and door method of installation was an approved method of installation by Empire Pacific windows and that the windows and doors have not leaked or given any evidence of leakage since installation in 2008.

In response, the City submitted pictures of undocumented unidentified units and purported mold. However, the uncontested

testimony of Appellants' expert indicated that the mold was not from outside intrusion.ROP 73. Mr. Lawless testified that windows and blinds become moldy as a result of interior humidity when it condenses against a cold surface. ROP73. Mr. Lawless uncontroverted testimony also indicated that there was no sign of any leakage or exterior water intrusion. ROP 65,69,73 and 111.

The Respondent City attempted to undermine the proposed methodology during the Appeals hearing by suggesting that the old aluminum frames should have been left in place (See ROP 131), and because they were not, the installation would not comply with Empire's instructions. However, everyone involved in the hearing agreed that leaving the existing aluminum frames in place would not be a good idea. Mr. Lawless testified and Board Member Tinner agreed that leaving the existing aluminum frames in place would not have accomplished the thermal break characteristic required and would not have been a good idea. ROP 80-84.

Simply put where is the City's substantial evidence that the proposed method of installation did not comply with Empire Pacific's instructions. (See Exhibit #27). Accordingly, the Board's decision must be reversed.

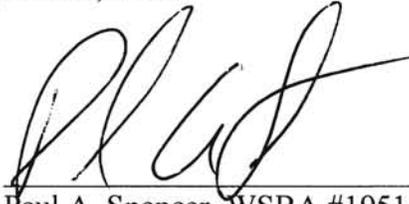
VI. CONCLUSION

In 2008 Appellants' spent in excess of \$40,000 to improve the efficiency and environment of the windows and doors of the Glen Grove apartments. The Appellants' contractor who was an approved contractor of Puget Sound Energy did not obtain a permit prior to installing the windows and doors at issue. Since that time, Petitioners have attempted to work with the City to obtain approval for the work performed. At each step of the way, they have met opposition from the City. The net result of which was the City's denial of the alternative material building permit for installation in the fall of 2011. A decision that was upheld by the Board of Appeals in April of 2012 and by Order of the Superior Court in March of 2013.

Appellants' respectfully request that the Board of Appeals decision be reversed, and that the Respondent City of Bothell be required to issue to Appellants the Building Permit for the Alternative Materials application submitted by the Appellants' in October of 2011. In the alternative, Appellants' respectfully request that the matter be remanded back to the Board of Appeals for further hearing or a new hearing wherein Mr. Delack is precluded from testifying and/or advising the Board on its authority and/or a determination as to: whether the stated method of installation

complies with the window and door manufacturers specifications.

Dated this 4th day of September, 2013.

A handwritten signature in black ink, appearing to read 'Paul A. Spencer', written over a horizontal line.

Paul A. Spencer, WSBA #19511
Attorney for Appellants

DECLARATION OF SERVICE

On this 4th day of September, 2013, I emailed and deposited into the United States Mail postage prepaid copies of the forgoing Appellants' Opening Brief to the following parties:

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In addition the original and one copy of the Appellants' Opening Brief was forwarded by messenger for filing with the Washington State Court of Appeals, Division I, at 600 University St., Seattle, Washington 98101.


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