IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SECURITY SERVICES NORTHWEST, INC., Appellant, v. JEFFERSON COUNTY, Respondent.	No. 38961-4-II UNPUBLISHED OPINION

HUNT, J. — Security Services Northwest, Inc. (SSNW) appeals the trial court's grant of summary judgment dismissal of its 42 U.S.C. § 1983 damages action and RCW 64.40 tortious interference claim against Jefferson County based on its land use enforcement actions. In a previous appeal involving the same facts, we held that the County committed no improper land use action and did not deny a land use right to SSNW. Holding that this previous decision precludes SSNW's claim for damages in the instant action, we affirm. We also grant the County's request for attorney fees on appeal.

FACTS

SSNW operates a security services training business on land zoned rural residential on

Discovery Bay in Jefferson County. When the County enacted a zoning code in 1992, its provisions for use of the land that SSNW had been leasing for its operations clashed with SSNW's ongoing business, particularly when SSNW expanded its operations to include a para-military training base with increased use of its firing ranges and other facilities.

Over the course of multiple public administrative hearings and actions in superior court and on appeal, it was determined that (1) although in conflict with the residential zone in which SSNW's business now operates, to a limited extent some of its current uses are legal continuations of previous uses,[1] including some intensifications of those uses; (2) some current uses are unpermitted illegal expansions of previous uses or new unpermitted uses; and (3) the County's land use enforcement actions were neither illegal nor did they deprive SSNW of any property or land use right. This appeal derives from SSNW's second superior court action, Kitsap Superior Court, Cause No. 07-2-00438-8, claiming damages for the County's stop work orders prohibiting these illegal uses and expansions.

I. First Appeal, LUPA[2]

We incorporate the following facts from our earlier unpublished opinion issued in the first

[1] "The evidence shows that the use prior to January 6, 1992, simply involved armed transport, installation and monitoring of security systems, and limited firearms training . . . ." CP at 74.

[2] "LUPA" is the acronym for the Land Use Petition Act, RCW 36.70C. LUPA provides the "exclusive means" of obtaining judicial review of "land use decisions," excluding review of local land use decisions "that are subject to review by a quasi-judicial body created by state law, such as . . . the growth management hearings board." RCW 36.70C.030(1)(ii). A "land use decision" is a final local determination on an "application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used," but not "applications for legislative approvals such as area-wide rezones or annexations." Former RCW 36.70C.020(1)(a) (Supp. 1995).

appeal, *Security Services Northwest Inc., v. Jefferson County*, noted at 144 Wn. App. 1002, 2008 WL 1723629, at *1[3]:

> [In 2005] Jefferson County issued stop work orders to Securities Services Northwest, Inc. (SSNW) after receiving several noise complaints and learning that SSNW had constructed several unpermitted buildings[4] and was conducting military special forces [weapons] training[5] on its property, which at the time was zoned as rural residential. SSNW appealed the [County's enforcement] orders to the County's hearing examiner, arguing that its activities were protected as a nonconforming use.

The hearing examiner disagreed, ruling that SSNW had no legal prior nonconforming use rights as of January 6, 1992, because SSNW had violated the building code when it constructed three new buildings without the required permits.[6] While awaiting the hearing examiner's ruling, the Jefferson County Superior Court granted the County's request for a temporary restraining order as well as preliminary injunction[7] against SSNW.

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[3] We acknowledge that GR 14.1 prohibits citing unpublished opinions as authority and that under RCW 2.06.040 they lack precedential value. Here, however, we merely quote facts from our previous opinion in this case, which involved the same parties and facts; we do not cite our previous unpublished opinion for precedential authority. Thus, we do not thwart these rules and objectives.

[4] On July 8, 2005, the County issued a stop work order for SSNW to cease using two new buildings that it had erected without the required building permits.

[5] On August 11, 2005, the County also issued a "Notice and Order" under the zoning code, forbidding SSNW from conducting training operations, including use of firing ranges. CP at 78.

[6] *See* page 2 of July 27, 2009 Hearing Examiner's Report and Decision on remand. Supplemental Clerk's Papers (SCP) at 1131.

[7] We note that although "[t]he modified injunction still permit[ted] the discharge of firearms for current employees," apparently "SSNW has not engaged in any firearms use on the property since [the injunction in Dec. 2005]." CP at 78.

SSNW filed a LUPA appeal in Kitsap County Superior Court,[8] asserting that the hearing examiner had erred in finding no prior legal nonconforming uses. The superior court ruled that (1) the County's land use enforcement actions were valid; (2) the hearing examiner had erred in denying that SSNW had established any legal prior nonconforming use[9]; and (3) by 1992, SSNW had established a limited nonconforming use by virtue of its predecessor's security services on the site. The superior court also ruled, however, that "most of the challenges raised by SSNW are without merit." CP at 73.

The superior court affirmed (1) the hearing examiner's "decision to uphold the County's stop work orders," CP at 73-74, concluding that "[t]he [h]earing [e]xaminer did not err in finding that the stop work orders were properly issued by the County," CP at 73, and that "proper procedure was followed by the County in its enforcement actions,"[10] CP at 73; and (2) the hearing examiner's ruling that SSNW had no legal nonconforming rights to use the property for its post-1992 expanded security services business.[11] In essence, the superior court found that the County's land use enforcement actions related only to SSNW's clearly illegal post-1992 activities,

[8] Kitsap Superior Court, Cause No. 06-2-00223-9.

[9] More specifically, the superior court ruled that the hearing examiner had erred "in finding that construction of the latrine, bunkhouse, and classroom without permits rendered all of SSNW's use of the property illegal." CP at 74.

[10] More specifically, the superior court found "that SSNW had constructed buildings without permits and that SSNW knew various permits were required but chose to wait to apply until faced with an enforcement action." CP at 74.

[11] As the hearing examiner found, this unlawful security services business component included "training activities and use of firearms and weapons on the property." CP at 428.

especially the erection of buildings without permits and on-site training of third parties.

The superior court remanded for another hearing to determine the scope of SSNW's nonconforming use as of January 6, 1992,[12] when the County enacted the zoning code that rendered SSNW's later uses illegal. The purpose of this hearing was to "establish the use which may be made of the property by SSNW following the Examiner's modified decision."[13] CP at 75. In the meantime, the superior court ordered that the temporary restraining order and the preliminary injunction would "remain in effect pending the Hearing Examiner's final decision." CP at 75. SSNW appealed.

Affirming the superior court on appeal, we similarly reversed the hearing examiner's decision that SSNW had no legal prior nonconforming use rights as of January 6, 1992. We also affirmed the superior court's ruling that SSNW had limited nonconforming use rights as of January 6, 1992, which were "properly limited to its pre-1992 activities."[14] We held that (1) "neither the hearing examiner nor the [superior] court erred in concluding that SSNW's current activities constituted an impermissible expansion of its pre-1992 uses,"[15] *Sec. Serv.*, 2008 WL

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[12] The superior court expressly limited the evidentiary hearing on remand as follows: "[N]o additional evidentiary hearings are to be held to explore whether SSNW's nonconforming use was lawfully expanded after January 6, 1992." CP at 73. It was this part of the superior court's order that we altered when we increased the scope of the remand hearing in our previous LUPA appeal opinion. Kitsap Superior Court, Cause No. 06-2-00223-9, order dated November 1, 2006; *Sec. Serv.*, 2008 WL 1723629, at *9.

[13] Again, the superior court did not find, nor does the record suggest, that the County's land use enforcement actions in any way impinged on SSNW's continuation of legitimate pre-1992 nonconforming activities.

[14] *Sec. Serv.*, 2008 WL 1723629, at *7.

[15] These impermissible expanded uses included: "military or para-military training of third parties"

1723629 at *7; and (2) "SSNW has not lost any vested property right." *Sec. Serv.*, 2008 WL 1723629 at *9.

We also noted, however, that the record was insufficient to show SSNW's activities as of 1992 and its subsequent potentially legal intensification of those previously existing activities. Expanding the scope of the trial court's remand order, we remanded for a new hearing "to determine the boundaries," *Sec. Serv.*, 2008 WL 1723629, at *9, of SSNW's nonconforming use rights and to "consider additional evidence on intensification of pre-1992 uses."[16]

II. New Hearing on Remand

On remand, the parties stipulated that SSNW's pre-1992 security services business included the following components as of January 6, 1992: armed and unarmed site security; armed and unarmed armored car security; armed and unarmed K-9 detection and tracking; security alarm installation, monitoring, and security response; dispatching services, including armed and unarmed security guards; security service training for employees; armed and unarmed land patrol; and armed and unarmed maritime patrol. The parties also stipulated that these pre-1992 security services activities used the old Gunstone farm house for offices, a conference room, and living accommodations but that three new buildings SSNW erected without permits in 2005

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on the property, which had not occurred before 1992 (as distinguished "from training SSNW's employees to provide private security services.") *Sec. Serv.*, 2008 WL 1723629, at *8.

[16] In issuing this remand order, however, nowhere in the opinion did we hold or even imply that the County's stop work orders affected any lawful activities SSNW conducted. On the contrary, as we note above, we clearly held that SSNW's 2005 activities affected by the County's land use enforcement actions were those that constituted an "impermissibl[e] expan[sion] of [its] pre-1992 uses." *Sec. Serv.*, 2008 WL 1723629, at *7.

to provide new accommodations were not preexisting nonconforming uses.[17]

On July 27, 2009, a new hearing examiner[18] ruled on remand that SSNW's pre-1992 nonconforming uses consisted of armed and unarmed site security, an armored car facility, K-9 detection tracking, patrol and maritime patrol, as well as security service training for employees, dispatching services and alarm installation and monitoring. The hearing examiner also ruled that since 1992, SSNW had lawfully intensified the following prior nonconforming uses: unlimited increase in the number of off-site employees, unlimited increase in the number of on-site administrative/monitoring employees not engaged in security guard activities or weapons training, a limit of 21 security personnel working on or from the site, and weapons training (firearms) of on-site security guard employees at one shooting range, use of gun ranges for on-site employee training, use of the Gunstone property to train off-site employees, helicopter landing for pre-1992 security services (such as transporting K-9 units and personnel to search for criminals or missing persons and to assist law enforcement/paramedics to transport injured citizens), and use of a dock for marine security training.

The hearing examiner further concluded that the following were either unlawful post-1992 expansions or uses that had not occurred before 1992: more than 18 armed and unarmed security personnel working on or from the site and needing weapons training; third-party use of or training at the shooting ranges;[19] and use of helicopters for training or surveillance. The hearing examiner

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[17] SSNW intended to submit "after the fact" permit applications for these buildings. SCP at 1134.

[18] The original hearing examiner had retired.

[19] The hearing examiner noted that any further increase in numbers would require a conditional use permit or the "nonconforming use permit expansion" process. SCP at 1135-36.

explained he could not rule, however, (1) on SSNW's requests that he vacate the County's 2005 stop work orders; (2) that SSNW's activities on the Gunstone property in 2005 were lawful, including training third parties and allowing military or para-military personnel to use the shooting ranges;[20] and (3) on whether all SSNW uses and activities could proceed without threat of future County enforcement action to stop them. The hearing examiner noted that these requests were "either beyond the jurisdiction of the Examiner or not consistent with the decision of the Court of Appeals," and that they amounted to "a second bite at the apple," requiring "reconsideration and rehearing of the entire case," essentially ignoring "the Court of Appeals' decision remanding the case for consideration of two limited issues." SCP at 1134.

III. Damages Action

On February 15, 2007,[21] however, before the remand for this new hearing, SSNW sued the County for alleged monetary damages based on 42 U.S.C. § 1983,[22] RCW 64.40.101, and tortious interference with a valid business expectancy.[23] SSNW asserted that the County's land use enforcement actions resulted in "loss of profit on the use of the land." CP at 894. The trial

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[20] *See* SCP at 1142. The hearing examiner noted that such use would require a conditional use permit or the nonconforming use expansion process.

[21] *See* CP at 1-19, CP at 878-895.

[22] The Civil Rights Act of 1871, 42 U.S.C.A. § 1983, provides a remedy for the violation of a person's constitutional rights by "any person acting under color of state law," including municipalities. *Crisman v. Pierce County Fire Protection Dist. No. 21,* 115 Wn. App. 16, 24-25, 60 P.3d 652 (2002).

[23] Kitsap Superior Court, Cause No. 07-2-00438-8. SSNW subsequently filed an identical complaint under Cause No. 08-2-01423-3 which the trial court disposed of at the same time it granted summary judgment. *See* CP at 970-987 and CP at 1117.

court granted the County's motion for summary judgment, ruling that collateral estoppel disposed of each of SSNW's claims "in light of the previous rulings" in the County's favor in SSNW's prior LUPA action and appeal. Verbatim Report of Proceedings, VRP (Feb. 6, 2009) at 23,[24] CP at 1116.

SSNW appeals.[25]

ANALYSIS

The threshold issue is whether the trial court erred granting summary judgment dismissal of SSNW's damages action against the County. We hold that the trial court did not.

We previously held that the County did not act improperly in enforcing its zoning code when it issued stop work orders in 2005 and that these enforcement actions did not violate any vested land use rights SSNW held. Therefore, there was no wrongful County action for which SSNW can claim damages. Because we previously upheld as legal the same County land use enforcement actions that SSNW now asserts as grounds for its damages claim, SSNW is collaterally stopped from seeking damages.

The doctrine of collateral estoppel bars re-litigation of issues that have already been determined in a prior judicial forum. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). In SSNW's previous LUPA appeal,[26] involving the same parties, the same

[24] The trial court further noted, "I see all the elements of collateral estoppel present in light of the previous rulings that have been made. And the tortious interference with business expectancy is sufficiently connected with the underlying issues in this case that collateral estoppel is the appropriate remedy." VRP (Feb. 6, 2009) at 23.

[25] SSNW does not appeal dismissal of its RCW 64.40 claim. *See* Br. of Appellant at 30.

[26] Kitsap Superior Court, Cause No. 06-2-00223-9.

activities, the same property, and the same County land use enforcement actions at issue here, we held that the County acted properly in limiting SSNW's nonconforming use to its pre-1992 activities and that, in so doing, the County did not harm SSNW.[27] Thus, as a matter of law, the County is not responsible for any harm SSNW alleges it suffered as a result of the County's land use enforcement in this case. We hold, therefore, that the trial court did not err in granting summary judgment to the County and in dismissing SSNW's damages action.

ATTORNEY FEES

The County requests attorney fees under RAP 18.9(a).[28] The County argues that SSNW's appeal is frivolous and that, "[i]n view of the factual and legal determinations previously made by this Court in [its prior opinion], this appeal is devoid of merit and there is no reasonable possibility of reversal." Br. of Resp't at 50 (citing *Childs v. Allen*, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), *rev. denied*, 155 Wn.2d 1005 (2005)). We agree.

RAP 18.9(a) authorizes an award of compensatory damages against a party who files a

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[27] We acknowledge that the prior LUPA appeal, Kitsap Superior Court, Cause No. 06-2-00223-9, did not involve whether there was *actionable* harm. Nevertheless, our holding of no harm in the previous LUPA appeal implies no actionable harm in the context of this second, damages appeal, especially in light of the law that "it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct" in order to grant relief under LUPA. RCW 36.70C.130(2), cited by the superior court in its order entered in the LUPA action. CP at 72.

[28] RAP 18.9(a) provides, in pertinent part:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

frivolous appeal. *See e.g., Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999), *review denied,* 138 Wn.2d 1022 (1999). An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, *Kearney*, 95 Wn. App. at 417 (citations omitted), and the appeal is so devoid of merit that there is no reasonable possibility of reversal. *Matheson v. Gregoire,* 139 Wn. App. 624, 639, 161 P.3d 486 (2007). Having already decided issues adversely disposing of SSNW's claim for damages, we hold that the instant appeal is frivolous. Therefore, we award the County attorneys fees under RAP 18.9(a).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, PJ.

We concur:

Houghton, JPT.

Quinn-Brintnall, J.