IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALEXANDER MACKENZIE, LLC d/b/a THE INN AT SALTAR'S POINT; JACK AND JOANNE BRAKE, Appellants, v. TOWN OF STEILACOOM, Respondent.	No. 40277-7-II UNPUBLISHED OPINION

Armstrong, J. — Alexander Mackenzie, LLC, doing business as The Inn at Saltar's Point (Inn), appeals the superior court's denial of its action under the Land Use Petition Act (LUPA), chapter 36.70C RCW, against the Town of Steilacoom. The superior court affirmed the Steilacoom town council's denial of the Inn's request to amend a conditional use permit to allow the Inn to operate a conference center in conjunction with its bed and breakfast. We affirm and award the Town attorney fees on appeal.

FACTS

Jonathan and Joanne Brake, doing business as Alexander Mackenzie, LLC, are property owners in the Town of Steilacoom. Their property is zoned R-7.2, a classification intended for higher-density residential use of property. Steilacoom Municipal Code (SMC) 18.12.020(A).

The Brakes built the Inn on their property, next door to their residence. The Inn consists of two guest suites on the second floor above a kitchen and a conference room, and it has 12 off-street parking spaces.[1] The conference room has a 24-person capacity.

[1] Some reports describe 10 parking spaces, but the appellants refer to 12 in their briefs.

In 2006, the Inn sought a conditional use permit to operate as both a bed and breakfast and conference center. The council considered the requests separately and approved the conditional use permit for the bed and breakfast but denied it for the conference room. The council concluded that the conference room was inconsistent with the purposes of the zoning district as well as the comprehensive plan and that it could not approve a use that was not listed in the applicable regulations.

A year later, the Brakes sought an amendment to the approved conditional use permit, again requesting permission to operate the conference room. The Brakes initially sought approval of the conference room as a separate business, but when informed that they could operate only one business on their property, they revised the Inn's proposal to include the conference room as part of the bed and breakfast. The proposal stated that the conference room would be available to community members as well as bed and breakfast guests.

The town planner informed the council that it would have to either reverse its earlier findings or amend the zoning code to allow the conference room. The council declined to take either step and denied the Inn's application to amend its conditional use permit, concluding that the proposed use at the proposed location was inconsistent with the town's zoning ordinances and was not a permitted use in the R-7.2 zoning district. After the council denied the Inn's motion for reconsideration, the Inn brought this action against the Town. The superior court dismissed the Inn's LUPA petition with prejudice after concluding that a conference room was inconsistent with the enumerated uses allowed in the R-7.2 zoning district as well as the district's intent.

ANALYSIS

I. Standard of Review

LUPA is the exclusive means for judicial review of land use decisions with a few exceptions. RCW 36.70C.030; *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 854, 175 P.3d 1050 (2008). Under LUPA, we review the land use decision on the basis of the administrative record rather than the superior court's record or decision. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 125, 186 P.3d 357 (2008). The party seeking relief from a land use decision must establish one of the errors set forth in RCW 36.70C.130(1). The Inn claims error under the first three statutory grounds:

> (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 law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in context with the entire record before the court;
> …

Appellant's Br. at 11-12. The burden of establishing error remains with the petitioning party on appeal. *Tahoma Audubon Soc'y v. Park Junction Partners*, 128 Wn. App. 671, 681, 116 P.3d 1046 (2005). Subsections (a) and (b) present questions of law that we review de novo. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Subsection (c) concerns a factual determination that we review for substantial evidence. *Cingular Wireless*, 131 Wn. App. at 768.

II. Failure to Follow Prescribed Process

The Inn argues that the council ignored required procedure by denying its application without considering the impact mitigation factors in SMC 18.28.020(1) and (4). SMC 18.28.020(1) provides that

> [a] conditional use may be approved by the Town Council when the findings required by this title are made. A request for a conditional use permit may be denied only if the expected impacts cannot be mitigated by assigned conditions.

The ordinance then sets forth nine nonexclusive evaluation criteria to be considered "in any review of an application for a conditional use permit." SMC 18.28.020(4).

The Inn's argument that the council erred in failing to consider these criteria and the possibility of impact mitigation overlooks the initial sentence of the ordinance: "The purpose of the conditional use permit is to assign conditions to otherwise permitted uses which mitigate potential impacts on the community." SMC 18.28.020. Because the council concluded that a commercial conference room is not a permitted use in a residential zone, it could not grant a conditional use permit even if it considered mitigating conditions. Moreover, a staff report discussed the mitigating factors outlined in SMC 18.28.020(4) in the event the council decided to allow the conference room, and the Inn provides no support for its allegation that the council did not consider the report. In the end, however, the Inn does not demonstrate that the council failed to follow prescribed procedures in evaluating the impact of a conditional use. It found that no such conditional use was permissible, regardless of mitigation.

III. Substantial Evidence

In a related claim of error, the Inn contends that substantial evidence does not support the council's decision because it did not refer to a single issue required for consideration under SMC 18.28.020(4) in its findings and conclusions. The council's conclusions reveal, however, that no evidentiary support was necessary for its decision. The council concluded that the proposed use was not permitted in the R-7.2 zoning district, that the purpose of a conditional use permit is to assign conditions to an otherwise permitted use that will mitigate the potential impacts of that proposed use on the community, and that because a commercial conference room is not a permitted use in a residential zone, a conditional use permit could not be granted.

Although its analysis is not determinative, the superior court recognized that review of the evidence was not required if the conference room was not a permitted use in the first instance: "[I]f I'm understanding the analysis here, you never get to analyzing the nine criteria for determining whether or not to grant a conditional use permit because it's not within the list [of conditional uses]." Report of Proceedings (RP) at 42. In its final conclusions, the court recognized that the claim of error under RCW 36.70C.130(1)(c) would apply if the council went beyond an interpretation of the zoning code to the nine factors for a conditional use permit and actually applied the law to the facts. "They did not, so there isn't a substantial evidence test before the Court[.]" RP at 76. The Inn's real complaint is with the council's interpretation of its code, which we address below.

IV. Erroneous Interpretation of the Law

The Inn argues here that the council misinterpreted the zoning provisions of the Steilacoom Municipal Code in denying its application for an amendment to its conditional use permit.

Courts interpret local ordinances the same as statutes. *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). We apply unambiguous ordinances according to their plain meaning and construe only ambiguous ordinances. *Griffin*, 165 Wn.2d at 55; *Milestone Homes, Inc.*, 145 Wn. App. at 126. We construe zoning ordinances as a whole and reject any unreasonable construction. *State v. City of Bellingham*, 25 Wn. App. 33, 36, 605 P.2d 788 (1979). Our goal in construing zoning ordinances is to determine legislative purpose and intent. *Milestone Homes, Inc.*, 145 Wn. App. at 126.

The Inn argues that if an ordinance is ambiguous, it must be interpreted in favor of the property owner, citing *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). In *Sleasman*, however, the ordinances in question were unambiguous; the court's discussion of the consequences of ambiguity was dictum. *See Milestone Homes, Inc.*, 145 Wn. App. at 127-28 (discussing questionable basis for *Sleasman* deference standard). LUPA requires courts to defer to an agency's construction of an ambiguous law. *See* RCW 36.70C.130(1)(b); *Tahoma Audubon Soc'y*, 128 Wn. App. at 682.

As stated, the council denied the Inn's application for an amendment to its existing conditional use permit on the grounds that a conference room was inconsistent with the purposes of Steilacoom's zoning ordinances and was not a permitted use in the R-7.2 residential zoning

district. SMC 18.12.020 initially sets forth the general intent of residential zoning districts, stating that

> [t]he comprehensive plan contains several housing related goals and policies which include preserving the predominantly single family character of the town, allowing short term lodging, group care facilities, accessory dwelling units and similar nontraditional housing units and providing for home occupations in residential neighborhoods.

The ordinance then describes the intent of the R-7.2 residential zoning district:

> The R-7.2 residential zoning district is intended to create a desirable living environment for a wide variety of family and housing types. The smaller lot size of this district reflects the higher density residential pattern of the early plats. . . . Accessory structures and uses, including home occupations, which are incidental and not detrimental to the residential environment are also provided for by this zone.

SMC 18.12.020(A).

SMC 18.12.030 then specifies the permitted uses in residential zoning districts: "Permitted uses within residential districts shall be as described in the following table. Conditional uses require a conditional use permit." Principal uses permitted in the R-7.2 zoning district include single family homes; secondary uses include accessory structures and home occupations; and the conditional uses listed are assisted living facilities, bed and breakfasts, day care centers, class II boarding houses, halfway houses, and group care facilities. SMC 18.12.030. The code otherwise defines a secondary use as "a use of property or of a building or portion thereof customarily incidental and subordinate to the principal use of the land or building," and it defines a conditional use, in part, as "a use allowed in one or more zones as defined by this title." SMC 18.08.920(F), (B).

The council denied the Inn's request for a conditional use permit amendment because

conference rooms are not included within the list of conditional uses allowed within an R-7.2 zoning district and because commercial conference rooms do not fit within the intent of that zone to "create a desirable living environment for a wide variety of family and housing types." SMC 18.12.020(A). The Inn makes a number of arguments in challenging the council's interpretation of the relevant ordinances.

a. Conference Room as Secondary Use

The Inn argues that its conference room is a permissible secondary use because the scope of secondary uses allowed within the R-7.2 zone is broader than the conditional uses allowed. As support, it cites allegedly inconsistent language in SMC 18.12.030 and SMC 18.08.920(B). SMC 18.12.030 states that permitted uses within residential districts "shall be as **described**" in the table provided, while SMC 18.08.920(B) states that a conditional use means a use "as **defined** by this title." (Emphasis added.) According to the Inn, use of these different words implies a different meaning. *See Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (where legislature uses certain language in one instance but different language in another, a difference in legislative intent is presumed). The Inn argues that the word "defined" implies an exclusive set of uses, while the word "described" implies a nonexclusive set of uses.

This argument is not persuasive given the list of permitted secondary uses in SMC 18.12.030, which clearly reads as an exclusive list. *See State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (the express inclusion of some implies the intentional omission of others). The code's rules of interpretation specify that the word "shall," as used in the phrase "shall be as described" in SMC 18.12.030, is mandatory. SMC 18.04.050(d). If a landowner could pursue

any commercial end in R-7.2, it is difficult to know what purpose the ordinance's list of specific uses would serve. *See Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes should be construed so that all language is given effect with no part rendered meaningless). And, even if the word "described" creates ambiguity, we defer to the council's resolution of that ambiguity. *See Tahoma Audubon Soc'y*, 128 Wn. App. at 682.

In a related argument, the Inn contends that a conference room is a permitted secondary use in an R-7.2 residential district because the code's definition of secondary uses as "customarily incidental and subordinate to the principal use of the land or building" authorizes many uses not listed in SMC 18.12.030. SMC 18.08.920(F). As support, the Inn cites case law providing that a secondary use is allowed even if not expressly permitted within a given zone.

The first case the Inn cites is *Ancich v. Turner*, 35 Wn. App. 487, 667 P.2d 1112 (1983), where property owners successfully challenged the reclassification of their timber land from "Forest Land" to "General Use" after they built a home on it. Their success was due to the statutory definition of forest land as land "'primarily devoted to and used for growing and harvesting timber.'" *Ancich*, 35 Wn. App. at 489 (quoting former RCW 84.33.100(1) (2001)). A forester's cottage was a valid secondary use because the legislature chose to require that the land be "primarily," rather than "exclusively," devoted to growing and harvesting timber. *Ancich*, 35 Wn. App. at 489. "The cabin . . . has not altered the character of the area. . . . The dwelling is incidental to the Anciches' primary use of their property--growing and harvesting timber." *Ancich*, 35 Wn. App. at 489.

The Town responds that unlike the statute in *Ancich*, Steilacoom's code provides an

exclusive list of secondary uses that are permitted within the R-7.2 zoning district. To the extent that the Inn seeks to fit a conference room within those uses, the only use that might qualify is that of an "accessory structure." SMC 18.12.030. Accessory structures include "carports, garages, greenhouses, storage units and other small buildings customarily incidental and subordinate to a principal residential, commercial, industrial or public/quasi public use." SMC 18.16.010(B). Even if a 24-person capacity conference center could be viewed as "customarily incidental and subordinate" to a two-room bed and breakfast, a separate ordinance limits a bed and breakfast's accessory structures "to those customarily found at single family residences." SMC 18.16.010(B), .060(d)(10). The Inn repeatedly points to SMC 18.16.060(d)(9), which provides that "[n]o outdoor events, such as weddings, receptions or parties, shall be held at a bed and breakfast inn located in a residential zoning district," and argues that because there is no similar restriction on indoor events, it reasonably assumed that an indoor conference was permitted. The Inn makes no reference to subsection (10) and does not argue that a commercial conference room is a structure customarily found at a single family residence.

The Inn attempts to bolster its argument that a conference room is a permissible secondary use by citing *Tahoma Audubon Society*, 128 Wn. App. at 674-75, where we upheld a hearing examiner's decision authorizing the development of a conference room in conjunction with a 270-room lodge. The analysis turned on Pierce County code provisions, but we also made the general observation that the conference center was a secondary occupancy of the lodge. *Tahoma Audubon Soc'y*, 128 Wn. App. at 685. Contrary to the Inn's argument, this language is not compelling where the "primary occupancy" is a two-room bed and breakfast. The primary uses in

Tahoma Audubon Society and in this case are too disparate to compel the conclusion that a secondary use for one is a secondary use for the other. Moreover, any such conclusion would ignore the limitation on a bed and breakfast's secondary uses in SMC 18.16.060(d)(10).

The Inn also cites *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1258 (D.C. Ct. App. 2000), where the court upheld a zoning adjustment board's decision allowing a nine-room bed and breakfast to host guest-sponsored social events as an accessory use. The bed and breakfast was the proprietor's residence and located in a zone "permitting the widest range of urban residential development and compatible institutional and semi-public buildings." *Dupont Circle*, 749 A.2d at 1259. The controlling regulations listed specific accessory uses and permitted other accessory uses customarily incidental to those uses. *Dupont Circle*, 749 A.2d at 1262. Given this language, the court held that accessory uses could be stacked, and it also concluded that substantial evidence supported the board's finding that a limited number of guest-sponsored social events would constitute a truly accessory use of the bed and breakfast. *Dupont Circle*, 749 A.2d at 1263.

We see several distinctions between *Dupont Circle* and the present case. Here, the relevant zone is strictly residential. There is no provision for stacking accessory uses; indeed, the code provides that only one home occupation is permitted in any dwelling unit. SMC 18.16.050(D)(11).[2] Furthermore, the social events allowed in *Dupont Circle* were found to be truly accessory to the operation of the bed and breakfast. Even if Steilacoom's specific restrictions on secondary uses in residential districts and bed and breakfasts are ignored, the general definition of a secondary use requires that it be customarily incidental and subordinate to a

[2] The Inn describes itself as an existing Class II Home Occupation Business.

building's principal use. SMC 18.08.920(F). As the superior court observed, "[A] conference room would be incidental to a hotel; it would be incidental to some type of a housing facility that was very large, but not to a two-guest room bed and breakfast." RP at 81-82.

The Inn also argues that the conference room would qualify as a home occupation. The bed and breakfast already qualifies as a home occupation, however, and there can only be one home occupation per dwelling. SMC 18.16.050(D)(11). Furthermore, the conference room does not appear to fit within the scope of a home occupation, which "shall be customarily incidental or secondary to the primary residential use, and shall not detract from a neighborhood's residential character." SMC 18.16.050(A). As the town planner observed in recommending denial of the Inn's motion for reconsideration, "[h]ome occupations are listed secondary uses in residential zones; conference rooms are not listed at all. . . . The Brake conference room is designed to attract customers, rather than be a secondary use of a residential property." Clerk's Papers (CP) at 222. Even if the bed and breakfast, rather than the Brakes' residence, qualifies as the primary residential use, the proposed conference center is not an occupation customarily incidental or secondary to such residential use.[3]

b. Absurd Results

Courts must construe statutes to avoid strained or absurd results. *Tahoma Audubon Soc'y*, 128 Wn. App. at 682. The Inn argues that the Town's interpretation of the code to disallow any structure that is not expressly allowed leads to absurd results and would prohibit conference rooms within Steilacoom because they are not listed anywhere within its zoning code.

[3] It is doubtful that the bed and breakfast qualifies as a primary use in the R-7.2 zone; the only primary use that is remotely relevant is a single family home (i.e., the Brakes' personal residence). SMC 18.12.030.

The Inn asserts that despite this omission, the Town operates two conference centers. The absurd result, according to the Inn, is that the Town is the only entity in Steilacoom with such operational authority.

It is true that conference centers are nowhere listed within the zoning code. Steilacoom's conference centers, however, are located within the public and quasi-public zoning district. SMC 18.12.070. The purpose of this district, in part, is "to provide for publicly and privately owned and operated facilities and buildings that provide for the cultural, historical, educational, religious and public service needs of the community." SMC 18.12.070. The principal uses allowed within the district include primary public facilities, which are defined as public facilities that serve residents within and beyond the surrounding neighborhood. SMC 18.12.070; SMC 18.08.730(A). "Examples include governmental buildings, schools, . . . and libraries." SMC 18.08.730(A). This reference to examples contrasts sharply with the more limited definitions of most uses permitted within residential zoning districts and implies that a broader range of uses is permitted within the public zone. *See Millay*, 135 Wn.2d at 202 (where legislature uses different language, a difference in intent is presumed). The different purposes that the residential and public zoning districts serve also supports the conclusion that different uses are intended. As the town planner observed, "A community center with meeting rooms in the Public/Quasi-public zone is a very different thing than a bed and breakfast with a meeting room in a residential zone." CP at 222.

The Inn further argues that the council's interpretation of its zoning ordinances is not entitled to deference because its interpretation has not been consistent. *See Cowiche Canyon*

Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (to support its interpretation of an ambiguous ordinance, executive body must show an adoption of its interpretation as a matter of agency policy). The Inn argues here that the council's reasons for denying its application in 2008 were different from its reasons supporting the 2006 denial and that the necessary pattern of enforcement is missing.

Even if we assume that the ordinances at issue are ambiguous, we find no inconsistency in the council's 2006 and 2008 decisions. In 2006, the council concluded that the conference room was inconsistent with the purposes of the zoning district as well as the comprehensive plan and that it could not approve a use that was not listed in the applicable regulations. In 2008, it concluded that the proposed use at the proposed location was inconsistent with the town's zoning ordinances and that a conference room was not a permitted use in the R-7.2 zoning district. These conclusions are entirely consistent and support the presumption of deference to which the council is entitled.

V. Appearance of Fairness

The Inn contends that the council's refusal of its request to operate a conference room appears to promote unfair competition and an unlawful monopoly because the only conference rooms permitted in Steilacoom are operated by the Town. *See Chrobuck v. Snohomish County*, 78 Wn.2d 858, 869, 480 P.2d 489 (1971) (members of planning commission must be "open minded, objective, impartial and free of entangling influences or the taint thereof").

The Town responds that the Inn knew when it applied for the conditional use permit amendment that Steilacoom operates the only existing conference centers and that the Inn waived

this issue by not raising it before the council reached its decision. *See* RCW 42.36.080 (where the basis for alleging violation of appearance of fairness doctrine is known or should have been known before the issuance of a decision and is not raised, it may not be relied on to invalidate the decision). The Town also points out that the appearance of fairness applies to administrative tribunals acting in a quasi-judicial capacity when the agency has used procedures that create the appearance of unfairness or when one or more members has apparent conflicts of interest that create an appearance of unfairness. *Faghih v. Wash. State Dep't of Health*, 148 Wn. App. 836, 842, 202 P.3d 962, *review denied*, 166 Wn.2d 1025 (2009). A party claiming an appearance of fairness violation must present specific evidence of a violation, not speculation. *Faghih*, 148 Wn. App. at 843.

The Inn argues that the council's decision is "shocking, unreasonable, and an abuse of municipal authority." Br. of Appellant at 28. These and similar allegations, which are made against the council as a whole and not against any member in particular, are unsupported by specific evidence that would support a finding of partiality. We reject the claim that the council's decision implicates the appearance of fairness doctrine.

VI. Incomplete Transcript

The Inn further contends that because the Town did not include a transcript of the public hearing in the administrative record, the council's decision is void. As support, it cites *South Capitol Neighborhood Ass'n v. City of Olympia*, 23 Wn. App. 260, 595 P.2d 58 (1979), where we invalidated a land use decision because the administrative record lacked a verbatim transcript of a public hearing: "[I]t is incumbent upon the agency passing upon the rezone application to

compile and make available for review a verbatim record of the hearings before it, as well as the planning commission, or the rezone will be void." *S. Capitol Neighborhood Ass'n*, 23 Wn. App. at 264.

The Town responds that this issue is waived because the Inn raised no objection when the Town informed the superior court that it had submitted the whole record. The Town also points out that LUPA has shifted the responsibility for providing a verbatim transcript from the agency to the petitioner. RCW 36.70C.110(1) provides that the local jurisdiction shall submit a certified copy of the record for judicial review of the land use decision, "except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter." If the parties agree, the record shall be shortened to avoid reproduction and transcription of portions that are duplicative or not relevant to the issues before the court. RCW 36.70C.110(2).

Thus, under RCW 36.70C.110, the Inn is responsible for the claimed deficiency in the record. And, where the Inn implicitly agreed below that the record was complete without the transcript, it is not now entitled to relief based on an incomplete record.

VII. Attorney Fees on Appeal

The Inn asserts that it is entitled to costs and fees on appeal under RCW 4.84.185 because the Town's defense of the council's land use decision is frivolous. Our decision shows that the Town's defense is not frivolous.

The Town seeks fees on appeal under RCW 4.84.370, which provides that reasonable fees and costs shall be awarded to the prevailing party on appeal "of a decision by a county, city, or

town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use . . . or similar land use approval or decision." RCW 4.84.370(1). The county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal. RCW 4.84.370(2). Parties thus are entitled to attorney fees if a town's decision is rendered in their favor and at least two courts affirm that decision. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005). "[P]arties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful before the superior court." *Habitat Watch*, 155 Wn.2d at 413. We grant the Town's request for fees on appeal.

Affirmed.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.