IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILLIAM H. DAVIS, JAMES F. BENTHIN, DEAN FOWLER, MARY PRINCE and NATALIE HILDERBRAND,	)	**No. 29204-5-III**
Appellants,	)	**Division Three**
v.	)	
CITY OF SPOKANE, a municipal corporation, and KONSTANTIN VASILENKO, an individual,	)	
Respondents.	)	**UNPUBLISHED OPINION**

Sweeney, J. — The appellants here challenge a hearing examiner's decision granting a conditional use permit to a landowner for the development of a cottage housing project in a single family residential neighborhood. We conclude that the city hearing examiner's decision to allow the development is well supported by fact and law. We, therefore, affirm the superior court's order affirming that decision and award attorney fees and costs to the respondents.

FACTS

Konstantin Vasilenko owned and wanted to develop five parcels of vacant property in an area zoned residential single family (RSF) on the south hill in Spokane, Washington. He first applied to rezone the property for multi-family housing. The City of Spokane (City) denied that application. He now proposes to develop a 24-unit cottage housing project on the property. At a pre-development conference in September 2008, the City recommended that Mr. Vasilenko aggregate his five parcels "to accommodate the flow of vehicles and stormwater passing from one parcel to the next." Administrative Record (AR) at 196. Mr. Vasilenko took that advice and requested a boundary line adjustment aggregating the five parcels into three parcels of 1.028 acres, 1.072 acres, and 10,219 square feet. The City granted the boundary line adjustment request on February 16, 2009.

Mr. Vasilenko's two one-acre lots are burdened by a City-owned utility easement and a City-owned right-of-way to a vacated portion of 34th Avenue that prevents lot owners from accessing Southeast Boulevard (the street bordering the lots to the north). The third lot is encumbered by a City-owned right-of-way to 34th Avenue for a Cook Street cul-de-sac.

On March 9, Mr. Vasilenko applied for a conditional use permit to develop the

cottage housing project on his two one-acre lots. He submitted his boundary line adjustment certificate and detailed site plans along with his general application to the City. He then notified neighborhood residents and homeowners of his development plan. Several neighborhood residents opposed the project.

The city planner granted Mr. Vasilenko a conditional use permit on May 8. The neighborhood residents led by William Davis (collectively, the Neighbors) appealed the decision to the City hearing examiner. The Neighbors also challenged the decision to adjust the boundary line. They argued that the conditional use permit allowed too many units, and asserted that the City-owned utility easement and rights-of-way made site development impossible. The Neighbors also maintained that the development was not suitable for the neighborhood, would increase traffic, and would reduce property values.

The appeal proceeded to hearing. City of Spokane Hearing Examiner Greg Smith entered findings and conclusions affirming the city planner's decision. The hearing examiner concluded that the boundary line adjustment was proper. He interpreted Spokane Municipal Code (SMC) 17C.110.350 as permitting the development of up to 12 cottage houses on property of a half-acre or larger in the RSF zone. And he found nothing that prohibited development of a 24-unit cottage housing project on two adjacent one-acre parcels. The hearing examiner also found that the City's easement and right-of-

way would not adversely affect the proposed development, that the increased traffic created by the development would not significantly impact traffic in the neighborhood, and that no evidence showed the proposed development would adversely affect property values.

The Neighbors appealed to the superior court and challenged the hearing examiner's findings and conclusions. The superior court affirmed and declined to stay the hearing examiner's decision pending appeal in this court. The Neighbors appeal.

DISCUSSION

Whether Appeal is Moot

Mr. Vasilenko and the City contend that the Neighbors' appeal is moot because the court's order was not stayed and the cottage housing project is now under construction. The failure to secure a stay of an appealed land use decision, however, does not render the appeal moot. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).

Whether Collateral Estoppel Bars Mr. Vasilenko's Conditional Use Permit Application

The Neighbors contend that Mr. Vasilenko should be collaterally estopped from applying for a conditional use permit to build "a unified multi-family rental development" in a RSF zone because the City has already denied his request to rezone his property for

multi-family use. Appellants' Br. at 3, 6. Collateral estoppel is an issue we generally review de novo. *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228 (2009). But the Neighbors did not raise it at the administrative level. And it is not an issue that can be raised for the first time on appeal. *Id.* The doctrine does not apply here in any event.

Collateral estoppel bars relitigation of identical issues where there has been a final judgment on the merits, the party against whom the plea is asserted was a party to or in privity with a party to the prior adjudication, and application of the doctrine does not work an injustice on the party against whom the doctrine is to be applied. *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001). There is no evidence that the parties ever litigated the rejection of Mr. Vasilenko's rezone application. Even if they did, the issues involved in the rezone application are different from the issues involved here. The issues here turn on the propriety of a conditional use permit. It is apparently undisputed that Mr. Vasilenko unsuccessfully attempted to rezone his property to build an apartment complex. Mr. Vasilenko, however, is no longer trying to develop an apartment complex. He wants to develop cottage housing.

The Neighbors characterize Mr. Vasilenko's cottage housing project as a multi-family development. A "multi-family residential building" is "[a] common wall dwelling

or apartment house that consists of three or more dwelling units." Former SMC 17A.020.130(M) (2007). Mr. Vasilenko's proposed cottages are not multi-family residential buildings. They are cottage housing, "[a] grouping of individual structures where each structure contains *one dwelling unit*." Former SMC 17A.020.030(AD)(1) (2007) (emphasis added); *accord* AR 147-48. And "[c]ottage housing is allowed . . . in . . . RSF zones." SMC 17C.110.350(C). Mr. Vasilenko, then, is not collaterally estopped from applying for a conditional use permit to develop cottage housing on his RSF-zoned property.

Standard of Review—Land Use Petition Act, Chapter 36.70C RCW

We now turn to the Neighbors'substantive challenges to the hearing examiner's decision. We, like the superior court, review the record developed by the hearing examiner when we review a land use decision. *Pinecrest Homeowners Ass'n*, 151 Wn.2d at 288; RCW 36.70C.120(1). The Neighbors contend that the hearing examiner's decision was based on an erroneous interpretation of the law, was not supported by substantial evidence, and involved a clearly erroneous application of the law to the facts. *See* RCW 36.70C.130(1) (setting forth standards for granting relief). The Neighbors bear the burden of showing that they have met any or all of these standards to obtain relief from the hearing examiner's decision. *Pinecrest Homeowners Ass'n*, 151 Wn.2d at 288;

RCW 36.70C.130(1).

Whether Hearing Examiner Erroneously Interpreted SMC 17C.110.350

The Neighbors argue that the hearing examiner misinterpreted SMC 17C.110.350 (the cottage housing ordinance) when he concluded that each cottage need not be individually owned and owner occupied. We review de novo any claimed error of law in the hearing examiner's interpretation of city ordinances and accord deference to his expertise in this area of the law. *Pinecrest Homeowners Ass'n*, 151 Wn.2d at 290.

The cottage housing ordinance does not expressly state that cottage houses must be owner occupied. The Neighbors would, nonetheless, have us imply such a requirement from the ordinance's provision for a homeowners' association. The ordinance says "[a] homeowners' association is required to be created for the maintenance of the open space, parking area and common use buildings." SMC 17C.110.350(C)(2). The Neighbors maintain that the proposed development can have no homeowners' association if Mr. Vasilenko is the sole owner of the development. We disagree.

A "homeowners' association" is "[a]ny combination or group of persons or any association, corporation or other entity that represents homeowners residing in a short subdivision, subdivision or planned unit development. A homeowners' association shall be an entity legally created under the laws of the State of Washington." SMC

17A.020.080(N). We do not read any limitation or requirement in this definition that would prevent Mr. Vasilenko from setting up a legal entity with just one person to represent and maintain his cottage housing development. And we will not read such a requirement into the ordinance. *Plouffe v. Rook*, 135 Wn. App. 628, 633, 147 P.3d 596 (2006). The hearing examiner properly interpreted the cottage housing ordinance as not requiring that cottages in this development be individually owned and owner occupied.

Whether Hearing Examiner Misapplied SMC 17C.110.350 (Cottage Housing Ordinance)

The Neighbors assert that the hearing examiner misapplied the cottage housing ordinance by approving Mr. Vasilenko's development plan even though the 24 cottage houses he plans to build have not been platted, segregated, assigned individual legal descriptions, or designed with setbacks. To overturn the hearing examiner's decision, we must be convinced that the decision is clearly erroneous. *Chinn v. City of Spokane*, 157 Wn. App. 294, 298, 236 P.3d 245 (2010) (clearly erroneous application test). And we find no mistake here for three reasons.

First, a fundamental concept of cottage housing is that "[t]he land underneath the structures is not divided into separate lots." Former SMC 17A.020.030(AD)(1) (defining "Cottage Housing"). In fact, the cottage housing ordinance specifically forbids subdividing a cottage housing development: "Cottage housing . . . shall not be allowed as

[a] small lot subdivision."[1] SMC 17C.110.350(D)(7)(c). The cottage housing ordinance, then, does not require platting or segregation. And a person needs an approved plat, binding site plan, or short plat only if he wants to divide a parcel of land into two or more lots. SMC 17G.010.100(2). Mr. Vasilenko is not seeking (or allowed) to divide or segregate his parcels. So he is not required to satisfy platting and subdivision laws (e.g., chapter 58.17 RCW (Plats—subdivisions—dedications)).

Second, the cottage housing ordinance does not require that a site plan include legal descriptions for each cottage house. SMC 17C.110.350(C)(1).

And, third, Mr. Vasilenko complied with the cottage housing ordinance's application requirements for setbacks. *See* SMC 17C.110.350(D)(7). He had to submit a site plan *depicting* setbacks and compliance with the setback requirements (among other things) to be eligible for a conditional use permit. SMC 17C.110.350(C)(1). The ordinance's setback provisions require that all structures in a cottage housing development be at least 10 feet apart, an average of 10 feet but not less than 5 feet from a property line, and not less than 15 feet from a public street. SMC 17C.110.350(D)(7)(a)-(b). Mr. Vasilenko's enlarged site plans depict compliance with these requirements. AR

[1] A "subdivision" is "[a] division or redivision of land into ten or more lots, tracts, or parcels for the purpose of sale, lease, or transfer of ownership (RCW 58.17.020)." SMC 17A.020.190(CB).

at 147-48. The hearing examiner, then, did not misapply the cottage housing ordinance.

Whether Hearing Examiner Should Have Applied Aggregation Ordinances

The Neighbors next urge that the hearing examiner should have applied "the aggregation rule under the Development Code" and combined Mr. Vasilenko's two one-acre parcels into one parcel because the cottage housing ordinance allows a maximum of 12 units in a cottage housing development and Mr. Vasilenko's project is a 24-unit cottage housing development. Appellants' Br. at 31.

It is not clear what the Neighbors mean by "the aggregation rule under the Development Code." They cite to no legal authority. It appears that the Neighbors wanted the hearing examiner to sua sponte approve a boundary line adjustment aggregating the two one-acre lots into one lot.

The hearing examiner, however, has no authority to take such action. Only a property owner may apply for and only the planning services director may approve a boundary line adjustment. SMC 17G.080.030(A); SMC 17G.010.100(A)(2)(b). And, even if the hearing examiner had authority to order a boundary line adjustment, aggregation of Mr. Vasilenko's two one-acre lots is neither required nor necessary.

According to the cottage housing ordinance, "Cottage housing developments are allowed on sites of one-half acre or larger with a minimum of six units and a maximum of

twelve units." SMC 17C.110.350(B). The ordinance limits only the number of units that can be built on a site. So Mr. Vasilenko's plan complies with the cottage housing ordinance as long as he builds no more than 12 cottage houses per site; that is, no more than 12 cottage houses on each one acre lot. It is, therefore, immaterial that all 24 cottage houses will be part of the same cottage housing project and share common utilities and amenities.

Whether Substantial Evidence Supports Findings of Compatibility and No Adverse Impacts

The Neighbors challenge the hearing examiner's findings that Mr. Vasilenko's cottage housing project is compatible with the surrounding neighborhood, that it will not adversely impact the neighborhood, and that there is no evidence of a negative impact on property values. The Neighbors claim there is no evidence sufficient to support the findings, in large part, because the record contains evidence contrary to the findings.

We will not reweigh or evaluate the persuasiveness of the evidence presented to the hearings examiner. We will review to determine only whether there is evidence to support the hearing examiner's findings. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Substantial evidence is evidence that could support the truth of the fact asserted. *Id.* We consider all of the evidence in the light most favorable to Mr. Vasilenko, the prevailing party before the hearing examiner. *Id.* "Under the substantial evidence

standard, we will not substitute our judgment for that of the [hearing examiner]." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133, 990 P.2d 429 (1999), *aff'd on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002). We instead accept the hearing examiner's assessments of weight and credibility. *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 11, 103 P.3d 802 (2004); *Isla Verde Int'l Holdings*, 99 Wn. App. at 133-34. Consequently, "[a]n order supported by substantial evidence can be upheld even if the record contains contrary evidence." *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 561, 222 P.3d 1217 (2009).

The hearing examiner found that the proposed cottage housing development is compatible with the surrounding single family neighborhood because the zoning code supports cottage housing in the RSF zone:

> By allowing the development of cottage housing in RSF zones, the City Council, through the zoning code has determined that it is a compatible use and appropriate in that zone. The code states that the intent is to support a diversity of housing and increase the variety of housing types for smaller households within existing neighborhoods. While the houses are smaller than most of the homes to the south they are also detached single-family dwelling units.

AR at 20. The Neighbors argue that the zoning code is the law, not evidence of compatibility. But, to establish compatibility and qualify for a conditional use permit, Mr. Vasilenko had to show that his proposed cottage housing development "is consistent

with the comprehensive plan designation and goals, objectives and policies for the property." SMC 17G.060.170(C)(2).

The zoning code states the goals, objectives, and policies for the property here as a matter of law. And it is consistent with the comprehensive plan. There is no dispute that the property at issue is zoned RSF. The purpose of the RSF zone is to "implement the single-family *and higher density* residential goals and policies and land use plan map designations of the comprehensive plan. They are intended to preserve land for housing and to provide housing opportunities for individual households." SMC 17C.110.010 (emphasis added). And "[t]he intent of cottage housing is to support the diversity of housing, increase[ ] the variety of housing types for smaller households and provide[ ] the opportunity for small, detached single-family dwelling units within existing neighborhoods." SMC 17C.110.350(A). Accordingly, "[c]ottage housing is allowed . . . in . . . RSF zones." SMC 17C.110.350(C). Based on the zoning code, Mr. Vasilenko established the compatibility requirement for a conditional use permit as a matter of law.

The hearing examiner also found that the traffic generated by Mr. Vasilenko's proposed development would not significantly impact the neighborhood:

> [T]he development of the two sites as planned would generate approximately 11, a.m. peak hour trips and 12, p.m. peak hour trips. The Transportation Department was satisfied that the surrounding streets could accommodate that additional traffic and that the number of additional trips would not have a significant impact on traffic in the neighborhood.

AR at 20. The Neighbors argue that a trip distribution letter from Traffic Engineer Ann L. Winkler P.E. does not support the hearing examiner's finding and is instead evidence of increased trips and impact. But the standard is not whether the development impacts traffic. It is whether the development has *significant adverse* impacts on traffic. *See* SMC 17G.060.170(C)(5) (Decision Criteria). And Ms. Winkler concludes that this development will not have such an impact: "Due to the size of this project, it is unlikely to have impacts on the intersections surrounding it and a traffic study would be unlikely to show the need for any specific off-site mitigation." AR at 313.

There is also other evidence that the development will not create a significant adverse traffic impact. The City's engineering department certified that the cottage housing development's transportation needs were compatible with the neighborhood. AR at 210. And a City engineer testified that "the available street network in the area at 34th and Regal . . . and East 29th Avenue and Southeast Boulevard . . . shows that the City has an existing transportation infrastructure to accommodate this growth." AR at 34. The record certainly includes evidence to the contrary (i.e., letters from neighborhood residents). But, again, we will not reweigh the evidence. We instead defer to the hearing examiner's finding because substantial evidence supports it.

Finally, on the issue of substantial evidence, the hearing examiner found that "[n]o evidence was submitted to show that there

will be any adverse effects on property values." AR at 20. The Neighbors, however, maintain that two neighbors testified that property values would decrease if the City allows Mr. Vasilenko's development. One of those neighbors testified, "[L]ow income rental properties will be detrimental to our neighborhood and have an adverse impact on our property values." AR at 29-30. The other neighbor testified, "I have nothing against the profit for one person[;] that is ok[,] but not if that profit cost[s] loss for the whole neighborhood. It is easy to destroy[;] it is really hard to gather it back because people will start selling houses because it will strongly affect our neighborhood." AR at 29. These statements are speculation. And speculation is not evidence. *See Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978). Regardless, the hearing examiner apparently was not persuaded by these neighbors' statements, and we defer to his assessment.

Whether Hearing Examiner Erroneously Found That City's Easement and Rights-of-Way Will not Adversely Affect Development

The Neighbors next challenge the hearing examiner's finding that "reservations on [Mr. Vasilenko's] title by the City would not adversely affect the development of the property." AR at 20. The Neighbors contend that the hearing examiner's finding is based on a misapplication of the boundary line adjustment laws. They argue that the City should not have granted Mr. Vasilenko's request for a boundary line adjustment.

The City's boundary line adjustment

decision is separate from its decision to grant Mr. Vasilenko a conditional use permit. The Neighbors did not appeal the boundary line adjustment decision. That decision, then, is not before us. And the Neighbors cannot collaterally attack it by challenging the propriety of one of the hearing examiner's findings of fact.

Moreover, the record supports the finding that the City's utility easement and rights-of-way will not affect development. First, the document that created the City's utility easement (Ordinance No. C32427) provides that "no structures or other obstructions shall be erected or placed within the easement area without the prior written approval of the Director of Engineering Services." AR at 60. This ordinance, then, allows development within the easement area with approval. And an engineer from engineering services testified that "[s]o long as the applicant [Mr. Vasilenko] can demonstrate how he is going to take care of the utilities then we would actually allow the construction." AR at 33. We infer from this testimony that the City will provide Mr. Vasilenko written approval. Second, Mr. Vasilenko's development plan abides by the City-owned rights-of-way. A cul-de-sac is planned for that portion of the property encumbered by the right-of-way for the Cook Street cul-de-sac. AR at 137-38. And no access point is planned for that portion of the property encumbered by the City's right-of-way to Southeast Boulevard. Residents will enter and exit the development only at Cook

Street. AR at 138. The hearing examiner, then, properly found that the City's easement and rights-of-way will not adversely affect Mr. Vasilenko's development plans.

Attorney Fees

The Neighbors request the cost of preparing the record under RCW 36.70C.110(4), statutory costs under *Brown v. City of Seattle*, 117 Wn. App. 781, 72 P.3d 764 (2003), and attorney fees under RCW 4.84.370. Mr. Vasilenko and the City each request an award of attorney fees and costs pursuant to RCW 4.84.370. All authorities supporting these requests provide relief for the prevailing party. The Neighbors are not the prevailing party. Their request for fees and costs is, therefore, denied. We grant Mr. Vasilenko and the City, as the prevailing parties on appeal and in all prior judicial proceedings, attorney fees and costs. RCW 4.84.370.

Conclusion

We affirm the decisions of the superior court and the hearing examiner and award fees and costs to Mr. Vasilenko and the City.

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

Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.