No. 62167-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PHOENIX DEVELOPMENT, INC., a Washington corporation, and G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a Washington limited partnership,

Appellants,

v.

CITY OF WOODINVILLE, a Washington municipal corporation, and CONCERNED NEIGHBORS OF WELLINGTON, a Washington nonprofit corporation,

Respondents.,

MOTION TO PUBLISH

I. IDENTITY OF MOVING PARTY

This motion is presented by Lanzce G. Douglass, Inc., Lanzce G. Douglass Investments, LLC, and Lanzce G. Douglass (hereafter "Douglass"), who are not parties to this case.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e) Douglass moves the Court to publish its *Unpublished Opinion* dated November 2, 2009, in the above-captioned case.

III. GROUNDS FOR RELIEF SOUGHT

Douglass is the respondent in an appeal currently pending in Division III of the Court of Appeals: *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, No. 278263. That case arises out of a decision of the Hearing Examiner of the City of Spokane Valley to deny Douglass' application for a preliminary plat and planned unit development, and to reverse the related mitigated determination of nonsignificance (MDNS) issued under SEPA.[1] Despite the fact that the Douglass project is within a designated urban growth area (UGA) of the City of Spokane Valley, the Hearing Examiner concluded that there is inadequate road capacity to evacuate an entire region of the City in the event of a wildfire. Douglass sought review in Spokane County Superior Court under LUPA.[2]

Douglass argues, *inter alia*, that "The legal requirements and standards that a project must meet are based in law, and the [Hearing Examiner] may not create new standards based on opinion testimony regarding what the planning policy should be." Brief of Respondent (No. 278263) at 22; **Appendix A**. Specifically, Douglass argues that the Hearing Examiner was in error for creating, then imposing, a requirement that the surrounding area be capable of evacuation with thirty minutes,

[1] State Environmental Policy Act, Chapter 43.21C RCW.

[2] Land Use Petition Act, Chapter 36.70C RCW.

despite the fact that no such requirement existed in any County-adopted regulation or policy. The Spokane County Superior Court agreed with Douglass that "[t]he Hearing Examiner erred as a matter of law that there be a 30 minute evacuation requirement." CP 100; **Appendix B**. Project opponents have appealed the superior court's ruling.

Douglass maintains that the Spokane County Superior Court's decision is consistent with and supported by existing law. Nevertheless, there is no case law that directly addresses the question of whether a final decision making body rendering a quasi-judicial land use determination is constrained to apply only existing regulations and standards. Publication of the *Unpublished Opinion* is necessary because the *Unpublished Opinion* directly addresses this question:

> A site-specific rezone request is a quasi-judicial decision that the council must evaluate under legislatively established criteria, including the comprehensive plan policies and other development regulations, which constrain the council's discretion. A quasi-judicial action involves the application of existing law to particular facts rather than the creation of new policy. Thus, when acting in its quasi-judicial capacity, the council is limited to interpreting existing policies and applying those policies to the particular facts relevant to its decision. By invoking its legislative authority midway through the quasi-judicial proceeding, the council adopted a new policy rather than applying existing policies and regulations.

Unpublished Opinion at 2.

The *Unpublished Opinion* clarifies an important principle in Washington land use law: that a Hearing Examiner or other body rendering land use decisions must employ only legislatively established standards and criteria, and may not create new standards *ex nihilo* to frustrate the expectations of land owners.

The issues addressed in the *Unpublished Opinion* are of substantial public interest and are important to the general public because questions regarding the scope of a quasi-judicial officer's authority in making land use decisions create a recurring problem in this area of the law, and clarification of these issues would be helpful in establishing expectations among land owners and decision makers. Citizens, property owners, developers and local governments need guidance on this point. Such guidance is provided by the *Unpublished Opinion.*

The *Unpublished Opinion* does not conflict with any prior opinion of the Court of Appeals or Supreme Court.

IV. CONCLUSION

For all these reasons the Court should publish its *Unpublished Opinion* dated November 2, 2009 in the above-captioned case.

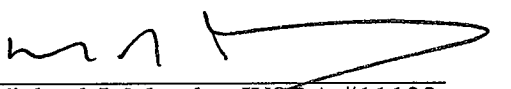
V. APPENDICES

A. Portion of the Brief of Respondent in case no. 278263.

B. Trial court memorandum decision in case no. 278263.

Dated this 23rd day of November, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on November 23, 2009, true and correct copies of the foregoing document to the counsel of record listed below, via the method indicated:

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DATED this 23rd day of November, 2009.

Beth A Russo

Beth A. Russo, Legal Assistant
Groff Murphy, PLLC

No. 278263

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

LANZCE G. DOUGLASS, INC., LANZCE G. DOUGLASS INVESTMENTS, LLC, and LANZCE G. DOUGLASS,

Respondents,

v.

CITY OF SPOKANE VALLEY, MICHAEL C. DEMPSEY, THE CITY OF SPOKANE COUNTY VALLEY HEARING EXAMINER,

Respondents,

and

PONDEROSA NEIGHBORHOOD ASSOCIATION,

Appellant.

BRIEF OF RESPONDENTS

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July 7, 2009

Appendix A Brief of Respondent (No. 278263)

PNA repeats its extended argument from the trial court about how the purpose of SEPA is to inform the decision-maker. App. Br. at 22-24; CP 202-205. This argument merely confirms, as explained in Section C, that the question of adequate emergency egress is a regional issue that must be addressed at the regional planning level. The HE is not charged with deciding whether to allow development in the entire Ponderosa area. That decision has already been made.

Finally, PNA notes that the HE had the opportunity to hear live testimony and review an extensive record before making his decision. App. Br. at 28. This argument merely confirms that the HE derived the 30-minute evacuation requirement from the opinion testimony of PNA's expert witness. It does not explain how the HE was empowered to do that, or why the MDNS was clearly erroneous. In sum, PNA has failed to explain why the HE was permitted to overrule the SEPA responsible official based on a non-existent regional evacuation standard.

3. The record does not support the HE's conclusion that the road system must support a 30-minute evacuation of the Ponderosa area.

The legal requirements and standards that a project must meet are based in law, and the HE may not create new standards based on opinion testimony regarding what the planning policy **should be**. The HE was required to defer to the Director, and not to establish by fiat new

requirements to impose upon the Project.

But even if the existence of the 30-minute requirement could be considered a question of fact, it is a fact unsupported by the record. The HE purportedly based this requirement upon Cova's testimony. CP 86 (Conclusion 26). However, such a conclusion demonstrates a clear misunderstanding of that testimony.

In fact, Cova's testimony **contradicts** the HE's conclusions. Cova acknowledged that **no national, local or regional standards** require the Ponderosa area to be evacuated in 30 minutes. CAR 6669-6670. Cova even rejected the possibility of a time-based standard: "**typically we don't just choose one time. There isn't an answer, like, 42 minutes or something like that.**" CAR 6656 (emphasis added). Cova testified that the time needed to evacuate "really depends on the scenario." CAR 6656.

Cova further testified that the assumptions upon which the HE based the 30-minute requirement are unrealistic. Any argument about whether all the cars in Ponderosa area could actually drive out of the area through two exit roads in 30 minutes is pointless because, as Cova testified, the hypothetical instantaneous notification and compliance were "***impossible***" and could never be achieved in the real world. CAR 6693. A real evacuation requires notification time as well as time for residents to prepare to leave. CAR 6655-56. Cova clearly understood the purpose of

the 30-minute constraint in the evacuation study: to identify points of congestion for public planning purposes. CAR 6686.

Furthermore, the 30-minute evacuation was just one hypothetical scenario among other options. CP 69-70 (Findings 385, 390). In the earlier Ponderosa Ridge decision, based on documentation from Fire District 8, the HE found that the Fire District "would not envision evacuating the entire area, but rather have citizens shelter in place or move to an area of refuge." CAR 3934. The HE made a nearly identical finding in the current case. CP 50 (Finding 244).[21] It is simply immaterial whether the entire Ponderosa area can be evacuated in 30 minutes.

PNA argues that the 30-minute requirement was imposed by Fire District 8's Development Requirements, which recommend that the "[t]raffic study should cover the need for an evacuation and the capability of the road system exiting the Ponderosa development to handle approximately 5000-6000 vehicles in a set period of time." CAR 5228; App. Br. at 31-32. This shows that the Fire District's interest in the study was to assess traffic issues that arise generally from evacuation scenarios – not to set a minimum threshold on evacuation times. There is no evidence

[21] The HE now attempts to distance itself from the earlier finding by noting that the fire district had not provided details about the alternative strategies. CP 50 (Finding 244). This is irrelevant, as it is not Douglass' duty to prove that governmental agencies are performing their functions in a manner acceptable to the HE.

to suggest that Fire District 8 imposed a 30-minute evacuation requirement on the Project, and PNA has never shown that a fire district even has the authority to impose such land use regulations.[22]

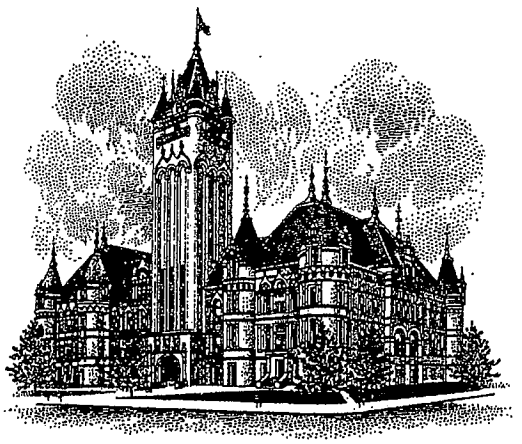
In fact, the Fire District's recommendation reinforces the testimony of Douglass' traffic engineer. The engineer consistently said that the Fire District requested the study to analyze congestion problems within the Ponderosa in the event of an evacuation – not to impose an arbitrary time limit on evacuation potential. CAR 500-02, 4267, 3934. PNA's own expert, Cova, recognized that this was the point of the simulation. CAR 6686. Moreover, Cova acknowledged that the report uses a thirty-minute time frame as a **conservative** constraint, to show a worst-case scenario for traffic congestion. CAR 6691.

In sum, there is no legal or factual basis for the 30-minute evacuation requirement. This Court has previously decided this same issue with respect to the adjacent Ponderosa Ridge plat. The HE's ruling was wrong as a matter of law, as the trial court correctly held in this case.

C. The Project level SEPA review is not required to address evacuation of the entire Ponderosa area.

The HE reversed the MDNS based on alleged pre-existing regional emergency evacuation issues. CP 85-87 (18-27). The trial court ruled that

[22] Neither district involved in the Ponderosa area has ever suggested it had such authority.



SPOKANE COUNTY COURTHOUSE

SPOKANE COUNTY SUPERIOR COURT
Department No. 11

GREG SYPOLT
Judge

KAREN BACHMEIER
Bailiff

SPOKANE COUNTY COURTHOUSE
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December 24, 2008

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LANZCE G DOUGLASS INC ETAL VS CITY OF SPOKANE VALLEY ETAL
No. 2007-02-05749-2/ LETTER DECISION

Dear Counsel:

The court has in mind the voluminous record which has been provided, and further has considered counsels' arguments, which were presented on November 13, 2008. Thank you for your insightful comments. The court's decision follows below.

Reviewability

As a threshold proposition, the court finds that this matter is reviewable under the Land Use Petition Act, (LUPA). (The Hearing Examiner did hold a hearing on the application to approve the plat and made a decision). This qualifies as a "land use decision" since the hearing examiner rejected the MDNS, and the project as a whole. The Hearing Examiner's decision was a rejection of the plat application since the Hearing Examiner concluded that the plat did not make a sufficient provision for storm water, roads, or public safety concerns. Further, RCW 43.21C.075(6)(c) does not impose a bar to review since the Hearing Examiner's decision did constitute as indicated, a rejection of the MDNS as determined previously by the city's Community Development Division. Additionally, the Hearing Examiner's decision was a rejection of the PUD application, linking the SEPA appeal by PNA to the hearing and decision on the project. The

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decision of the Hearing Examiner consequently combined environmental considerations along with a public decision.

This is thus not an example of an "orphan" SEPA appeal. The linkage requirement of RCW 43.21C.075(6)(c) has been met, as indicated. There was no authority on the part of the Hearing Examiner to determine that no appeal may be taken, either under LUPA or by the avenue of a writ of certiorari, (infra). The decision of the Honorable Hearing Examiner was in error.

This being so, it is not necessary to consider whether the matter is reviewable according to the writ of certiorari process. Nevertheless, as an alternative basis, under Article IV, section 6 the court finds that this matter is reviewable by the Superior Court, (infra).

LUPA Review:

Please note that the court agrees with petitioner's discussion as to applicable standards of review, (see pages 4 through 6 of petitioner's reply brief). In reference to LUPA analysis, the conclusions as set forth in numbers 6, 7, 8, 9, 18, 19, 20, 21, 25, 26, 27, 28, and 43 are examples of the Hearing Examiner exceeding the appropriate scope of authority.

In this regard and without excessive discussion, the court agrees with petitioner that most of the disputed issues are legal issues, (see pg. 4, petitioner's reply brief).

The court has reviewed questions of law de novo, giving deference to the city's and Hearing Examiner's expertise. see RCW 36.70C.130; *Milestone Homes, Inc. v. City of Bonney Lake* 145 Wash.App. 118, 186 P.3d 357, (2008); *Woods v. Kittitas County,* (2005) 130 Wash.App. 573, 123 P.3d 883, reconsideration denied, review granted 158 Wash.2d 1001, 143 P.3d 829, affirmed 162 Wash.2d 597.

The court has determined disputed factual issues by the substantial evidence standard. In a LUPA review, "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 Wash.App. 756, 129 P.3d 300, (2006).

The court has applied the "clearly erroneous" standard of review where there has been an application of law to the facts. Here, an instance of this type situation appears in the consideration by the Hearing Examiner of the city's Mitigated Determination of Non-Significance (MDNS). The Hearing Examiner should have employed this standard, but did not. This was not a proper recognition of the due deference which the Hearing Examiner should have accorded the city's MDNS. The failure to do so was without appropriate basis, conclusory, and a misapplication of law to the facts, *Quality Rock Products, Inc. v. Thurston County* (2007); 139 Wash.App. 125, 159 P.3d 1, review denied 163 Wash.2d 1018, 180 P.3d 1292. Consequently, the court has a definite and firm conviction that the Hearing Examiner committed a mistake in reversing the MDNS.

At the center of this controversy, the court finds that there was no 30 minute evacuation requirement. To the extent that many conclusions revolve around and hinge on that faulty and unsupported factual premise, they are either clearly erroneous, under the administrative review standard, or arbitrary and capricious under the writ standard, (please see specifically, e.g., Conclusions 18, and 19).

Appendix B

In addition to the above, there was error inter alia, in requiring the city Community Development Division to issue a DS. Further, the Hearing Examiner also went beyond legal authority by employing a project level SEPA review process as a means to change comprehensive planning policies in reference to regional issues (fire safety and evacuation); by finding that the project creates inadequate fire access; and by requiring an additional access road into the subject area; and failing to adequately provide for storm water.

Review by Writ Process

Under this analysis, the conclusions as set forth in numbers 6, 7, 8, 9, 18, 19, 20, 21, 25, 26, 27, 28, and 43 again are examples of the Hearing Examiner exceeding the appropriate scope of authority, i.e., arbitrary and capricious.

As counsel have set forth in their respective memoranda in great detail, Article IV, section 6 provides discretionary, alternate authority to the Superior Court to review decisions of a tribunal which are claimed to be arbitrary and capricious, or illegal, *Salotti Securities, Inc. v. Snohomish County*, 134 Wash.2d 288, 949 P.2d 370, (1998). Considering this method of review in this matter, the court agrees with petitioner and finds that that the honorable Hearing Examiner did exceed his authority in an arbitrary and capricious manner as accurately summarized in petitioner's memoranda.

CONCLUSION

In summary, the court finds that:

The court has jurisdiction pursuant to LUPA or Article IV, Sec. 6 and the Hearing Examiner's decision is subject to judicial review by either means. The decision of the Hearing Examiner which reversed the previous MDNS of the city is reversed and vacated. The PNA's SEPA appeal is denied. The Hearing Examiner's denial of approval of the petitioner's project is reversed and is remanded to the city Hearing Examiner with direction to approve the project. The Hearing Examiner's decision as it relates to storm water drainage plans is also reversed.

Additionally,

- The Hearing Examiner erred as a matter of law that there be a 30 minute evacuation requirement;
- The Hearing Examiner erred as a matter of law in the rejection of the project-level SEPA determination of the purported regional inadequacy of egress in the event of emergency;
- The finding of the Hearing Examiner that the subject Ponderosa area could not be evacuated in 30 minutes with emergency personnel assistance is not supportable by the record;
- As an alternative to the preceding item, the Hearing Examiner had no authority to order a DS , and should have left this to the discretion of the appropriate governing agency;

- It was error for the Hearing Examiner to conclude that the project does not make adequate provision for roads;
- It was error for the Hearing Examiner to deny project approval on the basis of an alleged lack of final county approval of the storm waste system instead of conditioning final project approval on obtaining county approval;

Presentment is set for **January 16, 2009 @ 4:30 p.m.** Counsel, Mr. Murphy will prepare an appropriate order with specific appropriate findings on the above which also will address a trial date on the issue of any damages. Agreed order(s) may be presented ex parte on or before that date.

Sincerely,

GREG SYPOLT
SUPERIOR COURT JUDGE

Appendix B