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JOYCE L. JULSRUD, CLERK
KITITIAS COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KITITIAS COUNTY

DESERT CLAIM WIND POWER LLC,)	
)	
Petitioner,)	No. 05 2 00243 6
)	
vs.)	MEMORANDUM DECISION
)	
KITITIAS COUNTY and RESIDENTS)	
OPPOSED TO KITITIAS TURBINES,)	
)	
Respondents,)	

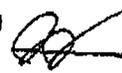
INTRODUCTION

Oral argument on this Land Use Petition Act (Chapter 36.70C RCW) appeal was heard by the court on October 6, 2005. Appearing for the petitioner was Eric S. Laschever, appearing for the respondent Kittitas County was deputy prosecutor James Hurson, and appearing for intervenor Residents Opposed to Kittitas Turbines (ROKT) was James Carmody. The court took the matter under advisement to review the extensive record; the court has had the opportunity to review those records, consider the arguments of the parties and now makes its memorandum decision.¹

DISCUSSION

¹ The court also heard County's motion to supplement the record. The court denies the motion. Subsequent to oral argument the court received Desert Claim's objection to Intervenor's colored tabs on the Administrative Record. The court granted the motion and instructed the clerk to remove any tabs before the court reviewed the record. The clerk complied by removing whatever tabs were in the five boxes of records.

MEMORANDUM DECISION - 1

CANNED 

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1. Background. On or about January 28, 2003 the petitioner Desert Claim Wind Power LLC (Desert Claim) applied to respondent Kittitas County (County) pursuant to Chapter 17.61A Kittitas County Code (KCC) for approvals for a 180 megawatt wind power project. The wind power project would include up to 120 wind turbine generators and also include the construction and placement of access roads, control and power collection cables, one or more substations, a transmission interconnection, and an operations and maintenance facility. Desert Claim proposed to construct the project on land described in the application as the "project area, containing approximately 5,237 acres held by eight land owners, all of whom authorize Desert Claim to seek permits to construct and operate the project on their lands." The southern edge of the project area is located approximately eight miles north of the central part of Ellensburg. The southwestern corner of the project area is more than one and a half miles east of U.S. Route 97. The project area is located within an area of approximately 27.5 square miles, extending approximately five and a half miles from east to west and five miles from north to south. The project area is in a rural, lightly populated section of Kittitas County and is characterized primarily by a variety of agricultural uses including cultivation for feed crop production and cattle grazing.

Near the project area is dispersed rural residential development in several locations, including dwellings on farm or ranch properties, scattered residences on large lots and a few small clusters of homes. 32 residents are either within the project area or within 1,000 feet of the project boundary. The project area straddles a major cross-state electrical transmission corridor linking hydroelectric dams on the Columbia River with the large power consumer market of western Washington. Eight high voltage transmission lines either directly cross or are adjacent to the project area. Six are owned and operated by Bonneville Power Administration and two are owned and operated by Puget Sound Energy. A BPA regional substation is located on a 133 acre parcel adjacent to the northeastern corner of the project area.

Most of the land within the project area is zoned Ag-20 under the Kittitas County Code. The northwestern portion of the project area is zoned Forest and Range. The entire project area is within the large area designated as Rural in the Kittitas County Comprehensive Plan.

On April 23, 2003 the County issued a Determination of Significance under the State Environmental Policy Act (SEPA) and began the Environmental Impact Statement (EIS) process.

After a series of scoping meetings, analysis and public review of a draft EIS, a final EIS (FEIS) was issued by the County on August 16, 2004. No one appealed the EIS.

Thereafter joint public hearings were held by the Kittitas County Board of County Commissioners (BOCC) and the Kittitas County Planning Commission on October 25 and October 26, 2004. At these hearings Desert Claim, County staff, project supporters, project opponents, and other members of the public presented their comments and input to the public record. At the conclusion of the public testimony, the Kittitas County Planning Commission began its discussions on the project proposal. After expressing concerns about the project and the inadequacy of the development agreement proposed by Desert Claim, the planning commission voted unanimously to recommend denial of the proposed project.² Essentially, the planning commission recommended denial of Desert Claim's project because of the non-contiguous nature of the proposal, because of the incompatibility of the project in relation to the surrounding neighborhood in light of the size and number of turbines involved, because of the failure of Desert Claim to adequately demonstrate that the property values in the area would not be adversely affected, and because of the lack of adequate set-backs from adjoining property.

The planning commission forwarded its recommendation to the BOCC for consideration. The BOCC conducted further public hearings on November 8, November 9 and December 7, 2004. At the December 7, 2004 hearing the BOCC asked Desert Claim to make a number of additional revisions to a second draft of the development agreement for further consideration on December 27, 2004. On December 27, 2004 Desert Claim submitted a third revised draft of its development agreement to the County. Rather than making a decision on Desert Claim's application on December 27, 2004 the BOCC continued the hearing to January 11, 2005 when two new county commissioners would be in office. The BOCC also instructed Desert Claim to present a progress report. On January 11, 2004 Desert Claim presented its progress report to the BOCC, which included drafts of all the documents and proposed changes requested by the BOCC. BOCC continued the public meeting to January 20, 2005. On January 20, 2005 after reviewing all the changes presented by Desert Claim the BOCC continued the hearing to January 27, 2005 so Desert Claim could provide another list of items for revision. On January 27, 2005 Desert Claim presented a second progress report to the BOCC, responding to the requests of the

² See findings of fact, conclusions of law and recommendations of the Planning Commission to the Kittitas County Board of County Commissioners.

BOCC made on January 11, 2005. The BOCC then continued the hearing to February 15 with a request to make revisions and present a finalized draft development agreement. On February 15, 2005 Desert Claim presented its third progress report to the BOCC in response to the BOCC's request. The BOCC then determined it would send out the development agreement draft for a two-week public comment.

The BOCC reopened its hearing for public comment on March 1 and March 9, 2005. After consideration of all the information presented to it the BOCC unanimously voted to deny the project application in its entirety. On March 29, 2005 the BOCC met to discuss findings on their decision and on April 5, 2005 they approved Resolution 2005-46, formally denying Desert Claim's application.

On April 25, 2005 Desert Claim filed its petition under LUPA seeking review of the BOCC decision by this court. On June 3, 2005 the parties stipulated pursuant to RCW 36.70C.080(5) to a scheduling order, to the intervention of ROKT and to a waiver of the preliminary hearing.³

2. Standard of Review. The Land Use Petition Act (LUPA) is the exclusive means by which to obtain a judicial review of a land use decision. RCW 36.70C.030. A land use decision is defined as a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination. RCW 36.70C.020(1). In reviewing the land use decision the court must apply the standards set forth in RCW 36.70C.130, which provide:

- "(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
- (a) the body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
 - (b) the land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
 - (c) the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
 - (d) the land use decision is a clearly erroneous application of the law to the facts;
 - (e) the land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

³ Initial hearing.

- b. A site-specific rezone of the county zoning map to wind farm resource overlay zoning district pursuant to Chapter 17.98 KCC, Amendments.
3. The approvals by the Board of County Commissioners set forth in subsections A and B⁵ of this section shall only be made if it determined that:
 - a. The proposal is essential or desirable to the public convenience;
 - b. The proposal is not detrimental or injurious to the public health, peace or safety or to the character of the surrounding neighborhood; and
 - c. The proposed use at the proposed location(s) will not be unreasonably detrimental to the economic welfare of the County and it will not create excessive public cost for facilities and service.
4. A comprehensive plan or amendment or sub area plan for wind farm resource overlay district must be processed by the County concurrent with the rezone application, development permit, and development agreement required for approval of a wind farm.”

5. Decision.

a. General. Both the County and ROTK contend this court does not have jurisdiction to review the denial of the comprehensive plan amendment decision under LUPA because amendment to the comprehensive plan is not a land use decision; rather it is a legislative action reviewable only by the Growth Management Hearing Board (GMHB) pursuant to the Growth Management Act (GMA). The County and ROTK's concern over this court's jurisdiction of the comprehensive plan denial is misplaced. First, as has been pointed out, all parties stipulated that the initial hearing could be waived. RCW 36.70C.080(2) requires the parties to note all motions on jurisdictional and procedural issues for resolution at the initial hearing. Parties may waive the initial hearing by scheduling with the court a date for the hearing on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised in the petition. RCW 36.70C.080(5). By entering the stipulated order, this court determines the County and ROTK waived any jurisdictional issue concerning this court's authority to review the denial of the comprehensive plan amendment proposal.

Secondly, even if the County and ROTK properly raised the jurisdictional issue concerning this court's ability to review the denial of the comprehensive plan amendment proposal, here, Desert Claim does not assert a GMA claim regarding the BOCC decision on the comprehensive plan amendment over which the Eastern Washington GMHB would have jurisdiction. “Unless a petition alleges that a comprehensive plan or development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does

⁵ Now paragraph 2.

not have jurisdiction to hear the petition." Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 178 (2000). See RCW 36.70A.289(1)(a). Because Desert Claim does not allege in its petition for review that the County violated the GMA, the court concludes it does have jurisdiction to review the County's denial of Desert Claim's application to amend the comprehensive plan.

The parties also disagree on the construction of Chapter 17.61A KCC as it applies to Desert Claim's application. Desert Claim argues that the criteria set forth in KCC 17.61A.040(3) are the only requirements by which the land use decisions on its application should be made. Desert Claim further asserts that the four land use decisions required to be made are to be made concurrent with each other as required by KCC 17.61A.040(4). The County contends that while Desert Claim correctly points out the three criteria an applicant must meet in order to have the wind farm application approved⁶ it fails to include the other requirements as set forth in Chapter 17.61A KCC, such as the development agreement conforming to Chapter 15A.11 KCC and RCW 36.70B.170 through RCW 36.70B.210 and the concurrent site-specific rezone application to change the County zoning map to wind farm resource overlay zoning district complying with Chapter 17.98 KCC. The County further claims the approval process can take place sequentially, rather than concurrently, because the application to amend the comprehensive plan is a legislative act subject to review by the Growth Hearings Board, not the BOCC.⁷

It is axiomatic in construing a statute⁸ that the court construe the law such that all of the language is given effect, and no portion is rendered meaningless or superfluous. Restaurant Development, Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682 (2003). So, in reviewing an ordinance or statute the court is bound to give meaning, if possible, to every word contained in it. State v. Beaver, 148 Wn.2d 338, 343 (2002). In reviewing Chapter 17.61A KCC it is clear to the court the Desert Claim wind farm application must comply with all components of the chapter, not just the three criteria set forth in KCC 17.61A.040(3). A development permit application and development agreement must comply with Chapter 15A.11 KCC and RCW 36.70B.170 through 36.70B.210 and the site-specific rezone application of the county zoning map to wind farm resource overlay zone must comport with Chapter 17.98 KCC pertaining to the amendments to the zoning map. If the BOCC or the court only applied the criteria set forth in KCC

⁶ Those criteria set forth in KCC 17.61A.040(3).

⁷ The parties also disagree on the application of SEPA, which will be discussed below.

⁸ Here an ordinance.

17.61A.040(3), without regard to internal requirements of the other provisions of Chapter 17.61A KCC neither the BOCC nor the court would be giving effect to the whole ordinance. The court concludes, therefore, with respect to Desert Claim's rezone application that the rezone application needs to comply with the requirements of Chapter 17.98 KCC and that the development agreement needs to comply with Chapter 15A.11 KCC and RCW 36.70B.170 through RCW 36.70B.210.

With respect to whether the applications to be processed by the County under Chapter 17.61A KCC are to be concurrent or sequential, the court concludes that the application process is designed to be concurrent. However, under circumstances that do not apply here for the reasons stated above, the amendment to the comprehensive plan can be legislative in nature and subject to review by the Growth Management Hearings Board as opposed to the County sitting in a quasi-judicial posture. Under those circumstances review of the rezone application, the development agreement and development permit could take separate paths of review, the amendment to the comprehensive plan being reviewed by the Growth Management Hearings Board and the rezone, development agreement and permit being reviewed by the BOCC.⁹ Here, as the court determined above, the issue was resolved, knowingly or otherwise, by the parties' stipulation of the scheduling order and waiver of the initial hearing.

b. Comprehensive Plan. In reviewing the decision of the BOCC with respect to the amendments to the comprehensive plan submitted by Desert Claim, the court determines the County complied with all applicable procedures and standards for review. In making its findings in paragraphs 7a and 7b of Resolution 2005-46, while the document does not specifically refer to the three criteria of KCC 17.61A.040(3), it is clear to the court the decision refers in some detail to the determination that the proposal was not essential or desirable to the public convenience and that the proposal, in not bearing a substantial relationship to the public health, safety or welfare of the surrounding neighborhood was detrimental or injurious to the public health, peace or safety, or to the character of the surrounding neighborhood. However, with respect to the third criteria of KCC 17.61A.040(3), although the BOCC attempted to make a determination in finding 9 that the proposed project at the proposed location would be unreasonably detrimental to the economic welfare of the County and could create excessive public costs for facilities and

⁹ In fact that is exactly what has happened in land use decisions the court has heard in another matter in another county.

service, the court concludes the BOCC had no basis on which to make such a determination and that legal costs potentially accruing to the County would not meet that criteria. Nevertheless, KCC 17.61A.040(3) requires all three criteria to be met. Since two of the three were not met the BOCC did not err in either interpreting the law or applying the law to the facts.

Moreover, the record contains substantial evidence to support the determinations of fact made by the BOCC. Substantial evidence is that sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the finding. Scofield v. Spokane County, 96 Wn.App. 581, 586 (1999); Wenatchee Sportsmen Association v. Chelan County, *supra* at 175. The BOCC followed the required proceedings and conducted public hearings, required the preparation of an EIS, accepted public testimony, comment in evidence, and weighed the evidence to arrive at its decision. The EIS itself supports finding of fact 8 of Resolution 2005-46 and recognizes the Desert Claim project involves significant unavoidable adverse impacts associated with the visual environment¹⁰. The visual and aesthetic element is recognized as a part of the environment that is to be maintained and enhanced. Polygon Corporation v. City of Seattle, 90 Wn.2d 59, 70 (1978). Additionally, the BOCC expressed concern in finding 8 regarding low frequency noise levels and the assumption that area residents would have to shade the interior of their homes from shadow flicker from the turbine blades. Overall, the BOCC found that the adverse impacts that could not be mitigated, either on site or off site, due to proximity of the proposed facility to nearby residences made it clear that the project area was not set back sufficiently from the impact areas so as to sufficiently mitigate the adverse impacts. While reasonable minds may differ as to the findings from the evidence there was evidence in the record to support the BOCC's determinations. The fact the BOCC referred to the EIS or the FEIS does not equate to the BOCC making a determination that the environmental impact alone was the legal equivalent of detriment or injury to public health, safety, peace or character of the surrounding neighborhood. To the contrary, it is apparent the BOCC considered the EIS as part of the evidence in arriving at its ultimate determination that, given all the facts and circumstances, testimony, comment, and evidence that the Desert Claim project was detrimental or injurious to the public health, peace, safety or character of the surrounding neighborhood¹¹.

¹⁰ See section 3.10.6 of the EIS.

¹¹ Contrary to the assertion by Desert Claim and/or as argued by respondent and intervenor, the County did not invoke its authority under RCW 43.21C.060 to deny Desert Claim's proposal solely on the existence of significant, unavoidable, adverse impacts.

c. Rezone Application. The County did not erroneously interpret Chapter 17.61A KCC as requiring Desert Claim to comply with the criteria for rezone set forth in KCC 17.98.020(5). As set forth above, both the BOCC and this court are required to read the ordinance as a whole and give import to every aspect of the ordinance. While the BOCC must apply the three criteria set forth in KCC 17.61A.040(3) in making a determination of whether to approve the project, the rezone application prong of the project needs to comply with Chapter 17.98 KCC because of the specific requirement as set forth in KCC 17.61A.040(2)(b). So, BOCC finding 7b of Resolution 2005-46 is not in error when it refers to proposed zoning amendment not being compatible with the comprehensive plan or not bearing a substantial relationship to the public health, safety or welfare. Those specific criteria set forth in KCC 17.98.020(5) condition approval of the application for rezone. The criteria must be met before the BOCC can determine that the Desert Claim project is entitled to the rezone.

As intervenors point out, Desert Claim failed to provide evidence on such factors as changed circumstances, need for additional property for wind farms and similar considerations. Moreover, it is not circular reasoning to deny the rezone based upon its incompatibility with the comprehensive plan when the applications for amendment to the comprehensive plan and rezone are addressed concurrently. A denial of the comprehensive plan amendment necessarily makes the rezone application goal inconsistent with the comprehensive plan. The applications for comprehensive plan amendment and rezone necessarily sink or swim together.

There is ample evidence in the record to support the finding that the project does not bear a substantial relationship to the public health, safety or welfare and is incompatible with uses in the area.¹² The FEIS identified numerous residences that would experience shadow flicker from the rotation of wind turbine blades, low frequency noise levels, strobe and flashing lights and other considerations. The mitigation offered was to have the property owners put blinds on the windows or plant trees and bushes to block the view, albeit at Desert Claim's expense. Evidently the BOCC determined that was not reasonable under the circumstances and therefore found that the rezone application was a detriment to the public health, safety and welfare and to the surrounding neighborhood.

d. Development Permit and Development Agreement. While Desert Claim evidently made extraordinary efforts to satisfy two different boards of county commissioners

¹² See KCC 17.98.020(5)(b) and (f).

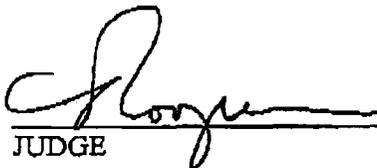
over the process of the application it submitted to the County, the bottom line is that Desert Claim did not convince the BOCC with the evidence presented in extended public hearings and exhaustive documentation that the project proposal was either essential or desirable to the public convenience or not detrimental or injurious to the public health, peace or safety, or character of the surrounding neighborhood with respect to either the amendment to the comprehensive plan or the rezone to wind farm resource overlay zone. Having failed to accomplish either the amendment to the comprehensive plan or the rezone, the County denial of the development agreement and/or the development permit is really a moot point. As intervenors pointed out, the development agreements are designed to document and implement the land use decisions and the development permit is to allow the project to proceed. Here, the land use decision pertaining to the rezone was denied and the application to amend the comprehensive plan was also denied. Hence, there was nothing to implement or any project to thereafter approve.

CONCLUSION

Based on forgoing, the determinations denying the amendment to the comprehensive plan, denying the rezone to wind farm overlay zone, and denying the development agreement and development permit, made by the BOCC through its findings, conclusions and resolution memorialized in Resolution 2005-46 should be affirmed.

Please prepare and present the appropriate order.

DATED: November 4, 2005.



JUDGE