Superior Court of the State of Washington

For Chelan County

Lesley A. Allan, Judge
Department 1
Travis C. Brandt, Judge
Department 2

Kristin M. Ferrera, Judge
Department 3
Tracy S. Brandt
Court Commissioner

19-2-00534-04

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Re: Friends of Leavenworth v. City of Leavenworth et. al. 19-2-00534-04

Counsel:

The matter came before the court for oral argument on November 6, 2019. The petitioner Friends of Leavenworth are represented by attorney David Bricklin. The respondent City of Leavenworth is represented by attorneys Thom Graafstra and Emily Guildner. The respondents D.R. Moffett &

Assoc., Inc., David Moffett, John Sutherland and Langston properties, LLC, are represented by attorney Duana Kolouskova and Dean Williams.

The City of Leavenworth hearing examiner ("hearing examiner") issued a decision on May 20, 2019, approving a conditional use permit application and a variance application for a project proposed by applicants D.R. Moffett & Associates, Inc., David Moffett, John Sutherland and Langston properties, LLC ("applicants"). (AR 2822). In a separate but legally and factually related decision, issued the same day, the hearing examiner denied an appeal by the petitioner, Friends of Leavenworth and affirmed the City of Leavenworth's Mitigated Determination of Non-Significance ("MDNS"). (AR 2792). Subsequently, the hearing examiner denied requests for reconsideration filed by the applicants and by the petitioner Friends of Leavenworth. (AR 2873; 2875). The petitioner, Friends of Leavenworth, filed a Land Use Petition with this court on June 25, 2019.

This court, having reviewed the files and records herein and considered the arguments of counsel, finds that the petitioner, Friends of Leavenworth, failed to satisfy its burden of proof as to the applicable LUPA standards for relief as set forth in RCW 36.70C.130(1). Therefore, this court AFFIRMS the above referenced findings, conclusions, conditions of approval and decisions made by the hearing examiner. The following constitutes the court's written decision.

The applicants applied for a conditional use permit and variance on November 8, 2018. The applicants proposed the construction and operation of a year-round commercial amusement enterprise called the Leavenworth Adventure Park ("adventure park" and/or "project"). The project site is located at 9342 Icicle Road, Leavenworth, Washington, and borders State Highway 2. The site is located within the Leavenworth tourist commercial district and is approximately 10.11 acres in size.

The applicant is proposing to construct the adventure park in two phases. Phase 1 is to consist of several amusement features including what is known as a Wiegand alpine coaster, a climbing wall, a bungee trampoline and sluice mining. Phase 2 of the project includes additional amusement features such as aerial ropes, challenge/obstacle course, and via ferrata climbing. There is a proposed 5,000 sq. feet building for food services, additional landscaping and parking as may be necessary.

The State Environmental Policy Act (SEPA), requires the City of Leavenworth, as the lead agency, to conduct an environmental impact

review of any action that might have a probable significant, adverse impact on the environment. RCW 43.21C. The review includes the completion of an environmental checklist by the applicant and a review of the checklist by the City of Leavenworth. WAC 197-11-330.

The decision following environmental review, called a threshold determination, may be a determination of non-significance, mitigated determination of non-significance, or significant. WAC 197-11-330. If the City of Leavenworth, as the lead agency, specifies mitigation measures on an applicant's proposal that would allow it to issue a determination of non significance ("DNS") and the proposal is clarified, changed, or conditioned to include those measures, the lead agency shall issue a DNS. WAC 197-11-350(3). If the impacts cannot be mitigated, an environmental impact statement (EIS) must be prepared. WAC 197-11-350(2).

The threshold determination made by the City of Leavenworth was that the project, with mitigation, does not have a probable significant adverse impact on the environment. (AR 1089). Therefore, an environmental impact statement (EIS) was not required under RCW 43.21C.030(2)(c). The City of Leavenworth issued a "Mitigated Determination of Non-Significance" ("MDNS") regarding the project on February 8, 2019. (AR 1089). On March 1, 2019, the petitioner, Friends of Leavenworth, timely appealed the MDNS. (AR 1341). An open record public hearing on the SEPA appeal was held on April 30, 2019. As referenced above, on May 20, 2019, the hearing examiner issued two written decisions: 1) Findings of Fact, Conclusions of Law and Decision on SEPA Appeal (AR 2792) and 2) Findings of Fact Conclusions of law, Decision and conditions of approval for the approval of a conditional use permit and variance request. (AR 2822).

This Court's review under the Land Use Petition Act ("LUPA"), RCW 36.70C, constitutes "appellate review on the administrative record before the local jurisdiction's body or officer with the highest level of authority to make the final determination". HJS Development, Inc., v. Pierce County ex rel. Dept. of Planning and Land Services, 148 Wn. 2d 451, 467 (2003). In this case, the highest level of authority was the City of Leavenworth hearing examiner. Therefore, this court reviews the evidentiary record as it existed before the hearing examiner and then reviews the examiner's findings of fact and conclusions. LUPA's standards for granting relief are set for in RCW 36.70C.130(1), which states:

(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
(f) The land use decision violates the constitutional rights of the party seeking relief.

A party pursuing a matter under LUPA bears the burden of proof. Nagle v. Snohomish County, 129 Wn. App. 703, 707 (2005). The court views the evidence, and reasonable inferences therefrom, "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Freeburg v. City of Seattle, 71 Wn. App 367. 371 (1993). Because the applicants prevailed in the land use decision the evidence and reasonable inferences therefrom is viewed in the light most favorable to them.

Factual findings are reviewed under the substantial evidence standard. Bierman v. City of Spokane, 90 Wash. App. 816, 821 (1998). The court "defers" to the hearing examiner's factual determinations and will not overturn those findings "unless they are not supported by evidence that is substantial in view of the entire record . . ." Miller v. Bainbridge Island, 111 Wn. App. 152, 162 (2002). The examiner's application of the law to those facts is then reviewed under the clearly erroneous standard: "a reviewing court may only reverse an administrative determination when, after considering the entire record, the court is left with the definite and firm conviction that a mistake has been made." Woodinville Water Dist. v. King County, 105 Wn. App. 897, 904 (2001). A question of law is reviewed *de novo*; however the Court affords deference to the local jurisdiction's interpretation of its codes and standards if there is any ambiguity or conflict. Neighbors v. King County, 88 Wn. App. 773, 778 (1997). RCW 36.70C.130(1)(b).

An MDNS must be based on information sufficient to evaluate the proposal's environmental impact. Anderson v. Pierce County, 86 Wn. App. 290, 302 (1994). Each mitigation measure imposed must be reasonable, capable of being accomplished, and based on an adopted policy or regulation, formally designated by the City for such purpose. RCW 43.21C.060; WAC 197-11-660(1)(a), (c). The law "does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible." Maranatha Mining, Inc. v. Pierce County, 59 Wn. App. 795, 804 (1990).

I. CONDITIONAL USE PERMIT

Conditional uses "shall be permitted only upon approval of the Leavenworth hearing examiner, after a public hearing . . ." LMC 18.52.050. "Conditional uses are those which may be appropriate, desirable, convenient or necessary in the district in which they are allowed, but which by reason of their height or bulk or creation of traffic hazards or parking problems or other adverse conditions may be injurious to the public health, safety, welfare comfort and convenience unless appropriate conditions are imposed." Id.

The project site is located at 9342 Icicle Road, Leavenworth, Washington, and borders State Highway 2. The site is located within the tourist commercial district and is approximately 10.11 acres in size. The Leavenworth Municipal Code ("LMC") permits a "commercial amusement enterprise" within the tourist commercial zoning district with a conditional use permit. LMC 18.44.030.

The conditional use permit decision addresses height, bulk, traffic and parking (AR 2822):

BUILDING HEIGHT

The height of the proposed buildings is limited to 35 feet within the tourist commercial district. LMC 18.44.050. Courts defer to the interpretation by the administering agency when regulations are ambiguous in relation to, or does not address, a specific use. Lakeside Industries v. Thurston County, 119 Wn. App. 886, 896-897 (2004). The coaster structure is not defined as a building in the LMC. The height of the coaster was addressed and conditioned within the MDNS issued February 8, 2019, to not exceed 35 feet at any point. (CUP/VAR FF # 14.1). The hearing examiner found that "The height of the proposed structure and buildings will not be injurious to the public health, safety welfare, comfort or convenience." (CUP/VAR FF #

14.2). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

BULK

The project site is approximately 10 acres. The proposed development covers approximately 3 acres with parking and congregation area, buildings and activities. The remaining approximate 7 acres is undeveloped, excluding the proposed emergency access easement road. (CUP/VAR FF # 14.2). The hearing examiner found that "The size of any one structure or the overall project, in relationship to the site, is not a bulk issue." (CUP/VAR FF # 14.2.1). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

TRAFFIC

To determine the potential impacts of the proposed development, the applicant provided a Traffic Impact Analysis ("TIA") completed by RBT Consultants, dated October, 2018, (AR 143), and a peer review by Gibson Traffic Consultants, Inc. dated October 24, 2018 (AR 275)

Level of service ("LOS") is a quantitative measure of roadway operations that is determined by analyzing how well a transportation system performs. (See pg. T-18 of the Transportation Element of the City of Leavenworth's Comprehensive Plan). Level of service, as established by the Highway Capacity Manual (HCM (Transportation Research Board, 2000) provides a range from LOS A (free flowing, minimal delay) to LOS F (extreme congestion, long delays). Id. The operation of roadways, signalized intersections, and unsignalized intersections are each based on a specific LOS definition. The City of Leavenworth has adopted LOS D as the standard for all streets. Id. at T-19.

The TIA completed by RBT consultants opined that it is anticipated that the project would generate approximately 70 new vehicle trips during the weekday PM peak hour and 100 new vehicle trips during the weekend midday peak hour, assuming 100% of the trips are made by vehicle (AR 149). This traffic count estimate did not take into account the current vehicle trips associated with the now existing business on the project site. Id at 149-150. The report indicates that "[A]ll study area unsignalized approaches (average of both movements on each approach) are expected to operate at LOS D or better (less than 35 seconds of delay per vehicle on average) under Phase 1 conditions (2020) and Full Build Conditions (2023) during both the peak season weekday PM and Saturday midday peak hours." (AR 150).

The peer review by Gibson Traffic Consultants, Inc. states that "GTC agrees with the level of service analysis documented in the Leavenworth Adventure Park TIA and does not have any recommended changes". (AR 278). "The Leavenworth Adventure Park TIA has been conducted using standard engineering practices . . . Neither the standard weekday nor the Saturday conditions showed a deficient level of services or a signal being warranted." (AR 280). The City of Leavenworth engineer, Thom Kutrich, reviewed the applicant's materials and determined "the RBT TIA Oct 2018 v. 3, and GTC Peer Review October 24, 2018, have been reviewed and meet the minimum City requirements. Recommend adoption of the Peer Review comments." (AR 974)

The MDNS conditions, relating to traffic include crosswalks, placement of "no parking" signs along Icicle Road, restriping of the left-hand turn lane for Icicle Road, and compliance with the other RBT recommendations. (AR 1095). The hearing officer found that "[T]his professional traffic impact analysis and these conditions resolve the technical impacts to the environment." (CUP/VAR FF # 14.3). Also that "Traffic related concerns for the development are addressed in the MDNS and the recommended conditions of approval. As conditioned, Phase I traffic impacts will not be injurious to the public health, safety, welfare, comfort or convenience of the public." (CUP/VAR FF # 14.5). The hearing officer also entered as a condition of approval that the hours of operation "shall be limited to 10:00 a.m. to 8:00 p.m. seven (7) days a week. Any private parties must be held during this time period." (CUP/VAR Cond. # 20). The findings of the hearing examiner related to traffic are supported by substantial evidence and are not a clearly erroneous application of the law to the facts.

PARKING

The LMC requires one stall per 300 square feet of ground area for outdoor amusement enterprises (except golf course and drive in theater). LMC 14.12.150(E)(4). The MDNS notes that the coaster area is similar in nature to golf course space and not included in the measurement of "gross floor area". (AR 1094). The applicant is proposing 69 parking spaces. (AR 1094). As noted in the MDNS, the calculation for parking was based on the congregation area of 17,055 square feet and the LMC requirement of 1 space for 300 square feet of ground area (17055/300 requiring 56.85 spaces).

The RBT report found that increasing the length of stay due to the development of Phase II may result in additional parking demands.

Therefore, a follow up parking study was recommended by RBT and is required as mitigation within the MDNS. (CUP/VAR FF # 14.7.1).

The hearing examiner found that "Parking related concerns for the development are addressed in the MDNS and the conditions of approval and should not be injurious to the public health, safety, welfare, comfort or convenience of the public. The conditions of approval require review of the parking after operations begin." (CUP/VAR FF 14.75). The hearing examiners findings related to parking are supported by substantial evidence and not a clearly erroneous application of the law to the facts.

II. VARIANCE

The LMC provides that in areas designated as "tourist commercial district" there "shall be a side yard of not less than 10 feet." LMC 18.44.040(B). The applicants requested a variance of the 10' side yard setback to approximately 2' along the south side yard property line. (CUP/VAR FF # 27). The LMC provides to the "hearing examiner the authority to grant a variance from the requirements" of the LMC. LMC 18.56.050. No variance shall be granted unless it can be shown that all of the conditions set forth in LMC 18.56.060 A-D exist.

A. *The variance is necessary for the preservation of a property right of the applicant substantially the same as is possessed by owners of other property in the same neighborhood or district. LMC 18.56.060(A), (CUP/VAR FF # 28).*

The tourist commercial district is intended for a wide variety of uses including restaurants, professional offices, and family amusement enterprises. LMC 18.44.020. The subject site is primarily surrounded by the Tourist Commercial zoning with similar uses permitted.

The hearing officer found that "The variance is necessary for the preservation of a property right of the applicant substantially the same as is possessed by owners of other property in the neighborhood or district." (CUP/VAR FF # 28.6). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

B. *The plight of the applicant is due to unique circumstances such as topography, lot size or shape, or size of buildings, over which the applicant has no control. LMC18.56.060(B).*

Because the Alpine Coaster is gravity fed, it creates unique circumstances for which the applicant has no control. The hearing examiner found that "The alpine coater variance is due to unique circumstances such as topography and the lot size or shape, over which the applicant has no control." (CUP/VAR FF # 29.4). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

C. The hardship asserted by the applicant is not the result of the applicant's or owner's action. LMC 18.56.060(C).

The hardship relates to site conditions and the preferred layout of the coaster. The proposed coaster development requires a specific layout on the exiting topography. The hearing examiner found that "the hardship asserted by the applicant is not the result of the applicant's or the owner's action." (CUP/VAR FF # 30.1). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

D. The authorization of the variance shall not be materially detrimental to the purposes of this title, be injurious to property in the same district or neighborhood in which the property is located, or be otherwise detrimental to the objectives of any comprehensive plan. LMC18.56.060(D).

The surrounding properties are primarily Tourist Commercial which are either developed with commercial uses (gas station) or intended to be developed with higher intensity commercial development. (CUP/VAR FF # 31.3). The hearing officer found that "The proposed variance request is not materially detrimental to the purposes of the zoning code, injurious to property in the same district or neighborhood in which the property is located, or otherwise detrimental to the objectives of any comprehensive plan." (CUP/VAR FF # 31.6). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

E. The hardship asserted by the applicant results from the application of this title to his property. LMC 18.56.060(E).

The Tourist Commercial zoning district requires a 10' side yard setback. The requested side yard setback variance for the alpine coaster variance is required due to the structure design constraints and the topography of the side for the alpine coaster. The hearing examiner found that it would be a hardship on the applicant to not be granted a variance for the side yard

setback. (CUP/VAR FF # 32.3). This finding is supported by substantial evidence and not a clearly erroneous application of the law to the facts.

CONDITIONS OF APPROVAL

The hearing officer approved the conditional use permit and variance subject to numerous "Conditions of Approval". (AR 2839). LMC 18.52.060 states, in part: "In permitting a conditions use, the hearing examiner may impose, in addition to the regulations and standards expressly specified by this title, other conditions found necessary to protect the best interest of the surrounding property, the neighborhood, or county as a whole..." The "Conditions of Approval" made by the hearing examiner were necessary, appropriate and serve to protect the best interest of the surrounding property, the neighborhood and Chelan County.

III. STATE ENVIROMENTAL POLICY ACT

As indicated, the May 20, 2019, conditional use permit, variance and SEPA appeal decisions of the hearing examiner involve overlapping legal and factual issues. The hearing officer's findings as to traffic, parking, building height, bulk and the variance have been previously addressed herein. The hearing officer's findings as to those issues in the SEPA appeal decision are supported by substantial evidence and they were not a clearly erroneous application of the law to the facts. The remaining issues pertaining to the SEPA appeal are as follows:

NOISE

The applicants provided to the City of Leavenworth an environmental noise assessment for a proposed Alpine Coaster Northstar – at Tahoe. (AR 343). The study concluded that measured against the ambient noise level the noise levels "were not predicted to result in a significant increase in overall ambient noise levels...." (AR 354). The LMC imposes restrictions on noise. LMC 9.33.039. Violations of the LMC subjects the violator to both civil and criminal penalty. LMC 9.33.030.

The hearing examiner limited the hours of operation from 10:00 am until 8:00 pm and ordered compliance with the LMC and Washington Administrative Code 173-60 to mitigate the noise. (COA ## 20, 22). In addition, the hearing examiner required a noise study be conducted prior to any permit approval for Phase II. (COA 28.3). The Hearing Examiner found that the potential adverse environmental impacts related to noise were

adequately considered in the MDNS. (SEPA FF # 37). The findings of the hearing examiner related to noise are supported by substantial evidence and not a clearly erroneous application of the law to the facts.

LIGHTING

To the extent possible, the hearing examiner conditioned approval of the project to it following the guidelines established by the Dark Sky Association. (COA # 24). Those guidelines include using shielded fixtures to minimize or eliminate upward light, minimizing lights during closed hours and only lighting spaces and amount required for safety. The hearing examiner found that the potential adverse environmental impacts related to lighting were adequately considered in the MDNS. (SEPA FF # 38). The findings of the hearing examiner related to lighting are supported by substantial evidence and not a clearly erroneous application of the law to the facts.

PHASING

The applicant is proposing to construct the adventure park in two phases. Phase 1 consists of certain attractions and Phase 2 provides further attractions. The MDNS allows for and in fact in some instances requires further studies. This is consistent with the timing of the SEPA process. WAC 197-11-055(2)(i) states that:

> "The fact that proposals may require future agency approvals or environmental review shall not preclude current considerations, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts."

The City of Leavenworth requires that conditional use permits are reviewed after one year. LMC 18.52.090. Only if "all conditions of approval have been or are being met" may the approval of conditional use be continued. Id. In addition, "[a]t any time, the City may at its discretion require the conditional use permit to be reviewed by the hearing examiner." Id. The MDNS also requires a noise report (AR 1092) and a traffic and parking analysis prior to development of phase 2. (AR 1095). If parking cannot be adequately addressed prior to development of Phase II, then Phase II shall not be permitted. Id. The hearing examiner was provided with adequate information that allowed him to assess both phases of the proposed project.

MAYOR'S TESTIMONY

Leavenworth Mayor, Cheryl Kelly Farivar, testified at the open records hearing in this matter. LMC 21.15.060(e) indicates in part that: "No city council member, city official or any other person shall interfere with or attempt to influence the hearing examiner in the performance of his or her designated duties." The mayor's testimony may give the appearance of an "attempt to influence" the outcome of the hearing. However, there is no evidence that the mayor's testimony affected the hearing examiner's decisions in this matter in any way. Therefore, this court finds that any procedural error created by the Mayor's testimony was harmless.

ADDITIONAL CONSIDERATIONS

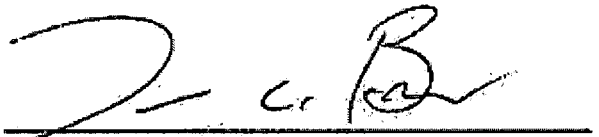
The Hearing Examiner found that the potential adverse environmental impacts related to wetlands, aesthetics and geotechnical were adequately considered in the MDNS. (SEPA FF # 39-41). The findings of the hearing examiner related to wetlands, aesthetics and geotechnical are supported by substantial evidence and not a clearly erroneous application of the law to the facts.

IV. CONCLUSION

The court directs counsel to draft, circulate and present an order reflecting the court's decision herein.

Sincerely,

Travis C. Brandt



Judge of the Superior Court for the
County of Chelan

cc: Superior Court File