

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 LESLIE A. POWERS,

4
5 Petitioner,

6 v.

7
8 JEFFERSON COUNTY,

9 Respondent.

Case No. 08-2-0010

**ORDER ON MOTION FOR
RECONSIDERATION**

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12 THIS Matter comes before the Board upon Petitioner's Motion for Reconsideration¹ in which
13 the Petitioner, Leslie A. Powers, requests that the Board reconsider its Order on Dispositive
14 Motion which dismissed his appeal of a decision of the Jefferson County Appellate Hearings
15 Examiner.

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18 Jefferson County opposes the motion.²

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20 In this Order, the Board finds that it was not improper to decide the Motion for
21 Reconsideration prior to preparation of the Index of the Record, especially when the timing
22 of the submittal of the Index and dispositive motions was agreed to at the Prehearing
23 Conference. The Board finds that Petitioner has not demonstrated an error of fact or law in
24 its April 22, 2008 Order. The Board therefore DENIES the Motion for Reconsideration.

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27 **I. ISSUE TO BE DECIDED**

28 ***Should the Board reconsider its April 22, 2008 Order dismissing the Petition for***
29 ***Review and allow the case to proceed to the Hearing on the Merits?***

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¹ Motion for Reconsideration, filed May 2, 2008.

² Respondent's Memo of Authorities in Response to Petitioners' Motion for Reconsideration, filed May 7, 2008.

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II. DISCUSSION

Petitioner's Position

Petitioner argues the Board erred by allowing the dispositive motion to be argued before an Index to the Record was presented.³ Petitioner argues that because the County's motion was brought pursuant to WAC 242-02-030(2) and not WAC 242-02-530(4) it should have been considered under the CR 12(b)(1) and, therefore, be based on the pleadings and not pursuant to a declaration. Thus, Petitioner argues that consideration of the declaration of Jefferson County Planning Director Al Scalf was improper (Scalf Declaration).

Petitioner argues the Board erroneously concluded that the Major Revision of the Port Ludlow Master Planned Resort was a matter outside of the Board's jurisdiction. He argues the resort plan contained in Section 3.901 of the MPR Code was a development regulation that was substantively amended by the Appellate Hearing Examiner. Petitioner also argues that the adoption of an approval process within the MPR Code that subjects all or part of it to the approval by a hearings examiner is an application to amend a comprehensive plan or a development regulation. Petitioner also asserts the Board erroneously mixes the various permit or project applications associated with the major revision (e.g. Shoreline development permits, hydraulic permits and boundary line adjustments) with the major revision itself. Petitioner claims the Board misconstrued Section 3.901 of the MPR Code in violation of applicable rules of statutory construction in ignoring that the Resort Plan "shall" be as set forth on the effective date of the ordinance. Finally, Petitioner claims error based on an allegation the Board erroneously concluded that it did not have jurisdiction because the Major Revision was a permit and not a development regulation.

County's Position

In reply, the County argues Petitioner's arguments fail on procedural and substantive grounds.

³ Motion for Reconsideration at 2.

1 Procedurally, the County notes Petitioner's objection to the bringing of a dispositive motion
2 prior to the submission of the Index of the Record is not a procedural irregularity that would
3 prevent a party from having a fair hearing within the meaning of WAC 242-02-832(2)(b).

4 The County notes Petitioner had ten days to respond to the motion and 20 to 30 minutes to
5 argue the motion during the time allotted for oral argument. The County argues that there
6 are no limits on how soon a motion may be brought to challenge a Board's jurisdiction.
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8 Finally, the County notes Petitioner has not demonstrated he was prejudiced by not having
9 the Index prior to the Motion to Dismiss for lack of jurisdiction.

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11 Substantively, the County argues Petitioner merely repeats the arguments previously made
12 in his response to the dispositive motion. The County relies on the arguments it made in
13 that motion and suggests that the Board correctly decided that it did not have subject matter
14 jurisdiction to hear this appeal.

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16 Board Discussion

17 A motion for reconsideration, pursuant to WAC 242-02-832(2), shall be based on at least
18 one of the following grounds:

- 19 (a) Errors of procedure or misinterpretation of fact or law, material to the party
20 seeking reconsideration;
21 (b) Irregularity in the hearing before the board by which such party was prevented
22 from having a fair hearing; or
23 (c) Clerical mistakes in the final decision and order.

24 A. Procedural Irregularities

25 Petitioner argues that the County's motion was "clearly" brought pursuant to WAC 242-02-
26 030(2) and not WAC 242-02-530(4).⁴ Petitioner is incorrect. The Notice of Motion and
27 Memorandum of Authorities (Motion to Dismiss) filed by the County both stated that the
28 motion was brought "pursuant to WAC 242-02-530".⁵ Nevertheless, Petitioner asserts the
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32 ⁴ WAC 242-02-030 pertains to the Board's jurisdiction. WAC 242-02-530 pertains to the procedures for filing a motion.

⁵ Notice of Motion for Dispositive Motion, at 1; Memorandum of Authorities in Support of Respondents' Dispositive Motion, at 1.

1 motion should have been considered under the CR 12(b)(1) and therefore it was improper
2 to consider the Scalf Declaration. However, even if the motion was brought pursuant to
3 WAC 242-02-530(4), that rule allows dispositive motions to be brought on a limited record.
4 Furthermore, Petitioner provides no legal authority to support his claim that, even if the
5 motion were considered under CR 12(b)(1), that rule precludes the submission of supporting
6 declarations. Petitioner concedes that “[H]ad the motion been brought as a dispositive
7 motion subject to WAC 242-02-530(4) under procedures similar to summary judgment
8 motions, declarations would have been appropriate.” As noted above, the motion was in
9 fact brought pursuant to WAC 242-02-530.
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12 The Board further notes that the County filed its Motion to Dismiss on April 2, 2008. The
13 memorandum in support of that motion made it clear that the County had filed its motion not
14 only because it felt the “law is so clear” but also because it desired to have the matter
15 dismissed early “to conserve its limited clerical resources by not being required to make an
16 Index of the Exhibits with respect to this Petition.”⁶ Thus, during the April 11, 2008
17 conference the parties discussed the scheduling of the date on which the Index would be
18 due, in relation to the pending dispositive motion. By agreement of the parties the date for
19 the filing of the Index was changed from the April 10, 2008 date shown in the Notice of
20 Hearing and Preliminary Schedule to May 12, 2008. The schedule was established to
21 provide time for a decision on the dispositive motion to be issued prior to the preparation of
22 the Index. Petitioner made no objection to this schedule at that time or any other, prior to its
23 Motion for Reconsideration. Likewise, when Petitioner filed its Memorandum in Opposition
24 to the dispositive motion, it raised no objection to the fact that the motion was being
25 considered prior to the submission of the Index. The Board finds that Petitioner cannot
26 consent to a schedule that provided for a deadline for the preparation of the Index that
27 followed the decision on the dispositive motion and then claim for the first time, after having
28 its Petition for Review dismissed, that it suffered “[I]rregularity in the hearing before the
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⁶ Memorandum of Authorities in Support of Respondent’s Dispositive Motion, at 3.

1 board by which such party was prevented from having a fair hearing.”⁷ While the Board
2 does not find that the hearing of the County’s Motion to Dismiss prior to the preparation of
3 the Index was a procedural irregularity, to the extent it was, Petitioner’s objections are
4 barred as an “invited error.” Under the Invited Error Doctrine, a party may not set up an error
5 at trial and then complain of it on appeal.⁸
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7 The Petitioner also argues that WAC 242-02-550(7), which provides for the Presiding Officer
8 to set deadlines for the conduct of the appeal, makes reference to the parallel rules of
9 appellate procedure for dealing with motions on the merits. WAC 242-02-550(7) contains
10 no such reference to the RAPs and therefore Petitioner is incorrect in his arguments as to
11 any limitations provided by WAC 242-02-550(7). Nothing in that rule, or any other, suggests
12 dispositive motions may be filed or heard only *after* the Index is filed.
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14 15 B. Substantive Errors

16 To support his allegations of substantive error, Petitioner re-asserts many of the arguments
17 previously submitted in his initial briefing, and subsequently rejected by the Board in its
18 Order, as well as seeking the submittal of new evidence. The Board finds no error in the
19 Petitioner’s attempt to reargue the case, with Petitioner simply reaching a different
20 conclusion than the Board in application of the governing statutory and case law to the facts
21 at hand. However, Motions for Reconsideration will be denied when they present no new
22 arguments that were not previously considered in the original decision.⁹ The Motion for
23 Reconsideration in this case is based upon the position, already rejected by the Board, that
24 a revision to the Port Ludlow Master Planned resort constituted an amendment of a
25 development regulation, Section 3.901 of Ordinance 08-1004-99 now codified as JCC
26 17.50.020. Thus, Petitioner’s arguments to the effect that “revisions and amendments are
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32 ⁷ See, WAC 242-02-832(2)(b)

⁸ *Lavigne v. Chase, Haskell, Hayes & Kalamon*, P.S., 112 Wn. App. 677, 681, 50 P.3d 306 (2002) (citing *In re Personal Restraint Petition of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)).

⁹ *CCNRC v. Clark County*, WWGMHB No. 96-2-0017 (RO 1/21/98).

1 identical¹⁰ are beside the point. Whether termed a revision or an amendment, the fact
2 remains that the County did not amend, revise or otherwise alter the provisions of Section
3 3.901/JCC 17.50.020. As noted in our Order on Dispositive Motion, the Appellate Hearings
4 Examiner was merely *applying* it the provision, he was not amending the regulation.¹¹
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6 At the same time, Petitioner argues that the Board erred by treating Section 3.901/JCC
7 17.50.020 as a project rather than a development regulation.¹² This allegation is based on
8 a misreading of the Board's Order. The Board never concluded Section 3.901/JCC
9 17.50.020 was anything other than a development regulation. However, because the
10 regulation had not been amended, the Board found no basis for an exercise of its
11 jurisdiction.
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14 Petitioner further asserts the Board erred in its reading of Section 3.901/JCC 17.50.020 by
15 ignoring the mandatory language in the first paragraph that "[A]s of the effective date of the
16 ordinance codified in this title, the Resort Plan shall be as set forth herein." Yet, Petitioner
17 acknowledges the preceding sentence specifically allows changes in the Resort Plan that
18 decrease the sizes of various uses. Petitioner sees no conflict, nor does the Board. The
19 first sentence of Section 3.901/JCC 17.50.020 provides that the Resort Plan "shall be
20 limited and shall not exceed the scope of development set forth below" and then provides
21 that a reduction in size is allowed. The action of the Appellant Hearings Examiner under
22 appeal did not authorize an expansion of the MPR but authorized a reduction in scope. An
23 amendment to the language of Section 3.901/JCC 17.50.020 was not needed to accomplish
24 this. Instead, the Appellate Hearings Examiner applied the code. Petitioner has not
25 demonstrated that the Board misinterpreted the regulations in reaching this conclusion.
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28 With his Motion, Petitioner included a Declaration with five attachments:
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32 ¹⁰ Memorandum of Authorities in Support of Respondent's Dispositive Motion, at 6.

¹¹ Order on Dispositive Motion at 8.

¹² Memorandum of Authorities in Support of Respondent's Dispositive Motion, at 7, et seq.

- 1 A. Excerpts of the Port Ludlow MPR Resort Plan Final SEIS, dated May 2005 –
2 Comparative Analysis of Alternatives
3 B. Correspondence from Port Ludlow Associates to Jefferson County RE: Major Resort
4 Plan Revision, dated September 13, 2006
5 C. Memorandum from Jefferson County Planning Department to Jefferson County
6 Board of County Commissioners RE: Port Ludlow Master Planned Resort, dated
7 August 25, 1998 (via Laserfiche Weblink April 17, 2008)
8 D. Excerpt of Resolution 1998-072-98 RE: Port Ludlow Master Planned Report (via
9 Laserfiche Weblink April 5, 2008)
10 E. Excerpt of Jefferson County Comprehensive Plan, Page 3-65 (updated by Ordinance
11 17-1213-04)
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14 With these exhibits, Petitioner is seeking to submit additional evidence to bolster his re-
15 argument of the case.
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17 If such evidence was available, but not offered until after the opportunity had passed, the
18 Petitioner is not entitled to another opportunity to submit the evidence.¹³ When a motion for
19 reconsideration is submitted after a final decision has been rendered, the Board must base
20 its decision on the evidence considered at that time. There was ample opportunity, with
21 reasonable diligence, for the Petitioner to present this evidence prior to the Board's
22 issuance of its Order. All of the documents that the Petitioner relies on were available at
23 the time of briefing on the issues presented to the Board with the County's Motion to
24 Dismiss. Therefore, the Board will not consider the Declaration and the related
25 attachments.
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28 III. ORDER

29 Based on the foregoing, the Motion for Reconsideration is hereby DENIED.
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¹³ See *Wager Development v. Fidelity & Deposit Co.*, 95 Wn. Wpp. 896, 907 (1999); *Meridian Minerals v. King County*, 61 Wn. App. 195, 203 (1991); CR 59(a).

1 DATED this 22nd day of May, 2008.

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James McNamara, Board Member

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7 Holly Gadbow, Board Member

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10 Pursuant to RCW 36.70A.300 this is a final order of the Board.

11 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
12 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
13 judicial review may be instituted by filing a petition in superior court according to the
14 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
15 Enforcement. The petition for judicial review of this Order shall be filed with the
16 appropriate court and served on the Board, the Office of the Attorney General, and all
17 parties within thirty days after service of the final order, as provided in RCW
18 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
19 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

20 **Service.** This Order was served on you the day it was deposited in the United States
21 mail. RCW 34.05.010(19)

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