IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

PHILLIPS 66 COMPANY, a Delaware company; Petitioner, v. WHATCOM COUNTY WASHINGTON and FRIENDS OF THE SAN JUANS, a Washington nonprofit corporation, Respondents.	No. 19-2-02360-37

The Court adopts the Hearings Examiner's findings of fact and conclusions of law, unless specifically modified, and enters the following.

PROCEDURAL HISTORY

I

On December 20, 2019, Phillips 66 (Respondent) filed an appeal of a Final Order of the hearing examiner issued on November 17, 2019, and revised on November 26, 2019. The matter was initially heard on June 4, 2020, and the Court gave a verbal ruling on September 11, 2020. The Court now issues formal findings and conclusions consistent with its prior ruling.

CONCLUSIONS OF LAW

Petitioner's Standing

I

WCC 22.05.160(2) provides that an applicant may appeal a final decision of the hearings examiner to Superior Court. As such, the Petitioner has standing and has timely appealed hearings examiner's final order.

Standard of Review

II

The Petitioner bears the burden of establishing a basis of relief based on the six identified standards provided in RCW 36.70C.130(1). Chinn v. City of Spokane, 173 Wash. App. 89, 95, (Div. II, 2013). Whatcom County was the prevailing party before the Hearings Examiner. As such, facts are viewed in the light most favorable to the Respondents.

III

The Petitioner has alleged it is entitled to relief pursuant to RCW 36.70C.130(1)(b) as the final decision was an erroneous application of the law. An allegation of an erroneous interpretation of the law is reviewed *de novo* but, only after giving due deference to the expertise of the local jurisdiction. City of Fed. Way v. Town & Country Real Estate, LLC, 161 Wash. App. 17, 37 (Div. III, 2011), as corrected (May 10, 2011).

IV

The Petitioner has alleged it is entitled to relief pursuant to RCW 36.70C.130(1)(c) as the final decision was not supported by substantial evidence. Division II has defined "substantial evidence" as, "…evidence sufficient to persuade an unprejudiced, rational person that a finding is true." Bayfield Res. Co. v. W. Washington Growth Mgmt. Hearings Bd., 158 Wash. App. 866, 892 (Div. II, 2010).

V

The Petitioner has alleged it is entitled to relief pursuant to RCW 36.70C.130(1)(d) as the final decision was clearly erroneous in its application of law to fact. The Supreme Court has directed that, "A finding is clearly erroneous under subsection (d) when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed." Phoenix Dev., Inc. v. City of Woodinville, 171 Wash. 2d 820, 829 (2011).

VI

The Petitioner has alleged it is entitled to relief pursuant to RCW 36.70C.130(1)(e) as the final decision exceeded the jurisdiction of the Hearing Examiner. The challenge is a question of law, reviewed *de novo*. Phoenix Dev., Inc., at 828.

VII

The Petitioner has alleged it is entitled to relief pursuant to RCW 36.70C.130(1)(e) as the final decision violates the Petitioner's constitutional rights. Constitutional questions are reviewed by this Court *de novo*. Id.

Respondent's Standing

VIII

Friends of the San Juans (FOSJ) participated in the public comment period prior to the County's issuance of the MDNS. As indicated by the hearing examiner, FOSJ comments regarding maritime traffic were more than a "mere hint" of the issue ultimately appealed by FOSJ. Therefore, the hearing examiner did not err in concluding that the FOSJ had standing to bring the initial administrative appeal.

Authority of the Hearings Examiner

IX

A hearings examiner's authority pursuant to the Land Use Petition Act is that which is granted by the body that creates the position, herein, the Whatcom County Code. Durland v. San Juan County 174 Wash.App. 1, 298 P.3d 757, (2012).

X

The office of the hearing examiner is created in WCC 2.11. Specifically, WCC 2.11.210(k) authorizes the hearing examiner, in accordance with Chapter 22.05 WCC, to issue "final decisions" in SEPA appeals.

XI

The term "final decision" is addressed in WCC 22.05.110. which provides,

> (1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.
>
> (2) The hearing examiner's final decision on all Type III applications per WCC 22.05.020 or appeals per WCC 22.05.160(1) shall either grant or deny the application or appeal.
>
> > (a) The hearing examiner may grant Type III applications subject to conditions, modifications or restrictions that the hearing examiner finds are necessary to make the application compatible with its environment, carry out the objectives and goals of the comprehensive plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(b) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(c) The hearing examiner shall render a final decision within 14 calendar days following the conclusion of all testimony and hearings. Each final decision of the hearing examiner shall be in writing and shall include findings and conclusions based on the record to support the decision.

(d) No final decision of the hearing examiner shall be subject to administrative or quasi-judicial review, except as provided herein.

(e) The applicant, any person with standing, or any county department may appeal any final decision of the hearing examiner to superior court, except as otherwise specified in WCC 22.05.020. (Ord. 2019-013 § 1 (Exh. A); Ord. 2018-032 § 1 (Exh. A)).

Petition relies on the statutory construction rule of *expression unius est exclusion alterius* to argue that the silence of the Code with respect to the hearings examiner's authority to approve with condition Type 1 applications is intentional. Thus, Petitioner argues that there is no inherent authority of the hearing examiner to modify conditions and is limited to approving or denying the initial decision. This Court finds Petitioner's argument strained, and fails to account for the broader statutory scheme.

XII

Applying rules of statutory construction, courts will read the statutory scheme as a whole, giving effect to all provisions, reading avoiding conflicts between the provisions, and attempt to achieve a "harmonious statutory scheme." Am. Legion Post #149 v. Washington State Dep't of Health, 164 Wash. 2d 570, 585 (2008).

XIII

It is noteworthy that the Whatcom County Code vests initial decision making for Type I and II permits with the director, while Type III are initially heard by the hearing examiner. This distinction appears critical to the analysis in interpreting the purpose of WCC 22.05.110. The term "final decision" and "appeal" also appear distinct in WCC 22.05.110(2) yet, interchangeable with respect to the hearing's examiner's authority to issue a "final decision" pursuant to WCC 2.11.210(k) in SEPA "appeals." Put another way, the Whatcom County code makes no distinction between an initial administrative decision and a decision on appeal.

XIV

The term "final decision" is not defined in 20.97 WCC.

XV

When read in conjunction with the entire statutory scheme, the Court concludes that the hearings examiner did not exceed his authority in modifying conditions in his final order. The distinction in WCC 22.05.110(1) and (2) regarding the respective duties of both the director and hearings examiner in issuing "final decisions" must be read in conjunction with the entire statutory scheme. Which, vests the authority to issue the initial "final decision" in Type I and II permits with the director, and Type III permits with the hearings' examiner. The purpose of WCC 22.05.110(1) and (2), is to frame the authority of the respective bodies in issuing an initial "final decision." Read as a whole, it does not divest the hearing's examiner from issuing a "final decision" for the purposes of a SEPA appeal. Moreover, WCC 22.05.110(1) provides that a "final decision" in a Type I permit may be modified. As the hearing's examiner maintains

authority to issue a "final decision" on appeal, he also maintains the same authority to modify granted to the director.

Conditions E and F Based on Unfounded Community Concern

XVI

Community concern regarding potential environmental impacts alone is not sufficient to sustain a mitigating SEPA condition. Levine v. Jefferson County, 116 Wn.2d 575, 581-582. The Petitioner objects to the director's imposition of conditions E and F as response to community response, absent any evidence of environmental impact. This Court disagrees. Moreover, the proper question on judicial review is whether the hearings' examiner's conclusions imposing conditions E and F are supported by sufficient facts. This Court finds that they are.

XVII

As noted by the Respondents, the hearings examiner took extensive additional testimony regarding environmental impacts of increased vessel traffic. The hearings examiner accurately noted in Conclusion of Law No. 3 that the county repeatedly requested quantitative data from the Petitioner regarding vessel traffic. While the findings indicate that the Petitioner's use of the additional storage tanks for production of low sulfur fuel would not increase vessel traffic, the adopted conclusions reflect the fact that the increased storage capability would create additional vessel traffic if used for other purposes, *i.e.* export. As noted by the Respondent's, the record on appeal also contains testimony regarding the source for low sulfur feed stock required for the Petitioner's production that would arrive via marine transport. On appeal, the Petitioner asks that we accept the finding that additional storage does not create additional throughput, and simply trust that the tanks will be used exclusively for production purposes. The fact remains that the proposed tanks create additional storage which, could be used for additional export or requiring marine transported crude. The hearings examiner's adopted conclusion indicates a failure of the Petitioner to respond to County requests for quantitative data. Additionally, the

record suggests the potential for increased vessel traffic due to the marine shipping methods required for the low sulfur feed stock. Further, the record is significant with respect to environmental impacts of increased vessel traffic on resident killer whales. Therefore, the hearings' examiner's imposition of conditions E (as imposed by the director) and F is supported by substantial evidence. Moreover, the hearing examiner did not err in his application of law to facts.

Speculative Impacts

XVIII

An initial SEPA threshold determination requires a decisionmaker to consider the "...probable significant environmental impact" of the proposal. WAC 192-11-330(1)(b). A decisionmaker may only implement conditions "...to mitigate specific adverse environmental impact." RCW43.21C.060. a decisionmaker considers mitigating measures by the agency or applicant. WAC 192-11-330(1)(c). The regulation contemplates the requirement for subsequent environmental review. Moreover, in determining the significance of the impact of a proposal, the decisionmaker is to consider that some proposals may be impossible to forecast due to variables and, that a proposal may to a significant degree establish a precedent for future actions with significant impacts. WAC 192-11-330((3)(d) and (e)(iv).

XIX

Here, the fact remains that the Petitioner's project does increase storage capacity. Whether this increase increases vessel traffic is not speculative, rather it is dependent on how the Petitioner chooses to use the new facility. The Petitioner has maintained the need for "flexibility," essentially asking the County to simply trust that it will be used for a purpose that would increaser vessel traffic. As discussed below, the original term of Condition E, as offered by the Petitioner, is that the "primary" use of the project will be for feedstock associated with production. It does not negate the possibility for some use as storage for other purposes. The

MDNS conditions address more than mere speculative harms. Consequently, the hearing examiner did not err in his application of law to the facts.

Broad Restrictions of Conditions E and F

XX

Initially, it is important to note that the Petitioner has maintained throughout the process that the primary purpose of the project is to store feedstock for production purposes. In response to County inquiries, the Petitioner affirmed this primary purpose, and essentially offered up what was implemented in the MDNS as Condition E. Moreover, the Petitioner did not appeal the director's implementation of either Condition E or F, and only did so following the Respondent's initial administrative appeal.

XXI

Regarding Condition F, the Court finds no error in the hearings examiner's implementation and modification. The condition is directly targeted at a resulting impact, increased vessel traffic. The modification properly clarified a vague pronouncement, clarifying when additional SEPA review is triggered. As the condition is proportionate to the impact addressed, the Court finds no error in the hearings examiner's decision.

XXII

Regarding condition E, the Court finds no error in the original MDNS that was not appealed by the Petitioner. The condition was essentially offered by the Petitioner to ease concerns regarding increased vessel traffic caused by a use of the facility not originally contemplated in the application. Petitioner's current objection appears entirely disingenuous in light of its correspondence with the County leading up to the MDNS, and failure to file an initial appeal. The Court does conclude that the hearings examiner erred in modifying condition E as it went beyond what was offered by the Petitioner. Additionally, the strict language prohibits the intended flexibility of the storage tanks, without narrowly tailoring the condition to the

environmental impact itself. Indeed, the Petitioner could theoretically reduce processing production while increasing crude export without having a net effect on marine vessel traffic. Or, use the storage facilities temporarily for the purpose of transferring crude with no net effect. Consequently, the Court finds the modifications overly broad with respect to the impact being addressed. As such, the additional limiting language imposed by the hearings examiner in Condition E was an erroneous application of law. Therefore, the director's original Condition E shall be reinstated.

Dormant Commerce Clause and Condition E

XXIII

As we have already noted, the modified condition E as applied by the hearing examiner was overly broad. With respect to the Dormant Commerce Clause argument, the Court finds no error in the Hearings Examiner's application of law to the original condition. The original condition was essentially offered by the Petitioner. Therefore, the Court finds no violation.

XXIV

The modification of Condition E by the hearings examiner that went beyond that offered by the Respondent is concerning to the court. Express restriction on all export likely invokes the protection of the Dormant Commerce Clause. While the State's interest in protecting resident killer whale habitat is significant, as previously discussed the condition is not narrowly tailored to address the environmental impact. *See generally*, Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440 (1986). Ultimately, the Court declines to address whether the hearings examiner's modification to Condition E violates the Dormant Commerce Clause as that issue is moot in light of the Court's ruling setting that modification aside.

XXV

Pursuant to RCW 36.70C.140, the Court may affirm, reverse, or remand the decision of the hearing examiner for modification or further proceedings. The matter will be REMANDED

for entry of a final decision consistent with the Court's ruling with respect to modified Condition E.

The final decision of the hearing examiner is AFFIRMED as MODIFIED. The matter is REMANDED to the hearing examiner for the issuance of a final decision consistent with the Court's ruling.

Dated this 6 day of ~~March~~ April, 2021

SUPERIOR COURT JUDGE