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July 17, 2015

Travis Saunders, Senior Planner
Development Services Group
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040

Re: File No. SHL 14-031/SEPA 14-025, Cherberg Dock at 9418 SE 33rd Street

Dear Mr. Saunders:

This firm represents Dr. James Cherberg and Mrs. Nan Chot Cherberg regarding the above referenced application. This letter responds to your letter to Seaborn Pile Driving dated July 7, 2015. The letter indicates that the City is prepared to issue a decision on the application. However, the letter goes on to note that Dr. and Mrs. Cherberg have not obtained approval from the neighbors, Mr. Hal Griffith and Mrs. Joan Griffith, regarding the 35 foot setback from adjoining moorage structures. As a result, the City letter suggests that Dr. and Mrs. Cherberg request an extension to obtain more time to complete negotiations with the Griffiths.

Dr. and Mrs. Cherberg agree that an extension is warranted, but an extension is not the only solution in this situation. Specifically, the City could and should issue the shoreline permit conditioned upon submittal of the signed Joint Use Agreement prior to issuance of the building permit. The City Code specifically authorizes shoreline permit applications to be approved "with conditions":

> 6. Shoreline Permits Administration and Procedures.
>
> a. Administrative Responsibility. Except as otherwise stated in this section, the code official is responsible for:
>
> i. Administering shoreline permits.
>
> ii. Approving, ***approving with conditions*** or denying shoreline exemption permits, substantial development permits, shoreline conditional use permits, shoreline variances and permit revisions in accordance with applicable provisions.

Mercer Island City Code (MICC) 19.015.020(G)(6)(a)(ii) (emphasis added).

The shoreline permit application complies with all other requirements, except the consent from the Griffiths. The Cherbergs recognize that, under the applicable requirements, the City will not allow the Cherbergs to proceed with construction until the Joint Use Agreement is finalized and submitted to the City. Dr. and Ms. Cherberg's preference would be to have the City approve the shoreline permit conditioned on submittal of the fully executed Joint Use Agreement prior to issuance of the required building permit.

There are good reasons supporting this approach in any situation, not just in this situation. First, there is nothing in the applicable City Code that requires the submission of the Joint Use Agreement prior to approval. The Code only requires compliance which is assured by a condition of approval. Second, the standard agreement requires the dock improvements to be set forth on an attached diagram. The precise location or configuration of the proposed dock improvements is confirmed only by the approval, so it is premature to have the Griffiths sign an agreement prior to approval of the final design. Third, by issuing the permit conditioned on submission of the Joint Use Agreement, the City would be avoiding any entanglement in the issue between the Cherbergs and Griffiths.

It should be noted that the City's letter is completely wrong to refer to the alternative dock diagram submitted by the Griffiths in their comments on the application. The Cherbergs have a right to have ***their*** application and ***their*** dock proposal considered by the City. Possibly, the City was pointing to that alternative solely to demonstrate non-agreement by the Griffiths. In any event, there is no basis to consider the Griffiths' alternative as a realistic proposal. The Cherbergs already have approval from the United States Army Corps of Engineers. The Corps issued approval under the Rivers and Harbors Act thus determining that there is no navigation issue due to the proximity of the proposed Cherberg dock to the Griffith dock—contrary to the comment by Hal Griffith. Clearly, if the City had to pick, then the City would necessarily rely, for navigation issues, upon the United States Army Corps of Engineers. Additionally, the diagram submitted by Griffith is essentially a cartoon, not backed up by any accurate, surveyed dimensions—it is not buildable as shown. Griffith's comment that the Cherberg proposal is too large is also comical given the massive size of the Griffith dock. More importantly, that alternative does not meet the needs of the Cherbergs.

At this time, the dispute between the Cherbergs and the Griffiths has proceeded to court with the parties essentially suing each other. King County Superior Court No. 15-2-10983-9 SEA. One issue in the court case is whether the Griffiths must agree to the Joint Use Agreement required by the City due to a prior agreement between the parties.

We think that City can avoid getting in the middle of the Cherberg-Griffith dispute by approving the shoreline permit conditioned on submission of the Joint Use Agreement prior to issuance of the building permit. The City would be done with the matter and leave it up to Dr. and Mrs. Cherberg to obtain consent from the Griffiths. Again, this is the approach preferred by Dr. and Mrs. Cherberg. However, another option is to grant an extension until the matter is resolved by the Superior Court. It is clearly inappropriate for the City to deny the application due to no Joint Use Agreement when the issue of the Joint Use Agreement is before the Superior Court. Thus,

even though, Dr. and Mrs. Cherberg would prefer to have an approval, in the alternative, they request an extension of at least six months which could be subject to a further extension if the matter is not resolved at that time.

In making these requests, the Cherbergs specifically reserve, and do not waive, other rights. First, it should be pointed out that "the Griffiths' dock" is controlled by the Griffiths based on an easement over the Cherbergs' property. "The Griffiths' dock" is almost entirely on the Cherbergs' property with only a couple of fingers on the Griffiths' property. The applicable City Code refers to the adjoining moorage structure and requires consent from the "adjoining owner." The Griffiths don't own "the Griffiths' dock"—they only hold an easement. The Cherbergs are the fee owners of "the Griffiths' dock," so ***the Cherbergs*** should, as the owners, be allowed to consent to the 35-foot setback. The Cherbergs reserve the right to push that issue.

Also, to the extent that the City maintains that consent of the Griffiths is required, the Cherbergs reserve the right to challenge the legality of the City's consent requirement. The United States Supreme Court ruled long ago that requiring consent from neighbors to issue a land use approval violates the Due Process Clause of the Constitution of the United States. *State ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (Roberge was the building official for the City of Seattle) (copy attached). It should be noted that violating the constitutional rights of property owners subjects the City to claims for damages and attorney fees under the Civil Rights Act. 42 U.S.C. §§ 1983, 1988. Although quasi-judicial decision makers are immune from damage claims, individual decision makers are liable for knowing violations, which here is obvious given that the *Roberge* case is 87 years old. As explained by Justice Brennan, "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 (1981).

In summary, the Cherbergs request that the City issue the shoreline permit conditioned on submission of the Joint Use Agreement prior to issuance of the building permit. In the alternative, the Cherbergs request an extension of at least six months. To ensure full disclosure, I am copying the City Attorney and the Griffiths' attorneys.

Sincerely,

STEPHENS & KLINGE LLP

Charles A. Klinge
klinge@SKlegal.com

cc: Clients
Kari Sand, City Attorney
Seaborn Pile Driving, Attn: Ted Burns
Rich Hill and Tyler Farmer, Attorneys for the Griffiths

49 S.Ct. 50
Supreme Court of the United States.

STATE OF WASHINGTON ex rel. SEATTLE TITLE TRUST CO.
v.
ROBERGE, Superintendent of Building of City of Seattle.

No. 29. | Argued Oct. 11, 12, 1928. | Decided Nov. 19, 1928.

In Error to the Supreme Court of Washington.

Suit by the State of Washington, on the relation of the Seattle Title Trust Company, as trustee, against George W. Roberge, as Superintendent of Building of the City of Seattle. Judgment for defendant was affirmed by the Supreme Court of Washington (144 Wash. 74, 256 P. 781), and plaintiff brings error. Reversed.

West Headnotes (4)

[2] **States**
Police Power
Legislatures may not, under guise of police power impose unnecessary and unreasonable restrictions on use of private property or pursuit of useful activities.

60 Cases that cite this headnote

[2] **Constitutional Law**
Property in General
Right of owner to devote his land to any legitimate use is "property" within due process clause. U.S.C.A. Const. Amend. 14.

57 Cases that cite this headnote

[3] **Constitutional Law**
Zoning and Land Use
Zoning regulations, to be valid, must bear substantial relation to public health, safety, morals, or general welfare. U.S.C.A. Const. Amend. 14.

62 Cases that cite this headnote

[4] **Constitutional Law**
Particular Issues and Applications
City ordinance, permitting erection of philanthropic home for children and aged in first residence district only by consent of two-thirds of property owners, held void as denying due process. U.S.C.A. Const. 14.

160 Cases that cite this headnote

Attorneys and Law Firms

****50 *116** Messrs. Corwin S. Shank and Glenn J. Fairbrook, both of Seattle, Wash., for plaintiff in error.

Messrs. A. C. Van Soelen, Thomas J. L. Kennedy, and Arthur Schramm, Jr., all of Seattle, Wash., for defendant in error.

Opinion

***117** Mr. Justice BUTLER delivered the opinion of the Court.

Since 1914, the above-named trustee has owned and maintained a philanthropic home for aged poor. It is located about 6 miles from the business center of Seattle, on a tract 267 feet wide, extending from Seward Park avenue to Lack Washington, having an average depth of more that 700 feet and an area of about 5 acres. The home is a structure built for and formerly used as a private residence. It is large enough to accommodate about 14 guests, and usually it has had about that number. The trustee proposes to remove the old building and in its place, at a cost of about $100,000, to erect an attractive 2 1/2-story fire proof house large enough to be a home for 30 persons. The structure would be located 280 feet from the avenue on the west and about 400 feet from the lake on the east, cover 4 per cent. of the tract, and be mostly hidden by trees and shrubs. The distance between it and the nearest building on the south would be 110 feet, on the north 160, and on the west 365.

A comprehensive zoning ordinance (No. 45382) passed in 1923 divided the city into six use districts, and provided that, with certain exceptions not material here, no building

should be erected for any purpose other than that permitted in the district in which the site is located (section 2). The land in question is in the 'first residence district.' The ordinance permitted in that district single family dwellings, public schools, certain private schools, churches, parks and playgrounds, an art gallery, private conservatories for plants and flowers, railroad and shelter stations (section 3a). And, upon specified conditions, it also permitted garages, stables, buildings for domestic animals, the office of physician, dentist, or other professional person when located in his or her dwelling (section 3b), fraternity, sorority, and boarding houses, a community clubhouse, a memorial building, nurseries, greenhouses, and buildings necessary ***118** for the operation of public utilities (section 3c). It declared that the section should not be construed to prohibit the use of vacant property in such district for gardening or fruit raising, or its temporary use for fairs, circuses, or similar purposes (section 3e). By an ordinance (No. 49179) passed in 1925, section 3c was amended by adding:

'A philanthropic home for children or for old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two-thirds of the ****51** property within four hundred (400) feet of the proposed building.' [1]

***119** Subsequently the trustee, without having obtained consents of other landowners in accordance with the provision just quoted, applied for a permit to erect the new home. It is the superintendent's official duty to issue permits for buildings about to be erected in accordance with valid enactments and regulations. He denied the application solely because of the trustee's failure to furnish such consents. Then the trustee brought this suit in the superior court of King county to secure its judgment and writ commanding the superintendent to issue the permit; and it maintained throughout that the ordinance, if construed to prevent the erection of the proposed building, is arbitrary and repugnant to the due process and equal protection clauses of the Fourteenth ***120** Amendment. That court held that the amended ordinance so construed is valid and dismissed the case. Its judgment was affirmed by the highest court of the state. 144 Wash. 74, 256 P. 781.

[1] **[2]** The trustee concedes that our recent decisions require that in its general scope the ordinance be held valid. Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016; Zahn v. Board of Public Works, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074; Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, 53 A. L. R. 1210; Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842. Is the delegation of power to owners of adjoining land to make inoperative the permission, given by section 3(c) as amended, repugnant to the due process clause? Zoning ***121** measures must find their justification in the police power exerted in the interest of the public. Euclid v. Ambler Realty Co., supra, 387 of 272 U. S. (47 S. Ct. 118). 'The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or ****52** general welfare.' Nectow v. Cambridge, supra, page 188 of 277 U. S. (48 S. Ct. 448). Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385; Adams v. Tanner, 244 U. S. 590, 594, 37 S. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; Meyer v. Nebraska, 262 U. S. 390, 399, 400, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446; Burns Baking Co. v. Bryan, 264 U. S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813, 32 A. L. R. 661; Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74, 44 S. Ct. 439, 68 L. Ed. 904; Pierce v. Society of Sisters, 268 U. S. 510, 534, 535, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468; Weaver v. Palmer Bros. Co., 270 U. S. 402, 412, 415, 46 S. Ct. 320, 70 L. Ed. 654; Tyson & Brother v. Banton, 273 U. S. 418, 442, 47 S. Ct. 426, 71 L. Ed. 718.

[3] [4] The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority ***122** -uncontrolled by any standard or rule prescribed by legislative action-to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There

is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 366, 368, 6 S. Ct. 1064, 30 L. Ed. 220. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. Eubank v. Richmond, 226 U. S. 137, 143, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123; Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141, 70 L. Ed. 330.

Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594, involved an ordinance prohibiting the putting up of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected. The question was whether the clause requiring such consents was an unconstitutional delegation of power and operated to invalidate the prohibition. The case was held unlike Eubank v. Richmond, supra, and the ordinance was fully sustained. The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. Pages 529, 530 of 242 U. S. (37 S. Ct. 190). It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person. The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be affensive.

As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon ***123** the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.

We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the state or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.

Judgment reversed.

All Citations

278 U.S. 116, 49 S.Ct. 50, 86 A.L.R. 654, 73 L.Ed. 210

Footnotes

1 The pertinent provisions of the ordinance as amended follow:

The title is:

An ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes.

Section 2:

(a) For the purpose of regulating, classifying and restricting the location of trades and industries and the location of buildings designed, erected or altered for specified uses, the city of Seattle is hereby divided into six (6) use districts, namely: First residence district, second residence district, business district, commercial district, manufacturing district and industrial district.

(b) The boundaries of the aforesaid districts are laid out and shown upon the map designated 'Use Map,' filed in the office of the city comptroller and ex-officio city clerk. * * * The use districts on said map are hereby established.

(c) * * * No building shall be erected, altered or used, nor shall any premises be used, for any purpose other than that permitted in the use district in which such building or premises is located.

(d) Where a use in any district is conditioned upon a public hearing or the consent of surrounding property, such use if existing at the time this ordinance becomes effective, shall be allowed repairs or rebuilding without such hearing or consent.

Section 3. First Residence District.

(a) The following uses only are permitted in a first residence district:

(1) Single family dwellings.

(2) Public schools.

(3) Private schools in which prescribed courses of study only are given and are graded in a manner similar to public schools or are of a higher degree.

(4) Churches.
(5) Parks and playgrounds (including usual park buildings).
(6) Art Gallery of Library Building.
(7) Private conservatories for plants and flowers.
(8) Railroad and shelter stations.
(b) In a first residence district, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage in a first residence district shall not occupy more than seven per cent. (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. cent, of the property within a radius of two hundred must be obtained of the owners of fifty (50) per cent, of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowls shall be permitted on any lot in the first residence district, except that a building of greater area or a greater number of buildings shall be permitted when the written consent shall have been obtained of the owners of fifty (50) per cent. of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less than four (4). The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (60) persons, in a single family dwelling shall be considered an accessory use.
(c) A fraternity house, sorority house or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a) this section (3), a community club house, memorial building, nursery or greenhouse, or a building which is necessary for the proper operation of a public utility may be permitted by the board of public works after a public hearing. A philanthropic home for children or for old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.
(e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to law, for fairs, circuses or similar purposes.

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