NO. 94357-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an Association of multiple concerned residents of the Chiliwist Valley, RUTH HALL, ROGER CLARK, JASON BUTLER, WILLIAM INGRAM and LOREN DOLGE, Residents and property owners in the Chiliwist Valley,

Petitioners,

v.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision of the State of Washington; RAYMOND CAMPBELL, SHEILAH KENNEDY, and JAMES DETRO, Okanogan County Commissioners; DANIEL BEARDSLEE, Okanogan County Hearing Examiner; JOSHUA THOMPSON, Okanogan County Engineer; Respondents; and GAMBLE LAND & TIMBER Ltd., a Washington Limited Partnership,

Respondents,

OKANOGAN COUNTY'S ANSWER TO AMICI CURIAE MEMORANDUM OF METHOW VALLEY CITIZENS COUNCIL AND FUTUREWISE

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I. INTRODUCTION

An amicus memorandum has been submitted by Methow Valley Citizens Council ("Citizens") and Futurewise in support of the Petition for Review filed herein. The memorandum presents arguments based in large part on newspaper articles and other hearsay documents which are unrelated to the specific circumstances surrounding vacation of Three Devils Road. The Court will note that the vacation order dealt exclusively with a stretch of remote, unimproved road far from any residential properties, and miles from any properties owned by the Petitioners herein. There was no competent evidence in the record that any of the named Petitioners had ever used Three Devils Road as a fire escape route; nor could they identify anyone who had.

The assertion in the amicus memorandum that a "fundamental right" arises when a remote rural road is vacated is supported by no relevant authority. The cases cited simply do not support the legal argument for which they are offered. The trial court and the Court of Appeals correctly deferred to the County's discretionary determination that the road was not useful or necessary to the County's road system. Supreme Court review should be denied.

II. ARGUMENT

A. A primitive road vacation does not involve a fundamental right which would implicate equal protection or substantive due process.

Citizens and Futurewise begin their legal argument with vague assertions that "safety" is a "fundamental right" which should give rise to federal and Washington State constitutional considerations in the form of equal protection and substantive due process. In effect, they argue that a county's decision to vacate a remote primitive road should be viewed under a "strict scrutiny test" applicable to an equal protection challenge to legislation implicating a "suspect" class. Yet a careful review of this argument reveals it to be a convoluted mix of legal terms, with no underlying coherence.

The only cited case which even involves a road vacation has nothing to do with considerations of "safety." In *Bay Industries, Inc. v. Jefferson County Board of Commissioners*, 33 Wn. App 239, 653 P.2d 1355 (1982), the county had approved a road vacation on the express condition that property owners along the road were compelled to grant access easements to a power company, a fire department and to other owners who had supported road vacation. The owners were not required, however, to grant an easement to Bay Industries, which was the only adjacent property owner that had opposed vacation. The court held that there was no rational basis to support the discriminatory exclusion of

rights to the party opposing the road vacation. No comparable equal protection issue exists here. Moreover, the *Bay Industries* case had nothing whatsoever to do with "safety" as a fundamental right.

None of the other cases cited in support of the "fundamental right" argument are even remotely on point. For example, *In re Dependency of R.H.*, 129 Wn. App. 83, 117 P.3d 1179 (2005), had nothing to do with road safety or constitutional law. Instead, the court in that case merely applied express language from RCW 13.34.020 that, when there is a conflict, the "safety of a child" prevails over the legal rights of a parent. *Id.* at 88. In *Personal Restraint of Hegney*, 138 Wn. App. 511, 158 P.3d 1193 (2007), *review denied* 152 Wn.2d 1034, the court held that "strict scrutiny" under the equal protection clause should *not* be applied in a case involving a minor offender, because juveniles are not members of a suspect class. *Id.* at 530.

In *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), it was held that revocation of a parent's commercial license for failure to provide child support did not violate a fundamental right. And in *State v. Osman*, 157 Wn.2d 474, 139 P.3d 334 (2006), this Court held that the trial court did not violate equal protection by considering an alien's possible deportation status in making a sentencing decision.

In short, Citizens and Futurewise offer no legal support for the notion that the alleged "safety" afforded by a remote primitive road

implicates any fundamental rights inherent in the constitution. Because there are no such fundamental rights, the rest of the argument presented by in the amicus memorandum also fails.[1]

B. There is no issue of substantial public interest justifying the overthrow of Washington's statutory appearance of fairness rule.

Section B of the amicus memorandum essentially repeats Petitioner Chiliwist's unsupported contention that all public hearings should be subject to the appearance of fairness doctrine, contrary to the express language of RCW 42.36.010. But just as Chiliwist's argument was unsupported by legal authority so, too, the amicus memorandum does not provide a legal basis for rejecting Washington's statutory appearance of fairness doctrine.

Citizens and Futurewise concede that in 1989 the legislature expressly limited the scope of the appearance of fairness doctrine in RCW 42.36 to quasi-judicial actions, but then make the strained argument that the statutory language should be ignored because, they claim, road vacations are not "local land use decisions." Not surprisingly, this curious argument is supported by no legal authority. The legislature has specifically precluded application of the appearance of fairness doctrine to

[1] As explained below, the competent evidence in the record does not even support the claim that Three Devils Road is useful or necessary for the purpose of fire safety.

legislative functions. RCW 42.36.030. A road vacation is a classically legislative act and therefore the doctrine does not apply.

C. No issue of substantial public interest arises from a County's vacation of a remote primitive road.

In section C of the amicus memorandum, Citizens and Futurewise return to their argument grounded in fire safety as a fundamental right. They argue that a County's road vacation order should be treated as a quasi-judicial order subject to a writ of review, notwithstanding clear authority that such actions are legislative in nature. Again, they cite no legal authority supporting their novel view that safety is a fundamental right requiring a strict standard of review. Indeed, they curiously rely on *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 324, P.2d 1113 (1958), where the Court *denied* a challenge to a road vacation despite similar allegations of fire safety concerns, because fire safety is a uniquely local legislative function. *Id.* at 367.

The authors of the amicus memorandum do not contest the sworn testimony of Petitioners that none of them had ever used Three Devils Road as an escape route and knew of no one who had. (CP 1387-88, 1431, 1443, 1451, 1467). Instead, they ask the Court to go outside the administrative record and consider newspaper articles and reports of fires in other locations miles away from Three Devils Road. Relying on these documents, they note that the "Twisp Fire" resulted in deaths from a

"crash on a short dead end road serving six houses." (Brief, page 8). They also cite an article to the affect that fire losses have increased due to the "large number of homes in the urban-rural fringe . . . ." (page 9).

Their argument is curious, in view of the fact that Three Devils Road is nowhere near the urban/rural fringe. Indeed, it is undisputed that there are no residences near the road, and Petitioners live miles away from the stretch of road that was vacated. Indeed, the record supports the conclusion that exclusion of the public from this primitive road through Gamble's property likely reduces the risk of personal or property damage in the event of a fire. (CP 1132-33).

In any event, the proposed "fire safety" exception to the rule governing road vacations would inevitably swallow the rule, if a mere allegation of fire danger was sufficient to paralyze the local government's vacation authority, because virtually any road could theoretically be utilized in a hypothetical fire situation.

III. CONCLUSION

The power to vacate roads is a legislative function not subject to judicial review under a writ of review. The Court of Appeals properly affirmed the decision of the trial court. Supreme Court review should be denied.

Executed at Seattle, Washington this 29th day of June, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the parties of record as stated below in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington on the 29th of June, 2017.

Sandy Watkins

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