FILED
SUPREME COURT
STATE OF WASHINGTON
11/30/2022 9:11 AM
BY ERIN L. LENNON
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NO. 101222-5

SUPREME COURT
OF THE STATE OF WASHINGTON

Viking JV, LCC,

Petitioner,

v.

City of Puyallup,

Respondent.

ANSWER TO PETITION FOR REVIEW

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PUYALLUP MUNICIPAL CODE

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I. INTRODUCTION

Viking JV, LLC ("Viking") seeks review of an Unpublished Opinion of the Court of Appeals, Division II filed June 14, 2022 ("Decision"). The Decision is not in conflict with any decision of this Court or any published decision of the Court of Appeals. To the contrary, the detailed, 33-page Decision is in clear lockstep with -- if not compelled by -- Division I's published decision in *Westridge-Issaquah II, LP v. City of Issaquah*, 20 Wn. App. 2d 344, 500 P.3d 157 (2021). The Decision also does not involve any significant constitutional issues. Therefore, review is clearly not warranted under RAP 13.4(b)(1)-(3).[1] Further, Division II itself conclusively

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[1] Viking's PFR expressly seeks review only under RAP 13.4(b)(4). *See* PFR at 14, 16, 30. However, Viking asserts that the Decision "overextended" and "erroneously relied on" *Westridge-Issaquah II*. PFR at 2, 5, 24-26. Viking is incorrect, but, in any event, RAP 13.4(b) does not authorize review where a decision "overextends" or "erroneously relies on" other case law.

determined that its Decision has <u>no</u> precedential value when, on July 29, 2022, it issued its Order Denying Motion to Publish.

This matter also does not involve any issue of substantial public interest that would warrant review under RAP 13.4(b)(4). Contrary to Viking's assertion, this matter does not "concern whether a city may adopt procedures under its code to adjust a system development charge ('SDC') and, if so, whether it may apply its own code in a 'gaming' fashion that denies an owner their appeal rights." *See* PFR at 1. And, Viking's argument that the unpublished Decision somehow calls into question the validity of code provisions adopted by other cities is not colorable. *See* PFR at 14-15.

The Court of Appeals Decision here clearly holds both that (1) individualized adjustment of SDCs are not permitted under state law, *i.e.,* RCW 35.92.025, consistent with Division I's decision in *Westridge-Issaquah II* **<u>and</u>** (2) they are also not permitted by the Puyallup Municipal Code (PMC). Decision at 30.

Ultimately, this case concerns an SDC charged to one developer in one city under one city code; it does not concern or call into question SDC provisions adopted by other cities in their city codes. In short, there is no issue of substantial public interest present in the unpublished Division II Decision that would warrant review by the Supreme Court.

II. STATEMENT OF THE CASE

For the statement of the case, the City refers the Court to Division II's Decision, which provides a far more detailed and accurate recitation of facts and procedural history than provided by Viking. *See* Decision at 2- 16.

III. ARGUMENT

RAP 13.4(b) provides:

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved;

> or (4) If the petition involves an issue of substantial
> public interest that should be determined by
> the Supreme Court.

RAP 13.4(b) (emphasis in original). There are no significant constitutional issues present here, and the Decision is not in conflict with any decision of this Court or any published decision of the Court of Appeals. Recognizing that review is clearly not warranted under the specific provisions of RAP 13.4(b)(1)-(3), Viking defaults to RAP 13.4(b)(4) only, arguing that its petition somehow generally involves an issue of substantial public interest. *See* PFR at 14, 16, 30. However, Viking's PFR devotes substantially more time to rearguing the merits of its appeal than it does explaining how it presents an actual issue of substantial public interest worthy of Supreme Court review. Viking also misconstrues the Court of Appeals Decision and its reasoning, attempting to manufacture "public interest" where there is none.

For all of the reasons discussed further below, Viking's PFR should be denied.

A. Individualized Adjustment of SDCs is Not Permitted Under State Law, ***i.e.,*** RCW 35.92.025, Consistent with Division I's Decision in ***Westridge-Issaquah II*.**

Viking argues that the Court of Appeals erroneously relied on *Westridge-Issaquah II* and incorrectly concluded that no equitable adjustment is permitted by state law. PFR at 23-26. In doing so, Viking emphasizes that it is not seeking review of the conclusion that RCW 35.92.025 does not "require" an equitable adjustment, but instead is seeking review of the conclusion that no equitable adjustment is "permitted" by state law, *i.e.,* RCW 35.92.025. PFR at 23; PFR at 25-26, fn. 34. However, both conclusions are correct consistent with the plain language of RCW 35.92.025 and *Westridge-Issaquah II*.

Nowhere in RCW 35.92.025, or chapter 35.92 RCW generally, is there any mention of equitable or individualized adjustments to SDCs. Thus, under the plain language of the statute, there are no equitable or individualized adjustments either "required" or "permitted."

As explained in *Westridge-Issaquah II*:

> Under RCW 35.92.025, "the only requirements placed on [cities] are that the charge is reasonable and that [cities] base[ ] these charges on the equitable cost of their [utility] system." *Palermo*, 147 Wn. App. at 79. Additionally, "'the fundamental basis on which the fee is to be calculated … is not that of the benefit received but merely an equitable sharing of the cost of the system.'" *Boe*, 66 Wn.2d at 156.

Westridge-Issaquah II, LP v. City of Issaquah, 20 Wn. App. 2d 344, 366-67, 500 P.3d 157, 168 (2021).

In *Westridge-Issaquah II*, as in this case, a developer challenged the assessment of connection charges against their particular property under RCW 35.92.025, but the developer did not argue the ordinance or underlying rate study was invalid. The *Westridge-Issaquah II* court emphasized that to successfully challenge an assessment under RCW 35.92.025, a party must provide evidence that the basis on which the ordinance establishes the fee is not the proper basis authorized by the statute. *Id.* at 368. It went on to explain:

> The statute requires connection charges established by ordinance to be "reasonable" such that "property *owners* shall bear *their* equitable share of the cost of" the city's utility system. RCW 35.92.025 (emphasis added). This language contemplates the equitable share of property owners as a class, not what is equitable to charge an individual property owner based on that particular owner's impact on the city utility system.

Id. (emphasis in original).

The court unequivocally concluded that a developer cannot challenge assessments under RCW 35.92.025 "solely as they apply to its particular properties." *Id.* at 369. If an assessment ordinance is properly challenged and it is unreasonable, the remedy is to invalidate the enacting ordinance in its entirety, not to simply invalidate charges as they apply to a specific property. *Id.* Further, the court rejected the argument that RCW 35.92.025 connection charges are required, under RCW 82.02.020, to be proportionate to the share of the utility systems' costs attributable to the developer's property. *Id.* at 369-70.

The Court of Appeals Decision here correctly relies on *Westridge-Issaquah II* in concluding that individualized assessments and equitable adjustments are not required or permitted under state law. *See* Decision at 25-30 (discussing *Westridge-Issaquah II* and other authorities at length and concluding: "Under a correct interpretation of RCW 35.92.025, it was proper to impose a system development charge calculated according to the terms of the City's municipal code. No individualized assessment or equitable adjustment was permitted by state law.").

B. The City's Code Also Does Not Permit Individualized Adjustment of SDCs.

Viking's asserts that state law sets a ceiling on what a city may charge, but that it "leaves room for a city to adopt a variance/deviation type procedure to adjust an individual SDC." PFR at 24. And it argues that the effect of the Court of Appeals Decision is to prohibit cities "from any equitable adjustment based on the circumstances of the case," thereby calling into

question provisions adopted by other cities that Viking contends allow for such adjustments. PFR at 15. Thus, according to Viking, this matter presents an issue of substantial public interest with regard to tying other cities' hands. PFR at 14-15. However, to create a "substantial public interest" issue where none exists, Viking's argument ignores what Division II actually held.

The Court of Appeals in this case did not conclude its analysis after deciding that RCW 35.92.025 does not require or permit an equitable or individualized adjustment. Instead, immediately after reaching that conclusion, the Court of Appeals went on to determine the next logical question: whether an adjustment was authorized under the provisions of the Puyallup Municipal Code (PMC). Decision at 30-31. After considering the arguments of the parties, including the same arguments presented by Viking in its PFR to this Court, the Court of Appeals concluded that no individualized assessment or equitable adjustment is authorized by the PMC either:

> Nor was it permitted by the City's code. The public works director calculated a reduced charge, but the City's code only authorized him to review the assessed development charge and “make a determination in writing as to the correctness of the … charge.” Former PMC 14.26.080(2) (1999). In other sections of the municipal code, the City expressly authorizes the director to exercise his reasonable discretion. For example, when determining the appropriate reimbursement charge under a latecomer's agreement, the code provides that the charge “shall be based on the total project cost and figured on either a front-foot or area assessment basis or both *at the reasonable discretion of the public works director*.” PMC 21.10.130(2) (emphasis added). PMC 14.26.080(2) did not similarly authorize use of “reasonable discretion.” When read in conjunction with RCW 35.92.025 and contrasted with other provisions of the municipal code, it is clear that the director's role in determining “the correctness” of a charge was limited to verifying the underlying calculations and project details that informed the charge, such as the square feet of impervious surface that would be added to the City's storm water system.

Decision at 30-31 (emphasis in original).

Thus, in affirming the system development charge assessed against Viking, the Court of Appeals emphasized that its decision was not only based on RCW 35.92.025, but was both fact specific and dependent upon the City’s code:

> Washington law does not require an equitable adjustment based on the Viking project's specific characteristics or infrastructure contributions. Because the amount of impervious surface area that Viking is adding to the City is uncontested, the system development charge calculated based on that amount of surface area is supported by substantial evidence. Applying RCW 35.92.025 <u>and the City's municipal code to these facts</u>, the appellate examiner's decision was not clearly erroneous.

Decision at 31 (emphasis added).

C. There Are No Issues of Substantial Public Interest Raised That Warrant Supreme Court Review Under RAP 13.4(b).

As discussed above, Viking's "pitch" to this Court for review rests on a fundamental misconstruction of the Court of Appeals Decision, *i.e.* that it precludes cities from adopting code provisions that might allow for adjustments to system development charges and therefore calls into question provisions

adopted by other jurisdictions.[2] The Decision only construes what the Puyallup Code allows; it does not lay down any principles or rules that would preclude cities from adopting a different approach than that authorized by the Puyallup Code. Further, even if it did so, the Decision is unpublished and of no precedential value in any event.

Nor does this matter "concern whether a city may adopt procedures under its code to adjust a system development charge ("SDC") and, if so, whether it may apply its own code in a 'gaming' fashion that denies an owner their appeal rights." *See* PFR at 1.

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[2] Viking only cites a few code provisions from other jurisdictions and actually quotes only one, using ellipses to redact key language. PFR at 14-15. Viking provides no real explanation or analysis of the provisions cited, some of which are quite detailed and voluminous. It is not clear that any of the cited provisions would authorize the kind of adjustment that Viking seeks here and Viking does not explain how they would.

Here, the Court of Appeals held that the City code does not authorize the adjustments demanded by Viking, and that based on the specific facts at issue, the system development charge assessed in the City's final decision was appropriate. Viking clearly disagrees with these conclusions, but that is not a basis for Supreme Court review.

The pragmatic proposal for a possible reduction that the City public works director initially made to break the logjam with Viking was beyond his authority, as determined by the City Appellate Hearing Examiner in the City's final, reviewable decision.[3] That the public works director made his proposal contingent upon Viking not pursuing further appeals reflected a

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[3] *See* Decision at 24 ("The appellate examiner's decision is therefore the reviewable land use decision under LUPA. *See* RCW 36.70C.020(2). We review the appellate examiner's decision to reinstate the full $997,280 system development charge and reject Viking's claim that the City 'engaged in unlawful procedure or failed to follow a prescribed process' in violation of RCW 36.70C.130(1)(a).")

pragmatic approach to solving a problem and moving on. However, it is beside the point – the public works director did not have the authority under the Code to authorize the reduction *regardless of* the condition.

Viking is being assessed what it should be assessed and will therefore have to pay its fair share toward the City's system based on the amount of undisputed impervious surface area that Viking is adding to the City.

It is notable in this regard that the Court of Appeals not only held that the Puyallup Code simply did not authorize SDC adjustments, but also went on to conclude "that there is substantial evidence in the record to support the appellate examiner's conclusion that Viking benefits from the City's stormwater system." Decision at 31. Accordingly, even assuming that an adjustment could have been made, Viking did not demonstrate that the assessment was unreasonable and an adjustment was called for. *See* Decision at 32.

There is no gamesmanship and the City is not being "rewarded." Viking simply must pay what the Code requires.

Finally, no appeal rights have been denied. Viking has now had four appeals, including two before City hearing examiners, one before the superior court, and one in the Court of Appeals. Denial of Viking's appeals on their merits is not synonymous with deprivation of Viking's appeal rights.

IV. CONCLUSION

For all of the above reasons, the Court should deny Viking's PFR.

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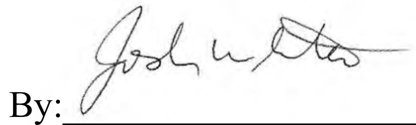
I certify that this Answer is in 14-point Times New Roman font and contains 2,435 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 30th day of November, 2022

Respectfully submitted,

EGLICK & WHITED PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2022, I filed electronically one copy of the foregoing document with the Supreme Court of the State of Washington and delivered a copy of the document via electronic mail on this date to:

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November 30, 2022 - 9:11 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Viking JV, LLC v. City of Puyallup
Superior Court Case Number:	20-2-04697-9

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