101727-8

NO. 56808-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE DEPARTMENT OF ECOLOGY, et al.,

Respondents.

CITY OF BAINBRIDGE ISLAND'S ANSWER TO CLERK'S MOTION TO STRIKE REPLY

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Respondent, the City of Bainbridge Island ("City"), files this answer in support of the Clerk's motion to strike PRSM's improper reply brief. The Clerk's analysis is correct. Respondents have not asked the Court to review any new issues and, in fact, have opposed review entirely. None of PRSM's arguments address this fact. Instead, PRSM doubles down on its improper tactics by using the motion to strike as an excuse to file an additional thirteen pages of argument on the merits of its petition.

This is the second time PRSM has filed an improper reply brief on a petition for review, in this Court in this same litigation. PRSM employed the same tactic when it asked this Court to review an interlocutory issue three years ago. The Court struck PRSM's improper reply brief then and should do so again here.

A. Respondents did not raise new issues for review by explaining why PRSM's arguments do not warrant review.

PRSM attempts to justify its improper reply brief by claiming that Respondents' Answer "raises three new alternative

arguments…."[1] There is no merit in PRSM's conclusory assertion that the simple act of responding to the arguments raised in a petition for review somehow gives the petitioner broad license to file a reply. PRSM ignores the plain language of the rule, which provides that a party "may file a reply to an answer only if the answering party ***seeks review*** of issues not raised in the petition for review." RAP 13.4(d) (emphasis added).

Even if Respondents' arguments could be characterized as raising "new issues," Respondents did not seek review of any such issues. Respondents did not seek review at all and, in fact, opposed this Court's review of the Court of Appeals' decision entirely. PRSM's reply therefore plainly violated RAP 13.4(d).

B. Allegedly new arguments do not justify PRSM's improper reply brief.

PRSM also claims that, if the supposedly new arguments were "deemed credible," they "would reverse the lower court's decision and secure a ruling that would be substantially more

[1] *Petitioners' Answer to Clerk's Motion to Strike*, at 2.

favorable to the Respondents."[2] First, PRSM is simply mistaken as a procedural matter. All the arguments in Respondents' Answer were offered as bases for *denying* review of the Court of Appeals' decision. Because Respondents did not ask the Court for review, if the Court accepts Respondents' arguments, the result will be that the Court will deny review. The ruling would not be "substantially more favorable to the Respondents." Rather, the Court of Appeals' decision would be left undisturbed.

Second, in its effort to identify some new argument by Respondents, PRSM misrepresents Respondents' briefing. For example, PRSM claims that Respondents "claim that PRSM's trial-court briefing did not satisfy RAP 10.3(c)."[3] But Respondents never cited RAP 10.3(c). At pp. 14–17 of their Answer, Respondents explained why the Court of Appeals correctly found that PRSM failed to preserve its arguments about the precautionary principle. In support of the Court of Appeals'

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[2] *Petitioners' Answer to Clerk's Motion to Strike*, at 2.
[3] *Petitioners' Answer to Clerk's Motion to Strike*, at 4.

conclusion, Respondents cited a case holding that the courts generally do not consider arguments raised for the first time in a reply brief.[4] Respondents never argued that the Court of Appeals erred in considering the doctrine of unconstitutional conditions, as PRSM now claims. To the contrary, Respondents argued that the Court of Appeals correctly handled the issue.

Likewise, Respondents did not argue that the Court of Appeals "erred in addressing the doctrine of unconstitutional conditions on the merits because … the City's buffer demand does not constitute the type of permit condition that is subject to *Nollan/Dolan*."[5] At pp. 8–9 of PRSM's petition for review, PRSM argued that the City's buffer regulations demand a dedication of property to public use. Respondents explained in their Answer why that argument had no merit. Again,

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[4] *Joint Answer of State of Washington, Department of Ecology and City of Bainbridge Island in Opposition to Petition for Review*, at 17.

[5] *Petitioners' Answer to Clerk's Motion to Strike*, at 4.

Respondents did not claim that the Court of Appeals committed any error on this point.

PRSM also claims that Respondents argued that it was "unnecessary for the Court to evaluate the buffer demand" because "an SMP procedure for adjusting buffer configurations (*i.e.*, the 'vegetation management plan') provides an alternative basis for avoiding the merits of PRSM's unconstitutional conditions claim…."[6] Respondents mentioned the Vegetation Management Plan in a single sentence in their argument, which states, in its entirety: "Additionally, the landowner has the ability to further customize vegetation requirements through an individual Vegetation Management Plan if a more tailored solution is needed."[7] Respondents made this point to bolster their arguments about why the Court of Appeals properly applied *Honesty in Environmental Analysis and Legislation v. Central*

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[6] *Petitioners' Answer to Clerk's Motion to Strike*, at 4.

[7] *Joint Answer of State of Washington, Department of Ecology and City of Bainbridge Island in Opposition to Petition for Review*, at 17.

Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 979 P.2d 864 (1999), and *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wn. App. 250, 255 P.3d 696 (2011) ("*KAPO*"). Respondents offered this argument in direct response to PRSM's arguments about *KAPO*, at pp. 24–25 of its petition. Again, responding to PRSM's arguments is not seeking review of new issues.

C. If review is granted, this Court can affirm on any ground adequately supported by the record.

In further misuse of the briefing process, PRSM asks the Court to issue an advance ruling limiting the issues Respondents could raise in supplemental briefing if review is granted. That request for alternative relief is as meritless as PRSM's attempted justifications for filing a reply brief.

PRSM appears to believe that, unless Respondents seek cross review, they are strictly limited to parroting the language from the Court of Appeals decision in response to PRSM's

arguments. That is clearly not the rule, as demonstrated by PRSM's own analysis:

> The U.S. Supreme Court's "cross-appeal rule" confirms the longstanding rule that, although a responding party need not cross-appeal "if all it wishes to do is present alternative grounds for affirming the judgment," it may not raise alternative arguments designed to "alter a judgment to benefit a nonappealing party."

Petitioners' Answer to Clerk's Motion to Strike, at 10 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)) (footnote omitted).

Thus, if this Court grants review, Respondents will be entitled to present alternative grounds for affirming the judgment, and this Court may affirm "on any grounds established by the pleadings and supported by the record." *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002)). If PRSM believes that any of Respondents' arguments do not meet this standard, it can make that argument

in its supplemental brief pursuant to RAP 13.7(d) if review is granted.

But Respondents have no intention of asking this Court to "alter a judgment to benefit a nonappealing party." *Greenlaw*, 554 U.S. at 244. Respondents currently ask the Court only to deny review and leave the current judgment untouched. If this Court accepts review, Respondents will be asking this Court only to affirm the current judgment without alteration. Thus, the grounds offered by PRSM for prospectively limiting Respondents' arguments are inapposite, and PRSM's alternative request should be denied.

D. This is the second time PRSM has filed an improper reply in this Court, in this same litigation.

PRSM knows that it is not allowed to file a reply in support of a petition for review when the respondents have not sought cross-review. This Court previously struck a reply brief filed by PRSM, in this same litigation, for the same reason.

In Case No. 98365-8, PRSM sought review of an interlocutory issue. The City and Ecology each filed separate answers, and PRSM filed a reply.[8] As here, the Clerk moved to strike the reply because Respondents had not sought review of any new issues.[9] The City also moved to strike the reply on the same ground.[10] As here, PRSM used the motion to strike as an excuse to file yet another lengthy, substantive brief.[11] When the Court denied review, it also granted the motion to strike.[12]

This Court should not tolerate PRSM's continued flaunting of its rules.

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[8] *Reply in Support of Petition for Review*, Case No. 98365-8 (May 20, 2020).

[9] *Clerk's Letter*, Case No. 98365-8 (May 21, 2020).

[10] *Motion to Strike Reply in Support of Petition for Review*, Case No. 98365-8 (May 28, 2020).

[11] *Response in Opposition to Motions to Strike*, Case No. 98365-8 (May 28, 2020).

[12] *Order Terminating Review*, Case No. 98365-8 (July 8, 2020).

E. Conclusion

PRSM fails to show that its improper reply brief was permitted under RAP 13.4(d) or under any other theory. This Court should grant the Clerk's motion to strike, as it did the first time PRSM used the same improper tactic in this litigation.

This document contains 1,515 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on the 8th day of May, 2023, I caused to be served the foregoing document upon the parties hereto via the Court of Appeals efiling system, which will send electronic notifications of such filing to all parties of record.

Dated this 8th day of May, 2023, in Seattle, Washington.

/s/James E. Haney
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