NO. 102024-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
COURT OF APPEALS CASE NO. 56857-8-II

PARK JUNCTION LLC

Petitioner,

v.

PIERCE COUNTY,

Respondent,

AND

TAHOMA AUDUBON SOCIETY, PETRINA VECCHIO, STEVE REDMAN, BETH REDMAN, CLARE DUNCAN MCCAHILL, DR. PETER WOODS MCCAHILL, GEORGE WERN, LEIGH WERN, BUD REHBERG, and JAMES HALMO,

Respondents.

OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

When a project developer fails to comply with the express terms of a permit, the permit is subject to revocation. This is not a novel, confusing, or surprising tenet of the law. Yet the only legal question Petitioner Park Junction, LLC has submitted to this Court is a challenge to this basic rule.

Park Junction urges review solely under RAP 13.4(b)(4), alleging that the revocation of its permit presents issues of substantial public interest. But Park Junction's permit was revoked after more than twenty years of inaction pursuant to long-established principles of law. Park Junction's only argument is that the Court should establish a new rule that a permit can never be revoked unless there are no other available options—a principle that is both contrary to the plain terms of the Pierce County Code, and that would make revocation impossible.

Park Junction spends most of its Petition for Review reciting an alternative version of the facts largely in direct

conflict with the Pierce County Hearing Examiner's findings. This Court should see Park Junction's petition for what it is: a final effort to reevaluate the Hearing Examiner's fact-finding to which courts deciding a Land Use Petition Act ("LUPA") petition are required to defer.

II. RESTATEMENT OF ISSUE

Under RAP 13.4(b), this Court accepts review only if a Court of Appeals ruling is in conflict with a decision of the Supreme Court or of the Court of Appeals, if a significant question of constitutional law is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. This case involves the straightforward application of the Pierce County Code to facts supported by substantial evidence. Should the Court decline review?

III. RESTATEMENT OF THE CASE

An appellate court's review of factual findings under LUPA considers only whether the decision is "supported by

evidence that is substantial when viewed in light of the whole record before the court." RCW 36.70C.130(1)(c). Nonetheless, Park Junction's Petition for Review presents a lengthy exposition of its own alternative version of numerous facts that are directly at odds with the Examiner's decision, laying bare that it is actually a request to rewrite the Examiner's findings. Through its repeated misstatements of discredited testimony rejected by the Examiner, Park Junction seeks to submit to this Court not a legal question of statewide significance but its belief that the Examiner got the facts wrong.

Park Junction obtained its Conditional Use Permit ("CUP") to develop a planned resort project in 2001. CP at 1543. Under the CUP, if "at any time after a final plan has been approved it appears that the project or phase thereof is not progressing in a reasonable and consistent manner or the project has been abandoned, action may be initiated . . . to revoke the approval." CP at 2171.

As required by Park Junction's permit, the Examiner conducted a series of review hearings to determine whether and how the project was progressing. CP at 1548, 2192, 2212. At the first two hearings in 2012 and 2014, the Examiner noted the lack of progress towards development of a resort but allowed for more time in light of various project setbacks. *Id.* at 2211.

After an extensive hearing on November 14, 2019, however, the Examiner found that "nothing has occurred on the site with the exception of a legally permitted, timber harvest" in 2005. *Id.* at 2233. Thus, Park Junction "ha[d] not shown that it [was] progressing in a reasonable and consistent manner in finalizing the project." CP at 2234. At that point, Park Junction was out of compliance with the CUP, allowing for permit revocation under PCC 18.150.050(D).

But the Examiner gave Park Junction another chance. The Examiner ruled (eighteen years after Park Junction obtained its CUP):

> Condition 34 provides that if the project does not progress in a reasonable and consistent manner, Pierce County may initiate an action to revoke the approval. The applicant in the past has made promises to obtain permits and otherwise move the project forward and has accomplished little. Thus, *the applicant has not progressed in a reasonable and consistent manner*. However, the applicant now provides measurable benchmarks going forward. Assuming compliance with said benchmarks and any other timelines imposed by Pierce County, the project will come into compliance with Condition 34. . . . [T]he examiner recommends that Pierce County not take action at present to revoke the Park Junction CUP, but allow the applicant an opportunity to meet proposed milestones set forth in Exhibit 32. Planning Staff and/or State agencies should establish milestones for future progress with the understanding that *if such are not met, a revocation will be commenced*.

CP at 2234 (emphasis added). The Examiner later confirmed that this language "clearly determined that the applicant was not making progress in a reasonable and consistent manner and was presently in violation of Condition 34." *Id.* at 1525. No party appealed the November 2019 decision and Park Junction has characterized it as "law of the case." Br. of Resp't at 52 (citing

King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993)).

The very first milestone required Park Junction to physically construct two "test" or "demonstration wetlands" to prove its planned bentonite-liner technology would be sufficient for the larger wetland mitigation work at the site. *See* CP at 1549-50, 1884-85, 2257. The deadline for this milestone was originally October 30, 2020, but the Examiner sua sponte extended the deadline to November 30, 2020. *Id.* at 2257. It was essential that the wetlands be completed by the beginning of the rainy season to avoid a full year of delay before the wetlands could be monitored to fulfill their demonstration purpose. CP at 3978, 4005.

Park Junction missed this first milestone deadline. By November 30, it had not completed construction of either of the two test wetlands. *Id.* at 1515-16, 3681-82, 3729-30. After hearing testimony and considering thousands of pages of exhibits, on May 20, 2021, the Examiner ruled that Park Junction

had missed the first and easiest milestone, delaying the project by a full year, and subjecting its CUP to revocation. *Id.* at 1498-1533.

In revoking Park Junction's CUP, the Examiner relied on the project's lack of any significant progress for twenty years. CP at 1517-21. Considering Park Junction's project "in light of not only the failure of the applicant to meet the first and easiest milestone, but also in light of the applicant's progress over the past 20 years," the Examiner found "a history of excuses and mismanagement" that had culminated in the missed milestone. *Id.* at 1524. For this reason, the Examiner granted the County's petition to revoke the CUP. *Id.*

Contrary to Park Junction's contention that its failings and decades of delay have caused "no harm," the Examiner found that its delays "have impacted the entire Upper Nisqually area," including the local school district, the National Park Service, and local residents. CP at 1531.

IV. ARGUMENT

Under RAP 13.4(b), review will be accepted only if the Court of Appeals' ruling is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals, a significant question of constitutional law is involved, or the petition involves a substantial public interest that should be determined by the Supreme Court.

Park Junction does not cite a single case that is inconsistent with the Court of Appeals decision here. Instead, it contends that "there is no Washington case law on this issue." Pet. for Review at 29. Thus, the standards of RAP 13.4(b)(1) and (2) are admittedly not met—the decision is not in conflict with *any* decision, much less a published Court of Appeals decision or decision from this Court. (The Court of Appeals decision in this matter is also unpublished.) Park Junction also does not allege that any constitutional questions are at play, foreclosing review pursuant to RAP 13.4(b)(3). Accordingly, this Court can only accept review if it concludes that Park Junction has raised

"an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). It has not done so.

Park Junction's proposed issues for review all invoke not open questions of law but application of established law to its own preferred alternative version of the facts. In considering a Petition for Review, this Court should "decline to consider facts recited in the briefs but not supported by the record." *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 615-16 n.1, 16 P.3d 31 (2007); *see also In re Dependency of Panilla P.B.*, 104 Wn.2d 643, 660, 709 P.2d 1185 (1985) ("[W]e cannot consider matters referred to in the brief but not included in the record.").

A. Park Junction Asks This Court to Adopt New Rules Without Any Basis in Statute or Case Law

Park Junction first discusses permit revocation in general and proposes that the Examiner should have utilized a different remedy. Park Junction suggests that this Court should adopt a new standard that revocation may only be implemented when there are no other options or if the permittee agrees to it. Park

Junction's proposed test would eviscerate the ability of any jurisdiction to ever a revoke a permit.

Park Junction frankly admits that it is asking this Court to manufacture a new "implicit" rule—that revocation should only be a last resort—from thin air because it understands that straightforward application of the Pierce County Code and its CUP required revocation in this case.

Park Junction does not dispute that PCC 18.150.050(B) and (D) were the Examiner's bases for revoking its CUP. Yet it does not cite any authority or even propose any interpretation of either of those provisions that would render the Examiner's decision erroneous under LUPA. It does not include the relevant code language because it knows that *any* interpretation of those sections provided for revocation. Subsection (B) provides for revocation where "the use for which [an] approval or permit was granted is not being exercised." PCC 18.150.050(B). Subsection (D) provides for revocation where "the approval or permit granted is being, or recently has been, exercised contrary to the

terms or conditions of such approval or permit, or in violation of any statute, resolution, code, law, or regulation." PCC 18.150.050(D). These provisions are consistent with the law in this state that failure to comply with express permit terms may result in revocation. *See Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2008).

Relying on *Andrew v. King County*, 21 Wn. App. 566, 572, 586 P.2d 509 (1978), Park Junction characterizes its revocation as premised on "abandonment" of its permit, seeking to invoke an irrelevant body of case law concerning vested rights to nonconforming property uses. *See* Pet. for Review at 30-31. *Andrew* analyzed the standards for abandonment or discontinuance of a nonconforming use with regard to zoning laws. 21 Wn. App. at 570-71. It had nothing to do with the code provisions at issue here. The word "abandonment" does not appear anywhere in PCC 18.150.050(B) and has never had anything to do with Park Junction's CUP revocation.

As the Court of Appeals ruled in this case, "PCC 18.150.050(B) plainly does not require a showing of abandonment. It only requires a showing that the permit holder is failing to use the permit as intended." Slip Op at 15. Park Junction does not even challenge this portion of the decision or provide any statutory interpretation or analysis to do so—it prefers to assume the Court of Appeals is wrong and that "abandonment" in the nonconforming use sense is the relevant standard.

As to PCC 18.150.050(D), Park Junction does not propose any interpretation of the Code under which a permit-holder should be allowed to ignore the requirements of its permit. Instead, it abandons any pretext of relevant legal questions to submit to this Court and essentially admits that its challenge is purely factual. Pet. for Review at 30 ("No one could fairly say that Park Junction . . . failed to make reasonable and consistent progress in 2020.") *cf.* CP at 1528.

B. Park Junction Fundamentally Misstates the Record

Even if this Court were to entertain Park Junction's total departure from the local code provisions it asks this Court to interpret, its claim for review is based on a characterization of the facts that is utterly inconsistent with the Examiner's findings and the evidence in the record. Put another way, even if Park Junction's "implicit" rule existed, application of that rule would still result in revocation of Park Junction's CUP.

LUPA is clear that, to obtain reversal of a land use decision based on erroneous fact-finding, Park Junction would have to show that the decision "is not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 36.70C.130(1)(c). "Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter." *Erection Co., Inc. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011). The Court's review "'necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the

weight to be given reasonable but competing inferences.'" *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

The Examiner ruled in November 2019 that Park Junction was out of compliance because it had not "progressed in a reasonable and consistent manner" towards completion of its resort project. CP at 2234. After providing Park Junction the chance to come back into compliance by setting and meeting project milestones, Park Junction "agreed to construct two test wetlands" as the first milestone. *Id.* at 1528. Park Junction missed this "first and probably easiest of all milestones." *Id.* at 1530. Its missed deadline "postponed the ability to install the bentonite liner and monitor the wetland for a full year . . . represent[ing] another significant delay." *Id.* at 1528. Revocation was not based exclusively on missing the "first and easiest milestone, but also in light of [Park Junction's] progress over the

past 20 years" given its "history of excuses and mismanagement that previously delayed the project." *Id.* at 1524.

To the extent Park Junction claimed it believed it was required to complete only a single wetland, the Examiner found that the "evidence conclusively establishe[d] that from the beginning of negotiations, [Park Junction] agreed to construct two test wetlands." *Id.* at 1528; *see also* CP at 1672, 4012 (support for this finding in the record before the Examiner). Further, Park Junction did not even successfully complete *one* test wetland by the deadline. CP at 3827.

Park Junction "never contacted [the County] to request a delay in completion of the wetland work, never advised [the County] that it would be late, and presented testimony (from the project manager) that [Park Junction] completed the work only one day late, when such was obviously not true." *Id.* at 1529-30.

Park Junction also mischaracterizes the basis for the revocation of its permit. It alleges that "[n]o one could fairly say that Park Junction abandoned its project or failed to make

reasonable and consistent progress in 2020. That leaves the fact that Park Junction narrowly missed the deadline for the wetland milestone as the ***sole*** basis for revocation." Pet. for Review at 30. But it was the milestones (originally proposed and agreed-to by Park Junction) that were themselves the standard to measure "reasonable and consistent progress." Because Park Junction had already failed to demonstrate reasonable and consistent progress a year earlier at the time of the 2019 decision, the milestone represented Park Junction's final opportunity to *come back into compliance* with its permit. If it had constructed the two test wetlands and continued to meet milestone deadlines, the meeting of those deadlines would have demonstrated the progress necessary to come back into compliance.

Park Junction alleges that the Examiner failed to justify "going right to the most extreme remedy" of revocation "over modification or sanctions or some other alternate remedy." Pet. for Review at 29. It claims: "From 1 to 10 on the harshness scale, they went straight to 10." *Id.* The revocation was based not on a

single missed deadline, but on Park Junction's "lack of performance over the past 20 years as set forth in the Report and Decision for the [November 2019] Third Status Review and as continued by its failure to meet the first milestone, granting yet another opportunity to bring the project into compliance." *Id.* at 1532.

Park Junction purports to fear that "revocation could become a regular strategy tool of project opponents—a 'next step' following the last unsuccessful appeal" to "undermine the finality that is the very hallmark of LUPA." Pet. for Review at 34 (citing *Samuel's Furniture v. Dep't of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002)). It is unclear what Park Junction's fear has to do with this case. No party to this matter reopened a final decision; nor does any portion of the Court of Appeals decision provide any kind of "backdoor" process. The Examiner conducted a triennial review hearing, as provided for by Park Junction's permit, and found Park Junction out of compliance. CP at 2171, 2234. At the conclusion of that hearing,

the Examiner ruled that Park Junction had entirely failed to do any work towards completion of its project. *Id.*at 2234. Instead of revoking Park Junction's CUP, the Hearing Examiner allowed it a chance to come back into compliance *instead* of revoking the permit. Only after Park Junction failed to meet even the first milestone twenty years after the project commenced did the Examiner revoke the permit.

C. Park Junction Relies on a Single Out-of-State Case that Affirmed Permit Revocation

Park Junction relies on a single out-of-state case for its proposition that revocation is "harsh" and "should be used only as a very last resort": *Korean Am. Legal Found. v. City of Los Angeles*, 23 Cal. App. 4th 376, 28 Cal. Rptr. 2d 530 (1994). That case would not help Park Junction even if it were the law in Washington. That case required that, once a party has obtained and relied upon a "vested right" such as a permit for alcoholic beverage sales, the government may not simply revoke it without basic procedural due process protections. *Id.* at 391 n.5; *see also*

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (requiring basic principles of due process including "some form of hearing" before deprivation of a property right). There is no dispute that Park Junction's revocation followed an extensive fact-finding hearing at which Park Junction called numerous witnesses and submitted hundreds of pages of exhibits. Park Junction cannot credibly (and does not seem to) contend that its permit was revoked without due process of law.

Park Junction's reliance on the case appears to stem from the court's offhand reference to revocation as "a very harsh remedy which requires the strictest adherence to principles of due process." *Korean Am. Legal Found.*, 23 Cal. App. 4th at 379 n.5. Again, Park Junction does not tie this general principle to any applicable standard of law—it simply complains that it believes revocation is harsh in the abstract. In makes no effort to show how any result other than revocation would be appropriate under the relevant provisions of LUPA and the PCC.

D. Interpretation of a Local Code Does Not Present an Issue of Substantial Public Interest that Should be Determined by the Supreme Court

Park Junction does not offer any analysis into the actual PCC provisions that are determinative of this case. But even if it did, questions of county code interpretation are not matters of "substantial public interest" necessitating review by the Washington Supreme Court.

In an effort to persuade the Court otherwise, Park Junction alleges that "[m]any other cities and counties have similar codes allowing for revocation of vested land-use approvals." Pet. for Review at 34 (citing Puyallup Municipal Code 20.80.040; Seattle Municipal Code 23.76.034; Thurston County Code 26.05.070). Park Junction is correct that the respective codes of these jurisdictions provide for permit revocation in certain circumstances. But the language of two of Park Junction's three examples is completely different from the PCC language. *Cf.* PCC 18.150.050 *with* Seattle Municipal Code 23.76.034 *and* Thurston County Code 26.05.070; *see also* King County Code §

21A.50.040 *and* Snohomish County Code § 30.85.310. If Park Junction is aware of some source of law that renders all local code provisions requiring compliance with permit conditions unlawful or unenforceable, it has failed to cite it to the Examiner, in its LUPA Petition, or at any level of appellate review.

E. This Court Should Deny Review of Park Junction's Additional Issues Presented for Review That Are Unsupported by Any Argument in Its Petition

Finally, Park Junction purports to present three issues for this Court's review for which it provides no supporting argument. Pet. for Review at 5-6 (Issues 3-5). Among those issues are another direct challenge to the Examiner's fact-finding, an allegation that the County was required to provide deadline extensions that were never requested, and a challenge to the Examiner's authority to offer the very same "modification" remedy Park Junction states should have superseded revocation. *Id.* Because Park Junction provides no actual argument supporting review of any of these questions, this Court should deny review of them.

First, Park Junction challenges the Examiner's findings of fact that Park Junction contractors "had no issues with completing the ponds in spite of the Covid pandemic" and that "testimony from all witnesses, including [Park Junction's] experts, agree[d] that [Park Junction] had ample time to construct the two test wetlands, but failed to do so." CP at 1528, 1532. As with its other factual challenges, a routine application of LUPA's "substantial evidence" standard does not present a compelling question of substantial public interest.

Second, Park Junction contends that it should have been entitled to an extension of the milestone deadline based on Pierce County Ordinance 2020-46, which provided permit extensions during the pandemic. Pet. for Review at 5. Park Junction does not dispute the Court of Appeals ruling that it "did not communicate with Pierce County or request any extension until after it had missed its milestone deadline," nor that "the ordinance allowed extensions of deadlines" but "did not require extensions or make them automatic." Slip Op. at 21.

Furthermore, "[f]ewer than two months before the deadline, Park Junction's attorney assured the hearing examiner that the company could 'meet the submittal dates' and that the test wetlands were 'under construction.'" *Id.* at 18 (quoting CP at 1933). Whether a county is required to extend deadlines without any request to do so in the face of assurances that a project is on track does not present a question of substantial public interest.

Third and finally, Park Junction seeks review of the Examiner's alleged modification of an agreed milestone. Pet. for Review at 6. Nowhere does Park Junction dispute the Court of Appeals' ruling that "both before and after the hearing examiner changed the milestone language in October 2020, Park Junction representatives expressed an understanding that the milestone required the construction of *two* wetlands by the deadline." Slip Op. at 18. Further, even if the record did not clearly reflect that Park Junction always understood two wetlands were required, it "would not have met the milestone even if just one wetland had been required." *Id.* (citing CP at 1703). This purported issue

presents yet another highly fact-specific challenge to the Examiner's authority. Further, by attacking the Examiner's authority to modify the proposed milestone language, Park Junction undermines the very "modification" remedy it alleges should have provided an alternative to revocation.

V. CONCLUSION

This case presents a simple application of the Pierce County Code to a developer's twenty-year failure to act. Because Park Junction has not shown that any of the standards under RAP 13.4(b) are met, this Court should deny its Petition for Review.

Dated this 23rd day of June 2023.

I hereby certify that this answer contains 4,013 words.

SMITH ALLING, PS

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of June, 2023, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

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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 this 23rd day of June, 2023, at Tacoma, Washington.

/s/ Kelly Meyer
Kelly Meyer

SMITH ALLING, P.S.

June 23, 2023 - 2:48 PM

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