DIV III # 345858

No. 92423-6

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, LOREN DOLGE, Residents and property owners in the Chiliwist Valley,

Appellants,

vs.

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

Respondent.

APPELLANT'S REPLY BRIEF

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I INTRODUCTION

It is difficult to reply to briefs that have not meaningfully responded to the arguments in one's opening brief. Respondents have simply restated their positions from earlier litigation.

II ARGUMENT

A Quasi Judicial v. Legislative Action in Vacating a Road at Landowner's Request

In Appellants' opening brief we argued that the road vacation in this case was not legislative in nature but quasi judicial. We provided the following reasons:

1 The courts both historically and recently have reviewed both road and street vacations by writ of review, which is reserved for quasi judicial action

No party has answered this argument. Respondents simply assume that commissioner decisions concerning road vacation pursuant to a private party application is a legislative act, and build the entire edifice of their arguments from there. But they do not distinguish those cases where the courts *have been reviewing* road vacation actions under a writ of review, thus assuming the actions to be quasi judicial. *Federal Way v. King County,* 62 Wn. App. 530, 534, 815 P.2d

790 (1991); *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 240-241, 653 P.2d 1355 (1982); *DeWeese v. Port Townsend*, 39 Wash. App. 369, 371 - 372, 693 P.2d 726 (1984). Until they respond to this argument it is difficult to fashion a reply of any sort.

2. We argued that all application for public goods such as the disencumbering of one's property of a public easement must by their nature be quasi judicial.

No party has provided a counter example of a private party's application for a public benefit that is heard *"legislatively."* We therefor cannot reply to their brief on this point.

3. We argued that acts for which state statute requires public testimony on defined issues (including actual use of the road in question) which *must* result in a decision based on specific findings and conclusions (uselessness and public benefit from vacation (RCW 36.87. 020, 060)) never describes a legislative act.

No party has provided this court with a counter example.

4 What Okanogan County *does* argue

a) The County argues that managing the Road system in general is a legislative function

The County is correct – in general. But acting on an application from a specific landowner to disencumber his property in a process

requiring public hearing to take testimony in order to make findings and conclusions on whether te road is indeed "useless" and whether the public will be benefitted by the vacation is not "managing the road system;" it describes a quasi judicial process. None of the County's recitation of sections from multiple statutes gainsays this fact.

It argues from the following statutes:

i) RCW 36.75.040 (4)
Powers of the County Commissioners:

. . .

4) Perform all acts necessary and proper for the administration of the county roads of such county as by law provided;

Nothing in the section states or implies the nature of the authorized "acts," or limits them to legislative acts.

ii) RCW 36.75.020
County roads—County legislative authority as agent of state—Standards.

All of the county roads in each of the several counties shall be **established, laid out, constructed, altered, repaired, improved, and maintained** by the legislative authority of the respective counties as agents of the state, or by private individuals or corporations who are allowed to perform such work under an agreement with the *county legislative authority*. Such work shall be done in accordance with adopted county standards under the supervision and direction of the county engineer. (**bold added,** *italic emphasis by Okanogan County*)

There are two points here that invite comment: 1) "Vacation" finds no home among that responsibilities listed as management in this section; and 2) The fact that both county councils and boards of county commissioners are denominated under the single rubric "county legislative authority" in statutes (see, e.g. RCW 36.57A.010(4); RCW 36.140.010(2)(a)) does not mean or even imply that all of its acts are *per se* legislative. To the contrary, there are many examples of the "county legislative authority" performing quasi-judicial functions in statute. See, e.g. RCW §§ 36.70C.040(4)(c) ("If the land use decision is made by ordinance or resolution by *a legislative body sitting in a quasi-judicial capacity*, . . ."); RCW 36.105.070(5) ("*All quasi-judicial actions and permits relating to these plans and ordinances shall be made and decided by the county legislative authority* or otherwise as provided by the county legislative authority.") (*Emphasis added*).

iii) Chapter 36.87

The remaining sections quoted by the County, in Chapter 36.87 RCW, simply restate its misreading of the term "county legislative

authority" as defining only legislative functions. The fact that both a County Council in charter counties, the County Commissioners elsewhere, are called by the term "county legislative authority" when defining their functions in the vacation statues has no significance whatsoever.

Both decisional law and statutory sections (e.g., RCW 36.70C.040(4)(c) and RCW 36.105.070(5) *supra*), characterize multiple functions of county "legislative" authorities as "quasi judicial:"

> Washington courts hold action *by local legislative bodies* amending a zoning code or reclassifying land thereunder to be an adjudicatory act. *Barrie v. Kitsap Cy.*, 93 Wash. 2d 843, 852, 613 P.2d 1148 (1980); *Parkridge v. Seattle*, 89 Wash. 2d 454, 460, 573 P.2d 359 (1978); *Woodcrest Invs. Corp. v. Skagit Cy.*, 39 Wash. App. 622, 694 P.2d 705 (1985). Therefore, such action is reviewable by certiorari.

Kenney v. Walla Walla County, 45 Wn.App. 861, 866, 728 P.2d 1066 (1986). (*Emphasis added*)

The *Kenny* court continues by pointing to *Fleming v. Tacoma,* 81 Wn.2d 292, 299, 502 P.2d 327 (1972) to instruct on the elements of a rezone that cause it to be a quasi-judicial act of a "legislative" body, elements that appear tailored to fit our facts:

> In determining rezones to be quasi judicial, the court in *Fleming v. Tacoma,* 81 Wn.2d 292, 299, 502 P.2d 327 (1972) listed

> three characteristics that differentiate rezones from other official acts and justify their being categorized as adjudicatory: (1) Parties whose interests are affected are readily identifiable . . . the decision has a far greater impact on one group of citizens than on the public generally; (2) the decision is localized in applicability. The rezone only applies to the immediate area rezoned; and (3) zoning hearings are required by statute, thus recognizing the process must be more sensitive to individual rights involved.

id. (ellipses in original)

Appellants' concern is with a vacation of a specific public road encumbering a specific landowner, on *the landowner's* application, affecting mostly a geographically enclosed valley of people who use that road, for whom hearings are statutorily required wherein public users of the road are invited to testify on the usefulness of the public rights as defined in statute. Like the rezone, this is a quasi judicial act by "the legislative authority."

5 Gamble Land's Argument

Gamble argues that the elements set forth in *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 689 P.2d 1084 (1984) that define quasi-judicial as opposed to legislative acts militates against appellants' argument. They misunderstand those elements. Let us explore their argument.

Gamble correctly set forth those elements as follows:

> (1) whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

38 Wn.App. at 634-35, citing *Williams v. Seattle Sch. Dist. 1*, 97 Wash. 2d 215, 218, 643 P.2d 426 (1982).

Gamble then parses through these standards and determines that because the county commissioners or a county council (the "county legislative authority") is uniquely charged in statute with making the ultimate road vacation determination, it is not one a court could make or was historically performed by courts. This analysis misses the point of *Chaussee's* own analysis and explanation, and that of the cases it cites:

> The hearing examiner's and Council's actions amounted to the application of law, SCC 20A, to particular facts. Such a function is one historically performed by courts and a court could have been charged with making such decision. The actions further amounted to applying existing law to past or present facts and resembled the ordinary business of the courts. ***An administrative agency which applies existing legislation and policy to specific individual interests is not legislative, but quasi judicial in character.*** See *Cooper v. Board of Cy. Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980). Consequently, review by statutory writ of certiorari was proper under RCW 7.16.040.

Chaussee at 635 (***emphasis added***)

Obviously courts do not decide vacation actions in the first instance any more than they decide rezones. Both are the exclusive province of local "legislative" action and an ordinance must be passed to effectuate them, but both are quasi judicial in character. See, *Fleming v. Tacoma,* 81 Wn.2d 292, 299, 502 P.2d 327 (1972) (*supra*). That is the precise point the *Chaussee* court made when it cited *Cooper v. Board of Cy. Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980), which is the Idaho precedent that established rezones as quasi judicial in character in that state. The Idaho Supreme Court explained:

> However, appellants urge that a crucial distinction be drawn between a zoning entity's action in enacting general zoning legislation and its action in applying existing legislation and policy to specific, individual interests as in a proceeding on an application for rezone of particular property. We find merit in appellants' argument and the following from an Illinois case:
>
> "It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government." *Ward v. Village of Skokie*, 26 Ill.2d 415, [424,]186 N.E.2d 529 (1962)

Cooper v. Board of County Comm'rs of Ada County, *supra* at 409-410

Appellants' case (like *Cooper* and *Fleming)* is a challenge on an individual landowner's application for a particular benefit on a specific piece of real property; not general legislation. Applying the *Chaussee* factors correctly, we would note that this matter is stock in trade of hearings examiners and courts: It is applying defined legal standards set forth in RCW 36.87.020 and 060 (uselessness of road and public benefit from vacation) to facts as developed at a hearing designed to gather such facts. RCW 36.70.050 - 060; It is applying those legal standards to the facts developed on a specific public encumbrance on a specific piece of real property on the application of the encumbered landowner. It has every hallmark of a quasi-judicial function.

B Status as County Road Is Not at Issue

At every stage of this case below, including before the hearing examiner, Gamble has made the argument that 3-Devils is not really a county road and was not properly put on roster in 1955 and, they claim, it was actually only built in 1950 by a private party. Although it is clear that a road through the "Three Devils" -- which is a series of switchbacks, a physical feature of the landscape – see Brannon letter,

CP 387 and see CP 483 et seq.) has existed for centuries if not millennia (see published record of history, CP 483 et seq.) none of this is material to this case. Gamble Land has applied for vacation of the road, which has existed as a *listed* county road since 1955 (which implies that it existed at least seven years before that (RCW 36.75.070-080), and that application presupposes and something to vacate. Application for removal of public rights is a tacit admission that they exist.

The fact that the road's course may have meandered or been altered through the decades is of no importance, as we pointed out in our opening brief at 34-35, and see RCW 36.75.100. It maintains its identity as a public county road regardless of future variance from the surveyed road. This fact and the import of statutes as cited have not been challenged by Gamble.

C Standing and Injury

Appellants argued in our opening brief that Appellants clearly had standing, and even the court below so ruled. Most of our arguments were not answered:

1 Appellants argued that standing followed the statutory zone of interest as set forth in the applicable statue (*DeWeese v. Port Townsend*, 39 Wn.App. 369, 375, 693 P.2d 726 (1984)), and the applicable law, Chapter 36.87 RCW; not Chapter 35.79 (city street vacations)

Respondents did not analyze the standing factors inherent in Chapter 36.87 RCW in contrast to those in chapter 35.79, as we did, nor did they respond to or explain the implications of the different language that we pointed to. Only the court in *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P. 799 (1925) explained the meaning of the nearly identical county vacation statutes of its day, and that court did not find that a standing issue even existed for non abutting landowners. And see section (C)(3), infra.

2 We argued that the only supreme court county vacation precedent relied on by Respondents (*Olsen v. Jacobs*, 193 Wash. 506, 76 P. 2d 607 (1938)) did not consider the county vacation statutes at all, and relied on the court's rationale of city street vacation, which rationale is clearly inapplicable to a rural setting. Respondents did not respond.

The *Olsen* case in 1938 is the only precedent from this court that appears to hold that only abutting landowners have standing or are affected by a vacation and used this rationale from *Mottman v. Olympia*

45 Wash. 361, 88 Pac. 579.:

> the only practical effect that it [street vacation] has on appellants' egress and ingress is the deflection one block either east or west of the travel coming from the residence portion . . . that is too slight a consideration, we think, to be controlling in a case of this kind. It will be remembered that the appellants' property does not abut on the street vacated.

Olsen v. Jacobs, 193 Wash. 506, 76 P.2 607 (1938) *at* 511 quoting *Mottman v. Olympia* 45 Wash. 361, 88 Pac. 579.

Because that rationale was the only rationale cited by the *Olsen* court, and it has no application in a rural setting as in this case, we must look back to *Elsensohn v. Garfield County*, supra, as the only applicable precedent; and that case does not limit standing to abutting owners, or even mention a distinction between abutting owners and those in the area who use the road.

Respondents simply repeat *Olsen's* declaration without answering any of these points. One is reminded of the Robert Frost poem, "Mending Wall," wherein the poet's neighbor simply repeats his father's old saw that "good fences make good neighbors," and cannot tell us why. ("Mending Wall," The Poetry of Robert Frost by Robert Frost, edited by Edward Connery Lathem. Copyright, 1969: Holt Rinehart and Winston, Inc.).

3 Although the court below did find standing in petitioners before it, the court limited that standing to issues of danger to them, not the statutory issues that they were called to testify to and had a right to assert.

As Appellants pointed out in our opening brief, Judge Hotchkiss did in fact find that petitioners had standing by virtue of their pleading and offering of proof that the road closure constituted an actual danger to them. (RP 44-45, 9/18/15) And see *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 367, 324 P.2d 1113 (1958), Respondents appear to challenge even that standing. In any case the superior court's finding was incomplete.

As we pointed out above and in the opening brief, standing follows the zone of interest as set forth or implied in the controlling statute (*DeWeese v. Port Townsend,* supra, loc cit.), which is RCW 36.87.020-060.

In Chapter 36.87 RCW, unlike street vacations under Chapter 35.79 RCW, notice of public hearing is given at all "termini" of the road – such that the every one who uses but does not necessarily abut the road – is assured notification. As well, it is published in the county newspaper of record. The general public and all users of the road are

thereby notified and specifically invited to testify on their use of the road and its benefit to them. RCW 36.87.050,060.

Only abutting landowners are given specific notice and invited to testify in city vacation statutes (RCW 35.79.020). There is no publication and posting is only in three unspecified places in the city and one place on the street or alley sought to be vacated. id. The County statutes are specific that the subject of the hearing is to determine the usefulness of the road within the county system and the benefit if any of vacation. RCW 36.87.050-060. No such required factual determinations are found in Chapter 35.79 RCW.

These expansive provisions of general public notice, and narrower non-abutting user notice, inviting testimony, as well as the explicit reference to the subject of testimony, directly fit the zone of interest that the *DeWeese* court described as defining standing. *DeWeese, supra,* 39 Wn.App. 369, at 375.

D Because RCW 36.87.020-060 Describes a Quasi Judicial Process Designed to Determine Issues of Usefulness and Benefit from Vacation, the Commissioners' Action Cannot Be Sustained under Certiorari Standards, RCW 7.16.120, and Is Arbitrary and Capricious.

1. The Standards of Review on Certiorari Set Forth in RCW

7.16.120 Do Not Sustain the Commissioners' Action

As Respondents note, the statutory standard of review for *certiorari* are as follows:

> The questions involving the merits to be determined by the court upon the hearing are:
> (1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.
> (2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.
> (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.
> (4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.
> (5) Whether the factual determinations were supported by substantial evidence.

RCW 7.16.120

Other than jurisdiction set forth in subsection (1) of the statute, the Commissioners' actions here cannot be sustained under any of these provisions:

a Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

The law requires that the decision be confined to the record as

heard by the decision maker *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 240-241, 653 P.2d 1355 (1982). Gamble admits on the record multiple unrecorded ex parte contacts and meetings between applicant and all commissioners, (CP 392) which were never announced or described at the commissioner closed record public meeting during which they approved the vacation. We must assume that these meetings, disclosed only by the applicant in the written record, were for the purpose of imparting information to influence the commissioners to approve the vacation, and had that effect. Since this information was not on the record, not subject to cross examination or counter-testimony, and not disclosed except in a private email from the Mr. Wyss, the applicant, to public works, the commissioners' decision in consideration of it constitutes extra legal action by the decision maker.

b Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

The *ex parte* communication that was unannounced by the decision maker at the closed record public meeting at which the determination was made, or at the puiblic hearing before the Examiner

constituted a violation of RCW 42.36.060

The Commissioner Ray Campbell's close personal and business ties with the applicant family constitute a conflict of interest requiring recusal under both Chapter 42.36 RCW and the appearance of fairness doctrine, *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972), *City of Lake Forest Park v. Washington*, 76 Wn. App. 212, 884 P.2d 614 (1994)

His deciding the case without recusal and without disclosure was a violation of the rule of law and certainly to the prejudice of Appellants.

c Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

The facts necessary to be proved are in answer to two questions: 1) Is the road useful? and 2) Will the public benefit from the vacation. (RCW 36.87.060).

1. Useful/ Uselessness

Although the "any competent proof" standard is, as Respondents point out, not a difficult burden to meet, it presupposes an honest weighing and not pre-judgment. And non-credible unsupported

pretextual justification does not constitute competent proof. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2108-2109, 147 L. Ed. 2d 105 (2000).

In the public written record and at hearing the public, including individual Appellants, provided dozens of personal experience examples of use of the road for recreation (CP 1019-1021), access to state and federal land, id., and see CP 698-99, and of use and necessity for public safety (CP 742) and public heaing, *passim*. There was eyewitness testimony that emergency and firefighting services use Three Devils Road for access in wildfire suppression, and even that its existence had already saved lives CP 372. The evidence, in the hearing examiner's view was overwhelming that the road was useful within the county road system, and not useless CP 742. Add to this that over 200 persons from southern Okanogan County (and the Bridgeport area of Douglas County just over the county line) petitioned the commissioners demanding that the road be kept open, and it would. appear that the question of usefulness was firmly established.

What is important for this discussion is not the weight of the evidence but the fact that none of it was controverted.

There were and are only two significant elements of "proof" of "uselessness within the county system" that the Commissioners and the County rely on for their decision: The County Engineer's Report, and the fact that many other roads in multiple directions lead out of the valley.

The engineer's opinion of uselessness in his report can be fairly disregarded, because, 1) he admits that he has no data on use within the last five years, CP 356, and 2) he based his finding largely on the fact that the road was closed and gated at the Forest Service boundary making it a road to nowhere (id.) – a "fact" which was no longer the case by the time of hearing, finding 26 (CP 742). Furthermore, according to the official communication from the forest service was at the time only temporary; and moreover, the Forest Service affirmative stated that they would not gate the road as long is it served the useful purpose of providing public access to federal lands. (CP 698-99)

The fact that the Forest Service sent this communication for the record well before the hearing means that the commissioners and the engineer were aware that the engineer's report was based on false or misleading facts, and all parties still relied on it knowing it was false, speaks loudly to its use solely as pretext.

The fact that there are multiple roads, which are a mixture of private and public through the mountains to the north, CP 802, has no real probative value because there is no evidence of condition, maintenance, usability or use, in contrast to the findings of the Hearing Examiner who drove Three Devils and found it "quite passable and the gate open at the western terminus." CP 742.

In any case, the mere existence of such alternate routes do not in any fashion rebut the overwhelming uncontroverted evidence that Three Devils is viewed by the residents of the Chiliwist and South Okanogan County as, not just useful, but a vital lifeline to the west.

2. Public Benefit

In order to vacate a public road, or give away any public franchise, a public benefit must be found. RCW 36.87.060, and see *Puget Sound Alumni of Kappa Sigma Inc. v. City of Seattle,* 70 Wn.2d 222, 226-227, 422 P.2d 799 (1967). Here, even the County Engineer found no such benefit (CP 356), as did the Hearing Examiner. It is curious that the Commissioners chose to credit the Engineer on everything else – even after they knew absolutely that his finding of uselessness was based on false information – chose to somehow find

value to the people in the road vacation contrary to all the actual "people" who testified except the applicant's spokesperson (CP 741).

2) The Commissioners' Action was Arbitrary and Capricious

Courts have routinely interpreted RCW 7.16.120, as a codification of the arbitrary and capricious standard, see, e.g. *Responsible Urban Growth Group v. City of Kent*, 123 Wn. 2d 376, 383, 868 P.2d 861 (1994).

We believe that the facts of this case define that standard, which is "willful and unreasonable action, without consideration and disregard of facts or circumstances." *Barrie v. Kitsap County*, 93 Wn. 2d 843, 850, 613 P.2d 1148 (1980).

We cannot conceive of a case that more fully embodies the idea of willful disregard of facts and circumstances.

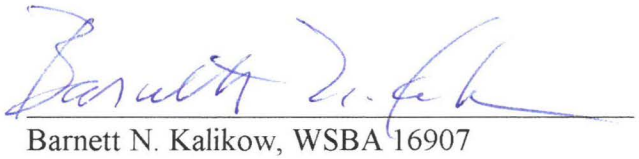
Arbitrary and capricious action is a *per se* constitutional violation. *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 125, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

CONCLUSION

Respondents provide no response to the fact that in form and function and statutory foundation a county vacation on application from the benefitted landowner is a quasi-judicial act. Once that fact is conceded, the Commissioners action cannot stand because if is in violation of basic fairness and the appearance thereof and was arbitrary, capricious and contrary to law.

May 18, 2016

KALIKOW LAW OFFICE



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Declaration of Service:

Barnett N. Kalikow, hereby declares under penalty of perjury according to the laws of the State of Washington that he is of legal age and competence, and that on May 18, 2016 he deposited in the mail, postage pre-paid the document to which this DECLARATION is affixed, to the following counsel for the parties hereto.

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May 18, 2016