IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT NO. 95171-3

COURT OF APPEALS NO. 75737-7-I

SCOTT BLOMENKAMP, Appellant,

v.

CITY OF EDMONDS, a municipal corporation

and

KAUTZ ROUTE LLC, Respondents.

RESPONSE BRIEF OF RESPONDENT CITY OF EDMONDS TO PETITIONER'S AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

Respondent City of Edmonds (“City”) respectfully requests that discretionary review of the Court of Appeals Division I’s decision in Case No. 75737-7-I ("Decision") terminating review be denied. The failure of Petitioner Blomenkamp (“Petitioner”) to meet any of the review considerations under RAP 13.4(b) precludes this Court from being able to further review his claims. Because Petitioner has failed to satisfy his burden for discretionary review of his Amended Petition ("Amended Petition"), review by this Court must be denied.

II. ISSUE PRESENTED

A. Has Petitioner proven any of the considerations necessary to obtaining Supreme Court review of the Court of Appeals Decision terminating review in Petitioner's Amended Petition for Review under RAP 13.4(b)? NO.

III. STATEMENT OF THE CASE

This matter comes before this Court as Amended Petition for Review filed by Petitioner Blomenkamp. Kautz Route, LLC (“Kautz”) has a 5-duplex development project in Edmonds, Washington. On February 5, 2014, the Architectural Design Board (“ADB”) for the City reviewed and approved the project with conditions. No one appealed the ADB decision.

No one appealed the December 29, 2014 site and utilities improvement permit, either.

Petitioner purchased property adjoining the approved project on May 12, 2015. In May 2015, after the City issued permits, Kautz began grading its property for development and damaged some tree roots extending onto Kautz's property from trees on Petitioner's property. On June 29, 2015, Petitioner Blomenkamp, along with two others, requested a review of the ADB approval of the permit under ECDC 20.100.040. The Hearing Examiner ("Examiner") concluded that he could not consider issues that were addressed in the ADB approval.

Petitioner Blomenkamp appealed the Examiner's decision to the Snohomish County Superior Court through a Land Use Petition on April 22, 2016. The Superior Court granted the City's Motion for Reconsideration and revised the prior remand order with instructions. The Examiner issued a Decision upon Judicial Remand consistent with the superior court's order, and the Court of Appeals, Division I filed its Decision on July 24, 2017. Petitioner filed a Petition for Discretionary Review of Decision Terminating Review with this Court on November 2, 2017 and again on December 7, 2017, through an Amended Petition.

IV. ARGUMENT

A. Standard of Review

A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review addressing four review considerations under RAP 13.4(b). RAP 13.4.

> (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).

Petitioner fails to prove any of the review considerations of RAP 13.4(b).[1]

[1] This brief addresses only those arguments that speak, either implicitly or explicitly, to the review considerations under RAP 13.4, in the Argument. For example, Petitioner raises the tree caliper issue in his Issues Presented for Review, Number 4, but does not argue or even address the issue in his Argument section. Amended Petition, 2-3, 9-20.

B. Petitioner Has Failed To Show That The Decision Is Inconsistent With A Supreme Court Decision Under RAP 13.4(b)(1)[2]

1. There Is No Showing That The Decision Is Inconsistent With A Supreme Court Decision Under RAP 13.4(b)(1) In Terms Of Petitioner's Failure To Exhaust Administrative Remedies

Petitioner claims there are four Supreme Court decisions with which the Decision is inconsistent in terms of exhaustion. But this claim rests on the assumption that purchasing property subsequent to when the permit is considered "final" excuses him from having to meet exhaustion requirements in the same way the parties in the cases he cites are excused from having to meet their exhaustion requirements.

None of the Supreme Court cases cited involve petitioners or objectors who purchased property (or represented owners who did) subsequent to the time of the permitting or decision that was

[2] Petitioner distributes his response to the review considerations under RAP 13.4(b) throughout the Amended Petition in terms of substantive issues. Accordingly, the City will address the extent to which the Decision is consistent with Supreme Court decisions within each substantive issue.

legally "final" under RCW 36.70C.020[3], making it difficult for Petitioner to claim that he can take advantage of the same or similar exhaustion requirement excuses as those parties. Indeed, the appellate court affirmed in its Decision that there *is* no case law support for an equitable exception to the exhaustion of administrative remedies requirement for acquiring property subsequent to when the permitting is legally "final" under the Land Use Petition Act ("LUPA"): "[t]o the extent Blomenkamp suggested at oral argument an equitable exception because he had not yet purchased his property when the permits were issued, he offers no authority, and we find none." Decision, 9, footnote 24.

The Decision is thus consistent with all of the cases cited because they all agree that administrative remedies be exhausted

[3] In *Lauer v. Pierce County*, petitioners challenging a variance on neighboring property owned their property at the time that the final building permit was issued. *Lauer v. Pierce County*, 267 P.3d 998, 990-992 (Wash. 2011). In *Citizens for Mount Vernon v. City of Mount Vernon*, objectors to a city council decision represented citizens who owned property implicated in the final city council decision ostensibly at the time of the decision. *Citizens for Mount Vernon v. City of Mount Vernon*, 947 P.2d 1208, 1210-1213 (Wash. 1997). In *Mellish v. Frog Mountain Petcare*, petitioner owned the land adjacent to the property against which development he was objecting at the time of the final permit and variance applications. *Mellish v. Fog Mountain Petcare*, 257 P.3d 641, 642 (Wash. 2011). And in *Habitat Watch v. Skagit County*, a citizens group represented petitioners who owned property adjacent to the objectionable development at the time the final permit was issued. *Habitat Watch v. Skagit County,* 120 P.3d 56, 57-59, 66 (Wash. 2005).

prior to parties being able to appeal an objectionable permitting decision under LUPA.[4]

That the Petitioner alleges he was involved in "every step" of the administrative review process (as were the petitioners in *Lauer*)[5], but only once he challenged the permit fourteen months after he was required to, does not mitigate for the fact that he (or his predecessor) did not exhaust his remedies fourteen months earlier.

The Decision is also consistent with the proposition stated in *Mellish* in terms of affirming that only finality allows a party to move forward with an appeal. The appellate court in the Decision would agree that, as Petitioner contends, Petitioner (or his predecessor) was given a "realistic chance to exhaust administrative remedies," to challenge the permit as the petitioner was in *Mellish* because both were given notice, and because both decisions were properly considered final under LUPA. *Mellish*, 257 P.3d at 644-645 (holding that finality tolled only at objector's motion for reconsideration, allowing him to pursue appeal, because such a decision left "nothing open to further dispute and set[s] at rest the

[4] "It is a general principle of land use law that the failure to exhaust administrative remedies or appeals precludes an appeal under LUPA." Decision at 6; *Habitat Watch*, 120 P.3d at 60-62; *Lauer,* 267 P.3d at 993-994; *Citizens,* 947 P.2d at 865-866; *Mellish*, 257 P.3d at 645-646.

[5] *Lauer*, 267 P.3d at 993.

cause of action between the parties,'" citing *Samuel's Furniture, Inc. v. Dept. Of Ecology*, 54 P.3d 1194, 1200 (Wash. 2002) (quoting Black's Law Dictionary 567 (5th ed. 1979)); Decision at 24 (holding that failure of Petitioner to exhaust administrative remedies precluded him from raising substantive tree protection standards in his appeal, regardless of the fact that he did not own the property at the time of finality).

Finally, the Decision is consistent with the Supreme Court holding for *Habitat Watch*, in which the petitioner in that case also failed to fulfill an exhaustion exception, but for reasons other than Petitioner cites, i.e. the "his or her" language in LUPA standing for the fact that not every possible administrative remedy be exhausted. Amended Petition at 10. Both the appellate court in the Decision and the *Habitat Watch* Supreme Court agree that failure to timely exhaust administrative remedies amounts to collaterally attacking the objectionable permit and are thus consistent; the Decision cites directly to *Habitat Watch* on this point. Decision at 6-7, footnote 15, citing *Habitat Watch,* 120 P.3d at 62-63.

2. There Is No Showing That The Decision Is Inconsistent With A Supreme Court Decision Under RAP 13.4(b)(1) In Terms Of Due Process With Respect To The Director Having Sole Discretion To Limit The Issues From the Hearing Examiner To The Nuisance And Hazardous Condition Claims Or With Respect To The Hearing Examiner Having Held A Hearing Without Invoking A Repealed Section Of Code On Due Process

Petitioner appears to be implicitly arguing that the Decision is in conflict with two Supreme Court decisions in alleging that the Decision contains constitutionally unsound findings. Petitioner's contention is that the appellate court wrongly decided the due process involved in the Development Director's sole discretion to forward only the hazardous and nuisance conditions claims, and in terms of the Hearing Examiner not having applied a repealed section of code on due process.

Post v. City of Tacoma, which Petitioner cites, stands for the proposition that, as part of its due process obligations, cities must have some express procedure available to citizens to bring errors to the attention of their government when they issue infractions. Amended Petition at 17 (citing *Post v. City of Tacoma*, 217 P.3d 1179, 1186 (Wash. 2009)). *Matthews v. Eldridge* stands for the fundamental due process consideration, "the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v.*

Eldridge, 424 U.S. 319, 331, 96 S. Ct. 893, 900 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)).

The appellate court in the Decision invokes *Post* for the proposition that the city afforded Petitioner due process through a complete process: "Blomenkamp was afforded ample notice and opportunity to be heard at meaningful times and in a meaningful manner before the Examiner and the superior court." Decision at 13, footnote 37 (citing *Post*, 217 P.3d at 1186, citing *Matthews*, 424 U.S. at 331, 96 S. Ct. at 900. To the extent that the Decision is consistent with *Post* and *Matthews* in terms of due process, the Decision must also be deemed constitutionally compliant.

C. Petitioner Has Failed To Show That The Decision Is Inconsistent With An Appellate Court Decision Under RAP 13.4(b)(2)[6]

1. Petitioner Has Failed To Show That The Decision Is Inconsistent With An Appellate Court Decision Under RAP 13.4(b)(2) In Terms Of Petitioner's Failure To Exhaust Administrative Remedies, Or, Conversely, In Terms Of Petitioner's Failure To Disprove Collateral Attack Of The Approved Permit

The Decision is also consistent with the court's holding in *Chumbley v. Snohomish County*, an additional case Petitioner raises to rebut the courts' collateral attack arguments against him.

The appeal in *Chumbley* was precluded from being considered a collateral attack on a permit because it was not until the county decided that developer did not have to obtain a grading permit that appellants' administrative remedies were exhausted and finality became operative. *Chumbley v. Snohomish County*, 386 P.3d 306, 312-316 (Wash. Ct. App. 2016). *Chumbley* also involved a different parcel than the one to which the permit applied. *Id.* at 308-311. Although both *Chumbley* and the courts in this case made finality determinations in terms of the City's enforcement actions,

[6] Petitioner distributes his response to the review considerations under RAP 13.4(b) throughout the Amended Petition in terms of substantive issues. Accordingly, the City will address the extent to which the Decision is consistent with appellate decisions within each substantive issue. In this section of his Amended Petition, Petitioner addresses only exhaustion.

finality became operative for Petitioner on either December 29, 2014 and/or February 5, 2014 upon ADB approval[7], regardless of the fact that he did not own the property to which the operatively final permits pertained at that time. *Id.* at footnote 24. Therefore, the Decision is fully consistent with *Chumbley*.

The Decision is also consistent with *Nickum v. City of Bainbridge Island*, because, unlike the petitioner in *Nickum*, who received no notice of the objectionable activity[8], Petitioner was put on notice of the operatively final permit through ADB approval, because it was publicly available information. *See* Decision at 1, 2, 8, 9. The burden was on Petitioner to show that the City failed to provide notice of the ADB hearing, regardless of the fact that he did not yet own the property to which the permit pertained. The Decision stands for the proposition that notice triggers a requirement for a petitioner to exhaust his administrative remedies whether or not petitioner owns the property. Decision at 9, footnote 24. The Decision is thus also fully consistent with *Nickum*.

[7] Decision at 9.
[8] *Nickum v. City of Bainbridge Island*, 223 P.3d 1172, 1178-1181 (Wash. Ct. App. 2009).

D. Petitioner Has Failed To Show That There Is A Significant Question Of Law Involved Under The Constitution Of The State Of Washington Or Of The United States Under RAP 13.4(b)(3)

Petitioner defines due process and takings but does not provide case arguments - or any arguments - to explain why the three constitutional issues he raises in this petition - 1. due process with respect to the Development Director's discretion, 2. due process with respect to the Hearing Examiner's not having adhered to a repealed section of code pertaining to due process, and 3. takings with respect to damaged tree roots on a neighboring property – are constitutionally "significant questions of law."

It is clear from the case law that RAP 13.4(b)(3) is asking for parties to explain why the particular questions they raise are significant in the context of particular constitutional issues, not simply list out the questions or explain the significance of due process and takings, generally.[9] Petitioner does not do either. He merely cites principles of

[9] For example, in *In Re Dependency P.H.V.S.*, the Court found that, through a particular case, the parents trying to fulfill RAP 13.4(b)(3), "…did not address the analysis that is appropriate when a GAL is appointed and is absent for a portion of the proceeding but is present during the remainder of the proceeding" in the context of due process. *In Re Dependency P.H.V.S.*, 389 P.3d 460, 461 (Wash. 2015). This indicates that the Court believes some degree of analysis as to the significance of the constitutional question at issue is required. Moreover, the City also submits that it has already rebutted Petitioner's due process arguments in Section IV.A.2. of this brief. *Supra* at 8-9. In Section IV.A.2, the City has shown consistency of the Decision with the Supreme Court cases Petitioner raises in terms of due process, namely, that the appellate court has held that there are no due process issues with this case. *Id.*

due process without using them to explain why his particular questions are constitutionally significant, and does not substantively address takings whatsoever. Therefore, Petitioner has failed to meet his burden of proving RAP 13.4(b)(3) for any of these constitutional issues.

E. Petitioner Has Failed to Show That This Case Involves An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court Under RAP 13.4(b)(4)

Finally, Petitioner fails to demonstrate that the Amended Petition involves an issue of substantial public interest. Petitioner includes in some of his headings[10] that the Amended Petition involves issues of substantial public interest, but fails entirely to substantively argue this review consideration, namely, to explain why any particular issue should be considered an issue of "substantial public interest" for the Court.

V. CONCLUSION

The Appellate Court properly handed down a decision terminating review of Petitioner's Amended Petition. Petitioner has failed to meet all four review considerations under RAP 13.4(b). Therefore, no further review by this Court should be granted.

[10] *See* Amended Petition at 9-10, 16, 18, 19.

Petitioner failed to show inconsistency of the Decision with prior appellate and Supreme Court decisions under RAP 13.4(b)(1) and 13.4(b)(2). Petitioner also failed to explain why the issues he raised embodied significant constitutional questions of law under RAP 13.4(b)(3), or to show which particular issues constituted substantial public interest under RAP 13.4(b)(4) and why.

Because Petitioner has failed to support all four review considerations under RAP 13.4(b), he has failed to meet his burden for discretionary review by this Court under RAP 13.4.

RESPECTFULLY SUBMITTED this 9th day of January, 2018.

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CERTIFICATE OF MAILING

I certify that I had a courier deliver a copy of the foregoing document to the following on January 9, 2018:

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I certify that I served a copy of the foregoing document via the Washington State Appellate Courts' filing portal at https://ac.courts.wa.gov/ to the following on January 9, 2018:

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