

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 39017-5-II (Consolidated)

THE SUQUAMISH TRIBE; KITSAP CITIZENS FOR RURAL
PRESERVATION; and JERRY HARLESS,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD; and
KITSAP COUNTY,

Respondents.

BRIEF IN ANSWER TO AMICUS OLYMPIC PROPERTY GROUP
APPELLANTS
SUQUAMISH TRIBE, ET AL.

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ORIGINAL

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I. INTRODUCTION

This brief addresses Appellants Suquamish Tribe and Kitsap Citizens for Rural Preservation (“Appellants”) answer to the Amicus Curiae Brief of Olympic Property Group (“Amicus OPG”) concerning the appeal of the Rural Wooded Incentive Program (“RWIP”) adopted by Kitsap County (“County”) as part of its ten year update of the Comprehensive Plan under the Growth Management Act, RCW 36.70A.

Amicus OPG raises no new matters in this appeal but repeats the County’s litigation position. The only additional information provided by Amicus OPG is its “envisioned” conceptual subdivision development coined the “String of Pearls” on lands it owns in North Kitsap County.

The issue before the Court is whether the *Rural Wooded Incentive Program ordinance* (“Ordinance”) that applies *county-wide* allows development in rural areas at urban and suburban densities that is characteristic of urban growth or fails to preserve rural character contrary to the goals and requirements of the GMA. RCW 36.70A.020; RCW 36.70A.070. The issue is not whether one specific proposal (e.g., OPG’s project in North Kitsap County) that might avail itself of the Ordinance would constitute urban growth in a rural area. The Board below and now this Court must consider all the types of development allowed by the Ordinance, not just one proposed by OPG.

Amicus OPG's brief is filled with mischaracterizations of Appellants' position—some of which OPG even acknowledges later in its brief.

II. STATEMENT OF ADDITIONAL FACTS RELATED TO THE AMICUS BRIEF

An estimated 42,108 acres are eligible for the RWIP.¹ Amicus OPG owns approximately seventeen percent (7,000 acres) of that total. The remaining 83 percent of lands eligible for subdivision development (35,108 acres) are owned by many other private landowners.²

Amicus OPG tries to limit the magnitude of development in rural areas authorized by the Ordinance by asserting that only the first phase of the program is authorized by this Ordinance.³ It is doubly wrong. First, the Ordinance's allowance of urban clusters in rural areas is substantial under the first phase alone. Up to 40 clusters of 25 urban-sized lots, totaling 1,000 urban-sized lots throughout the rural areas can be authorized in the first phase alone.⁴

Second, this is the only chance for the entire program to be reviewed by the Board or the courts. Subsequent phases do not require

¹ Op Br. at 44 (citing to CP 106, AR 33, Ex. 6# 30967, App. 10).

² CP 104, AR 41, #30516 (App. 11 of Op. Br.). Other owners of large parcels of Rural Wooded lands include but are not limited to Alpine Evergreen, Manke Timber, and McCormick Land.

³ Am. Br. at 14.

⁴ KCC 17.301.080 1. B. (Op. Br. at App. 7)

further legislative action by the county.⁵ It is the Board of County Commissioners that decide whether to release the next 5,000-acre phase of Rural Wooded lands for development.⁶ There will be no opportunity later for the Board or the courts to consider whether the program in its entirety can result in urban growth and the loss of rural qualities in the County's rural areas under the GMA.

The Court should be wary of Amicus OPG's claims regarding its project. There is no evidence in the record that lays out the details of its proposed development. All that exists are generalized schematics and concepts.⁷

In fact, Amicus OPG's admits it is offering a concept with no guarantee: "[R]esidential development *could* be clustered in a way that the remaining blocks of 3,000 acres of permanent open space *could* provide for . . ."⁸ Further, it admits that it "may have to sell off or develop its large holding of Rural Wooded lands in 20-acre increments" related in part to its assertion that "timber harvesting is no longer the highest and best use of the lands, nor is it economically viable."⁹

⁵ KCC 17.301.080 2. b, 3 (Op. Br. at App. 7).

⁶ *Id.*

⁷ *Id.* at App (CP 260, AR 76, Ex. 51).

⁸ *Id.* at 5 (emphasis added).

⁹ *Id.* at 1, 3.

Although the County seeks to grant “incentives for owners of large tracts of land to realize a better economic return,”¹⁰ for Rural Wooded landowners, like Amicus OPG, there is no such GMA goal. Granting economic incentives to large landowners cannot come at the expense of creating urban densities in rural lands and failing to preserve rural character contrary to the goals and requirements of the GMA.¹¹

Amicus OPG offers bare assertions that “The String of Pearls Initiative cannot be realized, however, without the RWIP. . . .”¹² If Amicus OPG means that some kind of clustering ordinance is necessary to accommodate its plans for clustered developments in the north county, it is right. But if Amicus OPG means that this particular ordinance is necessary, then it is wrong. A clustering ordinance that allows only smaller clusters (i.e., less than the 25 unit subdivisions authorized by this ordinance) and that caps the number of units and their proximity to each other in ways not addressed by this Ordinance could still allow Amicus OPG to proceed with its concept, yet avoid bringing hundreds of urban subdivisions into rural areas. Amicus OPG never points to facts in the

¹⁰ Op. Br at 37, fn. 31 (citing to App 7. at Ex. B, 10)

¹¹ There is a GMA “economic development” goal, but it is carefully worded to encourage only economic development that is consistent with comprehensive plans and only if within the capacities of the state’s natural resources, public services, and public facilities. RCW 36.70A.020 (5).

¹² Am. Br. at 3.

record or otherwise makes an effort to establish that *this* Ordinance is necessary to its development plan.

Like the County, Amicus OPG misunderstands Appellants legal challenge by asserting that “a cookie cutter pattern of 20-acre residential lots on these lands” is the alternative “favored by Appellants.”¹³ The rural density of one home on twenty acres is simply not the subject of this appeal. Appellants do not object to clustering in rural areas. It is the scale and design of the clustering allowed by this Ordinance that is the catalyst for this appeal.

III. ARGUMENT

A. OPG’S CONCEPTUAL SITE-SPECIFIC SUBDIVISION DEVELOPMENT PLAN IS NOT PROCEDURALLY RIPE FOR REVIEW NOR DOES THIS COURT HAVE JURISDICTION

Even if Amicus OPG were a party to this case, any site-specific development scheme it offers to the Court is not ripe for legal review and this Court does not have jurisdiction to hear it. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 178, 4 Pd.3 123 (2000).

The issue is not whether Amicus OPG’s concepts would be acceptable in a rural area. The issue is whether the maximum development allowed by the Ordinance is acceptable or whether, in

¹³ Am Br. at 4,6,16.

contrast, the maximum would violate the goals and requirements of the GMA.¹⁴ In our Opening Brief, Appellants provide examples of the types of suburban development that are allowable under the Ordinance and that could occur across the County.¹⁵ As an example, Appellants pointed to Amicus OPG's large blocks of Rural Wooded lands in North Kitsap County to show the type of negative cumulative effects that could occur under the Ordinance once large contiguous parcels are fully developed.¹⁶ Neither Appellants nor the County cited to Amicus OPG's conceptual "String of Pearls" development proposal because it is not reviewable under the GMA. *Wenatchee Sportsmen*, 141 Wn.2d at 178. The issue here is "What does the Ordinance allow?" not "What is OPG talking about proposing?" Rather than focus on any one potential development proposal, Appellants provided examples of a variety of development patterns that are allowable under the ordinance: "development patterns may range from pervasive pin cushions (25-lot subdivisions randomly scattered throughout

¹⁴ See, e.g., *Ullock v. Bremerton*, 17 Wn. App.573, 575, 565 P.2d 1179 (1977) (under State Environmental Policy Act, analysis of impacts of regulatory changes should be "discussed in terms of the maximum potential development of the property under the various zoning classifications allowed").

¹⁵ Op. Br. at 45-46. This example was used to show what type of development could occur across other Rural Wooded lands in the County that are eligible for subdivision development.

¹⁶ *Id.*

the rural area) to large areas with dozens of 25-lot subdivisions in close proximity to another.”¹⁷

As stated in Appellants’ Reply:

the parties and this Court must consider the development patterns that may arise county-wide under the ordinance to evaluate whether it allows development that the GMA intends to prohibit in rural areas. If the ordinance allows *any* development that would constitute “urban growth” or conflict with “rural character,” then the ordinance must be revised. Appellants cannot object to the ordinance’s terms later, during the processing of an individual permit application. At that time, it is too late for parties to challenge the validity of the ordinance.¹⁸

Here, Amicus OPG puts the cart before the horse and attempts to save the flaws in the Ordinance by offering its site-specific vision as compliant with the goals and requirements of the GMA. Amicus OPG’s claims about its project, even if true, would not be sufficient to save the Ordinance.

Finally, it is procedurally improper for Amicus OPG to argue the merits of its conceptual site-specific development plan as an Amicus in this appeal. Under the Ordinance, a developer must submit an application for approval “through a Type III subdivision approval process” and is subject to other “submittal requirements.”¹⁹ The approval of a development application by the County is appealable to a Hearing

¹⁷ Op. Br. at 48-49.

¹⁸ Reply at 34 (citing *Wenatchee Sportsmen*, 141 Wn.2d at 181-182).

¹⁹ KCC 17.301.080 C, D. (Op. Br. at App. 7)

Examiner.²⁰ A Hearing Examiner’s final decision is appealable to the Board of County Commissioners.²¹ That decision is appealable to a Washington State Superior Court under the Land Use Petition Act. RCW 36.70C.

For all these reasons, Amicus OPG’s conceptual “String of Pearls” site-specific development proposal is not ripe for review, is procedurally improper, and this Court should not entertain any of Amicus OPG’s arguments on the subject.

B. AMICUS OPG REPEATEDLY MISCHARACTERIZES APPELLANTS’ POSITION

Amicus OPG repeatedly mischaracterizes Appellants’ position by asserting that we ignore that the GMA allows clustering in rural areas.²² It is wrong. Appellants expressly acknowledged that GMA allows clustering,²³ but we explained that the Act’s allowance for clustering is not an “anything goes” allowance, but rather—per the Act-- must be used judiciously, to avoid damaging rural environments and inadvertently bringing urban growth to rural areas.²⁴

²⁰ KCC 17.301.080 H.

²¹ KCC 21.04.120.

²² Am. Br. at 12.

²³ Op. Br. at 39; Reply at 21-22.

²⁴ Reply at 22-23.

Amicus OPG also asserts that in our view, no cluster ever could meet the requirements for being located in a “rural” area.²⁵ It is wrong again. Rather, our view, mirroring the Act, is that all clusters are not created equal. Clusters can be designed and located in rural areas so that they exhibit “rural” qualities.²⁶ But this ordinance allows clusters that are too large, too common, and too visually intrusive to meet the GMA standard that requires clusters in rural areas only if they are not “urban” and only if they preserve surrounding rural qualities. Indeed, three pages after asserting that we believe no cluster ever could be rural, Amicus OPG acknowledges that we recognize just the opposite: that smaller clusters can fit in quite nicely in a rural environment.²⁷

Amicus OPG also asserts that we ignored the conditions the Ordinance places on rural clusters (directly and as may be imposed by the Examiner on a case by case basis).²⁸ Yet, we discussed those conditions extensively in both of our briefs²⁹—when at the same time Amicus OPG acknowledges this fact on the next page of its brief.³⁰

²⁵ Am. Br. at 13.

²⁶ See, e.g., Reply at 21-23.

²⁷ Am. Br. at 14 (quoting Op. Br. at 38)

²⁸ *Id.*

²⁹ Op. Br. at 44-54; Reply at 31-37.

³⁰ Am. Br. at 15.

C. AMICUS OPG CONCEDES THAT ITS DEVELOPMENTS
“MAY RESEMBLE LARGE SUBURBAN LOTS”

In a telling admission, Amicus OPG acknowledges that its supposed “pearls,” in fact, “may resemble large suburban lots.”³¹ Precisely. Subdivisions (or “clusters”) of 25 “large suburban lots” do not belong in rural areas. These are urban developments that belong in urban areas. The GMA allows clusters in rural areas as long as they are rural. Urban (or suburban) clusters are not allowed.

Amicus OPG argues that even though its subdivisions will consist of “large suburban lots,” the developments will not be urban because they are surrounded by “permanent open space.” Of course, this is not to be untouched, unsullied open space. Rather, Olympic can continue its logging operations on that land indefinitely.³² Basically, Amicus OPG gets to retain its historic logging use of most of its rural land and gets to develop suburban style subdivisions on the remainder. This is totally contrary to Act’s efforts to reign in urban sprawl and allow future urban subdivisions only in urban areas.

Amicus OPG reference to the surrounding logging lands (so called “open space”) also ignores that no amount of adjacent logging lands can change the inherently urban nature of the subdivisions authorized by the

³¹ *Id.* at 17.

³² KCC 17.301.080 F. 1 (Op Br. at App. 7)

Ordinance. The GMA was prompted, in part, by the helter skelter creation of suburban subdivisions scattered throughout rural areas. These suburban-style developments ruin rural character and force local governments or private purveyors to extend urban services and facilities across broad areas, very inefficiently. The development authorized by this Ordinance would simply be a continuation of the poor planning and development that the GMA was intended to end.

D. AMICUS OPG REPEATS THE COUNTY'S "BRIGHT LINE
RULE" LITIGATION POSITION

On the issue of whether the Board committed an error of law by applying a "bright line" rule, Amicus OPG sets forth the same defenses posited by the County, *i.e.*, that the Board never mentions a "bright line" rule by name.³³

If the Board had not employed a bright line rule, then there would have been analysis in the Board decision assessing the extent to which the development patterns authorized by this Ordinance constitute "urban" or "rural" development and preserve rural qualities. Amicus OPG fails to cite to any portion of the Board decision where such analysis is provided by the Board—for good reason: it simply does not exist. It further claims the Board did not decide that one unit per five acres is "always" rural.³⁴

³³ Am. Br. at 10; Resp. at 47.

³⁴ Am. Br. at 10.

Yet that is exactly what the Board did. It did not address how the subdivisions allowed by the Ordinance fit into the rural environment. The Board did not answer the question whether the developments would preserve rural qualities. The only thing the Board did on this issue was to state that one unit per acres is a rural density.³⁵ That is a bright line rule, impermissible under *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 329, 359, 190 P.3d 318 (2008).

Amicus OPG misconstrues the holding in *Thurston County* by asserting that Appellants have provided no analysis of their own to show that “a net density of one dwelling unit per five acres is not an appropriate density.”³⁶ On this issue, Appellants burden is to demonstrate that the Board used the wrong analysis in rendering its decision. In *Thurston County*, the Court held:

Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case. . . . The Board . . . must on remand, consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character.

Thurston County, 164 Wn. 2d at 359-360. Here, it is the Board that was required to but never looked at the facts based on the specific local circumstances of this case. Instead, of reviewing the facts and analysis

³⁵ AR 55 at 36 (Op. Br. at App. 2)

³⁶ Am Br. at 10-11.

cited to the Board by Appellants in the briefing below,³⁷ the Board applied an illegal bright line rule to define an appropriate rural density and rejected Appellants' claims without proper analysis.

E. AMICUS OPG REPEATS THE COUNTY'S LITIGATION POSITION FOR CALCULATING RURAL DENSITY

Amicus OPG sets forth the same arguments posited by the County concerning Appellants' claim that the Board miscalculated the rural density that is allowed on-the-ground under the Ordinance and that promotes urban sprawl: (1) Appellants ignore the fact that innovative land management techniques are allowed under the GMA; and (2) Appellants ignore the 75 percent of lands that will be preserved as open space.³⁸

Appellants incorporate by reference the arguments in our Opening Brief and Reply Brief.³⁹

IV. CONCLUSION

For the reasons stated herein, and incorporating by reference Appellants' Opening Brief (at 49-50) and Reply Brief (at 39), Appellants request this Court to vacate the portions of the Board's Final Decision and Order dated August 15, 2007, Order on Motion for Reconsideration dated September 13, 2007, and Order Finding Compliance dated June 5, 2008, challenged herein; to remand issues to the Board that it failed to consider;

³⁷ CP 106, AR 32 at 59-69.

³⁸ Am. Br. at 12-13; Resp. at 51-52.

³⁹ Op. Br. at 40-44; Reply at 27-31.

and to provide such other relief as the Court deems reasonable.

Dated this 12th day of August, 2009.

Respectfully Submitted

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I, ERIN EARLE, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal secretary for the Office of the Suquamish Tribal Attorney. On the 12th day of AUGUST, 2009, I caused the BRIEF IN ANSWER TO AMICUS OLYMPIC PROPERTY GROUP along with this PROOF OF SERVICE, to be served on the persons & addresses listed below in the manner indicated below:

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DATED this 12th day of AUGUST, 2009.



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