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SUPREME COURT
STATE OF WASHINGTON
10/10/2018 4:52 PM
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No. 96052-6

SUPREME COURT OF THE STATE OF WASHINGTON

THE BEHIND THE BADGE FOUNDATION, DANIEL J. EVANS,
GARY LOCKE; CHRIS GREGOIRE, RALPH MUNRO, KAREN
FRASER, SUSAN OLMSTED, JANE HASTINGS, MICHAEL S.
HAMM, CAPITOL OLYMPIC PARK FOUNDATION, OLYMPIA
ISTHMUS PARK ASSOCIATION, ROBERT V. JENSEN, GERALD
REILLY, BOB JACOBS, THE NATIONAL ASSOCIATION OF
OLMSTED PARKS, THE FRIENDS OF SEATTLE'S OLMSTED
PARKS, THE FRIENDS OF THE WATERFRONT, AND THE BLACK
HILLS AUDUBON SOCIETY, Appellants,

Vs.

CITY OF OLYMPIA; VIEWS ON 5TH, LLC; and CAPITAL VENTURE
GROUP, LLC. Respondents

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case involves the most important land use decision affecting the historical Washington State Capitol Campus view corridor. Appellants ask this court to reverse the decision of the Thurston County Superior Court dismissing Appellants Petition under the Land Use Petition Act for lack to standing under RCW 36.70C.060(2). Appellants asked the Thurston County Superior Court to review the determination of Defendant City of Olympia to grant a development permit to Defendants Views on 5th, LLC and Capital Venture Group, LLC for the long abandoned Capitol Center Building. Appellants participated in the entire development application process and all available appeals available under the City of Olympia Municipal Code. Appellants have standing to pursue review under the Land Use Petition Act and their Petition should not have been dismissed.

II. ASSIGNMENT OF ERROR

The trial court erred on June 13, 2018 in dismissing Appellants' case filed under the Land Use Petition Act (Ch. 36.70C RCW) for lack of standing under RCW 36.70C.060(2):

1. Whether the Thurston County Superior Court erred in dismissing the case for lack of standing under RCW 36.70C.060 (2) when all of the Appellants have been involved in enforcing the 35 foot height limit for the Capitol Center Building.

2. Whether the Thurston County Superior Court erred in dismissing the case for lack of standing under the State Environmental Policy Act and the Shoreline Management Act. (RCW 90.58.020 and 90.58.340.)
3. Whether the Thurston County Superior Court erred by denying Appellants standing to prevent non-conforming uses in the reconstruction of the Capitol Center Building.
4. Whether the Thurston County Superior Court erred by denying Appellants standing, as members of the public, to demand that the Superior Court evaluate the failure of Defendant City of Olympia to comply with the requirements of the City's permit review process.
5. Whether the Thurston County Superior Court erred in the Court's failure to review as "injury in fact" the protected view shed, potential flood damage, special historic significance, and height restrictions associated with the reconstruction of the Capitol Center Building.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND:

The Appellants have been working for years to make sure that the 35 foot height limit on the property would be applied to prevent changes and expansion of the Capitol Center building which is commonly called "The Mistake by the Lake." The property and building are adjacent to the North Capitol Campus Heritage Park which is owned by the people of the

State of Washington south of 5th Avenue and owned by the people of the City of Olympia north of 5th Avenue. (Clerk's Papers (hereinafter "C.P.") 14-23, 35 and 55: pgs. 1035-1449.)

Appellants have standing to seek review of the development permit issued by the City of Olympia that would expand the use of property already deemed to be an unlawful and non-conforming use by *Sato v. Olympia*,, SHB 81-41 (1982). Underlying issues involve the application of the State Environmental Policy Act (SEPA), ch.43.21C RCW on property with known petroleum contamination issues, earthquake liquefaction dangers, sea level rise, and destruction of the Olmsted Brothers and Wilder and White view corridor from the Temple of Justice and the Capitol Campus's Law Enforcement Memorial toward Puget Sound and the Olympic Mountains and from Budd Inlet toward the Capitol Group. Appellants filed their Petition under the Land Use Petition Act on March 19, 2018. (C.P 2.)

Over one hundred years ago, the architects Wilder and White and the Olmsted Brothers planned in 1911 and 1928, respectively, the City Beautiful Movement design for the Washington State Capitol Campus. The State Capitol Campus is acknowledged to be the most magnificent of the fifty state capitol campuses in the United States. One design element of this nationally-recognized architectural masterpiece is the view corridor

to and from the State Capitol Campus across Capitol Lake to be borrowed landscapes of Puget Sound and the Olympic Mountains. (C.P. 15, 17, C.P. 55: pgs 1403-1449.)

In 1911, Walter Wilder and Harry White, a pair of young, little-known architects from New York, won a national design competition that drew 30 entries. The revolutionary and grand plan by Wilder and White was for a Capitol Group that would include a glorious domed Capitol building (now called the Legislative Building) and a cluster of other buildings, including the Temple of Justice. The Capitol Group of buildings would be viewed as one grand building from Capitol Lake, downtown Olympia, and Puget Sound and would be reminiscent of the Acropolis in Athens, Greece. (C.P. 14-23, 35, 55: pgs 1403-1449.)

Greatly enhanced by the stellar 1928 landscape design by the internationally famous Olmsted Brothers, the Capitol Campus was destined to be America's most beautiful, with grand lawns and flower gardens, awe-inspiring buildings, a reflecting lake and sweeping views of the southernmost bay of Puget Sound, the snow-capped Olympic Mountains, and the charming downtown and waterfront. A grand promenade connected the upper Campus to the lower Campus, Capitol Lake, downtown, and Puget Sound out to the north and west. *Id.*

The State Capitol Campus was the first major commission for the young architects, and their design was stunning. At the time, statehouses were grandly described as “Temples of Democracy,” and the Washington State Capitol was called the nation’s “jewel in the crown.” The Temple of Justice was the first to be constructed, starting in 1912, with its water-and-mountain view to the north and adjacent to the main Capitol Building, called the Legislative Building, on a lovely flag circle. Other buildings of similar monumental architecture and materials were adjacent, and tree-lined lanes connected the group in a cohesive, pedestrian-friendly whole, which also offered vistas of Mount Rainier on a clear day. (C.P. 55: pgs. 1403-1449)

The Capitol Campus was built in phases over the years with the Temple of Justice in the 1910’s, the Legislative Building in the 1920’s, the associated Insurance, Cherberg and O’Brien buildings of the Capitol Group in the 1930’s and 1940’s, Capitol Lake in 1950, and the North Capitol Campus promenade in the 1990’s and 2000’s. The sandstone and marble Legislative Building was crowned by the fourth tallest dome in the world, behind only St. Peter’s in Rome, St. Paul’s in London, and the U.S. Capitol in Washington, D.C. Stone carvers and other artisans, working in Wilkeson sandstone, marble, brass and other materials achieved a work of art of rare excellence.

J. Kingston Pierce wrote, "The results were well worth the effort. Better than the national Capitol, the Olympia legislative complex fulfills Thomas Jefferson's early dream of a government center on a hill. Professor Henry Russell Hitchcock wrote, "in Olympia, the American renaissance in state capitol buildings reached its climax."

Similar to our National Mall in Washington, D.C. and the Rainier Vista on the University of Washington Campus in Seattle, which were both also designed by the Olmsted Brothers, the borrowed landscapes of Puget Sound and the Olympics are integral to the design of the Washington Capitol Campus.

The Appellants have a right to protect the view corridor to and from Capitol Campus across Capitol Lake to the borrowed landscapes of Puget Sound and the Olympic Mountains. Allowing the retention of the Capitol Center Building and construction of additional structures will permanently and adversely impair the public's view from the Washington State Law Enforcement Memorial and the North Capitol Campus. The harm to the national and statewide interest would be irreparable. Appellants are current and former public servants and public interest groups. Appellants have a right to protect the public interest. This court should protect the integrity of the historic view corridor for the public. (C.P. 2, 14-23, 35.)

This project flies in the face of applicable City ordinances, City plans, and state law. The applicable laws and policies were ignored. Appellants have a right to raise these public issues.

B. PROCEDURAL BACKGROUND

Appellants are community members, community leaders, and public servants. Matters concerning the City of Olympia and specifically Capital Campus are important issues. Clerk's Papers 14 through 23 are Declarations that explain the history of Appellants' community involvement and specifically Appellants' involvement with issues impacting Capitol Campus.

The procedural history of Appellants' objections to Defendant City of Olympia's approval and Appellants' internal administrative appeal of the development permit is contained at C.P. 55: pgs. 1696-2090. The Hearing Examiner's Findings of Fact and Conclusions of Law were in error.

Accordingly, on March 19, 2018 Appellants commenced their Land Use Petition Act (LUPA) litigation against the City of Olympia and Defendants Views on 5th LLC and Capital Venture Group, developers from California. (C.P. 1.) Defendants filed a Motion to Dismiss Appellants' LUPA Petition on the basis of standing. (CP 33, CP 43, CP 46, CP 48, CP 52.) The Superior Court granted Defendants' Motion to Dismiss on June 13, 2018. (C.P. 77.) This appeal follows.

IV. ARGUMENT

A. Standard of Review

Under RAP 4.2(a)(4) this is a case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination because of the adverse effect of the project on the State Capitol Campus National Historic District. This is certainly the most important case dealing with the design of the State Capitol Campus since the Wilder and White Plan was adopted by the State Capitol Committee in 1911 and the Olmsted Brothers Landscape Plan adopted by the State Capitol Committee in 1928.

B. Public Importance:

This matter involves issues of broad public importance because of the adverse effect of the project which presents “a fundamental and urgent issue of broad import which requires a prompt and ultimate determination by this court. *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 277 (2012).

C. Standing under LUPA

The Petitioners have been involved for decades to implement the 1911 Wilder and White Plan and the 1928 Omstead Brothers Plan for the State Capitol Campus which includes the view corridor from the Washington State Law Enforcement Memorial and North Campus Trail.

LUPA Standing requirements are broad. There is no case law interpreting the “prejudiced or likely to prejudice” requirement of LUPA. Case law has compared the LUPA standing requirement to the State Environmental Policy Act. Under SEPA and the National Environmental Protection Act there is a two-part test for standing: (1) whether the interests that the party seeks to protect are arguably within the zone of interests protected or regulated by SEPA and (2) whether the party alleges injury in fact. To show an injury in fact, the party must allege specific and perceptible harm. If the party alleges a threatened rather than an existing injury, the party must also show that the injury will be immediate, concrete and specific. *Squamish Tribe v. Kitsap County*, 92 Wn.App. 816, 965 P.2d 636 (1998). An organization has standing to sue on behalf of its members when its members have standing to sue as individuals, the interests at stake are germane to the organization’s purpose, and the participation of the members is not necessary to either the claim asserted or the relief requested. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 636 (1972);

If the harm alleged “in fact” affects the recreational or even the mere aesthetic interests” of the party, that will suffice for standing purposes. *Sierra Club v. Morton*, 405 U.S. 727, 734-36, 92 S.Ct. 1361, 31 L.Ed.2d

636 (1972); see also *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992). Appellants' testimony demonstrated standing to challenge the harm that will be caused if the proposed project is built. (CP. 55: pgs. 1978-2050, 2017-2077.)

D. Standing under SEPA and SMA

Washington courts have found that SEPA is substantially similar to the National Environmental Protection Act (NEPA) and that Washington Courts may look to federal case law for interpretation. *International Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn.App. 512, 525, 309 P.3d 654 (2013); *Public Utility District No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn. App. 150, 158, 151 P.3d 1067 (2007).

An Environmental Impact Statement was required by the State Environmental Policy Act (SEPA) and a shoreline substantial development permit was required by the Shoreline Management Act (SMA), RCW 90.58.020 and RCW 90.58.340. Further, this case is on all fours with *Sato Corporation v. City of Olympia*, SHB No. 81-41 (1982).

In *Sato* the Shoreline Board stated:

. . . the six story building on the site . . . would have its maximum visual impact on southern upland viewpoints located on or near the state capitol campus. The visual effect upon the northern shoreline vistas would be adverse. Water area views of Budd Inlet would be impaired; the building on the relatively narrow isthmus separating

Budd Inlet from Capitol Lade would be out of scale. . . .

While the existing view loss associated with the Capital Center Building may be seen as precedent for high rise structures on the narrow isthmus, it also serves as an example of adverse visual effects which should be limited.

Sato at Conclusions of Law VI concludes:

We must therefore conclude that the proposed [building] is inconsistent with the foregoing portion of RCW 90.58.020. The cumulative effect of allowing this and similar proposals on the isthmus would irreversibly damage the aesthetic views remaining.

Under *Sato v. Olympia*, SHB 81-41 (1982) and the 35 foot height limit for buildings in the isthmus, the Capitol Center Building has been a non-conforming use and structure since at least 1982. The proposed development which does not conform to the adopted laws is, by definition, inimical to the public interest embodied in those laws. *Abbey Road Group, LLC, et al., v. The City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009). Under the *Sato* case the proposed conversion of the Capitol Center Building is subject to the SMA and violates RCW 90.58.020. The building is a non-conforming use and structure and it has not been used in over 12 years. The building was vacated by lease Washington State Department of Corrections in 2006.

E. Standing to prevent non-conforming uses

The State Supreme Court has consistently emphasized that public policy and the intent of planning measures are “to restrict and not to increase

non-conforming uses.” *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 299-300, 266 P.2d 1034 (1954). This case gives the Supreme Court the opportunity to apply the non-conforming use and structure policy that has been established.

Zoning and planning policy is against the indefinite extension of non-conforming uses. The public policy is not to extend the life of non-conforming uses but rather to permit such a use to exist as long as necessary and then to require conformity. Indeed, the public intent is the eventual elimination of non-conforming uses. A non-conforming use in existence when a zoning ordinance is enacted cannot be changed into some other kind of a non-conforming use. *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 300-01, 266 P.2d 1034 (1954) (non-conforming rooming house cannot be changed to a fraternity house). *See, also, Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150-51, 995 P.2d 33 (2000) (legal non-conforming use as a church could not be resumed after intervening years as art school); *Shields v. Spokane Sch. Dist. No. 81*, 31 Wn.2d 247, 255, 196 P.2d 352 (1948) (non-conforming elementary school cannot change into a trade school). Other jurisdictions have reviewed zoning ordinances that use the word “vacant” in the same way as the term “vacated is used in a municipal code. They have viewed the term

consistent with the definition found in Black's Law Dictionary. *Choi v. Fife*, 60 Wn.App. 458, 803 P.2d 1330 (1991).

The Capitol Center Building is non-conforming with the 35 foot height limitation and the zoning. The conversion of the building and parking lots into apartment use is inconsistent with the 35 foot height limit allowed in the Urban Waterfront Housing Zone. It is time for the non-conforming building and proposed use to be brought into conformity. OMC §18.37.060 provides that a non-conforming use not used for a year may not be resumed. The Capitol Center Building has not been used since 2006, a period of twelve years and must not be allowed further life.

Nonconforming uses are disfavored and it is the public policy of this state to restrict such uses so that they may be ultimately phased out. A finding of compatibility cannot be based on the existence of the nonconforming use in the area in question. *Jefferson County v. Seattle Yacht Club*, 73 Wn.App. 576, 770 P.2d 987 (1994).

It is universally held that the mere purchase of property and occupation thereof are not sufficient factors, either jointly, or severally, to establish an existing nonconforming use, and a vested right to a nonconforming use cannot exist unless the particular use in question is, in fact, established. Commentators agree that nonconforming uses limit the effectiveness of land-use controls, imperil the success of community plans

and injure property values because of the nonconformity. *See* 1 ANDERSON, AMERICAN LAW OF ZONING, ch. 6.02; SETTLE. WASHINGTON LAND USE, ch. 2.7. If a non-conforming building is too high, it cannot be rebuilt without a variance. *State ex rel. Edmond Meany Hotel v. City of Seattle*, 66 Wn.2d 329, 402 P.2d 486 (1965).

Appellants should have been allowed to pursue these issues through their LUPA action. The trial court erred in dismissing the case for lack of standing.

F. City Land Use Ordinances bring the public “Into The Zone of Interests” protected by SEPA and the City Ordinances. Appellants are members of the public.

Under SEPA participation of the public is essential.RCW 43.21C.010 states that

The purposes of this chapter are: (1) to declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and to stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

Appellants, as members of the public, will all be harmed by the damage to the State Capitol Campus view corridor. (CP 55: pgs. 1403-1424, 1431-1432, 1904-1911.)

The Superior Court needed to require that the City of Olympia engage in the reviews required under SEPA and the ordinances of the City of

Olympia. The Hearing Examiner did not fulfill the SEPA requirements in the Views on 5th permit review process. The Hearing Examiner did not give any opportunity to the Petitioners to respond to the motion for summary judgment.(C.P. 55: pgs. 1802-1815, 1816-1911, 1912-1976, 1978-2037, 2038-2050, 2071-1077, 2079-2090.) This matter needs to be remanded to the Hearing Examiner to raise the environmental issues that were not considered including sea-level rise, the shoreline jurisdiction and impacts, seismic issues, and protection of the nationally historic view corridor.

Further, the network of City Ordinances contained in the City of Olympia's Municipal Code invites public participation in the land use application and decision-making process. Participation is not just limited to contiguous property owners. OMC 18.78.020 discusses the procedures of public notification of a permit application. OMC 18.78.040 discusses the requirements of public hearing notifications. Notices are published in the newspaper of general circulation in the City. Notices are mailed to property owners within a radius of 300 feet. The applicant is required to post signs in the immediate vicinity of the subject site giving further notice to the general public. OMC 18.70.060 discusses public notification of administrative process by posting a public notice on the subject property in SEPA threshold determination matters.

In short, in every step of the way of the permitting process, the City of Olympia invites neighboring property owners and members of the public to participate in the land use review and permitting process. Petitioners are doing exactly what they are required to do under law. The State Capitol Campus is across the Avenue from the proposed project and belongs to all citizens of the State of Washington.

G. Appellants have shown “Injury-in-Fact”

The loss or destruction of something is an “injury-in-fact.” The Olympia Municipal Code contains various “protections” as a matter of law. City staff is required to enforce municipal laws. Appellants should have been given an opportunity to present their information at a full hearing under LUPA.

The loss of a protected view shed is an injury in fact to the view shed that is protected by law for members of the public under OMC 18.110.060 and OMC 18.120.030. Potential flood damage areas must be protected under OMC 16.70, OMC 16.80, OMC 18.12 and OMC 18.32.325. Areas of special historic significance must be protected under OMC 19.100.040C. Height restriction must be enforced when a building has been abandoned for twelve years under OMC 18.37.040 and OMC 18.37.060.

Under *Squamish Tribe v. Kitsap County*, 92 Wn.App. 816, 965 P.2d 636 (1998), Petitioners have identified numerous “injuries in fact” that violate sections of the city’s Municipal Code that were designed to prevent the described categories of loss or injury. Washington Courts follow federal law. Under federal law, an environmental plaintiff shows “injury in fact” when the party avers that the party uses the affected area and is an individual for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc.* 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Sierra Club v. Morton* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) .

In this matter, the injuries include damage to the 1928 Olmsted Brothers Plan and 1911 Wilder and White view corridor to and from Capitol Campus across Capitol Lake to Puget Sound and the Olympic Mountains. See: Johnson, Norman J., *Washington’s Audacious State Capitol and its Builders*, University of Washington Press, Seattle and London 1988, ISBN 978-0-295-9646-6. There is injury to national and statewide interests in the preservation of the view corridor. (C.P. 55: pgs: 1403-1424, 1431-1412, 1904-1911.)

A party may demonstrate a “concrete interest” by showing a “geographic nexus” between the individual asserting the claim and the

location suffering an environmental impact. *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n.5 (9th Cir. 1995); Whether a party's interests are non-economic or unquantifiable is immaterial. *Washington Utilities and Transportation Commission v. F.C.C.*, 513 F. 2d 1142, 1149 (9th Cir. 1976). Nor does the attenuation of the causal link between the alleged failure to comply with the law and the possible injury to the party's interests defeat standing. *Id.*

The Appellants have standing to protect the 1928 Olmsted Brothers and 1911 Wilder and White view corridor to and from the Capitol Campus across Capitol Lake to the borrowed landscapes of Puget Sound and the Olympic Mountains. The harm to the national and statewide interest is palpable

Appellants and the public will suffer injury because Respondent Views on 5th LLC and Capital Venture Group, LLC's completed project will cause the damaging effect and detrimental impact that that the applicable law clearly seeks to prevent. The Appellants have standing to argue that an Environmental Impact Statement is required by SEPA and a shoreline substantial development permit is required by the SMA, RCW 90.58.020 and RCW 90.58.340 because of the adverse environmental effects.

V. CONCLUSION

For the above stated reasons, the Appellants respectfully request that the Supreme Court determine that Appellants have standing under RCW 36.70C.060 (2) and vacate the dismissal entered by the Thurston County Superior Court and order a hearing on the issues. Additionally, Appellants request an award of attorney's fees and costs under RAP 18.1.

Dated this 10th day of October 2018 at Olympia, Washington.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties; or their counsel of record, on this 10th day of October 2018, as follows:

City of Olympia Through: Dale Kamerrer Law, Lyman, Danier, Kamerrer & Bogdanovich, PS PO Box 11880 Olympia, WA 98502 dkamerrer@lldkb.com	<input type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt Requested <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
Heather Burgess Phillips Burgess Law 724 Columbia Street NW Suite 320 Olympia, WA 98501 hburgess@phillipsburgesslaw.com	<input type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt Requested <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 10th day of October, 2018 at Olympia, WA



Mary-Margaret O'Connell
Legal Assistant to Allen T. Miller

THE LAW OFFICES OF ALLEN T. MILLER

October 10, 2018 - 4:52 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96052-6
Appellate Court Case Title: Behind the Badge Foundation, et al. v. City of Olympia, et al.
Superior Court Case Number: 18-2-01487-2

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