

FILED
Court of Appeals
Division II
State of Washington
3/2/2020 10:07 AM

No. 53723-1-II
(Clark County Superior Court No. 19-2-00512-06)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SIMON'S WAY DEVELOPMENT, INC., a Washington Corporation,
Appellant/Petitioner,

v.

CLARK COUNTY, WASHINGTON,

Respondent,

SCOTT and ANJA O'NEIL, ERIC and MELISSA WALDAL, ROY and
DELLA MASSIE, ALAN and KATHRYN HOLTZ-OLSON, RYAN and
LINDA ROSENLUND, and BRIAN and JANET WOLF,

Respondents/Other Parties.

APPELLANT'S RESPONSE TO AMICUS BRIEF OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

LeAnne M. Bremer, P.C.
MILLER NASH GRAHAM & DUNN LLP
500 Broadway Street, Suite 400
Vancouver, Washington 98660
360.699.4771

Attorneys for Appellant/Petitioner
Simon's Way Development, Inc.

TABLE OF CONTENTS

	Page
I.	INTRODUCTION 1
II.	WASHINGTON STATE DNR'S ARGUMENTS IN ITS AMICUS CURIAE BRIEF DO NOT SUPPORT DENIAL OF THIS APPEAL 1
A.	DNR's Issues on Appeal Either are Outside the Scope of This Appeal or Provide No Assistance to the Court..... 1
1.	The Notice of Conversion Applicable to the Waldal Property Is Irrelevant to This Appeal 3
2.	DNR Approved a Forest Road Across Forestland in a Forest Practices Permit, and It Cannot Now Dispute That 6
III.	CONCLUSION..... 7

Cases

Chelan Cty. v. Nykreim,
146 Wn.2d 904, 52 P.3d 1 (2002).....7

Statutes

RCW 76.09.020(15).....6

RCW 76.09.2057

Other Authorities

RAP 10.6.....1

I. INTRODUCTION

This Court granted a request of the Washington State Department of Natural Resources ("DNR") to file an amicus curiae brief in this case under RAP 10.6. DNR's arguments are unpersuasive because its amicus curiae brief addresses an issue that is neither addressed below nor before this Court, and the brief provides no new argument or perspective on the actual issues before this Court.

II. WASHINGTON STATE DNR'S ARGUMENTS IN ITS AMICUS CURIAE BRIEF DO NOT SUPPORT DENIAL OF THIS APPEAL

A. DNR's Issues on Appeal Either are Outside the Scope of This Appeal or Provide No Assistance to the Court

This case began at the administrative level when Clark County issued notices and orders against Simon's Way, and other property owners, claiming that the owners must retroactively obtain County permits for a Class III DNR-permitted forest road. Roth Investments, the predecessor of Simon's Way, obtained permission from DNR to construct a 1,500-foot-long forest road to harvest timber from two parcels. One of the parcels, the Waldal property, has continuing forestry obligations imposed as a condition attached to a building permit for a house.¹

¹ CP0195.

Simon's Way, and others, filed an appeal challenging the County's notices and orders. The sole issue in the appeal, then and now, is whether Clark County regulations apply to Class III DNR-permitted forest roads even though (1) County regulations exempt such roads; (2) the time to challenge DNR's permit for construction of the forest road has long passed; and (3) DNR has not issued a Notice of Conversion to Nonforestry Use applicable to the forest road.

Yet the appeal issue metamorphosed into something else in the hearings examiner's decision and in the superior court's decision: the focus there was on whether DNR actually permitted a forest practice, or a forest road across forestland. And now DNR seeks, in part, to interject argument on yet another issue in this case other than the one on appeal.

In its brief, DNR argues two points:

1. The Waldal property converted to a nonforestry use, so Clark County regulations apply to the forest road; and
2. DNR never had proper forest practices jurisdiction over a road crossing a pasture, so again Clark County regulations apply.²

² Amicus Curiae Brief at 1.

The first argument is outside the scope of this appeal, and the second argument offers nothing that Clark County has not already argued, and it ignores the finality doctrine applicable to land use decisions. Accordingly, DNR's arguments provide no assistance to the Court and the Court should disregard them.

1. The Notice of Conversion Applicable to the Waldal Property Is Irrelevant to This Appeal.

One of the parcels subject to the DNR-permitted timber harvest is what is now known as the Waldal property because it is owned by Eric and Melissa Waldal, acquired in a deed from Roth Investments dated January 27, 2017.³ Around this time, Mr. Waldal sought a waiver from the moratorium placed on his property to ensure continuing forestry obligations in order to build a house.⁴ In a letter dated February 14, 2017, Clark County approved the waiver with this statement:

A residence building permit may now be applied for, and issued. (FPA#2928500 Dated 06/07/2014) 6 YR MORATORIUM is hereby waived. Continuing Forestry Obligations under RCW 76.09.060, 070, & 390 apply to this County Waiver.⁵

³ CP0054.

⁴ CP0195.

⁵ *Id.*

Roth Investments replanted the Waldal property with Douglas fir trees at 300 stems per acre.⁶ The continuing forestry obligation imposed on the Waldal property, even after construction of a house, requires reforestation and the cultivation of the planted trees.

Simon's Way filed its appeal challenging Clark County's notice and order related to the forest road on June 14, 2018.⁷ After that, and completely unconnected to the forest-road issue on appeal, on December 11, 2018, DNR issued a Notice of Conversion to a Nonforestry Use to Roth Investments claiming that the harvested sites—not the forest road—converted to a nonforestry use.⁸ This notice specifically alleged that there was clearing, grading, and stump removal on the harvested sites, and construction of a single-family residence (even though the County approved the moratorium waiver for the house).⁹ The form allowed DNR to check the box "Construction or reconstruction of roads to local government standards (above FP standards)" as a conversion activity, but

⁶ CP0207.

⁷ CP0109.

⁸ CP0308.

⁹ CP0309.

DNR left the box unchecked.¹⁰ DNR checked boxes for three out of nine conversion activities, but not the one that alleged conversion of the forest road.¹¹

Simon's Way does not contest that DNR issued a Notice of Conversion applicable to the Waldal property, or that DNR has the authority to make allegations of conversion in the notice it issued. But Simon's Way objects to DNR's attempted extrapolation of this fact to the forest road. DNR had, and has, every opportunity to issue a Notice of Conversion to the forest road itself by checking the box in the form and directing it to the appropriate party and has failed to do so. In its briefing, DNR attempts to minimize the impact of the unchecked box, arguing that allegations of conversion to any part of the permitted forestry operation means all the land covered by the permit converted, citing RCW 76.09.060(3)(b).¹² This statute does not state that, and this reading

¹⁰ *Id.* While Roth Investments filed an appeal of the Notice of Conversion to the Pollution Control Hearings Board, claiming, among other things, that the notice had been misdirected to it because it no longer owned the Waldal property, Roth Investments did withdraw the appeal when it realized that the notice had no bearing on it or the issues in this appeal because the notice did not cover the forest road. *See* Amicus Curiae Brief at 5 n.3.

¹¹ CP0309.

¹² Amicus Curiae Brief at 15 n.14.

of it would render the nine conversion activities listed in the form meaningless and would violate due process principles of fair notice of proscribed activities.

The record is clear. There has been no determination that the forest road converted to a nonforestry use.¹³ DNR has a process to make this determination and has failed to follow it. DNR should not be allowed to seek a conversion determination in this appeal, an issue not decided below.¹⁴

2. DNR Approved a Forest Road Across Forestland in a Forest Practices Permit, and It Cannot Now Dispute That.

Despite approving a forest practices permit for a forest road, which by definition crosses forestland, DNR now argues that it was mistaken, and that its mistake was jurisdictional: the road crosses a cow pasture, so it necessarily does not cross forestland.¹⁵ Specifically, DNR states that "if

¹³ Like the County, DNR makes much of the fact that the forest road is paved and is illuminated, but both have failed to cite any regulation that prohibits these features for a forest road. Simon's Way has repeatedly pointed out that for decades, while Roth Investments owned all the White Clover property, the property was already divided into five-acre parcels zoned Rural-5, allowing both home sites and forestry uses.

¹⁴ DNR admits as much by stating, "Neither the superior court nor the hearings examiner addressed conversion issues, despite the clear evidence of a conversion in the record." Amicus Curiae Brief at 15.

¹⁵ Forestland can be used for agricultural purposes too; these are not mutually exclusive uses. RCW 76.09.020(15) defines "forestland" as "all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which

the road crossed agricultural lands, DNR's action in approving the road as an amendment to the forest practices application was beyond its jurisdictional authority, ultra vires, and void."¹⁶

Simon's Way argued extensively in its briefing before this Court that it is too late for any party or decision-maker to invalidate a permit that approved the forest road. Even if the original permit approving the forest road was in error, controlling case law holds that it is too late to challenge it.¹⁷ There may have been a time for a party to argue that DNR's approval of the forest road was ultra vires and void, but that time was after DNR issued the permit and during the appeal period. Now it is too late.¹⁸

III. CONCLUSION

DNR's brief is not helpful to resolve this issues on appeal because it raises an issue not relevant to this appeal (conversion of the harvested parcel, not the forest road), and DNR has not raised any new issue or

is incompatible with timber growing." Contrary to DNR's statement in its brief (page 17), the land does not have to be currently forested to be forestland.

¹⁶ Amicus Curiae Brief at 16-17.

¹⁷ See, e.g., *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). Chelan County's approval of a boundary line adjustment was unlawful, but the Washington Supreme Court ruled that it was too late to challenge that decision.

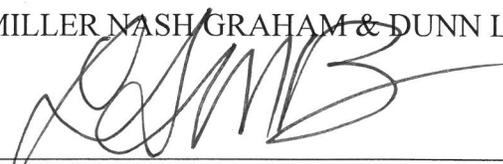
¹⁸ RCW 76.09.205 allows any person aggrieved by approval or disapproval of an application to conduct a forest practice to file an appeal with the Pollution Control Hearings Board within 30 days of issuance of the decision.

provided a fresh perspective on the definition of "forestland" or the doctrine on the finality of land use decisions.

Simon's Way respectfully requests that the Court grant its appeal for the reasons set forth in its briefing.

DATED this 2nd day of March, 2020.

MILLER NASH GRAHAM & DUNN LLP



LeAnne M. Bremer, P.C.
WSB No. 19129

Attorneys for Appellant/Petitioner
Simon's Way Development, Inc.

CERTIFICATE OF SERVICE

I, LeAnne M. Bremer, certify under penalty of perjury under the laws of the state of Washington that on March 2nd, 2020, I caused service of this Appellant's Response to Amicus Brief of Washington Department of Natural Resources on the following counsel of record and other parties as follows:

VIA E-MAIL AND HAND-DELIVERY:

William Richardson, Deputy Prosecuting Attorney
Clark County Prosecutor's Office—Civil Division
Post Office Box 5000
Vancouver, Washington 98666-5000
E-mail: Bill.Richardson@clark.wa.gov

VIA E-MAIL AND U.S. MAIL:

Philip M. Ferester
Senior Counsel
Natural Resources Division
P.O. Box 40100
Olympia, Washington 98504-0100
E-mail: Phil.Ferester@atg.wa.gov

VIA U.S. MAIL: (Other Parties)

Scott and Anja O'Neil
801 N.E. 26th Way
Battle Ground, Washington 98604

Eric and Melissa Waldal
26906 N.E. 180th Court
Battle Ground, Washington 98604

Roy and Della Massie
906 N.E. 11th Court
Battle Ground, Washington 98604

Alan and Kathryn Holtz-Olson
18111 N.E. 266th Street
Battle Ground, Washington 98604

Ryan and Linda Rosenlund
26805 N.E. 180th Court
Post Office Box 2002
Battle Ground, Washington 98604

Brian and Janet Wolf
3444 Shawnee Drive
Norco, California 92860

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Executed this 2nd day of March, 2020, in Vancouver,
Washington.

/s/ LeAnne M. Bremer, P.C.
LeAnne M. Bremer, P.C., WSB No. 19129

MILLER NASH GRAHAM & DUNN LLP

March 02, 2020 - 10:07 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53723-1
Appellate Court Case Title: Simon's Way Development, Inc, Appellant v. Clark County, Respondent
Superior Court Case Number: 19-2-00512-6

The following documents have been uploaded:

- 537231_Briefs_20200302100025D2508478_7440.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was Simons Way Appellants Response to Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- Bill.Richardson@clark.wa.gov
- CntyPA.GeneralDelivery@clark.wa.gov
- RESOlyEF@atg.wa.gov
- joy.voorhees@millernash.com
- phil.ferester@atg.wa.gov

Comments:

Sender Name: Le Anne Bremer - Email: leanne.bremer@millernash.com
Address:
PO BOX 694
500 BROADWAY STE 400
VANCOUVER, WA, 98666-0694
Phone: 360-699-4771

Note: The Filing Id is 20200302100025D2508478