

NO. 83611-6

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner,

v.

WHATCOM COUNTY, a municipal corporation;
BIRCH POINT VILLAGE, L.L.C., a Washington corporation;
SCHMIDT CONSTRUCTING, INC.,
a Washington corporation; and BRIGHT HAVEN
BUILDERS, LLC, a Washington corporation;
MAYFLOWER EQUITIES, INC.; LISA SCHENK
and MIKE SUMNER,

Respondents.

DISTRICT'S ANSWER TO AMICUS CURIAE MEMORANDUM
OF THE WASHINGTON FIRE COMMISSIONERS ASSOCIATION

Jonathan K. Sitkin
WSBA #17604
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
(360) 671-1796

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Attorneys for Petitioner Whatcom County
Fire District No. 21

A. INTRODUCTION

The petitioner, Whatcom County Fire District No. 21 ("District"), received the amicus curiae memorandum of the Washington Fire Commissioners Association ("WFCA") in support of its petition for review to this Court. The WFCA amicus memo only confirms that the present case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

B. ARGUMENT

In their answer to the District's petition for review, the four respondent developers raise several arguments that are simply untrue, as the WFCA amicus brief demonstrates.

First, a consistent refrain throughout the developers' answer to the District's petition for review is that the Whatcom County permitting process is "unique." Answer at 4, 10. The developers even go so far as to argue, without any support in the record, that ordinances similar to Whatcom County's concurrency ordinance have not been adopted by any other county in Washington. Answer at 9, 12. However, as demonstrated in the WFCA memorandum, other counties have such concurrence ordinances. WFCA memorandum at 7-10. Additionally, as noted in briefing before the Court of Appeals, the Department of Community Trade, and Economic Development (now the Department of Commerce)

has adopted regulations that specifically call upon local jurisdictions to adopt concurrency ordinances. WAC 365-195-070(3); WAC 365-195-835. The developers have no knowledge whatsoever about whether local jurisdictions have adopted concurrency ordinances consistent with the direction of the Department of Commerce in those WAC provisions, and for them to assert that no other county has adopted an ordinance like Whatcom County's is baseless.

Second, the developers argue that Whatcom County's concurrency ordinance is the product of unique "politics" in Whatcom County. Answer at 15-16. They assert, for example that "the ordinance is a relic from a recalcitrant County Council." Answer at 11. The developers have *no authority* for such a statement. There is *nothing* in the record below that supports this statement. The developers pulled this assertion out of thin air. It is *improper* for the developers to raise a factual assertion *unsupported in the record*. RAP 13.4(c)(6). Such an action is sanctionable. See RAP 18.9(a); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992).

Third, as the WFOA memorandum demonstrates, and as the developers do not deny, the RCW 58.17.110 issue, which is significant in this case, *was never addressed in the Court of Appeals opinion*. This issue is of significant public importance as to whether developers have satisfied

the statutory directive requiring them to make appropriate provision for public health, safety, and general welfare as a condition for approval of their developments. The only answer the developers have to the fact that the Court of Appeals opinion did not even address RCW 58.17.110 is that the District "implicitly recognized" before the Court of Appeals that the general subdivision statute does not provide an independent ground to reverse the hearing examiner. Answer at 18. This statement is *blatantly untrue*. The District repeatedly argued at the trial level and before the Court of Appeals that RCW 58.17.110 provides an independent grounds for a concurrency-like analysis in connection with the developers' projects.

The District's consistent assertion throughout this case has been that the District is not able to provide the appropriate level of fire and emergency services for the additional growth engendered by the developments here because it lacks resources to do so. The District is dependent upon a mixture of professional and volunteer firefighters that will be overburdened by the added fire and emergency calls engendered by the growth from the developers' projects.

Finally, as is now customary for the developers, they again raise an utterly irrelevant question relating to the District's earlier efforts to impose

a voluntary concurrency mitigation fee. Answer at 1-2, 9, 12-13.¹ They assert that the dispute over voluntary concurrency mitigation fees “clouds this appeal.” *Id.* at 12. The developers’ argument on the voluntary concurrency mitigation fees is frivolous and sanctionable. RAP 18.9(a). The developers *know* the question of such fees is not before the Court because *the District did not appeal the hearing examiner decision on voluntary concurrency mitigation fees to the trial court or the Court of Appeals.* Answer at 12. For the developers to continue to harp on this issue that is not before any court, including this Court, is a waste of the Court’s time.

C. CONCLUSION

The WFCAs memorandum in support of the District’s petition for review does an admirable job of indicating why this case satisfies the provisions of RAP 13.4(b)(4) and why this Court should grant review. Concurrency is a core issue in Washington’s Growth Management Act (“GMA”). Apart from one appellate decision relating to transportation concurrency, a mandatory subject for local ordinances under GMA per RCW 36.70A.070(6), this Court has never reviewed a case involving

¹ The District was trying to find a solution to meet its capital and staffing needs to allow orderly development to proceed in Birch Bay. Such *voluntary* mitigation fees were part of that solution. It is ironic that the developers requested that such fees be imposed as a condition for staying enforcement of the trial court’s order. CP 142-47.

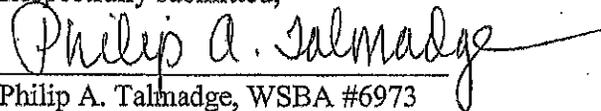
concurrency outside the transportation context. This case involves an issue of first impression under GMA.

Far from being unique, Whatcom County's concurrency ordinance required site-specific evaluation of the presence or absence of sufficient facilities to address important public needs like fire and emergency services impacted by the developers' proposed projects. Moreover, in its published opinion, the Court of Appeals failed to even address RCW 58.17.110, a statute that requires a concurrency-like analysis of the impact of a proposed project on public safety services. In an era in which public safety officers are under assault and local governments' ability to provide needed public safety services in the face of added growth is severely challenged, the issues in this case are critically important.

This Court should grant review in order to address the question of concurrency under GMA outside the transportation context, and the implications of RCW 58.17.110.

DATED this 5th day of January, 2010.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188-4630

(206) 574-6661

Jonathan K. Sitkin, WSBA #17604
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
(360) 671-1796
Attorneys for Petitioner
Whatcom County Fire District No. 21

DECLARATION OF SERVICE

On this day stated below, I deposited in the U.S. Mail a true and accurate copy of: District's Answer to Amicus Curiae Memorandum of the Washington Fire Commissioners Association, No. 83611-6 to the following parties:

Brian K. Snure
Snure Law Office
612 S. 227th Street
Des Moines, WA 98198-6826

Douglas K. Robertson
Belcher Swanson Law Firm PLLC
900 Dupont Street
Bellingham, WA 98225-3105

Phil J. Buri
Buri Funston Mumford, PLLC
1601 F Street
Bellingham, WA 98225-3011

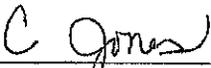
Karen Frakes
Whatcom County Prosecutor's Office
311 Grand Avenue
Bellingham, WA 98225-4048

Jonathan Sitkin
Seth Woolson
Chmelik Sitkin & Davis PS
1500 Railroad Avenue
Bellingham, WA 98225-4542

Original filed with:
Washington Supreme Court
Clerk's Office

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

DATED: January 5, 2010, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

DECLARATION