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NO. 74464-0-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2016 AUG 22 PM 5:11

PUGET SOUND ENERGY, INC.,

Appellant/Cross-Respondent,

v.

EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant,

and CITY OF BELLEVUE

Respondent.

REPLY BRIEF OF RESPONDENT/CROSS APPELLANT
EAST BELLEVUE COMMUNITY COUNCIL

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I. INTRODUCTION

While accusing the EBCC of elevating form over substance, PSE fails to confront the obvious purpose of Chapter 35.14 RCW. PSE Reply/Response Br. at 40. As the Washington Supreme Court expressly recognized in *City of Bellevue v. East Bellevue Community Council*, 138 Wn.2d 937, 945, 983 P.2d 602 (1999), the legislature’s clear purpose in enacting Chapter 35.14 RCW was to give community municipal corporations a voice in land use decisions affecting their territory. EBCC is not attempting to “imply jurisdiction” as PSE contends. PSE Response/Reply at 31. The legislature has explicitly granted EBCC authority to approve and disapprove “conditional use permits” of any kind.

II. ARGUMENT

A. **The plain text of the statute grants EBCC authority.**

The plain text of the statute grants EBCC authority to review “conditional use permits.” RCW 35.14.040(3). A shoreline conditional use permit is a type of conditional use permit: a subcategory. The unambiguous text of the statute includes all conditional use permits, including shoreline conditional use permits. *See, e.g., State v. Britton*, 84 Wn. App. 146, 149, 925 P.2d 1295 (1996) (concluding that subcategory, “gross misdemeanor,” was included within term “misdemeanor” in Chapter 10.22 RCW). Nothing in

Chapter 35.14 RCW indicates that the general phrase “conditional use permit” is limited or that it excludes those conditional use permits related to shoreline development. This Court should reject PSE’s attempt to narrow the scope of the statute beyond its plain meaning. *See Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wn.2d 628, 637 n.7, 115 P.3d 316 (2005) (refusing to adopt interpretation that would have narrowed definition of statutory term beyond ordinary meaning).

PSE insists that EBCC is asking this Court to graft the term “shoreline” onto RCW 35.14.040(3), relying on the Shoreline Management Act (“SMA”), Chapter 90.58 RCW, to argue that land-use and shoreline conditional use permits are fundamentally different. PSE Response/Reply at 29. But the legislature did not use the term “shoreline conditional use permit” in drafting the SMA. EBCC Brief at 43-44 (citing RCW 90.58.100(5)). As PSE aptly points out, the Court must “assume the legislature ‘means exactly what it says.’” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)); PSE Reply/Response Br. at 29 (quoting same language). The legislature used the general phrase “conditional use permit” in enacting both RCW 35.14.040(3) and the SMA, RCW 90.58.100(5).

PSE insists that the legislature's failure to amend RCW 35.14.040 to include the word "shoreline" is somehow indicative of the legislature's intent. But the lack of amendment since the passage of the SMA signifies nothing. EBCC Brief at 44-45. PSE cites no authority that would afford relevance to the legislature's failure to amend the statute to add "SCUPs" after enactment of the SMA. While the legislature's failure to amend a statute following a judicial decision interpreting that statute is presumed to indicate legislative acquiescence, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009), here there has never been any judicial decision holding that RCW 35.14.040 includes or excludes shoreline conditional use permits.

B. PSE's attempt to distinguish shoreline conditional use permits from other conditional use permits is unpersuasive and should not override the text of the statute.

PSE attempts to draw a distinction between the state interests served by the SMA and the local interests at stake for land use permits. PSE overstates the significance of this distinction. While the SMA certainly reflects state interests, so do the other types of permits and regulations enumerated in RCW 35.14.040. For example, the EBCC has authority to review comprehensive plans. RCW 35.14.040(1) (granting authority over comprehensive plans). Comprehensive plans are required by the Growth

Management Act, a statute which unquestionably reflects statewide interests. RCW 36.70A.010 (GMA legislative findings stating that “uncoordinated and unplanned growth, together with a lack of common goals expressing the public’s interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.”).

Further, both shoreline regulations and land use regulations are part of a city’s development regulations and implemented at the local level, and the GMA expressly states that a shoreline master program (required by the SMA) is part of a city or county’s comprehensive plan. RCW 36.70A.480 (providing that shoreline master program is “an element of the county or city’s comprehensive plan” and that shoreline use regulations “shall be considered a part of the county or city’s development regulations.”).

PSE also emphasizes that the process for review of conditional use permits related to general land use development, through the superior court, is different from the process for review of conditional use permits related to shoreline development, through the Department of Ecology and the Shoreline Hearings Board. PSE Response/Reply Br. at 27. While it is true the review processes for these permits are different, nothing in Chapter

35.14 RCW conflicts with the SMA's review process, and PSE does not articulate how the SMA would be frustrated by EBCC review of a conditional use permit. After approval by the City Council, a shoreline conditional use permit would be transmitted to the EBCC for review; if approved by the EBCC, the decision would be transmitted to Ecology. While EBCC review certainly adds another layer to permit review, that extra layer of local review and control is precisely what the legislature envisioned when enacting Chapter 35.14 RCW.

C. The City of Bellevue's code is not relevant to arguments about the state legislature's intent.

PSE points out that EBCC has never "asserted jurisdiction" over other types of conditional use permit like administrative conditional use permits. PSE Response/Reply at 26. The City of Bellevue's code creates a separate review process for administrative conditional use permits, which does not include EBCC review. *See* City of Bellevue Land Use Code (LUC) Chapter 20.30B (conditional use permits); Chapter 20.30E LUC (administrative conditional use permits). The administrative processes the City has set up are irrelevant in determining the meaning of Chapter 35.14 RCW. Whether or not the EBCC has in fact reviewed administrative conditional use permits in the past has no bearing on whether the legislature granted EBCC authority to review them. PSE's attempt to distinguish

multiple subtypes of conditional use permits is unavailing. All are conditional use permits within the scope of RCW 35.14.040(3).

D. PSE’s attempt to distinguish between land use regulations and permits is misleading, where EBCC has express statutory authority over both.

PSE contends EBCC “erroneously conflates” land use regulations and permits. PSE Response/Reply at 30. PSE disingenuously misreads EBCC’s argument. The “land use regulation” language PSE quibbles over is a direct quote from a state supreme court case that upheld the EBCC’s authority to review a land use regulation, specifically, a zoning ordinance. *City of Bellevue*, 138 Wn.2d at 945 (“The obvious purpose of the statute [RCW 35.14.040] is to place final decision-making power in the community council where *land use regulations* affecting property within its jurisdiction are concerned.” (emphasis added)); EBCC Response Brief at 43 (quoting same language).

That the current dispute involves a *permit* and not a *land use regulation* does not undermine EBCC’s fundamental point that the supreme court has recognized that maintaining local control is the “obvious purpose” of the statute. Moreover, it is beyond dispute that RCW 35.14.040 explicitly grants the EBCC authority over *both* individual permits and more general land use regulations. RCW 35.14.040 (granting EBCC authority to review conditional use permits, variances, subdivision plats, and zoning ordinances).

III. CONCLUSION

Because the clear text of the statute grants EBCC authority to review all conditional use permits, this Court should reverse the ruling of the superior court.

RESPECTFULLY SUBMITTED this 22 day of August, 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent the foregoing **Reply Brief of Respondent/Cross Appellant East Bellevue Community Council**, to the following:

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