

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/3/2023 11:24 AM  
BY ERIN L. LENNON  
CLERK

Supreme Court Case No. 101960-2

---

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

JUDITH ZIMMERLY, JERRY NUTTER, AND NUTTER  
CORPORATION,  
Petitioners/Appellants,

v.

COLUMBIA RIVER GORGE COMMISSION,

and

FRIENDS OF THE COLUMBIA RIVER GORGE,

and

JODY AKERS, PAUL AKERS, DANNY GAUDREN,  
KATHEE GAUDREN, RACHEL GRICE, ZACHARY  
GRICE, GREG MISARTI, EDMOND MURRELL,  
KIMBERLY MURRELL, RICHARD J. ROSS, KAREN  
STREETER, SEAN STREETER, AND ELEANOR WARREN,

Respondents/Appellees.

---

**MEMORANDUM OF AMICUS CURIAE THE  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON**

---

JACKSON WILDER  
MAYNARD, JR.  
GENERAL COUNSEL  
WSBA #43481  
JACKSONM@BIAW.COM

BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON  
300 DESCHUTES WAY SW, SUITE 300  
TUMWATER, WA 98501  
(360) 352-7800

ASHLI RAYE TAGOAI  
ASSOCIATE GENERAL  
COUNSEL  
WSBA #58883  
ASHLIT@BIAW.COM

*Counsel for Amicus Curiae the Building Industry Association of  
Washington*

**TABLE OF CONTENTS**

I. INTRODUCTION..... 6

II. FACTUAL AND PROCEDURAL BACKGROUND..... 7

III. IDENTITY AND INTEREST OF AMICUS..... 7

IV. ISSUES OF INTEREST TO AMICUS CURIAE..... 8

    A. Whether under 16 U.S.C. § 544m(a)(2), CCC 32.08, and CC 40.240, the Columbia River Gorge Commission exceeded its jurisdiction by hearing an appeal of a Clark County Code enforcement action?..... 8

    B. Whether federal land use regulation will exacerbate Washington State’s existing housing supply and affordability crisis? ..... 8

V. ARGUMENT ..... 8

    A. Considering the U.S. Supreme Court’s recent ruling in *Sackett v. EPA*, this Court should not defer to the Commission’s interpretation of 16 U.S.C. § 544m(a)(2). ..... 8

    B. Delays in permitting can cost both home builders and prospective home owners thousands of dollars on each home. .... 13

VI. CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### Cases

<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837, 843–44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984).....	8
<i>Sackett v. Env't Prot. Agency</i> , 143 S. Ct. 1322 (2023).....	passim
<i>Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers</i> , 531 U.S. 159, 168, 121 S. Ct. 675, 148 L.Ed.2d 576 .....	9
<i>United States v. Riverside Bayview Homes, Inc.</i> , 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419.....	9

### Statutes

16 U.S.C. § 544m(a)(2).....	passim
16. U.S.C. § 544(d).....	11
CCC 32.08 .....	7
CCC 40.240 .....	7

### Other Authorities

<i>Cost of Permitting Delays</i> , Building Industry Association of Washington (Nov. 2022), <a href="https://www.biaw.com/research-center/cost-of-permitting-delays/">https://www.biaw.com/research-center/cost-of- permitting-delays/</a> .....	13
<i>Housing Affordability in Washington</i> , Building Industry Association of Washington (May 1, 2023),	

<https://www.biaw.com/research-center/washington-states-housing-affordability-index/> ..... 12

*Merriam-Webster.com Dictionary*, Merriam-Webster,  
<https://www.merriam-webster.com/dictionary/implementation> ..... 11

## I. INTRODUCTION

Appellants request that this Court reverse the Columbia River Gorge Commission's ("Commission") Final Decision and reinstate the Clark County Examiner's decision because the National Scenic Area Act ("Act") does not give the Commission authority to hear appeals of Clark County ("County") code enforcement actions. Land use regulation is reserved to the states. Congress did not intend for the Act to be a federal zoning law, which it practically becomes if the Commission is given the authority to overturn every County code enforcement action.

This memorandum will frame the issue of agency deference in light of the U.S. Supreme Court's recent ruling in *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322 (2023) and will focus on how allowing the Commission to hear appeals of code enforcement actions will impact the home building industry and housing affordability.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In the interest of judicial economy, this brief defers to the thorough recitation of the facts and procedural background of this case given by Appellants.

## **III. IDENTITY AND INTEREST OF AMICUS**

BIAW represents more than 8,000 members of the home building industry. BIAW is made up of 14 affiliated local associations: the Building Industry Association of Clark County, the Central Washington Home Builders Association, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Home Builders Association of Kitsap County, the Lower Columbia Contractors Association, the North Peninsula Building Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Builders Association, the Skagit-Island Counties Builders Association, the Spokane Home Builders Association, the Home Builders Association of

Tri-Cities, and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry. The economic benefit of residential construction includes jobs, income for thousands of working families, and continued tax revenue for state and local governments. Nonetheless, Washington State is experiencing a severe shortage of homes, an issue further exacerbated by unnecessary additional costs related to overregulation and permitting delays.

#### **IV. ISSUES OF INTEREST TO AMICUS CURIAE**

- A. Whether under 16 U.S.C. § 544m(a)(2), CCC 32.08, and CCC 40.240, the Columbia River Gorge Commission exceeded its jurisdiction by hearing an appeal of a Clark County Code enforcement action?
- B. Whether federal land use regulation will exacerbate Washington State's existing housing supply and affordability crisis?

#### **V. ARGUMENT**

- A. **Considering the U.S. Supreme Court's recent ruling in *Sackett v. EPA*, this Court should not defer**



**to the Commission’s interpretation of 16 U.S.C. § 544m(a)(2).**

Historically, courts have given much deference to administrative agencies to interpret ambiguous legislation whether the legislative delegation be implicit or explicit. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Courts have long held the standard of interpretation as reasonableness; whether the agency’s response to ambiguity is based on acceptable construction of the statute. *Id.* at 843. Then, in *Sackett*, the U.S. Supreme Court (“Supreme Court”) found that administrative agencies often provide guidance that is wholly inconsistent with the Congressional intent, plain language, context, and legislative history of a statute. 143 S. Ct. 1322, 1341 (2023). For example, the court in *Riverside Bayview Homes* deferred to the Army Corps of Engineers (“Corps”) to provide guidance on which wetlands should be considered Waters of the United States. In that case, the Corps and EPA subsequently adopted the “migratory bird rule,” which

extended Clean Water Act (“CWA”) jurisdiction to “any waters or wetlands that are or would be used as a habitat by migratory birds or endangered species.” *Id.* at 1324 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419). Pursuant to this rule, the Corps sought to apply CWA jurisdiction to several isolated, intrastate ponds in Illinois. *Id.* (citing *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 168, 121 S. Ct. 675, 148 L.Ed.2d 576 (“SWANCC”). The Court swiftly rejected this application.

The Supreme Court has now held that administrative agencies do not get limitless regulatory authority, nor absolute deference, for interpretation in the case of legislative ambiguity. *See Sackett*. Similarly, this Court should not defer to the Commission for its interpretation of § 544m. First, this Court must begin with reading the plain language of the Act. *Id.* at 1336.

Any person or entity adversely affected by any final action or order of a county *relating to the implementation of sections 544 through 544p* may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside. *See* 16 U.S.C. § 544m(a)(2) (emphasis added).

Plainly, § 544m(a)(2) provides that a person adversely affected by any final action of a county that relates to the implementation of the Act may appeal to the Commission.

Thus, the appealed action must be related to the implementation of the Act. Therefore, the operable term is “implementation.”

The *Sackett* court made it clear that it is improper for an agency to ignore certain terms in a statute to create its desired effect. *Id.* at 1337 (court refused to read “navigable” out of the CWA, holding that it showed Congress was focused on its traditional jurisdiction over waters that were or had been navigable in fact). To do so is a clear abuse of regulatory power. Here, omitting “implementation,” from the statute

would give the Commission authority to hear an appeal of *any* County decision *related* to the Act.

Implementation of the Act is described in § 544d wherein the Commission was tasked with adopting a scenic area management plan. *See* 16. U.S.C. § 544(d). Upon its creation, the Commission was tasked with adopting a scenic area management plan and verifying that all counties within the Act's jurisdiction had created county land use ordinances consistent with this plan. Implementation is the process of making something active or effective. "Implementation." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam webster.com/dictionary/implementation>. (last visited June 30, 2023). Thus, § 544m only authorizes the Commission to make its scenic area management plan active in the affected counties. If the counties have land use ordinances consistent with the plan, the Commission has no jurisdiction to act further.

**B. Delays in permitting can cost both home builders and prospective home owners thousands of dollars on each home.**

With the average median home price sitting at \$565,613, only 24% of families can afford homeownership in Washington State. *Housing Affordability in Washington*, Building Industry Association of Washington (May 1, 2023), <https://www.biaaw.com/research-center/washington-states-housing-affordability-index/>. In Clark County, that number dwindles to 19%. *Id.* A significant, and often overlooked, expense in the business of providing housing is obtaining and preparing land for construction. Developers strive to ensure that they act in accordance with local and state zoning and land use requirements. The increase and variation in state and local codes is expensive to keep up with without having to anticipate that one's development will be halted for months – or even years – in the appeal process. The opportunity for the public to appeal every land use decision with no limitation will undoubtedly make it costlier for developers to purchase and

develop land, which in turn, will make it difficult to provide homes that the public can afford.

Specifically, permit delays substantially increase the cost of homes because the costs accrued during the time spent waiting to obtain a permit are subsequently passed on to the homebuyer in the sale price. Washington State has an average permit approval delay of six and a half months, resulting in a holding cost of \$31,375. *Cost of Permitting Delays*, Building Industry Association of Washington (Nov. 2022), <https://www.biaaw.com/research-center/cost-of-permitting-delays/>. This figure illustrates an increase of \$5,077 in total holding costs, up from a previously reported total of \$26,298. *Id.* In just two years, Washington has seen an increase in holding costs by \$9,028. *Id.*

The Mine, which had been granted a prior nonconforming use and did not require a permit at all, has been delayed for at least five years. If a developer or builder in our industry were to incur a five-year delay due to a Commission appeal and

accompanying litigation, the costs would be astronomical.

Using the six-and-a-half-month figure, \$300,000 is a rough estimate. Given the expense of delay, most builders will choose to build nothing in Clark County.

While there are many uncontrollable and unforeseen factors contributing to the cost of homeownership, costs imposed by the government can be controlled by reducing regulation. Expediting permit timelines is essential to lowering housing costs. This Court should consider these policy implications before rendering a decision in this matter, and as a result should rule in favor of the Appellants.

## **VI. CONCLUSION**

The Commission does not have authority to hear appeals that concern orders unrelated to the implementation of the Act. Therefore, BIAW respectfully requests that this Court reverse the Commission's final decision and reinstate the Clark County Examiner's decision.

**RAP 18.17(b) CERTIFICATE OF COMPLIANCE**

This document contains 1,507 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 3<sup>rd</sup> day of July, 2023.

By:



Jackson Wilder Maynard, Jr.

General Counsel

WSBA No. 43481

Building Industry Association of  
Washington

300 Deschutes Way SW, Suite 300

Tumwater, WA 98501

(360) 352-7800



Ashli Tagoai

Associate General Counsel

WSBA No. 58883

Building Industry Association of  
Washington

300 Deschutes Way SW, Suite 300

Tumwater, WA 98501

(360) 352-7800

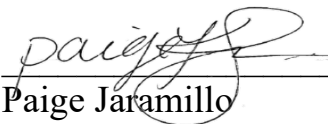
*Attorneys for Amicus Curiae the Building  
Industry Association of Washington*



**DECLARATION OF SERVICE**

I, Paige Jaramillo, hereby declare under penalty of perjury under the laws of the State of Washington, that on July 3, 2023, I electronically filed the foregoing document via the Washington State Appellate Court's Secure Portal, which will send e-mail notifications of such filing to all parties of record.

Signed in Tumwater, Washington, this 3<sup>rd</sup> day of July, 2023.

  
\_\_\_\_\_  
Paige Jaramillo  
Paralegal

# BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

July 03, 2023 - 11:24 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 101,960-2  
**Appellate Court Case Title:** Judith Zimmerly, et al. v. Columbia River Gorge Commission, et al.  
**Superior Court Case Number:** 19-2-03321-9

### The following documents have been uploaded:

- 1019602\_Briefs\_20230703112113SC927054\_9582.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was 230703 Memo of Amicus FINAL.pdf*
- 1019602\_Motion\_20230703112113SC927054\_9785.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was 230703Motion for Leave FINAL.pdf*

### A copy of the uploaded files will be sent to:

- AppellateAssistants@schwabe.com
- MCalvert@schwabe.com
- ashlit@biaw.com
- curtis.burns@clark.wa.gov
- david.bowser@jordanramis.com
- jacksonm@biaw.com
- jamie.howsley@jordanramis.com
- jeff.litwak@gorgecommission.org
- jmyers@lldkb.com
- lisa@lldkb.com
- litparalegal@jordanramis.com
- lydia@horensteinlawgroup.com
- nathan@gorgefriends.org
- paigej@biaw.com
- patricia@horensteinlawgroup.com
- shorenstein@schwabe.com

### Comments:

---

Sender Name: Jackson Maynard - Email: jacksonm@biaw.com  
Address:  
300 DESCHUTES WAY SW STE 300  
TUMWATER, WA, 98501-7719  
Phone: 360-352-7800 - Extension 108

**Note: The Filing Id is 20230703112113SC927054**