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NO. 91878-3

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ABC HOLDINGS, INC., and
CHEM-SAFE ENVIRONMENTAL, INC.,

Petitioners,

v.

KITTITAS COUNTY, a
Washington municipal corporation

Respondent.

ANSWER TO PETITION FOR REVIEW

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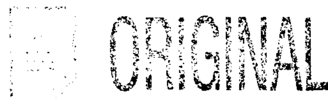

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I. INTRODUCTION

Kittitas County (the "County") asks this Court to deny the petition for review of ABC Holdings, Inc., and Chem-Safe Environmental, Inc., (collectively "CSE"). The petition seeks review of the decision of the Court of Appeals in *ABC Holdings, Inc., and Chem-Safe Environmental, Inc., v. Kittitas County*, 348 P.3d 1222 (2015) (the "Decision").

The petition fails to satisfy the criteria governing acceptance of review set forth in RAP 13.4(b) and is instead a re-argument of the merits of CSE's case below.

The Decision is consistent with established case law and does not present any matter of substantial public interest justifying review here. The Court of Appeals resolved the case on the basis of tactical choices and errors of CSE in proceedings below. At various points in these lengthy administrative and judicial appellate proceedings, CSE failed to introduce evidence, failed to challenge findings of fact, failed to preserve error, and waived legal arguments available to it. The likelihood of recurrence of these circumstances in future cases is very low and weighs against review because of the unique facts and procedural history of this case.

Only as a secondary matter does the Decision touch on any issue even arguably related to the substantive law of solid waste regulation. Even here, however, CSE has failed to show how the Decision conflicts with any other appellate decisions or how the Decision presents a matter of substantial public interest. This Court should uphold the narrow and well-reasoned decision of the Court of Appeals and deny the petition.

II. STATEMENT OF THE CASE

CSE does not dispute that it failed to challenge any findings of fact from the hearing examiner decision dated May 12, 2011. CP 4-10. This decision addressed CSE's appeal of the administrative action of Kittitas County by which a notice and order of violation was issued for CSE's failure to possess a permit for storage and management of moderate risk waste ("MRW").

A. The NOVA and CSE's appeal to the hearing examiner.

Prior to issuing the notice and order of violation ("NOVA"), the County communicated with CSE regarding the need to obtain a MRW permit to avoid further penalties. ABR 9[1]. After CSE

[1] "ABR" citations are to the appellate board record established before the hearing examiner.

persisted in its failure to obtain a permit from the County, the County issued the NOVA. ABR 40. The NOVA was appealed to the hearing examiner. CSE admitted to the hearing examiner that it had operated without a permit where one was required. ABR 56, pp. 11-12. At oral argument CSE's lawyer conceded that CSE did not possess a permit and that the County "absolutely....has a right to shut it down." CP 73. Similarly, CSE's lawyer acknowledged that "[a] permit ultimately is -- is required for the activity." CP 77. CSE instead argued to the hearing examiner that the NOVA was improper because there were not "a significant number of violations" and because applicable regulations did not require secondary containment measures to guard against leaks of waste. CP 67; 62-73.

The hearing examiner found that CSE "did not dispute that it has been operating during the period of investigation by Mr. Rivard without the required license and/or permit." CP 7.[2] The hearing examiner found that "[t]he evidence is that the appellant collects waste, including moderate risk waste on-site, [and] stores such waste for varying amounts of time before transporting the waste to off-site

[2] Hearing examiner finding of fact no. 18.

collection facilities."[3] The hearing examiner found that rather than disputing "that they operated without the required license/permit" CSE "instead focused on challenging the correctness of the alleged labeling and/or shipping incidents described in the Declarations of Mr. Rivard."[4] Other findings of fact included the finding that the floor at the CSE facility "is cracked and shows other forms of deterioration that most likely was caused by unknown chemicals."[5] "These unknown chemicals spilled on the flooring may pose a risk to the public's health, safety and welfare. Testing of this flooring is necessary to determine whether or not the flooring contains hazardous waste from chemical releases." *Id.*

CSE's appeal of the hearing examiner's decision proceeded to superior court pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction under Kittitas County Code § 18.02.030(6)(f).

B. The trial court review of the hearing examiner decision.

Before the trial court, CSE again admitted that it collected moderate risk waste prior to transporting the MRW to appropriate

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[3] Hearing examiner finding of fact no. 24.
[4] Hearing examiner finding of fact no. 25.
[5] Hearing examiner finding of fact no. 23; *see also* record items cited at ABR 54, pp. 5-7.

disposal facilities. CP 14. The RALJ rules imposed no limits on the superior court's consideration of alleged errors of law. RALJ 9.1(a). CSE's main legal argument was that the acknowledged lack of a permit was not sufficient to constitute a public nuisance. CP 21-25. The trial court found substantial evidence supporting each of the hearing examiner's findings of fact. CP 135. The court commented on the "broad based overall flagrant permit violation which regulates all aspects of solid waste…." CP 126. In subsequent proceedings before the trial court, CSE again acknowledged that "[w]hile CSE does not deny that a MRW permit may be required, it avers that DOH has the authority to approve such MRW permits on the procedure under which approval was granted." CP 150. Similarly, CSE stated as follows: "CSE do not contest the right of the DOH and Kittitas County to order the close down of the facility pending perfection of an MRW permit." CP 153.

In its Decision, the Court of Appeals succinctly noted that CSE "did not dispute it had been operating during Mr. Rivard's investigation without a required permit." Decision at 1226.

Contrary to arguments raised in the petition, CSE was never precluded from arguing to the trial court that the hearing examiner's

decision did not comport with due process. CP 105, 151. The Court of Appeals also considered—and rejected—constitutional claims of CSE regarding due process and "takings." Decision at 1228-29.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court of Appeals correctly resolved all of the issues on appeal and determined that there was no error below. Review by this Court is not warranted. Because CSE can point to no decision of the Court of Appeals or the Supreme Court that conflicts with the Decision in this matter, CSE is limited to seeking review based on RAP 13.4(b)(3) and (4).

A. This fact-specific local case has no issue of public interest.

CSE's argument regarding moderate risk waste permitting regulations does not involve an issue of substantial public interest. RAP 13.4(b)(4). The analysis of this criterion is informed by the manner in which the Court of Appeals resolved the issues in this case. The Court of Appeals correctly resolved the case on grounds of CSE's litigation tactics and errors below. There is no issue of substantial public interest. The main value of publication of the Decision is that it provides further instruction to litigants on the need to properly

assign error to factual findings in reviewing administrative decisions as well as the need to preserve alleged legal error. CSE does not, however, find fault with any aspect of the Decision on these issues, nor does the Decision conflict with any existing precedent on these points. *See Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) ("our cases require issues to be first raised at the administrative level."); *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.").

In a concurring opinion in the Decision, Judge Fearing emphasized the failure of CSE to properly present its arguments below. Judge Fearing found that CSE had invited error in proceedings before the hearing examiner. Decision at 1230-31. In his concurrence, Judge Fearing pointed out that "in two briefs, CSE told the hearing examiner it needed a county MRW permit. CSE asserted no exemption from the permit requirement." *Id.* at 1231. Likewise, "CSE affirmatively told the hearing examiner that it needed a permit and was engaged in the process of procuring the permit." *Id.* Based

on this record, Judge Fearing cited the traditional rule that "under the doctrine of invited error, a party may not materially contribute to an erroneous application of law during a hearing and then complain of it on appeal." *Id.* (citing *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995)).

B. This case has no significant questions of constitutional law.

CSE also argues that review should be granted based on the presence of a significant question of law under the Constitutions of the State of Washington or of the United States. In this section of its petition, CSE relies on two theories. First is the claim that Washington's preemption doctrine has constitutional significance due to the text of Article 11, Section 11, of the Washington Constitution. This argument is unsupported by any citation to precedent.

The text of the Washington Constitution lends no support to CSE's theory. The text states that municipalities "may make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. Based on this text, there is no constitutional significance to CSE's claim at all. CSE's so-called constitutional claim simply devolves to its oft-repeated and enduringly unsuccessful argument

that Washington's solid waste regulatory scheme somehow exempts CSE from compliance with applicable moderate risk waste handling permit regulations. CSE's argument is a question of statutory and regulatory interpretation, not constitutional law.

This argument is also incorrect. There is a strong emphasis in Washington law on the role of local governments in the administration of solid waste management, including moderate risk waste. A key purpose of Chapter 70.95 RCW, Solid Waste Management--Reduction and Recycling, is the establishment of a scheme in which local health departments are given authority to permit solid waste facilities. *See* 23 Tim Butler & Matthew King, *Washington Practice: Environmental Law and Practice* § 13.1 (2014).

Chapter 70.95 RCW emphasizes the role of local governments in the administration of solid waste management. *See, e.g.*, RCW 70.95.010(6)(c) (legislative finding that "county and city governments [are] to assume primary responsibility for solid waste management"); RCW 70.95.020(1) (stating purpose of chapter "[t]o assign primary responsibility for adequate solid waste handling to local government.").

CSE's reliance on WAC 173-350-360 is mistaken because this regulation does not operate as a basis for exempting moderate risk waste facilities from moderate risk waste permit requirements prescribed elsewhere in Chapter 173-350 WAC. Further, WAC 173-350-360 has no effect at all on the applicability of a local regulation such as Kittitas County Public Health Department Ordinance 1999-01, which is independently applicable to CSE pursuant to state authorization at RCW 70.95.160. ABR 5.

The second constitutional claim of CSE relates to a constitutional due process theory. This argument is also unsupported by any precedent. CSE complains that it was denied due process because it "has been prevented from being heard" on its "constitutional issues." Petition for Review at 18.

This argument has no constitutional significance because CSE's "constitutional" due process issue is only the previously-discussed (and constitutionally insignificant) preemption theory in a different guise. CSE's contention is also simply untrue because it had every opportunity to raise constitutional claims in its appeal of the hearing examiner's decision to the trial court. Pursuant to RALJ 9.1(a), the trial court had jurisdiction on appeal to consider whether

the hearing examiner had "committed any errors of law." CSE was not foreclosed from raising constitutional issues.

Indeed, CSE unsuccessfully argued to the superior court that it had been deprived of due process. CP 105, 151. CSE pressed its constitutional due process claims before the Court of Appeals. Appellants' Opening Brief pp. 34, 46-48. CSE also asserted that the County's actions constituted a taking. *Id.* at p. 37. These arguments were found to lack merit. Decision at 1228-29. The allowance for raising manifest constitutional errors under RAP 2.5(a)(3) applies where a litigant did not raise those issues at trial but only on appeal. *State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). But here, CSE was allowed to raise its constitutional issues on appeal, including (at length) in CSE's motion for reconsideration filed with the Court of Appeals. The Court of Appeals considered CSE's constitutional arguments. Appellants' Motion for Reconsideration at 9-23.

CSE's argument regarding constitutional issues only reinforces the basic trajectory of this case. CSE has lacked any coherent argument against the County's position from the very beginning. CSE has varied its arguments largely without

consideration of precedent or principal. As CSE's arguments have failed in serial fashion, CSE has tried to salvage its position by raising new arguments.

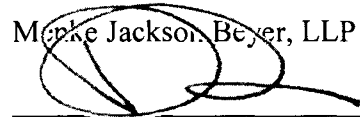
At this point in the proceedings, none of CSE's arguments implicates any of the standards set forth at RAP 13.4(b).

IV. CONCLUSION

This Court should deny review. The Court of Appeals correctly applied precedent to decide a fact-specific case involving a local company that admittedly required a moderate risk waste permit under applicable regulations but refused to obtain one. The criteria in RAP 13.4(b) have not been met. CSE has not cited a single case to support its claim that the Court of Appeals erred. Accordingly, Supreme Court review is unwarranted here and CSE's petition should be denied.

Respectfully submitted this 4th day of August, 2015.

Menke Jackson Beyer, LLP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served a true copy of this document on the following, properly addressed as follows:

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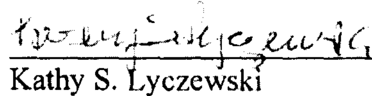

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Kathy S. Lyczewski Date

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Dear Clerk of the Court: Attached for filing is Answer to Petition for Review in the above-entitled matter. A hard copy will also be sent by regular mail.

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