No. 94357-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an Association of multiple concerned residents of the Chiliwist Valley, RUTH HALL, ROGER CLARK, JASON BUTLER, WILLIAM INGRAM, Residents and property owners in the Chiliwist Valley,

Appellants,

v.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision of the State of Washington; RAYMOND CAMPBELL, SHEILAH KENNEDY, and JAMES DETRO, Okanogan County Commissioners: DANIEL BEARDSLEE, Okanogan County Hearing Examiner, JOSHUA THOMPSON, Okanogan County Engineer; and GAMBLE LAND & TIMBER Ltd., a Washington Corporation,

Respondent

Gamble Land & Timber's Answer to Amicus Curiae Memorandum

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I Introduction

The Methow Valley Citizens Council and Futurewise (hereinafter jointly referred to as "MVCC") essentially reiterate Appellants' argument that this Court should change the standard of review when a party seeks vacation of a rural county road. Such a request would overrule almost 100 years of case precedent in Washington.

II Legal Analysis

A. **Road Vacation decisions do not require enhanced scrutiny.**

Counsel for MVCC argues that the equal protection clause of the 14th Amendment should apply, but fail to cite any evidence that persons similarly situated did not receive like treatment when Okanogan County reviewed Respondent's road vacation application.

MVCC also fails to cite any legal precedent where the equal protection clause has been applied to the review of a road vacation. While *Bay Indus., Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982) involved the vacation of a county road, the issue of equal protection was raised only because a condition imposed by the County (that the

applicant grant easements along the road only to certain abutting landowners) violated equal protection because the appellant/abutting landowner was treated differently than his neighbors. *Id.* at 242.

In the present case, the Okanogan County Commissioners imposed no conditions in approving the vacation of Three Devils Road that would invoke equal protection scrutiny.

B. <u>The Appearance of Fairness Doctrine is not Applicable</u>.

At no time have Appellants ever alleged that the public hearing before the County Hearing Examiner was unfair or lacked impartiality. MVCC ignores the foregoing, and argues that appearance of fairness should be applied to road vacations to "preserve public confidence" that public hearings are fair. MVCC cites the case of *Smith v. Skagit County*, 79 Wn.2d 715 (1969) as authority. That case confirmed that land use hearings are legislative in nature, not quasi judicial, but concluded the public hearing itself was not fair since proponents were invited into the closed meeting and allowed to speak, while opponents were excluded. *Id.* at 741-743.

In the present case, since there is no evidence (or even an allegation) of any improper conduct during the public hearing, RCW

42.36.010, and the case of *Raynes v. City of Leavenworth*, 118 W.2d 237, 247, 821 P.2d 1204 (1992) control - the appearance of fairness doctrine does not apply to hearings that are legislative in nature, such as road vacations.

C. The grounds allowing judicial review of a Road Vacation should not be expanded.

In Washington, a decision on a road vacation application is not judicially reviewable absent collusion, fraud, or interference with a vested right. See *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash 303, 306, 83 P.316 (1906); *Mottman v. Olympia*, 45 Wash 361, 88P.579 (1907). *Thayer v. King County*, 46 Wn.App. 734, 738, 731 P.2d 1167 (1987); *Capitol Hill Methodist Church of Seattle v. The City of Seattle*, 52 Wn.2d 359, 368, 693 P.2d (1958). In *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359 (1958), Appellants alleged that closing the road would expose their non-abutting properties to an extreme fire hazard. *Id.* at 364, 367. That Supreme Court held that the furnishing of fire protection is a governmental function, which the court would not interfere with in the absence of arbitrary or capricious conduct.

MVCC now makes a bold (and clearly speculative) assertion that the court in *Capital Hill* would have reviewed the decision to vacate if *Capital Hill* had simply asserted arbitrary and capricious conduct.

MVCC claims that Appellant raised the issue of arbitrary and capricious conduct, claiming it was arbitrary and capricious for the Okanogan County Commissioners to ignore the testimony given at the public hearing. What the Appellants apparently fail to grasp is that the County Commissioners are not bound by the hearing officer's findings. RCW 36.87.060(2) requires the hearing officer to prepare a record of the proceedings and a recommendation to the county legislative authority concerning the proposed vacation. During argument before the trial court, the trial judge asked Appellants' counsel, using the recommendation by a guardian ad litem by analogy, if the Judge had to abide by the GAL's recommendations, or whether the Judge could exercise his own judgment, and Appellants' counsel agreed that it was ultimately the judge's decision. (RP 37-38 from September 18, 2015 hearing).

The transcript of the Board's meeting clearly reflects that the Board considered the engineer's report, the hearing officer's recommendation, as well as evidence and testimony for and against the vacation in accordance

with RCW 36.87.060(1) and (2). (CP 910-914). At the special meeting of the county commissioners on June 3, 2015, the Commissioners made the following relevant comments:

COMMISSIONER CAMPBELL:

> "Well, I spent a great deal of time reviewing the application for the vacation,... - - well, here we have two - - recommendations. Here we have one - - opposing recommendations: one from our - - of course, our Hearing Examiner and one from our County Engineer. And to look at all this information and then try to weigh out what the - - what the results are in my perspective on that. And so I've come to gather my thoughts on it pretty well."

COMMISSIONER KENNEDY:

> "So I - - I, too, have spent a lot of time going through all the information, and I agree. Because right now, I feel like we're - - we're - - you know, we've got one recommendation and we've got another recommendation, so it's back to us right smack in the middle to do our job and to, you know, review that information."

(CP 128-129).

A review of the record before the County also indicates that the Commissioners had good reason to vacate the road on safety grounds as well as minimal use. As noted in the report of the County Engineer:

- the portion of right-of-way being petitioned for vacation is currently used minimally by the adjoining property owners.
- there is currently a Forest Service gate at the United States Forest Service boundary line with a Forest Service lock on it.
- the county performs very little, to no maintenance on this road.
- very little traffic as evidenced by its two narrow wheel tracks with vegetation between.

Engineers' report (CP 262). The specific recommendation of the Engineering Department is found in its March 12, 2015 report, "Recommending Commissioners approve the Vacation". (CP 249).

Further, the County Commissioners received the following uncontradicted evidence:

- The vacated portion of Three Devils Road is approximately three miles long (CP 245), in rugged

mountainous country, and is in rough condition (see Appendix photo's).

- Three Devils Road is subject to blockage by washout, downed trees, slides and other obstructions. (CP 376-78, 980-983 and Appendix photo's).
- At the west end of Three Devils Road the Forest Service installed a gate which the Forest Service intermittently closes and locks. (CP 352, 385-86). The Forest Service does not provide any notice to residents when the gate is closed and locked. (CP 1381, 1392, 1397).
- Three Devils Road does not meet the minimum width standard for a county road. (CP 123-124; 337-338).
- Three Devils Road is not regularly maintained by the County (CP 411-413) and is designated by the County as a primitive road. (CP 356, 491).

Under the facts of this case, the record demonstrates that there was certainly room for two opinions on the overall merits of keeping the road open, and the mere presence of two supportable positions in the record is sufficient to preclude a finding that the decision was arbitrary and capricious, as claimed by Appellants.

> "Under the arbitrary and capricious standard, this court only reverses willful and unreasoning action in disregard of facts and circumstances, (citation omitted). Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."

Snider v. Bd. of Cty. Comm'rs of Walla Walla Cty., Wash., 85 Wn. App. 371, 375, 932 P.2d 704, 707 (1997).

1. No evidence of public safety risk. Finally, MVCC argues that if a serious public safety risk is created by a road vacation, it should then be judicially reviewable. The problem with such an assertion is that Appellants failed to present any evidence (or testimony under oath) that a safety risk has been created by closing of Three Devils Road. The only evidence before the trial court on respondents motion for summary judgment was as follow:

- There are multiple alternative routes directly in the vicinity of Three Devils Road (see CP 1282-1300; 1377-1379; and 1540-1542).
- Despite recent fires in the vicinity, none of the Appellants have ever personally used Three Devils Road as an escape route, and in addition, knew of no one who had ever used the road to escape a fire. (CP 1387-88; 1431, 1443, 1451, 1467).
- Appellant Ruth Hall, who lives in the vicinity of Three Devils Road, testified that during the 2014 Carlton Complex Fires, she evacuated using the Chiliwist Road, and when the Chiliwist Road washed out after the fire, she exited by using Northstar Road down to Davis Canyon Road. (CP 1389-1390).

III Conclusion

Despite MVCC's attempts to paint a picture of threat to life, there is zero evidence before the Court substantiating the allegation of a "serious public safety threat" (see P. 6 of the MVCC Brief). In fact, the only

evidence before the Trial Court established is that it would be a safety risk to the public to keep the road open. Other than argumentative assertions, there was no evidence of increased danger or reduced safety to Appellants by vacating this primitive road.

RESPECTFULLY SUBMITTED this 28TH day of June, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

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DATED this 28 day of June, at Wenatchee, Washington.

Patty L. Gillin

Patty L. Gillin

DAVIS ARNEIL LAW FIRM, LLP

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