

DIV III # 345858

No. 92423-6

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
and LOREN DOLGE, 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;
Respondents; and GAMBLE LAND & TIMBER Ltd., a Washington
Limited Partnership,
Respondent and Cross Appellant.

Reply Brief of Respondent/Cross Appellant
Gamble Land & Timber, Ltd.

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INTRODUCTION

Appellants William Ingram, Ruth Hall, Roger Clark, Jason Butler and Loren Dolge have never lived or owned property on the portion of Three Devils Road being vacated. (CP 1416, 1427, 1447, 1462, 1476-78). Further, when deposed, they admitted that they have never used Three Devils Road as an escape route and know of no one who has, despite their prior inconsistent allegations. (CP 1387-88, 1431, 1443, 1451, 1467). They use Three Devils Road to access Forest Service land. (CP 1394-95, 1442, 1452, 1475). Numerous alternate and nearby access routes to the Forest Service land exist. (CP 376-378, 786, 806, 983-84).

Of the 228 people who signed a petition opposing the vacation, forty (40) signators on the petition (18%) do not even live in Okanogan County and over 50% do not live within 15 miles of Three Devils Road. (CP 547-569). None of the 228 signatories' properties are located adjacent to the vacated portion of Three Devils Road. Respondent Gamble Land & Timber Ltd. ("Gamble") owns all land on both sides of the vacated road (except a small portion that is DNR land - the DNR is not opposing the road vacation). (CP 237, 245, 434, 467).

After purchasing the property on both sides of the road in 1995, Gamble rebuilt Three Devils Road to make it passable for its own logging purposes. (CP 376-377, 773). Given its condition, Gamble has to regularly repair and maintain Three Devils Road. (CP 353-354, 376-378, 422-427, 429). When the road has been blocked or washed out, Gamble has reconstructed it at Gamble's expense. (CP 376, 773). The Okanogan County Engineer reported that “[w]hereas the adjoining property owners [Gamble] have performed all maintenance and improvements to the road since last summer, it may be advisable to vacate the road and allow them the control they are requesting.” (CP 356).

On August 24, 2015, Gamble filed dispositive motions, including for dismissal based on the Appellants’ lack of standing. (CP 188-200, 208-210). On September 25, 2015, the Okanogan Superior Court entered a written decision dismissing the case, but previously had ruled that Appellants had standing. (RP 44-45, 50-51 (9/18/2015)). The Superior Court erred. Respondent filed a cross appeal on November 4, 2015 (CP 13-26) seeking reversal of the Superior Court’s erroneous conclusion on standing and entry of judgment in its favor. Co-Respondent Okanogan

County similarly has moved this Court pursuant to RAP 17 for dismissal based on lack of standing. See Okanogan County Response Br. p. 1.

LEGAL AUTHORITY AND ARGUMENT

I. Appellants lack standing because they do not own property bordering the vacated portion of Three Devils Road and use Three Devils Road for recreational purposes only.

Appellants concede that they do not own property adjacent to Three Devils Road or claim that the road is necessary to access their properties. In fact, no Appellant resides or owns property adjacent to the vacated portion of Three Devils Road. (CP 1377-79, showing residential locations of Appellants in relation to vacated portion of Three Devils Road). Appellants argue only that they fall within an amorphous “zone of interest”.

There is no such general “zone of interest” rule for determining standing. The longstanding rule in Washington permits challenges to road vacation orders entered pursuant to the statutory process to only (a) abutting property owners or (b) those who suffer special damage by having their reasonable means of access obstructed. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 365, 324 P.2d 1113 (1958). The Supreme Court in *Capital Hill* held that since plaintiffs were

not abutting property owners, to maintain an action “their right of access had to be ‘destroyed or substantially affected,’ or, to put it another way, their reasonable means of access must be obstructed, and *they must suffer a special damage*, different in kind and not merely degree, from that sustained by the general public”. *Id.* at 366, 52 Wash.2d 359 (italics in original). *See also Olsen v. Jacobs*, 193 Wash. 506, 510, 76 P.2d 607 (1938).

The rule is longstanding. The *Capital Hill* Court cited to *Taft v. Wash. Mutual Sav. Bank*, 127 Wash. 503, 509-510, 221 P. 604 (1923), where the court stated:

“... we conclude that the correct rule is that only those directly abutting on the portion of the street or alley vacated, or alleged to be obstructed, or those whose rights of access are substantially affected, have such a special interest as to enable them to maintain an action. The further rule deducible from our own cases and the authorities generally is that owners of property abutting on a street or alley have *no vested* right in such street or alley, except to the extent that their access may not be unreasonably restricted or substantially affected. *Owners who do not abut, such as respondents here, and whose access is not destroyed or substantially affected, have no vested rights which are substantially affected.*”

(cited by *Capitol Hill Methodist Church*, 52 Wash.2d at 365, 324 P.2d 1113).

In *Capitol Hill*, the petitioning landowner, Group Health, owned all the property abutting east John Street from Fifteenth to Sixteenth Avenue in Seattle and sought vacation of a portion of John Street. *Id.* at 361, 324 P.2d 1113. The plaintiffs, owners of property in the vicinity, but not abutting the road in question, challenged its closing. They alleged the street was their means of access and its closing would deprive them of convenient access to their properties. *Id.* at 364, 324 P.2d 1113.

Appellants' challenge here is no where near as compelling as that rejected in *Capitol Hill*. The Appellants here do not rely on the Three Devils Road for access and do not even claim that the road's closure will deny them convenient access to their properties at all. Just as the challengers lacked standing in *Capitol Hill*, the Appellants here lack standing to challenge the elected officials' roadway management decisions. Appellants do not own property abutting the road, do not rely on the road for access to their properties, and have presented no evidence of suffering special damage unique to them. Appellants' challenge should be dismissed for lack of standing, consistent with the longstanding rule.

The rule on standing to challenge road vacations was also confirmed in *DeWeese v. Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (Div.II, 1984). In *DeWeese*, the court affirmatively recognized cases granting municipal authorities' broad discretion as to roadway vacations. See *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 P. 316 (1906) and *Taft*, 127 Wash. 503, 221 P. 604 (1923). The court restated the "substantive principle *that only persons dependent on a street for direct access to their properties* have any legally recognized interest in keeping it open. More simply stated, those who are not dependent on a street are not injured when it is vacated." *DeWeese*, 39 Wn.App. at 373, 693 P.2d 726 (citing *Hoskins v. Kirkland*, 7 Wn.App. 957, 503 P.2d 1117 (Div. I, 1972) (italics added). The Court found this principal not only reasonable but obviously necessary with reference to the vacation of streets as ordinary routes of travel. "To enlarge the rights of the general traveling public would be to restrict unduly the discretion granted to municipalities for the management of streets." *DeWeese*, 39 Wn. App. at 373-74, 693 P.2d 726.

Although standing in the road vacation context has been considered a "substantive, not jurisdictional, question," *Hoskins*, 7 Wash.App. at 961, 503 P.2d 1117, it can be determined as if jurisdictional

“in the interests of an orderly proceeding” and “before other substantive issues are considered.” *DeWeese*, 39 Wn. App. at 372, 693 P.2d 726. The Court need not sift through the multiple, confusing issues raised by Appellants because the Appellants lack standing in the first right to second-guess or obstruct the County’s elective body’s decision on roadway management.

The *DeWeese* Court identified that challengers must have a “legally protected interest”. *Id.* at 374, fn. 6, 693 P.2d 726. Appellants’ only claimed interest is their ability to access public lands across a little-used, primitive road through private lands. But such recreational interest is legally insufficient to seek relief from the courts.

II. The Appellants’ assertion of an interest in Three Devils Road for a fire escape route is not factually supported by the record nor legally sufficient to confer standing on the Appellants.

First, all Appellants admit they have never used Three Devils Road to escape a fire and know of no one who ever has. (CP1387-88, 1431, 1443, 1451, 1467). Unsupported, conclusory allegations in Appellants’ briefing that state otherwise are insufficient to support granting standing. If anything, the record demonstrates that use of the Three Devils Road, which is in chronic disrepair and routinely gated at the upper end, as a fire

escape could put persons in danger. Regardless, the Appellants all admitted they have never used the road for a fire escape nor known anyone else who had. They cannot obtain standing on mere conclusory remarks in their briefing.

Fire danger does not create standing by mere allegation, or else a “fire escape exception” would swallow the general rule on standing. In *Capitol Hill Methodist Church*, the Supreme Court denied a challenge to road vacation despite similar allegations of fire hazard.

The Court reasoned and concluded:

“that the asserted fire hazard, like all other matters complained of, was called to the attention of the city authorities prior to the passage of the vacation ordinance. The furnishing of fire protection ... is a governmental function (see *Benefiel v. Eagle Brass Foundry*, 154 Wash. 330, 282 P.2 13 (1929); RCW 35.22.280(23)), and this court will not inquire or interfere therewith in the absence of arbitrary or capricious conduct on its part... This is insufficient to warrant the court’s interference with a legislative function. We cannot and will not attempt to judge the wisdom of the council’s action, since, in a case of this nature, we cannot substitute our judgment for that of the municipal authorities on the degree of fire protection to be afforded the appellants’ properties.

Id., at 366-67, 693 P.2d 726.

The allegation of a general fire risk is insufficient to support a challenge to a proper road vacation because general fire risks are not the

type of special interest required to secure standing particular to the protected person(s) and distinct from the public generally.

III. There is no rural property exception to challenge road vacation orders.

Appellants' argue that *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P. 799 (1925) justifies a different rule where rural property owners not abutting the roadway being vacated have standing to challenge a road vacation. To the extent *Elsensohn* supports the assertion, subsequent courts have distinguished or overruled it. For example, *Olsen v. Jacobs*, involving the vacation of a county road, reaffirmed the rule that challengers must abut a road or have a special interest to have standing.

The *Olsen* Court reviewed the *Elsensohn* decision, stating:

Another case cited by the Appellants, concerning the rights of parties injured by road vacation to maintain an action set aside such vacation, is that of *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P. 799, 800. In that case we find that the plaintiffs were not the owners of the property abutting on the road vacated, but were owners of property in the vicinity of the proposed road vacation and their property was in such a location that a vacation would 'require said plaintiffs or some of them to travel some six or more miles farther in reaching their lands, then is required by the road proposed to be closed.' While the right of the owner of property in that action to question the action of the board of county commissioners was not

discussed, it is plain that their injury was different in kind than that suffered by the general public.

Olsen, 193 Wash. at 512, 76 P.2d 607.

The fact that a property owner may be inconvenienced, or may have to go a more roundabout way to reach certain points, does not cause him or her an injury different in kind from the general public, but in degree only. *Capitol Hill Methodist Church*, 52 Wash. 2d at 365-66, 324 P.2d 1113. The inconvenience of using alternate routes to access Forest Service lands does not give appellants standing to challenge the Board of Commissioners' decision. The Appellants testified in depositions that their main access to their properties was via the main Chiliwist Road, which is maintained year-around and a much shorter route than via Three Devils Road. *See e.g.* CP 1387, 1390, 1394-95, 1415, 1444, 1453, 1465-66. Even if the closure would have caused them a more circuitous route (which it does not), not even that would necessarily give rise to the requisite "special injury". *See e.g. Bay Industries v. Jefferson County*, 33 Wash.App. 239, 241-42, 653 P.2d 1355 (Div. 2 1982) (upholding a county road closure even though an abutting landowner had to travel a more circuitous route).

Appellants have entirely failed to substantiate any allegation sufficient to support standing for a challenge to the County's roadway vacation. Appellants admit they do not own abutting properties and have not shown or demonstrated a special interest unique to them. Standing should not result from unsubstantiated, conclusory allegations alone.


CONCLUSION

The amorphous Coalition lacks standing, as do the five named members, to challenge the legislative decision of their elected Board of County Commissioners to manage County roads, including vacation of the useless Three Devils Road. None of Appellants' property abuts the vacated road. (CP 1416, 1427, 1447, 1462, 1476-1478). It is undisputed that Gamble owns all property on either side of the vacated road (except for a small portion that runs adjacent to DNR land). (CP 434, 467). Appellants have presented no evidence that they are dependent on Three Devils Road for direct access to their properties. All named Appellants testified that they use Three Devils Road primarily to gain access to National Forest Service land (but also admit there are other access routes to Forest Service land). (C 1466, 1475). P 1394-96, 1415, 1442, 1444, 1452-53. Three Devils Road is not passable after it snows and not plowed or sanded. (CP

1398, 1432, 1445-46, 1468-69). Appellants have no direct interest or special, legally protected interest in Three Devils Road sufficient to confer standing and their challenge should be dismissed in the first place on these grounds.

RESPECTFULLY SUBMITTED this 16 day of June, 2016.

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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 16th day of June 2016, at Wenatchee, Washington.



 Tracy Parke