No. 34585-8-III

94357-5

THE COURT OF APPEALS - DIVISION III
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, WILLIAM INGRAM, LOREN DOLGE, Residents and property owners in the Chiliwist Valley,

Petitioners,

vs.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision of the State of Washington: RAYMOND CAMPBELL, SHEILAH KENNEDY, and JAMES DETRO, Okanogan County Commissioners; JOSHUA THOMPSON, Okanogan County Engineer; and GAMBLELAND & TIMBER Ltd., A Washington Limited Partnership,

Respondent.

PETITION FOR REVIEW IN THE SUPREME COURT OF THE DECISION OF THE COURT OF APPEALS, DIV. III

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Petition for Review to Supreme Court of Washington
Court of Appeals No. 34585-8-III

PETITION FOR SUPREME COURT REVIEW

I IDENTITY OF PETITIONERS:

Coalition of Chiliwist Residents and Friends, an Association of concerned residents of the Chiliwist Valley; Ruth Hall, Roger Clark, William Ingram, and Loren Dolge, Chiliwist Valley residents or property owners. Jason Butler, a party below, is not participating in this petition.

II DECISION SUBJECT TO REVIEW:

Coalition of Chiliwist Residents and Friends, et al v. Okanogan County et al., Court of Appeals No. 34585-8-III: Appendix A hereto.

III ISSUES PRESENTED FOR REVIEW:

1. Is the Court of Appeals decision below inconsistent with *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982) which held county road vacation is properly reviewed by *certiorari* and confined to the hearing record; as well as inconsistent with *Federal Way v. King County,* 62 Wn. App. 530, 815 P.2d 790 (1991) and *DeWeese v. Port Townsend*, 39 Wash. App. 369, 372, 693 P.2d 726 (1984), which instruct that "certiorari is proper method to initiate review of a road vacation ordinance claimed to be contrary to existing law."

2. Is the Court of Appeals decision below inconsistent with *Raynes v.*

Leavenworth, 118 Wn.2d 237, 821 P.2d 1204 (1992), which holds that quasi judicial processes include actions of local legislative bodies which determine the legal rights, duties, or privileges of specific owners of specific parcels of land on application of such landowners, as determined in a contested hearing?

3. Does the statute governing county road vacation, including a) posting notice to all regular non-abutting users, RCW 36.87.050; b) invitation to voice objections at hearing based on use (RCW 36.87.060); c) specific required findings of non-usefulness (id) and conclusions of public benefit (id.), grant standing to those users who so testify and express objection?

4. Was the commissioners' determination of public benefit from vacation of Three Devils Road arbitrary, capricious and irrational, when the county has no statutory duty to maintain it (RCW 36.75.300), the county engineer's report finds no public benefit to the vacation, the Hearing Examiner after a full's day testimony determined that there was no public benefit, over 200 persons petitioned to keep the road open, and dozens testified in writing and or in person that they regularly used it for lawful purposes and most considered it a vital emergency link to and from the Chiliwist Valley?

5. Does Article VIII, § 7 of the Washington Constitution forbid vacation of a public road when such vacation provides no public benefit?

6. Does a well supported allegation of peril to life and property posed by the

vacation of a public road state a sufficient constitutional interest in such life and property Under the 5th and 14th Amendments to the U.S. Constitution, 1) to grant standing to petitioners to challenge such vacation, whether legislatively or quasi judicially decided; and 2) grant standing to maintain an action under 42 USC §1982 and §1988?

7. If the county commissioners follow professional advice that a road vacation decision is quasi-judicial and are cautioned that issues of appearance of fairness under Chapter 42.36 RCW apply; and relying on such advice they direct all inquiries to the public hearing process before a Hearing Examiner, does the fact of both undisclosed *ex parte* contact with the applicant and undisclosed close personal and business ties between the applicant and at least one commissioner create an appearance of fairness violation?

IV STATEMENT OF THE CASE:

This is a county road vacation case where Gamble Land and Timber Ltd. applied to Okanogan County under Chapter 36.87 RCW to vacate and disencumber its property of a public road, known as Three Devils Road.

The Road's eastern terminus is at the west end of the Chiliwist Valley, which is surrounded by mountainous terrain and except for one road to the South and the main road through the valley floor, all other roads are narrow primitive dirt roads through the mountains. CP 802.

We will not do an exhaustive statement of the case here. The case was originally filed in this court and facts have been set forth in detail previously.

The Court of Appeals however made a few statements that should be corrected. The road in question was not built by the Wagner Family in 1950. It has existed for a century at least and perhaps for millennia according to multiple published accounts. CP 387 and see CP 483 et seq. The fact that its precise course has changed over the years is both a universal phenomenon of primitive roads and has no legal significance. RCW 36.75.100.

It is also, not true as the appeals court states, Slip op. at 13-14, that all citizens had private access to the County Commissioners, as a legislative body, to provide input and influence.

On March 17, planning and development Director Perry Huston issued a memorandum (CP 430 et seq.) that explained the appearance of fairness doctrine, instructed that the road vacation hearing was quasi judicial and explained the ability of the Commissioners to avoid any possible violation of improper appearance under Chapt.42.36 RCW by "remand[ing] the petition to the Office of Hearing Examiner to conduct the public hearing. The final decision would still be made by the Commissioners ***based on consideration of the record and recommendation*** of the Hearing Examiner."CP 431-32. (***Emphasis added***)

Thereafter the applicant disclosed in an email for the record *ex parte* private meetings with all three commissioners expecting that would cure the legal violation, which of course it did not because the Commissioners did not disclose. See RCW 42.36.060.

At hearing and in the submitted written record for hearing dozens of people testified about their use of the road for recreation, access to public lands, and most importantly as an escape route and emergency vehicle access route to and from the Valley. Over two hundred persons signed petitions to the Commissioners urging denial of vacation. CP 542-568. One person testified that she had observed emergency vehicles accessing the Valley to fight a wildfire that consumed many homes in the Chiliwist and three people testified that its existence had saved their own or family members lives. 365-72;383-391;685-695;712-714; 739-740.

The Hearing Examiner found both that the road was useful and that vacation provided no public benefit.

Only the Applicant or its agents testified in favor of vacation.

The Commissioners thereafter disregarded the Hearings Examiners' findings and conclusions and voted to vacate.

V ARGUMENT: REASONS FOR GRANTING REVIEW (RAP 13.4(B))

1. **The Decision of the Court of Appeals below Is in Conflict with Multiple Published Decisions of the Court of Appeals.**

The starting point of the Court of Appeals' multiple alleged errors is that it held that a decision by the County Commissioners on a private party's road vacation petition is purely legislative in nature. No court has held that a county road vacation is purely legislative.

In fact, the opposite is true: Multiple courts have held explicitly that review of such decisions is, except in rare instances, had by writ of review. *Federal Way v. King County,* 62 Wn. App. 530, 815 P.2d 790 (1991) at 534: "certiorari is proper method to initiate review of a road vacation ordinance claimed to be contrary to existing law."; *citing DeWeese v. Port Townsend,* 39 Wash. App. 369, 372, 693 P.2d 726 (1984) at 371-372; and *see, Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982):

> Because superior court review was by writ of certiorari, RCW 7.16.120, the court was limited to review of the record before the Board and to a determination of whether the Board's action was arbitrary and capricious or contrary to law.

33 Wn.App at 240-241,

This last is important for two reasons: 1) *Bay Industry* concerns a *county* road vacation action based on Chapter 36.87 RCW, and instructs review by certiorari. Most of Respondents' cases are city street vacation cases based on wholly different statutes; and 2) It further instructs that

review of such cases is confined to the record before the Commissioners, and the lower courts here went far afield of that record to make their decision.

The legislature, and this court, and all divisions of the court of appeals have held that a writ of review is reserved exclusively for review of quasi-judicial decisions. RCW 7.16.040; *Saldin Securities Inc. v. Snohomish County*, 134 Wn.2d 288, 379-380, 949 P.2d 370 (1998); *Foster v. King County*, 83 Wn.App. 339, 346, 921 P.2d 552 (Div I, 1996); *Harris v. Pierce County*, 84 Wn.App. 222, 228, 928 P.2d 1111 (Div II, 1996); *Coballes v. Spokane County*, 167 Wn. App. 857, 274 P.3d 1102 (Div. III, 2012).

The Court of Appeals below noted this point but failed to reconcile it with its holding. Instead, the court below gleaned its conclusion from several cases that explained that road management decisions, including vacation decisions are a matter of discretion for city county authorities and generally are not overturned absent major irregularity, citing *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 368, 324 P.2d 1113 (1958) (city street); *Fry v. O'Leary,* 141 Wash. 465, 469, 252 P. 111 (1927) (city street); *Thayer v. King County*, 46 Wn.App. 734, 738, 731 P.2d 1167 (1987) (county road); *Banchero v. City Council of City of Seattle*, 2 Wn.App. 519, 523, 468 P.2d 724 (1970) (city street).

All of these cases except *Thayer* involve city streets, and *Thayer* does

not state anywhere that vacation is a legislative function. (*Fry* does not mention legislative function either). The foundation of this court's legislative classification applies only to city streets. Both *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 P. 316 (1906), and *Mottman v. Olympia,* 45 Wash. 361, 88 P. 579 (1907), citing *Ponischil,* base this conclusion on the fact that decisions concerning city streets including platting and vacation were at formerly a function of the State Legislature and that function was delegated to ***cities*** by chapter 84 of the Laws of 1901. *Mottman* at 364, citing *Ponischil* [at 305]. This is a crucial distinction because as far as we are aware, the State Legislature did not "plat" county roads, nor vacate them. As we pointed out in earlier briefing, rural county roads such as Three Devils were almost universally established by public use and at some time simply recognized for their public character by, as here, placing them on the county roster. §10, Chapter 187, laws of 1937; RCW 36.75.070. The implication that the reasoning of *Ponischil* might apply to County roads is not justified.

Insofar as such implication exists, the plain conflict with those cases that explicitly instruct review of road vacation by writ of review, on the hearing record, can only be resolved by this court. Insofar as the "legislative" classification in the early cases would forbid review of city street vacation by writ of review as instructed by Federal Way, supra, and

DeWeese, supra, that too must be resolved by this court. *House v. Erwin*, 81 Wn. 2d 345, 348, 501 P.2d 1221 (1972).

2 **The Decision of the Court of Appeals Is in Conflict with a Decision of the Supreme Court**

a) *Raynes v. Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), quoting RCW 42.36.010, instructs that cases such as the one at bench represent the essence of quasi-judicial actions for the purpose of application of the appearance of fairness principles.

After setting out the 4-part test for determining what constitutes quasi-judicial action (which we believe the Court of Appeals misapplied, see *infra*), the *Raynes* court summed up the principle guiding its holding by quotation to the appearance of fairness statute:

> The statute [RCW 42.36.010] defines quasi judicial to include actions of local legislative bodies 'which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.'

118 Wn2d at 247 (*emphasis added*)

Here Gamble Land, a specific party, requested specific relief disencumbering a specific defined parcel of property of a discrete public property interest. It was required to follow a process that mandated a hearing, requiring specific findings. RCW 36.87.060 ("If the county road is found useful as a part of the county road system *it shall not be vacated*, but if it is not useful and the public will be benefitted by the vacation, the county

legislative authority may vacate the road") (*Empahsis added.*)

Although the *Raynes* quotation above, when applied to the facts of this case would appear conclusive as to the quasi-judicial nature of road vacations such as the one here, the *Raynes* court emphasized the same point again on the following page:

> There is a distinction between rezoning a specific site and amendments which modify the text of a zoning ordinance. [citation omitted.] Actions of a city council are rezones [and thus quasi-judicial in nature] when there are "specific parties requesting a classification change for a specific tract."

Raynes at 248, quoting *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981).

Although the Court of Appeals recognized the existence of *Raynes*, it ignored the foundation reasoning that was crucial to the case holding.

b) The Court of Appeals below misapplied the 4-part test in *Raynes* in a manner directly contrary to the actual *Raynes* holding.

The *Raynes* court sets out the four-part test for distinguishing between legislative and quasi-judicial acts, as follows:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Raynes, at 244-245, quoting *Standow v. Spokane*, 88 Wn.2d 624, 631, 564

P.2d 1145 *appeal dismissed,* 434 U.S. 992 (1977).

Using this test, the Court of Appeals below reasoned that, (1) courts are not authorized to vacate roads, only municipal authorities can do that; and, (2) courts have not historically performed such duties.

The point of this test in *Raynes*, however, was to distinguish zoning code text amendments (*held* legislative) from rezones of individual parcels (*held* quasi-judicial). If we apply the test as the court below did to the facts of *Raynes* itself, we must note that courts do not rezone property; and courts are not authorized to do so, and courts have not historically rezoned individual properties. Only local legislative authorities have ever had such power. The *Raynes* court could not have held as is did under this reasoning.

We must look to the *Raynes* court's own exegesis of the test in the paragraphs following its presentation to properly apply it. When we do so we see that the *Raynes* emphasis was whether the action was basically a policy function performed on behalf of the whole city or, to the contrary, the determination of specific competing rights with respect to individual parcels of property, which is the ordinary work of the courts. *Raynes* at 245.

In the case at bench, as in *Raynes,* the guiding principle is that deciding private petitions by determining the competing public and private rights to specific properties, according to explicit statutory and constitutional

guidelines, is precisely the ordinary and historic business of the courts.

Insofar as the literal language of the standard four-part test set forth in *Raynes* can reasonably be interpreted to mean that statutory functions reserved to a legislative authority can never be considered quasi-judicial, this court should correct or clarify it to avoid confusion in future cases.

3. **A Significant Question of Law under the Constitution of the State of Washington or of the United States Is Involved.**

a) Washington Constitution, Article VIII section 7.

Article VIII section 7 of our state constitution states as follows:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

The *county* vacation statutes controlling this case appear to explicitly carry out this provision: RCW 36.87.060 states,

> If the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefitted by the vacation, the county legislative authority may vacate the road or any portion thereof.

RCW 36.87.010 is even less equivocal and requires the commissioners to find the road "useless" before they can vacate it for the benefit of the private-party feeholder.

It is hard to read these statutes except, at least in part, as an expression of Article VIII sec. 7. The point made by RCW 36.87.060 is of sufficient constitutional significance that this court has extended the required finding of public benefit to apply to the vacation of city streets – whose statutes at Chapter 35.79 RCW do *not* contain the public benefit requirement. See the explanation of this extension at *Puget Sound Alumni of Kappa Sigma Inc. v. City of Seattle,* 70 Wn.2d 222, 226-227, 422 P.2d 799 (1967) and cases cited therein.

In 1929, this court explained the necessity of finding public benefit from a city street vacation, even though no statute required a showing public benefit for street vacations.

> To illustrate [the power of a city to vacate streets], it may change a street from its use as a highway to a use for another public purpose, when it is determined' that the change will better serve the public good; it may vacate a street when it is no longer required for public use, ***or when its use as a street is of such little public benefit as not to justify the cost of maintaining it;*** or when it is desired to substitute a new and different way more useful to the public; and, of course, it is within the power of a city to vacate a street where all of the property owners adversely affected[1] consent to the vacation. ***But in all instances, the order of vacation must have within it some element of public use,*** and even where the order serves a public use, it cannot be exercised against the will of abutting property owners

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[1] Note that the language here is not "all abutting landowners consent," but all "property owners adversely affected."

adversely affected, unless the damages they suffer thereby are in some way compensated.

Young v. Nichols, 152 Wash. 306, 308, 278 Pac. 159 (1929). (***emphasis added***)

Petitioners before this court point out the following:

A. The county engineer's report on the road (per RCW 36.87.040) stated that there was no benefit to closing the public road and the cost of maintaining it was minimal. CP136

B. The hearing examiner who actually heard the evidence at an open public hearing, at which the Applicant was represented and testified, found no public benefit, and even the applicant provided little or no evidence of public benefit to disencumbering his property. CP 742.

C. The county is not required to maintain primitive roads. RCW 36.75.300.

D. Dozens of persons testified in writing and/or in person on the public record that they regularly used the road in question for recreation, access to the National Forest, and, most important, that it was vital for emergency vehicle access and as an escape route during wild fire and other emergencies. Several testified that it had already been responsible for saving their or family members' lives. CP 365-72;383-391;685-695;712-714; 739-740. Over 200 residents petitioned

the Commissioners to keep it open, almost the entire Chiliwist Valley. CP 542-568. The hearing examiner found the evidence of usefulness overwhelming. CP 742.

E. The forest service road supervisor provided written testimony, that Three Devils Road had always provided access to the National Forest for the public, and as such would remain open at the Forest Service end unless closed by the Commissioners. CP 698-99

We believe that, given these facts, which are not controverted, the Commissioners' decision on public benefit and lack of utility in favor of vacation was arbitrary, capricious and irrational.

b. The Due Process Clauses of the 5th and 14th Amendments to the Federal Constitution create a federally protected interest in the safety of life and property which was violated here. The Court of Appeals failed to consider this issue although squarely raised.

The Court of Appeals found that Petitioners had no protectable constitutional interest in keeping the road open. It failed to address the Petitioners' interest in their lives and property which are facially protected by the Due Process clauses of Federal Constitution, and the safety of which would allegedly be imperilled by this road closure, according to substantial evidence. (See Opening Brief before the Supreme Court at page 42.)

This is certainly a significant Contitutional interest that the court of

Appeals failed to analyze at all. This court should address this significant constitutional issue.

4 **The Petition Involves Issues of Substantial Public Interest That Should Be Determined by the Supreme Court.**

a. Those imperilled by a Commissioner decision, regardless of the nature of that decision, deserve their day in court, and that includes the right of appeal.

The Court of Appeals here disenfranchised plaintiffs by refusing to even decide whether they had standing; holding, erroneously, that the court's decision on the alleged legislative nature of the decision rendered it moot. Slip op. at 8. The standing issue and the superior court's ruling on it were raised by all parties to this appeal. The case is only half done.

The superior court ruled that, regardless of the nature of the commissioner decision, petitioners *did* have standing to bring an action because they pled – and the record justified – the fact that closing Three Devils Road posed a threat to their health, safety and property. The category of actual peril creates an interest in the vacation separate and distinct from the general public and thus confers standing. RP 44-45, 9/18/15. See *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 365-367, 324 P.2d 1113 (1958)

The peril issue is even more significant here than it was in *Capitol*

Hill Methodist for two reasons, one factual and one jurisprudential:

First, a back country enclosed valley in Okanogan County is not downtown Seattle where emergency response is only briefly delayed by detour around a closed street. (See *Mottman v. Olympia*, 45 Wash. 361, 364, 88 P. 579 (1907)). All alternate mountain roads for either escape or emergency response are many miles long through rugged terrain. CP 802.

Second, the city in that case was not required to find that the street to be vacated was "not useful." But that is the standard that Okanogan County must meet RWC 36.87.060. Petitioners claim the Commissioners did not meet that standard on this record. The Superior Court disagreed. Petitioners had the right to appellate review of that decision. In the future those imperilled by decisions of this nature should also have that right.

This is both a matter of great importance to the citizens of the rural parts of this state, but it is also a matter basic jurisprudence and of the orderly administration of justice, such that cases are not left half-done.

b. <u>The Legislature appears to have explicitly conferred standing on the regular users of the road.</u>

In no instance in the law does a statute call out a specific class of stakeholders in a decision, require that such class members have actual notice of hearing on that decision, and invite them to express objections to the

action, unless that combination confers actual standing.

All regular users of the road are given notice. Notice of vacation hearing must be posted at "each [sic] termini" of the road to be vacated. This evidences a clear intent that all those who regularly use the road be made aware of a hearing on its closure. RCW 36.87.050. The users are invited to express their objections to closure at hearing (RCW 36.87.060). For the legislature to identify the stakeholders, give them notice, encourage them to testify, and then have the courts allow the local authorities to ignore that testimony without recourse would defy the plain intent of the legislature.

If this is not an instance where the legislature has conferred participation standing, this court should clarify why it is not. See e.g., *Sterling v. County of Spokane*, 31 Wn. App. 467, 642 P.2d 1255 (1982)

c. The necessity for basic faith that the people must have in the fairness of democratic institutions is at issue here. It is no less important in Okanogan County in 2017 than it was in Skagit County in 1969.

We assert here that the appeals court erroneously reasoned from its own conclusion to infer the facts necessary to support it. The actual facts are otherwise.

The court of appeals correctly determined that the essence of an appearance of fairness violation as set forth in the foundation case of *Smith v. Skagit County,* 75 Wn.2d 715, 453 P.2d 832 (1969) is the limitation of the

public to the open public hearing process while the decision-maker excluded the public, going behind closed doors with the applicant, to be privately influenced. Slip op. at 14-15. It is undisputed that the applicant went behind closed doors with the commissioners after the vacation application was filed. CP 392.

The court below reasoned that because *it* had determined that the action was legislative, everyone could have had access to the commissioners. Slip op at 12-13. This inference – necessary by the court's own reasoning to avoid an appearance of fairness violation – was false.

Until our action was filed, County Commissioner respondents and all parties accepted the fact that a road vacation on application of the benefitted landowner was and is a quasi-judicial function. They were told this, in writing, (CP 430 et seq.) by their own development director, Mr. Huston. Mr Huston stated that they could avoid the appearance of impropriety under Chapter 42.36 RCW by giving it to a hearing examiner and should be "based on consideration of the record and recommendation of the Hearing Examiner." CP 431-32. They followed his advice.

The Hearing Examiner treated his commission as an entirely judicial exercise: He opened the decision record, accepted legal briefing, made rulings on that legal briefing, heard evidence, made findings and conclusions therein,

and closed the record, except for asking for additional briefing to clarify a specific point of law. He was invited to extend the record on motion for reconsideration by the applicant and refused.

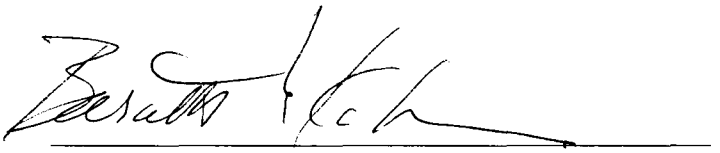
It is a fine point whether the actual facts constitute a waiver of the County's assertion that the Chapter 42.36 RCW rules on appearance of fairness do not apply. Regardless, neither the appeals court's reasoning on the issue, nor its conclusions survive the actual facts.

VI CONCLUSION

Not until this action was filed, did counsel come up with the novel theory that a county road vacation – especially under these circumstances – is purely legislative and not subject to the rules of fairness and due process, and rational determinations based on the record accorded to such hearings and decisions. The Court of Appeals should be reversed, the writ Granted and the decision of the Commissioners overturned.

Respctfully Submitted,
April 13, 2017

KALIKOW LAW OFFICE



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Barnett N. Kalikow hereby declares under penalty of perjury according to the laws of the State of Washington that she/he is of legal age and competence and that on April 13, 2017, he deposited in the U.S. Mail, first class postage prepaid and sent by electronic mail the following item:

PETITION FOR SUPREME COURT REVIEW

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April 13, 2017

Barnett N. Kalikow

Coalition of Chiliwist Residents et al v. Okanogan County et al.

Petition for Review to Supreme Court of Washington
Court of Appeals No. 34585-8

Appendix A

Decision of the Court of Appeals Division III

FILED
MARCH 16, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, Chiliwist Valley residents or property owners, 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 Hearings Examiner, JOSHUA THOMPSON, Okanogan County Engineer, JOHN CASCADE GEBBERS, JOHN WYSS, and GAMBLE LAND & TIMBER Ltd., a Washington Corporation, Respondents.	)	No. 34585-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — Coalition of Chiliwist Residents and Friends (Coalition) appeals the summary dismissal of their complaint that primarily sought to void Okanogan County (County) Board of County Commissioner's (BOCC) order vacating a portion of Three Devils Road. We hold that the BOCC's action of vacating a portion of that road was a legislative function, and thus susceptible only to a narrow judicial review. We further hold that Coalition has failed to present sufficient facts that would permit a rational trier of fact to find that the BOCC engaged in the type of improper conduct that would permit judicial review, i.e., fraud, collusion, or interference with any of its members' vested rights. We, therefore, affirm the summary dismissal of Coalition's claims.

FACTUAL BACKGROUND AND PROCEDURE

In the early 1950s, the Otto Wagner family built Three Devils Road as a logging road in rural Okanogan County. Three Devils Road, approximately 4.8 miles in length, was included in the County network of roads as part of a 1955 resolution opening certain roads as County roads. The western end of Three Devils Road extends into property owned by the United States Forest Service (USFS), and the eastern end of the road extends to Chiliwist Road. Gamble Land & Timber, Ltd., (Gamble) owns property along both sides of an approximate 3 mile stretch of Three Devils Road, ending at the USFS boundary.

On February 19, 2015, Gamble petitioned the County to vacate that portion of Three Devils Road surrounded by its property.[1] Because the USFS had satisfactory alternate access, it did not oppose Gamble's petition. The BOCC accepted the petition and, pursuant to RCW 36.87.040, directed the County engineer to generate a report and make a recommendation on whether the BOCC should vacate the road.

The engineer's March 12, 2015 report notes that Gamble performed all maintenance on Three Devils Road. The report also notes that Three Devils Road was classified as primitive and unimproved and saw minimal traffic. The report also notes that a gate blocked Three Devils Road at the entrance to the USFS land. The County engineer concluded that the road was useless as part of the county road system, and recommended that the BOCC vacate the road.

The BOCC then directed a hearing officer to conduct a public hearing pursuant to RCW 36.87.060(2). Under that subsection, the hearing officer must consider the engineer's report and public testimony and exhibits, and then prepare a record of the proceedings and make a recommendation to the county legislative authority concerning the petition.

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[1] For convenience, we will refer to the approximate 3 mile portion as "the road," and the 4.8 mile road as Three Devils Road.

Dan Beardslee, the County's hearing examiner, presided over the April 9, 2015 public hearing. In his May 2, 2015 posthearing report, he notes he received a petition signed by over 200 people opposing Gamble's petition, and that most of the signatories lived in the Chiliwist Valley or the surrounding area. In addition, his report notes that nearly 100 people attended the hearing, 18 people provided testimony, and of those 18, all but 1 opposed Gamble's petition. The hearing examiner's report provides a short summary of these testimonies. Many of the testimonies in opposition to Gamble's petition emphasized the need for the road as an escape route in the event of a wildfire. In the report, the hearing examiner notes Gamble's arguments in support of its petition, but determines that "[t]he testimony by citizens, both oral and written, particularly with respect to the utility of the road as an emergency evacuation route is far more compelling." Clerk's Papers (CP) at 741. The hearing examiner noted the overwhelming opposition to Gamble's petition, the usefulness of the road as an emergency evacuation route, as a scenic route, and as a connector to USFS lands. The hearing examiner's report concludes:

> . . . While the Hearing Examiner is sympathetic of the needs of Gamble to properly manage their land and protect their private property rights, they have not adequately demonstrated that the road should be vacated as useless to the County Road system, or that the public will be benefitted by the vacation.
>
> . . . .

> Based upon the information [considered] it is the recommendation of the Hearing Examiner that the petition for vacation of Three Devils Road be denied and the road not be vacated.

CP at 742-43.

On May 18, 2015, Gamble filed a memorandum supporting its motion for reconsideration of the hearing examiner's decision. In its request, Gamble asserted that many of the hearing examiner's findings—especially those relating to the importance of the road for fire escape—were not supported by the record. Gamble asserted that the record actually supported findings that the road was not an escape route, that the road would be dangerous and perhaps not passable in the event of a fire, and that numerous alternative fire escape routes existed. Gamble's memorandum was supported by an accompanying declaration from Cass Gebbers, including attachments, intending to refute many of the public comments cited and relied on by the hearing examiner. In denying Gamble's motion, the hearing examiner noted that the record was closed at the termination of the April 9 public hearing, except for a narrow issue not germane to Gamble's reconsideration material, and struck Gamble's submissions from the official record.

The County scheduled June 3, 2015, for a special public meeting of its BOCC to consider Gamble's petition. Prior to the meeting, each of the three County commissioners reviewed the engineer's report, the hearing examiner's report, and the

materials considered and made part of the record by those individuals. At the meeting, the commissioners commented they had reviewed the record, and briefly discussed the divergent opinions of the County's engineer and hearing examiner. In addition, Commissioner Campbell noted he reviewed documents that established that there were at least four alternate fire escape routes that were better routes than the road. Commissioner Campbell stated,

> And so in the recommendations from our County Engineer based on the fact that—that this road—I do not feel it is of benefit to the public there and it is useless.
>
> And, therefore, I move that we move forward with the vacation of this road that was requested by the petitioner.

CP at 913. Commissioner Kennedy seconded the motion. Commissioner DeTro opposed the motion.

The final order of vacation, signed by Commissioners Campbell and Kennedy, includes the following findings and order:

> **WHEREAS** the [BOCC finds] from the record that alternate routes exist out of the Chiliwist area,
>
> **WHEREAS** the [BOCC finds] the record discloses that the Three Devils Road has been impassable by vehicles due to rock slides, road being washed out by a flood event, road blocked by trees and logs crossing the road way,
>
> **WHEREAS** the [BOCC] finds the record discloses the use of the road is low and is not on the County's rotation for regular vehicle counts,

> **WHEREAS** the [BOCC] finds the record discloses the road has seen very little traffic as evidenced by photos included in the County Engineer's report.
>
> **NOW THEREFORE, IT IS HEREBY ORDERED BY THE BOARD** that [the road] is vacated.

CP at 1132-33.

On June 9, 2015, Coalition filed suit against the County and Gamble for injunctive and declaratory relief to void the BOCC's order to vacate the road. In addition, Coalition sought damages based on alleged violations of statutory and constitutional rights, including 42 U.S.C. § 1983, in addition to an award of reasonable attorney fees under 42 U.S.C. § 1988.

On August 24, 2015, Gamble filed a motion to dismiss or in the alternative for summary judgment. The uncontested material facts were that no member of Coalition owned any property on the portion of the vacated road nor was the road necessary to access any member's property.

On September 25, 2015, the trial court entered its written decision granting Gamble's motion for summary judgment. In its decision, the trial court held that Coalition had standing because of fire safety concerns to challenge the BOCC's order. The trial court further held that the BOCC's decision to vacate the road was a legislative

function, its review of the order was therefore narrow, and Coalition had failed to sufficiently assert any special circumstances warranting judicial review.

Coalition timely petitioned the Washington State Supreme Court for direct review. Gamble timely filed a cross petition, challenging the trial court's conclusion that Coalition had standing. Our high court subsequently transferred this case to us. Because we reject Coalition's arguments, we deem it unnecessary to reach the standing issue raised by the cross petition.

ANALYSIS

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). A nonmoving party must provide more than mere allegations or denials to rebut summary judgment; the party must provide specific facts showing genuine issues exist. CR 56(e). More than speculation or mere possibility is required to successfully oppose summary judgment. *Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995).

A bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955-56, 421 P.2d 674 (1966). A genuine issue of fact cannot be raised by stated facts that are "not supported by authority or citations to the record." *Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994). Unsupported facts are no more than bare allegations and conclusions, and are not true evidence. *Id.*

A. THE BOCC'S DECISION TO VACATE THE ROAD WAS A LEGISLATIVE FUNCTION

Coalition contends that the trial court erred when it held that the BOCC's action to vacate the road was a legislative function rather than a quasi-judicial function. Coalition argues that under the *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992) four-part test, road vacation is a judicial function. Coalition also argues that courts have historically reviewed road vacations by a writ of review, a process reserved for reviewing quasi-judicial actions.

The long-standing rule in Washington is that road vacation is a political function that belongs to municipal authorities, and is not judicially reviewable absent fraud, collusion, or interference with a vested right. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 368, 324 P.2d 1113 (1958) (city road); *Fry v. O'Leary*,

141 Wash. 465, 469, 252 P. 111 (1927) (city road); *Thayer v. King County*, 46 Wn. App. 734, 738, 731 P.2d 1167 (1987) (county road); *Banchero v. City Council of City of Seattle*, 2 Wn. App. 519, 523, 468 P.2d 724 (1970) (city road).

Coalition cites *Raynes*, 118 Wn.2d 237, and *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 689 P.2d 1084 (1984), in support of its argument that the BOCC's action of vacating the road was a quasi-judicial function. In *Raynes*, our high court set forth a four-part test for determining whether an action is quasi-judicial: (1) whether a court could have been charged with making the agency's decision, (2) whether the action is one which historically has been performed by courts, (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability, and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. *Raynes*, 118 Wn.2d at 244-45.

Application of the four-part test reinforces prior judicial holdings that vacation of county roads is a legislative function. First, RCW 36.87.080 vests the various county legislative authorities with the power to vacate roads by majority vote. Courts are not charged with vacating roads. Second, since at least 1937, when the legislature enacted chapter 36.87 RCW, the action of vacating county roads has been done by the various county legislative authorities, not courts. Third, the action of vacating county roads

involves obtaining an engineer's report, holding a hearing for public input, and the county legislative authority answering two simple statutory considerations—(1) whether the subject road is useless as part of the county road system, and (2) whether the public will be benefitted by its vacation and abandonment. RCW 36.87.020. Such a process does not involve the application of existing law to past or present facts for the purpose of declaring or enforcing liability. Although here, the hearing examiner issued findings of fact and conclusions of law in its recommendation to the BOCC, nothing in RCW 36.87.060(2) requires this. Fourth, the action of vacating county roads requires public input and opinion. Requesting public input in making decisions is not the ordinary business of courts; it is instead the ordinary business of legislators.

Finally, Coalition cites a few cases where plaintiffs have used the writ of review process to challenge a street or road vacation. For example, Coalition cites *DeWeese v. City of Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (1984). There, the city of Port Townsend vacated a city road that led to water. DeWeese petitioned the trial court for a statutory writ of certiorari, also known as a writ of review. A writ of review invokes a process to have a court declare that a lesser tribunal, board, or officer—*acting in a quasi-judicial function*—has erred. RCW 7.16.040.

We acknowledge there are a few plaintiffs who have used the writ of review process to challenge a street or road vacation and whose appeals have been considered by

the Court of Appeals. But none of these cases have actually held that the local legislative authority was performing a quasi-judicial function, nor have any of these cases overruled the authorities cited above.

For all of these reasons, we conclude the BOCC was performing a legislative function when it vacated the road.[2]

Unsupported allegations of collusion and fraud

Coalition does not argue that this court should apply the collusion, fraud, or interference with vested rights exceptions to review the BOCC's order. Nevertheless, Coalition, in other parts of its briefing, raises issues of collusion. We exercise our discretion to review the collusion issue as if it was properly raised. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

The dictionary defines "collusion" as "a secret agreement between two or more parties to defraud a person of his rights often by the forms of law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 446 (1993). Coalition relies on the following evidence to support its assertions of improper conduct by the County: (1) Commissioner Campbell had worked in real estate, and had advocated for vacating other roads prior to becoming an elected official, (2) Jon Wyss, a high-level Gamble employee who

[2] In light of this holding, we do not consider Coalition's argument that one BOCC commissioner violated the appearance of fairness doctrine, a doctrine explicitly inapplicable to legislative bodies engaged in legislative functions. RCW 42.36.030.

spearheaded Gamble's petition, once worked for the County, (3) in November 2014, when Gamble patriarch Dan Gebbers died, Commissioner Campbell gave a eulogy at the funeral and spoke of their mutual connections, (4) the Gebbers family may have given campaign contributions to the commissioners, and (5) the commissioners did not give deference to the hearing examiner's recommendation not to vacate the road.

The first two assertions emphasize potential unilateral bias only and, therefore, do not come within the definition of collusion. The second two assertions are overly speculative. When Gamble questioned Coalition members in discovery whether they had any evidence that any commissioner was improperly influenced by Gamble, not one member came forth with evidence beyond mere speculation. Speculation is insufficient to withstand summary judgment. *Chamberlain*, 79 Wn. App. at 215-16. As will be discussed in greater detail later, Coalition's fifth assertion fails because the law does not require the BOCC to give any deference to the hearing examiner's recommendation. Moreover, we note that the hearing examiner's recommendation was in conflict with the County engineer's recommendation.

Coalition makes one clear and nonspeculative assertion: prior to the final decision, Gamble had contacts with each commissioner, and various agents of the County government, concerning its petition to vacate the road. But as previously discussed, the BOCC's action to vacate the road was a legislative function. Legislators are expected to

have contacts with representatives both for and against pending legislation. Nothing prevented Coalition members or representatives from having similar contact with individual commissioners.

We note two reasons why the above assertion is insufficient to sustain a claim of collusion. First, although Gamble representatives met with individual commissioners, there is no evidence that Gamble sought to influence any commissioner by means other than by Gamble raising its legitimate concerns. If there was evidence of improper influence, bribery, or quid pro quo, our holding would be different. There simply is no evidence that the meetings were an attempt to defraud Coalition members of their rights.

Second, the contacts that occurred here—a few months before the scheduled BOCC meeting to vote on the petition—should be contrasted with the contacts in *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969). *Smith* involved an application for a rezone. In *Smith*, the Skagit County Planning Commission conducted a public hearing, and during the hearing announced it would go into executive session. *Id.* at 742-43. The Planning Commission members then invited the rezone advocates to join them in private and deliberately excluded the rezone opponents. *Id.* In concluding that the Planning Commission acted improperly, the *Smith* court held that "the hearing lost one of its most basic requisites—the appearance of elemental fairness." *Id.* at 743. In contrast here, there is no allegation that the BOCC adjourned the public hearing and met with Gamble

in private. There is no evidence that the public hearing was improper. Nor is there any evidence that the county commissioners or various agents of the County government refused to meet with Coalition members or representatives.

We conclude Coalition has failed to state facts on which a rational trier of fact might find that the BOCC's action of vacating the road was the result of collusion with Gamble.

B. NO DEFERENCE TO HEARING EXAMINER FINDINGS REQUIRED

Coalition argues that the BOCC was required to defer to the hearing examiner's recommendation. However, Coalition does not cite any authority that would require deference to the recommendation. The road vacation statute requires only a public hearing:

> . . . [T]he county legislative authority may appoint a hearing officer to conduct a public hearing to consider the report of the engineer and to take testimony and evidence relating to the proposed vacation. Following the hearing, the hearing officer shall prepare a record of the proceedings *and a recommendation* to the county legislative authority concerning the proposed vacation. . . .

RCW 36.87.060(2) (emphasis added). No authority suggests that the hearing examiner's recommendation is anything more than a recommendation.

Coalition cites to the Okanogan County Code (OCC) to demonstrate that a hearing examiner in that county is required to enter written findings and conclusions after a

hearing. OCC 2.65.120(J). Regardless, the OCC does not require the commissioners to give special deference to the written report concerning a road vacation any more than the controlling statute.

C. NO LIABILITY UNDER 42 U.S.C. § 1983

Coalition contends that the County's conduct violated the due process rights of Coalition members, and that the trial court improperly dismissed its 42 U.S.C. § 1983 claims. Coalition argues (1) it had a property or liberty interest in keeping the road open, and (2) the BOCC's action of vacating the road was arbitrary and capricious. We disagree with its first contention and do not address its second.

To sustain a § 1983 claim, Coalition must show "that some person deprived [its members] of a federal constitutional or statutory right, and that person must have been acting under color of state law." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 117, 829 P.2d 746 (1992). "The threshold question in any due process challenge is whether the challenger has been deprived of a protected interest in life, liberty or property." *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 143, 866 P.2d 8 (1994). Absent deprivation of a cognizable property or liberty interest, this court must dismiss a due process claim under § 1983. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). A constitutionally protected property interest exists only where the plaintiff demonstrates that he possessed and was deprived of a reasonable

expectation or entitlement created and defined by an independent source such as federal or state law. *Id.* A subjective expectation on the part of the plaintiff that a benefit will be provided or continued does not create a property interest protected by the Constitution. *Clear Channel Outdoor v. Seattle Popular Monorail Auth.*, 136 Wn. App. 781, 784-86, 150 P.3d 649 (2007).

1. *No property interest*

Coalition asserts its members have a property interest in keeping the road open. Property owners who do not abut and whose access is not destroyed or substantially affected, have no vested rights that are substantially affected. *Capitol Hill Methodist Church of Seattle*, 52 Wn.2d at 365. No Coalition member owns property that abuts the road, and the vacation of the road does not affect any Coalition member's access to his or her own property. Coalition alleges generally that the road's use or potential use is for recreation or fire escape. But such considerations are insufficient because they are not expectations defined by an independent source such as federal or state law. We conclude Coalition fails to allege any cognizable property interest in the road.

2. *No liberty interest*

Coalition asserts its members have a liberty interest in keeping the road open. A liberty interest may arise from the Constitution, from guarantees implicit in the word "liberty," or from an expectation or interest created by state laws or policies. *In re Pers.*

Restraint of Mattson, 166 Wn.2d 730, 737, 214 P.3d 141 (2009). To establish a liberty interest in keeping the road open, Coalition relies on *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958). In *Kent*, the State Department denied plaintiff a passport when he refused to submit an affidavit denying that he was a member of the Communist Party. *Id.* at 117-19. The Supreme Court recognized that the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." *Id.* at 125. The Court stressed the importance of owning a passport in order to establish citizenship to reenter the country. *Id.* at 121. The right to travel outside of the United States and then reenter is of a different nature and magnitude when compared to the expectation of traveling on a stretch of primitive unimproved road. Coalition does not cite any authority that traveling on a street or road is recognized as being implicit in the word "liberty." If we were to recognize such a right, no street or road vacation would be possible. We decline to go where no court has gone before.

We conclude the trial court did not err when it dismissed Coalition's 42 U.S.C. § 1983 claims.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.