No. 97693-7

SUPREME COURT
OF THE STATE OF WASHINGTON

DONALD AND KATHLEEN MILLER,

Petitioners,

vs.

THE CITY OF SAMMAMISH,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent is the City of Sammamish ("City").

II. COURT OF APPEALS' DECISIONS

A copy of the Court of Appeals' published opinion affirming the decisions below and finding that Donald and Kathleen Miller ("Millers") violated the Sammamish Municipal Code ("SMC") is attached as Appendix E to the Millers' Petition for Review ("Petition").

III. ISSUES PRESENTED FOR REVIEW

A. Do the Millers' assertions satisfy any of the review criteria set forth in RAP 13.4(b)? *No*.

B. Whether the City is entitled to attorneys' fees? *Yes.*

IV. FACTS RELEVANT TO PETITION

A. Factual Background.

1. Prior to their destruction, two regulated wetlands existed on the Millers' Property.

The Millers' purchased their property—approximately 2.29 acres containing a single-family residence ("Property")—in 1999. AR 412.[1] At that time, the Property featured a large pond in the southwest corner of the

[1] "AR" refers to the Certified Administrative Record prepared by the City, containing the record and proceedings before the City's Examiner. The complete Certified Administrative Record was timely filed by the City with the King County Superior Court. The Millers failed to designate the AR as part of the record on appeal; the City then prepared and filed a supplemental designation, and the AR was transmitted to the Court of Appeals by the trial court, but without Clerk's Paper page references.

lot, grassy open areas, and areas of dense vegetation, as depicted in an aerial photograph from the year 2000. AR 000288.

Over the years, the Millers have been approached by six different developers to buy their Property. CP 359:22 – 360:1. In 2005, the Millers were approached by Camwest Development, who commissioned Talasaea Consultants to prepare a sensitive areas study and report of the proposed development area (the "Talasaea Report"). Id. The Talasaea Report mapped two Class III wetlands on the Property, each with a 25-foot buffer pursuant to the SMC: Wetlands K and L. AR 000183 and AR 000186. Wetland K—located at the southwest corner of the Property—is approximately 5,448 sq. ft. in area and is described as a palustrine, scrub-shrub, unconsolidated bottom, seasonally flooded, impounded wetland. Id. As described, this wetland includes a pond, which appears to be an excavated feature. Id. In the report, Wetland L is described as approximately 7,465 sq. ft. in area along the northwest edge of the Property, and is described as a palustrine, emergent, saturated wetland, primarily composed of mowed lawn. Id.

2. A second wetland biologist confirms existence of regulated wetlands on the Millers' Property.

A few years later, another developer, Summit Homes ("Summit")—seeking to develop the parcel to the south of the Millers' Property—

commissioned a second critical areas analysis of the area. AR 000330–31. A wetlands expert, Altmann Oliver Associates, LLC ("Altmann"), prepared a Wetland Delineation Report for Summit, dated June 12, 2008 (the "AOA Report"). AR 000330–80. Although the AOA Report focuses on the parcel to the south of the Property, Altmann analyzed Wetland K because that wetland's mapped buffer extends onto the parcel to the south of the Property. AR 000332–51. Altmann independently verified the existence of Wetland K and its buffer, and determined that Summit was required to establish a Native Growth Protection Area on its parcel to protect Wetland K and its buffer, reducing the proposed development by one entire lot/house. AR 000331.

3. City issues Notice to Comply to the Millers in April 2016, which they ignore.

The Millers began changing the landscape of their Property as early as 2000 (AR 000282) and began filling the wetlands—including the pond—in earnest in late 2015. AR 000237–40; AR 000385; and AR 000254–60.

The City first learned of the Millers' activities in January, 2016. CP 188:12–20. The City's Code Compliance Officer ("CCO") consulted with the City's wetland biologist about reported clearing and grading activities on the Property and verified that no permit had been issued for the work. CP 188:24 – 189:2; AR 000241; and CP 357:17–22. The City's wetland

biologist then reviewed City files associated with the Property, visited the Property, and confirmed that the Millers had graded and filled within the previously mapped wetlands. AR 000237–40.

On February 12, 2016, the CCO sent the Millers a letter stating a Code Compliance Investigation had been opened, and that the City believed unpermitted grading and clearing activities had occurred within mapped wetlands and their buffers. AR 000241.

Shortly thereafter, Mr. Miller contacted the CCO and admitted to filling and grading activities, but denied that the Property contained wetlands. CP 194:9 – 195:2.

The CCO next sent a "Notice to Comply" to the Millers on April 14, 2016 ("Notice"). AR 000242–43. The Notice expressly set forth the process required to bring the Property into compliance. Id. The Millers ignored the City's requests. CP 197:10–12.

4. City issues Stop Work Order after the Millers again undertake unpermitted filling and grading.

On February 9, 2017, the City received a new complaint that the Millers had recently placed a substantial amount of fill material on the Property. CP 200:10 – 201:8. On February 10, 2017, the City investigated and confirmed the presence of large piles of fill dirt in several locations on the Property. CP 201:3 – 202:8. The CCO also observed evidence of

additional unpermitted work, including clearing, grading, and fill within the wetlands and wetland buffers. Id. and AR 000262–63. The CCO took measurements and estimated that over 380 cubic yards of fill had been placed on the Property, completely covering both wetlands. CP 207:5–25.

As specifically authorized by the SMC, the CCO immediately prepared and posted a Stop Work Order on the Property for the unpermitted clear and grade activities and filling of regulated wetlands. AR 000261–63. The Millers did not substantively respond, nor did they file a timely appeal of the Stop Work Order. CP 205:1 – 206:5.

The Stop Work Order and its accompanying letter directed the Millers to provide verification that they had taken steps to prepare a wetland report and mitigation plan for the damaged wetlands on or before March 10, 2017, in accordance with SMC 21A.50.120. AR 000261–63. Pursuant to the SMC, the letter stated that the onus was on the Millers to commission a valid Critical Areas Review and Mitigation Plan for their own Property, which would then be audited by the City's expert. AR 000262–63; CP 270:19 – 272:25; CP 320:4–18; and CP 141:12–21. The deadline to submit the report and associated permit application(s) to the City for review was to be established based upon the Millers' wetland professional's availability, given the scope of work to be completed. AR 000262–63.

5. City issues a Notice and Order to Abate, after the Millers' continued non-compliance.

The Millers again did nothing to bring the Property into compliance. The City accordingly then served the Millers with a "Notice and Order to Abate Civil Code Violation" on March 27, 2017 ("Notice and Order"). AR 000268–76. The Notice and Order identified the actions required under the SMC to correct the violations and provided 60 days from the date of service to do so. Id. The CCO calculated the civil penalties applicable to the violations pursuant to SMC 23.100.010 and the administrative "Guidelines for Determining Environmental Damage/Critical Areas Violations" worksheet established pursuant thereto. AR 000264–67 and CP 208:8 – 211:2.

The wetlands had been totally obliterated. The City set the penalty at $15,000, plus the cost of restoration likewise authorized by SMC 23.100.010. While the penalty amount was significant, it is only 60% of the maximum penalty allowed under SMC 23.100.010 of $25,000. Id.

B. Procedural Background.

1. The Millers took full advantage of the ample due process provided by the City.

On April 5, 2017, the Millers appealed the Notice and Order to the Hearing Examiner. AR 000003–09. During the two-day evidentiary hearing, the City offered live testimony by CCO Chris Hankins ("Hankins")

and wetlands expert Nell Lund ("Lund"). Ms. Lund also submitted two written reports. CP 99–183; AR 000281–328; AR 000386–98; CP 128–281; and CP 322–33.

As evidence of the existence of wetlands on the Millers' Property, the City provided Lund's testimony; the Talasaea Report; the AOA Report; Lund's reports; a report from a biologist with the Washington state Department of Ecology; aerial photographs and iMaps; and written testimony from wetland biologist Kathy Curry. CP 99–183; AR 000281–328; AR 000386–98; AR 000170–236; AR 000330–380; AR 000399–400; AR 000254–60; AR 000413–15; and AR 000381–85. The Millers presented testimony by Don Morin, who owned the Property prior to the Millers; Mr. Miller; and wetlands expert Ed Sewall, who also submitted a report. CP 78–95; CP 289–321; CP 347–77; and AR 000426–440.

The hearing began on August 24, 2017, and after a day of testimony was continued to October 23, 2017. AR 000487. Between those two dates, and by his own admission, Mr. Miller performed additional unpermitted filling and grading work within the critical areas on the Property. AR 000415–17 and CP 371:6 – 372:10. As even more proof of the continuing violations, the City presented photographic evidence, including photos taken of the Property on September 8, 2017, depicting the new wide dirt road running through Wetland L created while the evidentiary hearing was

in recess. AR 000415–17 and CP 371:6 – 372:10.

After weighing the evidence and hearing argument of counsel, the Examiner issued his Decision denying the Millers' appeal. AR 000486–500. The Decision addressed the Millers' due process claim, finding that the Millers offered no authority to support their claim that the City bore any burden to notify the Millers that wetlands existed on the Millers' Property. Id. Further, the Examiner noted the Millers' argument that SMC 23.100.010 (the code enforcement penalties matrix) was unconstitutional because it exceeded a municipality's statutory authority was outside his jurisdiction under the SMC. Id. Finally, he found in favor of the City on the violations and rejected for lack of evidence the Millers' claim that they were exempt from the City's critical area regulations due to their established alleged non-conforming agricultural use rights. Id.

2. The Examiner's Decision was properly affirmed by King County Superior Court and the Court of Appeals.

The Millers timely appealed the Examiner's Decision to King County Superior Court, pursuant to chapter 36.70C RCW. CP 1–39. After extensive briefing by the parties and lengthy oral argument, Judge Helen Halpert issued a detailed Order Denying [the Millers'] Land Use Petition Appeal. Id. Judge Halpert properly concluded that the Examiner did address constitutional challenges raised by the Millers—including

nonconforming use property rights and due process—and affirmed his Decision. Id.

The Millers appealed to Division One of the Court of Appeals. The Millers again argued that the Examiner had violated the Millers' constitutional rights, and that the Examiner's determination that the Millers filled regulated wetlands was not supported by substantial evidence and was a clearly erroneous application of facts to law. In its lengthy, published opinion, Division One correctly affirmed the Hearing Examiner and trial court decisions.

V. ARGUMENT FOR DENIAL OF REVIEW

A. The Millers Fail to Satisfy RAP 13.4(b).

RAP 13.4(b) provides:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Millers fail to satisfy any of the criteria described in RAP 13.4(b) necessary to merit review by this Court.

B. The Petition for Review Offers No Factual Support for the Legal Arguments Presented.

In Section IV of their Petition for Review (Statement of the Case), the Millers offer what appear to be factual statements. No citations to the record are included. RAP 10.3(a)(5) requires that "[r]eference to the record must be included for each factual statement." *See also* RAP 10.4(f). As this Court noted in State v. Hensler, 109 Wn.2d 357, 745 P.2d 34 (1987),

> [d]efendant's statement of facts does not contain a single reference to the record. This violates RAP 10.4(f). Once more we remind counsel of the necessity of complying with the rules. Imposition of sanctions or nonconsideration of the claimed error should be no surprise to lawyers who fail to comply.

Here, the Statement of the Case constitutes only the same unsupported, unsuccessful legal arguments that the Millers have advanced at all stages below.

C. No Significant Issue of Substantial Public Interest Exists Sufficient to Grant Review (RAP 13.4(b)(4)).

The Millers fail to identify any issue of substantial public interest sufficient to warrant review. The Millers' Petition, at Section V.B, discusses an alleged "proliferation" of wetland enforcement actions, stating "[t]his Court needs to address the effect of exceptions designed to exempt property owners from the enforcement of new wetland regulations . . ." (Petition at 8) and "it is in the public interest for this Court to address the

Court of Appeals' holding that a more relaxed due process standard applies to environmental penalty/abatement orders . . . ." Petition at 9. The scant briefing fails to expound on these assertions or offer any clarity as to why environmental code enforcement actions are of "substantial public interest" as required by RAP 13.4(b)(4). These bare arguments offer no support for review under this criterion.

D. The Court of Appeals' Decision Is Wholly Consistent with the Decisions of This Court, the Courts of Appeals, and the U.S. Supreme Court Regarding Due Process (RAP 13.4(b)(1) and (2)).

At Sections V.C and V.D[2] of their Petition, the Millers argue that the Court of Appeals below created a "more relaxed due process environmental standard." Petition at 9. Essentially, the Millers contend the code enforcement action against them was too vague and that Washington Courts demand "clear and precise orders." Petition at 12. The Millers believe the Court of Appeals' decision conflicts with Burien Bark Supply v. King Cty., 106 Wn.2d 868, 725 P.2d 994 (1986), State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), and F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 377, 85 S. Ct. 1035, 1038, 13 L. Ed. 2d 904 (1965). The

[2] The Millers' header to Petition Section V.D states, "The Court of Appeals New Due Process Standard Governing Environmental Penalty Orders Conflicts with the Decisions of this Court and the US Supreme Court." Petition at 12. The Millers then fail to identify any Washington State Supreme Court or United States Supreme Court cases in Section V.D. Instead, the Millers cite to two out-of-state cases for support.

record here includes more than sufficient factual evidence to demonstrate that the code enforcement notices to the Millers were, in fact, clear and precise. Washington case law broadly supports that interpretation.

Here, the operative SMC provisions, and the letters and notices to the Millers, were clearly written and provided adequate notice of the penalties for continued non-compliance. SMC 23.100.010 expressly provides as follows for environmental damage and critical area violations:

> In addition to the other penalties provided for in this chapter, any person responsible for a violation of Chapter 21A.50 SMC may be jointly and severally liable for site restoration for the redress of ecological, recreation, and economic values lost or damaged and shall pay a civil penalty up to $25,000 plus restoration, based upon the severity of the violation as documented in the City's file.

In this case, the plain meaning of the code is clear and easy to understand; the Millers—like any violator—must pay penalties and are responsible for paying the cost of site restoration necessary to cure the damage they have caused.

Pursuant to SMC 23.100.010, City Staff utilized a form—using the factors dictated by the SMC—to determine the penalty, based on the "severity of the violation," and the Millers received a copy of that form. AR 000264–67. The CCO relied upon the materials in the City's file to complete the form, pursuant to SMC 23.100.010. CP 209:14 – 211:2.

Notably, the monetary penalties assessed were only 60% of the maximum allowed under the SMC. The penalties were based on sound reasoning and well within the parameters established by the SMC.

The Millers also argue that the concept of wetland restoration is vague, yet the Millers' own wetland expert contradicted that claim, acknowledging that this is a term routinely utilized in his field. CP 320:4–18. Even without that expertise, the Notice and Order is easily understandable—it requires a wetland delineation, classification of the wetland, evaluation of buffer areas, and a restoration plan prepared by a wetland biologist in accordance with specific regulations and parameters set out in the SMC. AR 000273.

SMC 21A.50.310 expressly requires restoration when critical areas have been damaged, and SMC Title 21A further clarifies what it means to remediate impacts to a critical area resulting from development (in this case, clearing and grading). In accordance with SMC Title 21A, the Notice and Order directed the property owner to retain a wetland biologist to perform a wetland delineation and prepare a critical area restoration plan that remediates the damage done. AR 000268–75.[3] Although this exercise typically occurs prior to development (*i.e.*, a mitigation plan to address

[3] Notably, prior to their administrative hearing, the Millers conceded that Wetland L needed to be restored and stated an intent to prepare a restoration plan. AR 000131 ("The Millers will agree in the face of uncertainty that Wetland L needs to be restored, and agree on a restoration plan.").

impacts from proposed construction), the same approach is used by all agencies where unpermitted work impacted a critical area. *See* SMC 21A.50.310; *see also* CP 320:4–18.

This type of mitigation plan is not vague or lacking in due process. Instead, the City acknowledges the power to control property is in the hands of the owner/violator, while requiring that the proposed remediation plan meet standards set out in code and in applicable scientific manuals adopted by reference. Imposing conditions on a violator is not a one-size-fits-all proposition—no two sites are damaged in the same specific manner. The City (like all other agencies in Washington, CP 320:9–18) directs property owners to propose the design to resolve a violation, so long as the proposal fits certain parameters set out in code.

Here, the Millers are guided by the standard application and critical area processes delineated in the SMC. The Millers' wetland expert testified he was familiar with the industry standard and had prepared such reports before. CP 320:4-18. The Notice and Order allowed the Millers the freedom to control their land without excessive City oversight, as long as they met the standards described in adopted City code and the order. Lastly, if the Millers objected to the City code requirements, the SMC provided them with the opportunity to appeal that decision.

Despite creating a very clear process for remediation, under

Washington law, the City was not *required* to provide the Millers with a precise standard for how to complete their restoration project.

The Court of Appeals appropriately analogized the present case to Beatty v. Washington Fish & Wildlife Comm'n, 185 Wn. App. 426, 341 P.3d 291 (2015), *review denied*, 183 Wn.2d 1004, 349 P.3d 856 (2015), which involved the denial of a hydraulic mining permit to conduct suction dredge operations on a creek outside the designated work period. The court found that, when dealing with environmental issues, a "precise standard" was not required, especially for "environmental factors not subject to standardization." Id. at 458.

Similarly, in Conner v. City of Seattle, a Seattle ordinance provided regulations regarding design features surrounding city landmarks which lacked specific city-wide design mandates, and provided for a back-and-forth between applicants and the City of Seattle. 153 Wn. App. 673, 223 P.3d 1201 (2009). The Conner court held that the test for impermissible vagueness is not whether a regulation indicates to an applicant "exactly what he can do with his property" but instead, the question is whether the applicant "can ascertain the requirements for an acceptable project." Id. at 693. There, the regulation contained sufficient contextual standards and a process for providing clarification and guidance. The court accordingly held the regulations passed muster. Id.

The Court of Appeals' decision here does not conflict with Burien Bark Supply, 106 Wn.2d 868, where this Court held the term "processing in a limited degree" in a zoning ordinance was unconstitutionally vague as applied to prohibit a beauty bark business from using a bark sorter. This Court determined citizens affected by the regulation had no basis in common practice and understanding regarding the meaning of "limited" processing and thus had no fair warning of conduct that might violate the ordinance. Id. at 872. Burien Bark Supply did not address environmental remediation processes and did not hold, as suggested by the Millers, that this Court "declined the invitation to conclude that due process requires less specific standards in the context of land use regulations . . . ." Petition at 11. Here, the regulations violated by the Millers are clearly spelled out in the SMC, such that a citizen can "determine the law by reading the published code." Burien Bark Supply, 106 Wn.2d at 872.

The Court of Appeals' decision here is also consistent with F.T.C., 380 U.S. 374. There, the U.S. Supreme Court analyzed the Federal Trade Commission's order regarding deceptive trade practices and found the subject order was not vague, further stating:

> We believe that respondents will have no difficulty applying the Commission's order to the vast majority of their contemplated future commercials. If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed

> course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

Id. at 394.

Further, the Court of Appeals' decision does not conflict with Sansone, 127 Wn. App. 630, which is a criminal case addressing possession of pornography, for which different, more stringent, due process and notice standards apply.

Finally, the Court of Appeals' decision is in harmony with United Nuclear Corp. v. Cannon, 553 F. Supp. 1220 (D.R.I. 1982). There, a Rhode Island court ruled that a vague statute can, at times, be explained or augmented by administrative processes or additional regulations.

> Even if a legislative pronouncement is peccant in that it has no internalized language which can save it from constitutional infirmity, the statute may be palliated if the affected party can rationally be expected to resort to the administrative process for clarification of that party's rights and obligations thereunder.

Id. at 1225. The Millers have failed to demonstrate that the Court of Appeals' decision conflicts with current law.

E. The Millers Raise No Arguments Which Would Merit Review.

Section V.E of the Millers' Petition alleges that the Court of Appeals failed to address the Millers' argument that they were entitled to destroy the

wetlands on their property under some form of landscaping maintenance exception to critical areas regulations. Petition at 16. Similarly, in Section V.G of the Petition, the Millers argue the Court of Appeals failed to consider the "garden maintenance exception." Petition at 19.

The facts were clear that the Millers were not *maintaining a garden* – they were actively filling and grading protected wetlands with more than 380 cubic yards of fill. Further, the Court of Appeals expressly did consider whether the Millers' activity constituted a non-conforming use (Decision at 11–13) and whether the Millers' activities constituted a valid garden maintenance exemption under SMC 21A.50.060(4) (Opinion at 13–14). The Court correctly concluded that there was "no evidence in the record that the wetlands and wetland buffers present on the Millers property was maintained or improved. To the contrary, there was credible testimony that the Millers completely removed the wetlands and wetland buffers on their property." See Opinion at 13-14, fn. 4. The Millers further fail to identify how this issue satisfies the criteria required under RAP 13.4(b).

In Section V.F of the Petition, the Millers argue the Court of Appeals' failure to apply retroactive effect to laws is in conflict with Loeffelholz v. University of Washington, 175 Wn.2d 264, 285 P.3d 854 (2012), and City of Ellensburg v. King Videocable Co., 80 Wn. App. 901,

912 P.2d 506 (1996).[4] Both cases stand for the general proposition that, unless language in a statute requires retroactivity, a court will not give retroactive effect to regulations. Here, the Court of Appeals' decision does not conflict with this concept. The Court of Appeals succinctly analyzed and concluded that the record contained substantial evidence demonstrating the Millers had filled and graded the critical areas on their Property, and identified that the Examiner applied the laws in effect *at that time*. CP 36–38. This is not a case where clearing and grading activity occurred *prior* to the enactment of the SMC critical areas ordinances; in fact, evidence showed that the Millers were engaged in clearing and grading activity in the wetland on multiple occasions, including even between the first and second hearing dates before the Examiner. AR 000415–17 and CP 371:6 – 372:10.

F. The City Is Entitled to Attorneys' Fees and Costs.

RCW 4.84.370 provides for the award of attorneys' fees and costs to the prevailing party to defend an appeal of land use decisions:

> [R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or

[4] Loeffelholz is a case interpreting the Washington Law Against Discrimination; King Videocable Co. addresses the retroactivity of the Cable Television Consumer Protection and Competition Act. Neither case bears any resemblance to the present case.

> decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, . . . ; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

This matter clearly constitutes a land use decision under RCW 4.84.370, and the City has prevailed at every stage of litigation. *See* Mower v. King Cty., 130 Wn. App. 707, 721, 125 P.3d 148 (2005). The City is entitled to an award of attorneys' fees and costs to Answer this Petition for Review.

VI. CONCLUSION

The Millers' Petition fails to satisfy any of the criteria for review set forth in RAP 13.4(b). The Millers' Petition should be denied and the City should be awarded attorneys' fees and costs.

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RESPECTFULLY SUBMITTED this 18TH day of November, 2019.

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