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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Twin Bridge Marine Park, L.L.C., and Ken Youngsman (Ken Youngsman
and Associates),
Respondents,

v.

Washington State Department of Ecology,
Petitioner.

**AMICUS CURIAE BRIEF ON BEHALF OF BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON**

Timothy M. Harris, WSBA No. 29906
Andrew C. Cook, WSBA No. 34004
Julie M. Sund, WSBA No. 37685
Building Industry Association
of Washington
111 21st Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801

ORIGINAL

I. INTRODUCTION

This case involves the intersection of the Shorelines Management Act (SMA) and the Land Use Petition Act (LUPA), proving exactly why the Legislature enacted LUPA: to provide “consistent, predictable and timely judicial review” to land use decisions which otherwise would be subject to arbitrary reversals well after the final decision has been made.

After years of negotiation and litigation with the Department of Ecology (Ecology), Skagit County and the City of Anacortes, the owners of Twin Bridge Marine Park, LLC (Twin Bridge) finally received its final building permits (and, later, certificate of occupancy) in 2001. Although Ecology did not appeal this decision within LUPA’s 21-day timeline, the agency continued to impose administrative orders and penalties on Twin Bridge’s development. The Court of Appeals, upholding the trial court, ruled that because Ecology failed to timely file a LUPA appeal its subsequent administrative orders and penalties constituted “a collateral attack on a local government decision at odds with the policy” of the SMA. *Twin Bridge Marine Park, LLC v. Department of Ecology*, 130 Wn.App. 730, 743, 125 P.3d 155 (2005).

This case will decide whether Ecology has unfettered enforcement authority under the SMA, or instead, must proceed under LUPA like all

other entities challenging a final land use decision issued by a local jurisdiction.

When it comes to enforcing laws, the public has the right to a reliable and predictable set of procedures and rules. Predictability and certainty are cornerstones of the building industry and the economy. Without these principles, economic sustainability would not exist.

This brief will focus on the public policy behind LUPA's enactment. In particular, *Amicus* Building Industry Association of Washington will highlight this Court's consistent acknowledgement of the critical public policy issues of certainty, finality and predictability that LUPA provides property owners.

II. ISSUE OF CONCERN TO *AMICUS CURIAE*

Whether the Land Use Petition Act's stated purpose of favoring administrative finality, certainty and predictability in land use decisions, protects land owners from a state agency challenging a final local land use decision when the agency fails to file a timely challenge?

III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington ("BIAW") is the largest trade association in the state with over 12,000 members who

employ over 350,000 Washingtonians. BIAW has many members in Skagit County who obtain permits to develop land, including shorelines permits. BIAW members across the state rely on the finality and certainty of administrative decisions by local government officials. BIAW and its members are directly affected by the Land Use Petition Act and the Shoreline Management Act. Therefore, BIAW and its members have an interest in ensuring that that the courts properly apply both Acts.

IV. STATEMENT OF THE CASE

Amicus BIAW adopts and incorporates the statement of facts as set forth in Twin Bridge's Brief of Respondents (CP4-5).

V. ARGUMENT

A. THIS COURT RECOGNIZES THE IMPORTANT PUBLIC POLICY SUPPORTING ADMINISTRATIVE FINALITY, CERTAINTY AND PREDICTABILITY IN LAND USE DECISIONS.

This Court has repeatedly emphasized the strong public policy supporting finality in land use decisions. There is no compelling reason for this policy to stop with the case at hand.

In *Deschenes v. King County*, 83 Wash.2d 714, 716, this Court explained the importance of adhering to time limitations: “[t]he purpose of time limitations in such matters is to give finality. . . . If there were not

finality, no owner of land would ever be safe in proceeding with development of his property.”

This reasoning has been a consistent theme in Washington Supreme Court land use cases during the past 30 years. In the pre-LUPA case of *West Main Associates v. City of Bellevue*, 106 Wash.2d 47 (1986), this Court considered the application of the vested rights doctrine to a city ordinance.¹ The Court in *West Main* reasoned that “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main*, 106 Wash.2d at 53. In *West Main*, this Court concluded that the city “misused its power by denying developers the ability to determine the ordinances that will control their land use.” *Id.*

In *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1 (1992), this Court considered a takings challenge by a developer that arose from a city low-income housing ordinance. In *Sintra*, this Court highlighted the benefits of administrative finality to both the land owner and the government, pointing out that “[i]ncreasingly, this court is called upon to resolve disputes concerning land use regulation, and the trend is likely to continue,” then explaining its objective in resolving these disputes: “[a]

¹ Similar to the stated purpose of LUPA, the purpose of the vesting doctrine is to allow property owners and developers to determine the rules that will govern the development of their land. See *West Main Associates v. City of Bellevue*, 106 Wash.2d 47 (1986).

body of cogent, workable rules upon which regulators and landowners alike can rely is essential to the task.” *Sintra*, 119 Wash.2d at 5.

This Court in *Skamania County v. Columbia River Gorge Commission*, 144 Wash.2d 30, (2001) expanded on this benefit, pointing out that federal courts also have long recognized the importance of administrative finality. There, this Court quoted the federal court decision in *Eagle-Picher Indus. v. United States Environmental Protection Agency*, 759 F.2d 905 (1985), which said, “Statutory time limits for review of agency action . . . serve the ‘important purpose of imparting finality into the administrative process, thereby conserving administrative resources.’”

Several Washington Supreme Court cases since LUPA’s enactment have re-iterated the same public policy considerations favoring certainty, finality and predictability in land use decisions.

For example, this Court ruled in 2000 that a party’s failure to bring a timely LUPA challenge to a site-specific rezone in Chelan County barred a later challenge to the County’s approval of the plat application for the same property. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wash.2d 169, 4 (2000).

Two years later, this Court continued its “stringent adherence to statutory time limits” in *Chelan County v. Nykreim*, 146 Wash.2d 904, (2002). There, this Court considered the applicability of LUPA in the

context of a boundary line adjustment challenge. Citing *Wenatchee Sportsmen* and *Skamania County*, the Court ruled in favor of the property owner, explaining that it has long “recognized strong public policy supporting administrative finality in land use decisions.” *Nykreim*, 146 Wash.2d at 931 (citing *Skamania County*, 144 Wash.2d at 49).

In a 2005 case involving a developer’s challenge to impact fees issued by Kitsap County as a condition for a building permit, the Court rejected the developer’s challenge, once again pointing to its long standing recognition of “the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions.” *James v. County of Kitsap*, 154 Wash.2d 574, 589 (2005).

1. The Legislature enacted LUPA with these public policy considerations in mind.

The Legislature made clear its intent when it enacted LUPA. The Legislature explicitly stated that the purpose of LUPA is “to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable and timely judicial review.” RCW 36.70C.010 (emphasis added). The Land Use Petition Act mandates that any

challenge be filed within 21 days of the issuance of the land use decision. RCW 36.70C.040. “Land use decision” is defined as “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination.” RCW 36.70C.020. This Court previously held that building permits are considered “land use decisions” subject to LUPA. *See, e.g. James*, 154 Wash.2d 574, 584 (2005); *see also Nykreim*, 146 Wash.2d at 929.

The Court in *Nykreim* emphasized the importance of the LUPA’s public policy favoring finality:

To allow respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature’s declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature’s intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Nykreim, 146 Wash.2d at 933. This Court in *James* provided a succinct summary of the critical nature of time limits when it comes to providing certainty to developers: “The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property.” *James*, 154 Wash.2d at 589.

Interestingly, while Ecology repeatedly emphasizes the public policy expressed in the SMA, it completely ignores the public policy considerations in LUPA.

The Legislature explicitly enunciated the public policy behind setting the 21-day time limit in LUPA. This Court should follow the Legislature's dictates, and not read out of the statute the Legislature's intent to provide predictability and certainty in the land use decision making.

2. This Court already dealt the intersection between the SMA and LUPA and concluded that LUPA requires a timely appeal.

This Court already considered – and rejected – many of the same arguments Ecology is making in this case when it issued its decision in *Samuel's Furniture, Inc. v. State of Washington*, 147 Wash.2d 440, 456 (2002).

Similar to this case, *Samuel's Furniture* involved the intersection between the SMA and LUPA. There, this Court said that the SMA and LUPA are intended to complement each other and that enforcing one law does not mean that the other can be disregarded. For example, this Court explained that LUPA was enacted to fill a gap in the law, providing an exclusive means for judicial review of local land use decisions; including the granting of building permits by counties, who have the statutory

responsibility under the SMA to enforce the Act. *See Samuel's Furniture*, 147 Wash.2d at 460. Once the County's Shorelines Management Program has been completed, the SMA sets the responsibility for administration squarely with the County. *See* RCW 90.58.140(3) ("Administration of the system so established shall be performed exclusively by the local government.")

In *Samuel's Furniture*, this Court rejected arguments that LUPA prevents Ecology from enforcing the SMA. The Court said, "We also disagree with Ecology that requiring it to appeal a local government decision pursuant to LUPA would impair its ability to ensure compliance with the [SMA]. . . Requiring Ecology to follow the procedures established in LUPA merely provides structure and finality to the enforcement process." *Samuel's Furniture*, 147 Wash.2d at 457.

This Court noted that Ecology's position provided property owners no predictability or certainty. Specifically, the Court stated that Ecology:

failed to provide land owners and developers with any assurance that they may proceed with a project without risk of later action by Ecology. More importantly, it does not in any way limit the time frame in which Ecology may take action. Land owners and developers are therefore left to proceed at their own peril.

Id. at 461. As in *Samuel's Furniture*, Ecology once again asks this Court to conclude that developers and land owners proceed at their

own peril. Here, Twin Bridge applied for and received no less than *seven* approvals to move forward with construction from Skagit County officials. Ecology argues that these permit approvals are ultimately meaningless and it should be able to issue stop work orders and penalties in indifference to a local government's final decisions about environmental impact. In justifying its actions against Twin Bridge, Ecology suggests that this Court should set aside the goals of predictability and certainty that are emphasized in both LUPA itself as well as previous land use cases decided by this Court.

Property owners must be able to rely on the decisions of the officials who bear the statutory responsibility for enforcing land use laws. The "structure and finality" that LUPA provides is an absolute necessity in a system where landowners and developers have no choice but to rely on the decisions of their local enforcement officials. Proceeding at one's own peril, for a property owner, is not an option when hundreds of thousands, or perhaps even millions, of invested dollars are on the line. Proceeding at one's own peril is also not an option for the financial institutions lending to these property owners.

B. GRANTING ECOLOGY BLANKET AUTHORITY TO OVERTURN LOCAL GOVERNMENT DECISIONS AT ANY POINT IN TIME WOULD IGNORE THE DOCTRINE OF ADMINISTRATIVE FINALITY.

This Court repeatedly has rejected granting Ecology blanket authority to overturn local land use decisions.

For example, this Court in *Nykreim* perfectly summarized the consequences of giving Ecology blanket enforcement authority. The Court concluded that “[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature’s intent to provide expedited appeal procedures in a consistent, predictable and timely manner.” *Nykreim*, 146 Wash.2d at 933. This is precisely the kind of power that Ecology is requesting from the Court in the present case.

Additionally, this Court in *Samuel’s Furniture* recognized that taking the SMA as a whole leads to the conclusion that “RCW 90.58.050 was merely meant to emphasize the cooperative roles of Ecology and local governments and not to give Ecology free reign to unilaterally overturn decisions made by local governments. *Samuel’s Furniture*, 147 Wash.2d at 458.

As in *Samuel's Furniture*, Ecology once again argues it has broad enforcement authority under the SMA. This Court concluded, however, that Ecology's argument in *Samuel's Furniture* was "insufficient to overcome the strong public policy in favor of finality of land use decisions and because of the burden it places on land owners and developers. *Samuel's Furniture*, 147 Wash.2d at 460.

This Court in *Samuel's Furniture* outlined the negative consequence of expanding Ecology's enforcement authority:

The blanket enforcement authority sought by Ecology is in sharp contrast to the policy favoring finality in land use decisions. Under Ecology's position, even though a party relies in good faith on a local government determination that the SMA does not apply, and therefore proceeds with construction, it may still be subject to Ecology enforcement action weeks, months, and even years later for failing to obtain a substantial development permit. These belated enforcement actions could result in civil and/or criminal penalties being issued against the party as well as the potential loss of thousands of dollars in construction costs that have already been incurred. . . Ecology's interpretation of the SMA would leave land owners and developers unable to rely on local government decisions – precisely the evil for which LUPA was enacted to prevent."

Id. at 458-459. Skagit County, in issuing building permits to Twin Bridge, concluded that the law had been met with regard to other environmental requirements for the property. Twin Bridge relied on this conclusion. The prior decisions of this Court lead to the

conclusion that Ecology should not have blanket authority to come back and overturn the final decisions of local officials.

C. PROPERTY OWNERS, AS A MATTER OF PUBLIC POLICY, SHOULD BE ABLE TO RELY WITH REASONABLE CERTAINTY ON DECISIONS ISSUED BY THEIR LOCAL LAND USE AUTHORITY.

“The tendency of the law must always be to narrow the field of uncertainty.” Oliver Wendell Homes, Common Law 127 (1881).

In fact, civil society exists as a result of a set of predictable and certain rules. To assume that Washington’s scheme of land use regulations should operate any differently (as Ecology suggests here) is inconsistent with fundamental issues of fairness and inconsistent with years of precedent emphasizing the importance of certainty and finality.

As this brief explains, this Court repeatedly has recognized the need for property owners and developers to rely on an agency’s land use decision with reasonable certainty. A decision that Ecology is not required to follow LUPA would mean that certainty and predictability are taken out of the system. For property owners and developers, who rely every day on the decisions of their local officials, this is no option at all.

VI. CONCLUSION

This Court has faced numerous cases involving statutory time limits for challenging land use decisions. Repeatedly, the Court has concluded that it is critical to the land use system to have a set of rules that provide certainty, predictability and finality to both the land owners and the government. In this case, Ecology requests that the Court ignore years of precedent emphasizing the importance of certainty and finality by granting the agency blanket authority to overturn the decisions of local officials. A decision in favor of Ecology would be disastrous to property owners and members the building community who rely on the certainty created by LUPA. Therefore, *amicus* BIAW requests this Court to uphold the Court of Appeals decision that Ecology lacked jurisdiction to impose penalties against Twin Bridge due to the agency's failure to timely appeal under LUPA.

RESPECTFULLY SUBMITTED this 20th day of February, 2007.

By 

Julie M. Sund, WSBA No. 37685
Attorney for Amicus Curiae
Building Industry Association of Washington
111 21st Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801