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SUPREME COURT
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NO. 78462-1

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SUPREME COURT OF THE STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK, LLC, and KEN YOUNGSMAN (KEN
YOUNGSMAN AND ASSOCIATES),

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE TO BRIEFS OF AMICI CURIAE**

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I. SUMMARY OF ARGUMENT

The amici Association of Washington Business (AWB) and the Building Industry Association of Washington (BIAW) emphasize the importance of finality and certainty, policies that Ecology has embraced in its arguments. Amici, however, reach the wrong conclusions because they do not consider the material facts and express statutes. Here, Twin Bridge had a final conditional use permit under the state Shoreline Management Act (SMA), authorizing it to build a marine construction business. Ecology penalized Twin Bridge when it proceeded to build a large marina not allowed by that final conditional use permit.

The Court should not follow amici, because they offer no analysis of the SMA provision that a person who obtains a shoreline permit is bound to follow its terms and conditions and may be penalized for failure to comply. RCW 90.58.210. Amici erroneously read *Samuel's Furniture v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), giving no effect to this Court's recognition in that case that Ecology is not "prevented from taking action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate the conditions of the permit."

More significantly, the result offered by amici would make a final conditional use permit irrelevant because a local building permit bars

enforcement of any limits or requirements in Twin Bridge's conditional use permit. That result is unwarranted because the SMA provides its own provisions to establish finality of SMA permits and for modifying such permits. The SMA also gives Ecology authority to ensure the integrity of SMA permits by providing for enforcement of final permits in RCW 90.58.210(2).

Finality is important. But as shown below, Washington's businesses and citizens are best protected if final conditional use and substantial development permits can be enforced under the SMA.¹

II. ARGUMENT

A. **Amici Do Not Show How Ecology Collaterally Attacked Any Decision of Skagit County**

Amici recite this Court's cases concerning finality of land use decisions, but amici fail to analyze the central issue – whether Ecology's enforcement of the SMA was an untimely collateral attack on Twin Bridge's building permits. It was not. In each prior Land Use Petition Act (LUPA) case, the petitioning party sought to overturn or invalidate a prior land use decision of the local government. *See, for example, Chelan Cy. v.*

¹ Correspondingly, Ecology asks the Court to discount the overstatements of amici. For example, at page 11, BIAW says Ecology seeks “blanket authority to overturn local government decisions at any point in time” and “free reign to unilaterally overturn decisions made by local government.” Amicus, of course, cannot cite to any place where Ecology seeks such authority and those overstatements are not helpful or an accurate description of Ecology's application of RCW 90.58.210 to Twin Bridge, who chose to build a marina that was not allowed by its existing shoreline conditional use permit.

Nykriem, 146 Wn.2d 904, 52 P.3d 1 (2002) (declaratory action by county seeking to overturn prior boundary line adjustment). In particular, *Skamania Cy. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001), is distinguishable. In that case, this Court rejected the Gorge Commission's claim that a federal statute authorized Commission orders that could, *at any time*, allow the Commission to invalidate local building permits. The Court held that the federal statutes required the Gorge Commission to review and appeal the local permits issued by counties in the Columbia Gorge scenic area; there was no separate statutory enforcement authority. The case then simply barred the untimely collateral invalidation of a final land use permits. *Id.* at 53.

Ecology's case, in contrast, has none of the hallmarks of a collateral attack found in *Skamania*. Ecology's penalty involved no attempt to invalidate the building permits; indeed the building permits were ultimately used by Twin Bridge. Ecology's penalty arose because a marina was not allowed by Twin Bridge's final shoreline conditional use permits. Ecology was thus taking enforcement action based on a separate permitting scheme, and as expressly allowed by RCW 90.58.210. The shoreline conditional use permits and the statutory enforcement power for such permits distinguish this case from *Skamania*.

Amicus AWB then argues that the statutes do not show that the Legislature gave Ecology the authority to enforce the SMA:

[H]ad our Legislature intended to allow Ecology civil money penalty authority over alleged violations of permit conditions outside of LUPA, it would have said so expressly and unequivocally by creating an express exemption in LUPA or provision in the SMA.

AWB Br. at 6. AWB's statement overlooks RCW 90.58.210(2):

Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

AWB further overlooks the provision that "[a]ny penalty imposed pursuant to this section by the department shall be subject to review by the shorelines hearings board." RCW 90.58.210(4). Finally, AWB overlooks that LUPA does not apply to decisions reviewable by the Shorelines Hearings Board:

[LUPA] does not apply to:

(a) Judicial review of: . . . (ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board.

RCW 36.70C.030(1)(a)(ii). Ecology therefore has the express statutory authority AWB claims is absent.

Again, Ecology agrees with amici that it is good policy and necessary for land use decisions to have finality, and that the bar to untimely reviews in LUPA achieves this result. It is also important to give effect to the requirements of the Shoreline Management Act and to give finality to SMA permits. Amici cannot cite any case that has expanded the bar in LUPA to avoid compliance with independent legal requirements, such as enforcement of permits under RCW 90.58.210(2).

B. Amici Fail To Give Effect To SMA Provisions

Amici offer little analysis of the actual statutes and facts presented in this case. Amici do not overcome Ecology's showing that as a matter of law and fact the Court of Appeals erred by holding that an "inferential decision" by the county could effectively amend Twin Bridge's shoreline conditional use permits. First, the record here does not support treating the local building permits as amendments of the shoreline permits because the building permits were issued under a separate regulatory regime that did not consider shoreline criteria or values. Second, the SMA does not allow final conditional use permits to be changed using a building permit. *See Ecology Supp. Br. at 11-15.*

At page 10, AWB illustrates how its ultimate conclusion about this case may reflect its inaccurate evaluation of the facts and relevant law:

When Skagit County issued the two shoreline substantial development permits at issue, that action included a determination that development under the permits would be consistent with the SMA and the county's shoreline master program. WAC 173-27-140. This was a final and appealable land use decision under LUPA.

AWB Br. at 10. First, AWB misstates facts. The County did not "issue two shoreline substantial development permits." Rather, Twin Bridge had shoreline conditional use permits, which required approval by Ecology for issuance or modification. RCW 90.58.140(10); WAC 173-27-140(6). These were the subject of the SHB hearing.

Second, AWB wrongly describes shoreline substantial development permits as "final and appealable land use decisions under LUPA." LUPA expressly provides that SMA permits are not covered. RCW 36.70C.030(1)(a)(ii). Instead, SMA permits become final and appealable by complying with the SMA, which occurs 21 days after a substantial development permit is filed with Ecology, or a conditional use permit is approved by Ecology. RCW 90.58.140(6), (10).

AWB's brief might have meant to refer to the county building permits. If so, then AWB seems to endorse treating the building permits as if they were SMA permits, even though they were not issued in

accordance with SMA procedures or SMA criteria. That interpretation of the county's building permits is untenable. A building permit is not a shoreline permit and cannot substitute for one. The regulation cited by AWB, WAC 173-27-140, does not say that building permits can only be issued if they are consistent with the SMA. The regulation does not mention building permits at all. It simply repeats the language from RCW 90.58.140 that all developments within shoreline jurisdiction must be consistent with the SMA. This contemplates that development will be consistent with the SMA, but it does not follow that merely because Twin Bridge had building permits it was then free to violate its shoreline permits, or free to avoid obtaining a shoreline permit that reviewed and allowed the marina.

Before the county could modify the final conditional use permits and allow a marina, the SMA requires a written county decision to that effect filed with Ecology. RCW 90.58.140. Moreover, the county did not have unilateral authority to alter what was allowed under the shoreline conditional use permits approved by Ecology under RCW 90.58.140(10). *See Ecology Supp. Br. at 16-17.*

In the end, amici "ignore and/or reject Ecology's role in enforcing the shoreline act." *See SHB Conclusion of Law X.* Allowing Twin Bridge to ignore the conditions of its shoreline conditional use permits and

build a marina undermines the purposes of the SMA to the detriment of all shoreline property owners. *Dep't of Ecology v. Pacesetter Construction*, 89 Wn.2d 203, 214, 571 P.2d 196 (1977).

C. Ecology Enforced Final Shoreline Permits As Written

Contrary to amici's claims, Ecology does not seek unfettered review powers or to overturn *Samuel's Furniture*. Ecology asserts that *Samuel's Furniture* should be distinguished from this case because there LUPA filled a gap and gave finality to a local decision determining that a project was not in the shoreline. Without that judicial application of LUPA, the developer would not have had finality over the local decision that the project was not within the shoreline.

In this case, there is no gap to be filled by LUPA. Twin Bridge previously obtained shoreline conditional use permits for a construction business, so jurisdiction to apply RCW 90.58.210 is not in question. This is a case where a developer decided to proceed with a marina when its final-written shoreline conditional use permits did not allow a marina.²

Amici offer no good reasons to bypass the finality of Twin Bridge's written shoreline conditional use permits. Amici offer no good reasons for building permits to undo the finality of shoreline conditional

² Twin Bridge, in fact, did not seriously try to show that its final shoreline conditional use permits authorized a marina. See TR at 65 (Twin Bridge stipulates that marina is not the same as marine construction and dredging business).

use permits issued 10 years before. Indeed, if amici's position is taken to its logical end, the bar in LUPA can be used to avoid obtaining or complying with final SMA permits, leaving the SMA unenforceable even when permit requirements are clear.

Ecology, in sharp contrast, gives finality to *both* the shoreline permits and to the building permits. That is because Ecology did not seek to overturn the building permits by enforcing the SMA. Ecology simply required revision or issuance of a new shoreline permit for a marina before actual development work.

Ecology's enforcement power is therefore consistent with express statutory language and ensures the integrity and predictability of the SMA permit process. The courts, the public, state agencies, neighboring property owners, and amici themselves, should be able to rely on the public permitting process as set forth in the SMA. Those parties must be able to take for granted that a shoreline permit means what it says – that, in other words, the permittee will build the project authorized in the permit, and not some completely different project, unless the permit is properly and publicly revised. Allowing, as amici suggest, shoreline permits to be rendered moot and unenforceable by a subsequent building permit is not only inconsistent with the SMA, it is inconsistent with the very values of finality and predictability amici themselves support.

D. Deference To Local Government Under The GMA Is Not Impaired By Ecology's Action

Amicus AWB cites several Growth Management Act (GMA) cases to claim that the local decision in this case to allow the marina should be given deference. There is no conflict in this case between deference to local government decisions or Ecology decisions. Indeed, there is no question that Ecology ultimately concurred in the local decision to issue a marina permit. The penalty is because Ecology insisted on the reasonable step that a marina actually have a shoreline substantial development permit, which Twin Bridge did not have at the time of the penalties.

Amici cannot show why LUPA should be read to impliedly amend RCW 90.58.210 to require Ecology to appeal local building permits before enforcing previously issued shoreline permits. No language in LUPA supports that conclusion. In fact, LUPA expresses the contrary intent -- that permits reviewable under the SMA stay in the SMA. RCW 36.70C.030(1)(a)(ii).

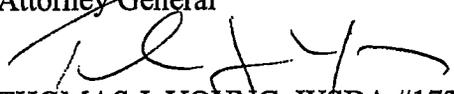
Amici also invoke this Court's prior decisions that a development project vests when complete application is made for a building permit. *E.g., West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). The vesting concept is also irrelevant because no one is disputing what law applies to Twin Bridge's applications.

III. CONCLUSION

The interests of Washington businesses and citizens in shoreline property are best protected when a final shoreline conditional use permit can be enforced as written. The arguments of Twin Bridge are inconsistent with the SMA and LUPA and contradict the values of finality and certainty proposed by amici.

RESPECTFULLY SUBMITTED this 12th day of March, 2007.

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