

NO. 87679-7

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CATHERINE LAKEY, a single woman; GERTHA RICHARDS,
a single woman; MICHAEL HESLOP, a single man; TROY FREEMAN
and CAROLINA AYALA de FREEMAN, husband and wife; PATRICK
MCCLUSKY and MICHELLE MCCLUSKY, husband and wife;
SHAHNAZ BHUIYAN and ANN RAHMAN, husband and wife;
STEVEN RYAN and NORA RYAN husband and wife; KEVIN
CORBETT and MARGARET CORBETT, husband and wife;
KATHRYN MCGIFFORD, a single woman; and
JACQUELYN MILLER,, a single woman,

Appellants,

v.

PUGET SOUND ENERGY INC., a Washington corporation; and
CITY OF KIRKLAND, a Washington municipal corporation,

Respondents,

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONERS

Attorney for Amicus, Washington State Association
of Municipal Attorneys

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I. IDENTITY OF AMICUS CURIAE

Amicus is the Washington State Association of Municipal Attorneys (WSAMA) (hereinafter Amicus).

II. STATEMENT OF THE CASE

Amicus accepts the facts as identified in the briefs of the Respondents, City of Kirkland and Puget Sound Energy, Inc.

III. ARGUMENT

This case is not just a case that affects the parties or just the City of Kirkland. If what the Appellants argue were the law, every city and town across the State of Washington would be affected. Moreover, the State of Washington itself and every county would be affected. Especially if the requirement for “public use” is no longer a factor in inverse condemnation claims, every governmental entity that makes decisions that could (arguably) affect property values would be vulnerable to claims similar to those of the Appellants. If the Appellants can make the claims they are making in this case, the question must be asked whether the same type of inverse condemnation claims could not, for instance, be brought against a school district that changed the boundaries of particular schools in a way that challengers argue diminish their property values and thus inversely condemn their property. There would be absolutely no “public use” to the challenger’s property (or to any of the property of their neighbors whose school service areas were changed), but if all it takes to bring an inverse condemnation claim is an assertion that property values have diminished, the scope of what could be subject of inverse condemnation would be

dramatically expanded. Under existing precedent, that is not the law, and it should not become the law.

As pointed out by the City of Kirkland, the Appellants' [inverse] condemnation argument is not consistent with the law in this state because the development in question is not public - not public property - and thus would not constitute condemnation, inverse or otherwise. Section 5.10.745 of the Kirkland Zoning Code (KZC) defines a "Public Utility" as a private business organization. For that matter, there is no basis for dispute that Puget Sound Energy, Inc. is such an entity. The approval by the City of Kirkland of the Puget Sound Energy, Inc. land use application did not transfer any property interests to the City of Kirkland, nor did it change the private character of Puget Sound Energy, Inc. property.

The Washington Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." Const. Art. I, § 16. An inverse condemnation claim is "an action alleging a governmental 'taking' or 'damaging' that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain." *Dickgieser v. State*, 153 Wn.2d 530, 534–35, 105 P.3d 26 (2005) (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998)). See also *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605–06, 238 P.3d 1129 (2010). "The elements required to establish inverse condemnation are: (1) a taking or damaging (2) of private property (3) *for public use* (4) without just compensation being paid (5) by a governmental

entity that has not instituted formal proceedings.” *Dickgieser*, 153 Wn.2d at 535 (emphasis added).

Also as noted by the City of Kirkland, a governmental entity is not liable for inverse condemnation if its only action is to approve private development under existing regulations. In *Phillips v. King County*, 136 Wn.2d at 960-61, the court stated that:

If all that the County [in that case] had done was to approve private development, then one of the elements of an inverse condemnation claim, that the government has damaged the Phillips' property for a public purpose, would be missing. There is no public aspect when the County's only action is to approve a private development under then existing regulations.

Accordingly, in the case before this Court, inverse condemnation does not apply, as Kirkland's action was only the approval of private development under its land-use regulations. Another troublesome aspect of the Appellants' inverse condemnation claim is that, according to their argument, it would apply regardless of whether the city had a choice or discretion based upon the application before it. If a land-use application came before a city asking for a permit to develop property in a way that was completely consistent with city code, the city would have no basis to deny the application. But if neighbors were unhappy with the decision/outcome, according to the Appellants' argument, they could sue under an inverse condemnation theory.

Setting aside for the moment the fact that Kirkland's land-use decision was for private development, not public use, the fact of the matter is that Kirkland's decision was a land-use decision and as such was

covered under the Land Use Petition Act (Chapter 36.70C of the Revised Code of Washington [RCW]) hearing/appeal process. If such a decision were not appealed, it stands.

Section 36.70C.040 RCW defines the appeal procedures for the Land Use Petition Act. That statute provides in part as follows:

36.70C.040. Commencement of review--Land use petition--Procedure

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

....

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

....

RCW 36.70C.040 (emphasis added).

The Appellants' are seeking to get around the bar to review of the Land Use Petition Act decision, something to which this Court should not give countenance. Additionally, this non-public, non-condemnation aspect of the Appellants' claim is all the more troublesome in that the subject matter of the City of Kirkland decision was clearly within the scope of Land Use Petition Act and the decision was not appealed by the Appellants, even though they were aware of it (argued against it in the Land Use Petition Act hearing process). For that matter, the Appellants'

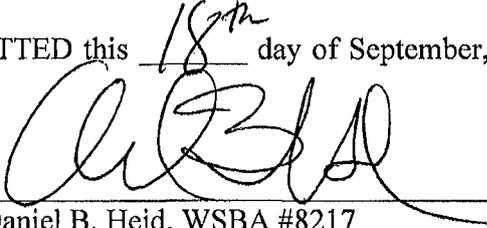
argument would be just as problematic if the “decision” were something over which the City, town, county, state, etc, has no basis under the operable codes to deny. According to Appellants' argument, they suggest that they would be entitled to challenge the City of Kirkland decision approving Puget Sound Energy's application for a variance because, while not appealed under the Land Use Petition Act, they argue it diminished their property values and thus was an inverse condemnation notwithstanding the absence of public use. Again, there was no public use and they did not appeal the land-use decision through the appropriate remedy. Therefore, the appellants are barred from seeking review. Any other result defeats and frustrates the purpose of RCW 36.70C.040 and the procedures of the Land Use Petition Act. *See Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 188, 271 P.3d 966 (2012), citing *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) (“It is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same.”). That is exactly what would happen were the Appellants' argument accepted. The words of RCW 36.70C.040, that “a land use petition is barred, and the court may not grant review, unless the petition is timely filed,” would mean nothing.

Again, per *Phillips*, 136 Wn.2d at 960-61, if all Kirkland had done was to approve private development; one of the essential elements of an inverse condemnation claim is missing - to wit: the “public use” aspect.

IV. CONCLUSION

For all of the above reasons and for those argued by the City of Kirkland and Puget Sound Energy, Inc., the relief requested by the Appellants' must be denied. Again, the impacts of a decision to the contrary would leave all cities and towns, the state, counties, school districts and special purpose districts, with the prospect of facing inverse condemnation lawsuits when development decisions for private property are made, even though no appeal was filed under the Land Use Petition Act, or whatever appellate procedure is in place.

RESPECTFULLY SUBMITTED this 18th day of September,
2012.


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CATHERINE LAKEY, a single woman;
GERTHA RICHARDS, a single woman;
MICHAEL HESLOP, a single man; TROY
FREEMAN and CAROLINA AYALA de
FREEMAN, husband and wife; PATRICK
MCCLUSKY and MICHELLE
MCCLUSKY, husband and wife;
SHAHNAZ BHUIYAN and ANN
RAHMAN, husband and wife; STEVEN
RYAN and NORA RYAN husband and
wife; KEVIN CORBETT and MARGARET
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PUGET SOUND ENERGY INC., a
Washington corporation; and
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municipal corporation,

Respondents,

Cause No. 87679-7

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September ____, 2012, I caused service of the Amicus Motion and Brief of the Washington State Association of Municipal Attorneys on the attorneys of record herein via e-mail and U.S. Mail, to the following addresses:

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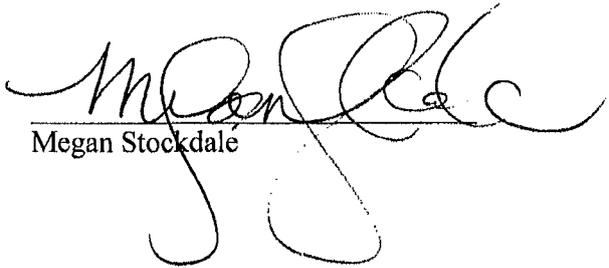
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Dear Mr. Carpenter:

Attached hereto please find an electronic copy of the Motion for Leave to file Brief of Amicus Curiae and Brief of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter.

Please let me know if you have any questions. Thank you.

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