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Case No. 87679-7

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.

**APPELLANTS' ANSWER TO THE *AMICUS CURIAE* BRIEF
OF THE WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS**

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 ORIGINAL

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I. OVERVIEW

This portion of the appeal is taken from the Trial Court's Order dismissing Appellants' claims on summary judgment for failure to pursue an appeal under the Land Use Petition Act ("LUPA," Chapter 36.70C RCW) from the decision of the City of Kirkland (the "City") to grant a variance for the construction of the largest electrical substation ever constructed by Puget Sound Energy Inc. ("PSE") in a residential neighborhood (the "Substation"). It is not in dispute that the construction of the Substation caused a significant de-valuation of Appellants' properties. The issue is whether the City is responsible for that loss under an inverse condemnation theory.

In overview, the arguments raised by the Washington State Association of Municipal Attorneys ("Association") are essentially the same as those made by the City. The arguments are twofold:

1. There is no basis for an inverse condemnation claim because Appellants' properties were taken for a private use; and
2. As a condition to asserting a claim for compensation, Appellants would be required to appeal the land use decision under LUPA.

The first issue was not a basis for decision by the Trial Court.

II. DISCUSSION

A. Public Versus Private Use.

The Association first argues that the use at issue here is by a private utility company and, therefore, not a public use. Based on this contention, the Association asserts that an inverse condemnation remedy is unavailable

to Appellants where a governmental action has resulted in an appropriation of private property rights for a private use.

In reality, what the Association, as well as the City, is really saying is that the owner of the Substation is a private corporation. Irrespective of the character of the owner of the Substation, the use is public as a matter of law. “The generation and distribution of electric power has long been recognized as a public use by this court. State ex rel. Washington Water Power Co. v. Superior Court, Wash., 111 P.2d 577.” Carstens v. PUD No. 1 of Lincoln County, 8 Wn.2d 136 at 143, 111 P.2d 583 (1941). PUD No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC, 125 Wn. App. 622, 105 P.3d 441 (2005):

Our Supreme Court has ruled that power production is a public use. Evans, 136 Wn.2d at 821, n. 3, 966 P.2d 1252 (citing State ex rel. Chelan Elec. Co. v. Superior Court, 142 Wash. 270, 272, 253 P. 115 (1927)). Other jurisdictions rule similarly. See Barham v. S. Cal. Edison Co., 74 Cal.App.4th 744, 752, 88 Cal.Rptr.2d 424 (1999) (transmission of electrical power is a public use); Town of Faval v. City of Eveleth, 587 N.W.2d 524, 528 (1999) (supplying electricity, even if provided by a quasi-public entity, is a public use).

PSE is obligated to provide service to members of the public generally. See RCW 80.28.110 (“Every...electrical company...engaged in the sale and distribution of...electricity..., shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all electricity...as demanded, ...”). PSE can be characterized as quasi-public for this reason.

The City Staff's Conclusions and Recommendations to the Hearing Examiner on PSE's application state that granting the variances:

[I]s consistent with the public health, safety and welfare because it will allow a *Public Utility* Use to replace an existing substation with a new substation that will increase electrical service capacity and improve reliability, benefiting property owners and electrical customers.

(*CP 1537; emphasis added*). The City acted expressly for the purpose of conferring a benefit on the public in general by increasing access to electrical service. And, if you go to the Amicus Brief filed by the Utilities, what the Utilities argue is that the public benefit of having readily-available electrical service justifies imposing the clear loss of value on these Appellants. This is the exact circumstance under which Article I, § 16, of the State Constitution requires compensation to be paid.

The fact that PSE did not physically occupy the property taken would be immaterial to the claim. *Dickgeiser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005). Courts have been basing awards in eminent domain proceedings on a diminution in property value resulting from a fear of electromagnetic fields for decades. See, e.g., *San Diego Gas & Electric Co. v. Daley*, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988), surveying the authority from multiple jurisdictions. The awards are not dependent on whether the fear has a reasonable basis – the fear is recognized as a market force irrespective of whether it is reasonable.

These kinds of damages, called “stigma damages,” are well recognized under Washington law:

The psychological effect of an adverse condition, real or imagined, on a potential buyer may have a material

influence on the market value of property. These effects and their impact on the market value have been recognized in cases involving *the inherent fear of electricity and gas transmission lines*... It is not the landowner's fault the adverse conditions exist; he has been damaged in the value of his property by the mere existence of a mental attitude which had a material influence on the market value of his feedlot.

State v. Evans, 26 Wn. App. 251, 612 P.2d 442 (1980), *reversed on other grounds* 96 Wn.2d 119 (*Citations omitted; emphasis added*).

There is no doubt under the theory of the case espoused by the City and the Association that if the Substation had been constructed by a public utility district, a cause of action for inverse condemnation would lie. Under the analysis by the City and the Association, compensation to Appellants would have been a mandatory condition to construction of the Substation, and the alleged impediment to an inverse condemnation claim absent. The difference between a public utility and the situation here is that PSE had to rely on the City to effectuate the condemnation. Notwithstanding, Appellants' properties were still taken for a public use and the fact that PSE is a private utility rather than a public utility is a distinction without a difference.

Nevertheless, the problem with this argument is much more fundamental. RCW 8.40.070 provides:

[I]f the court has satisfactory proof that...the contemplated use for which the lands, real estate, premises, or other property are sought to be appropriated is really necessary for the public use of the state, it shall make and enter an order, to be recorded in the minutes of the court, and which order shall be final unless appellate review thereof is sought within five days after entry thereof, adjudicating that the contemplated use for which the lands, real estate,

premises or other property are sought to be appropriated is really a public use of the state.

The public use requirement in the State Constitution and in RCW 8.40.070 is a limitation on the exercise of the power of eminent domain by the government – not a limitation on the right of a property owner to seek compensation for a taking. See, e.g., State ex rel. Washington State Convention and Trade Center v. Evans, 136 Wn.2d 811, 966 P.2d 1252 (1998). In seeking to exercise the power of eminent domain under RCW 8.40.070, the governmental entity must show that the intended use is public. State v. Lauman, 5 Wn. App. 670, 490 P.2d 450 (1971).

If this burden is not met, the governmental entity cannot appropriate property through the exercise of the power of eminent domain. If it does meet this burden, the governmental entity exercising the power of eminent domain is still required to pay adequate compensation to the affected landowner.

However, as the Association notes:

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.

(*Association Brief at 2*). In other words, the property has already been taken under circumstances where the government did not first meet the burden of showing that the appropriation was for a public use because the property was taken without a showing of public use or a declaration of public necessity. Is that not exactly where we are here?

What the City and the Association are really urging here is that a fundamental protection to landowners against governmental action should be used to protect the City from the consequences of the very action Article I, § 16, of the State Constitution is intended to prevent – the taking of private property by the government for a public use without compensation. It is a perversion of the whole concept of protecting property rights from governmental action for the City and the Association to argue: “We took your property for the benefit of the public but, because we gave it to a private party, we don’t have any liability.” If the properties here have been taken, it simply makes no sense to deprive Appellants of a remedy because the taking was in fact illegal.

Was there a taking? The Association asserts that there was no taking because: “a governmental entity is not liable for inverse condemnation if it’s only action is to approve private development under existing regulations;” (*Association Brief at 3*, citing to *Phillips* – “There is no public aspect when the [City’s] only action is to approve a private development under then existing regulations.” 136 Wn.2d at 960-961).

The specific action by the City alleged to have been a taking was the granting of a variance.

Because of the configuration of the Subject Property, PSE applied to the City for a variance to construct the new substation. Hearing Examiner’s Decision, pp. 2, 3 & 9, Findings of Fact Nos. 1 & 10; Conclusion No. 8. PSE sought a variance from the City with respect to setbacks, landscape buffering and maximum height. *Id.*, p.1.

(CP 1568:1-8). A variance is an exception to zoning regulations granted to benefit a single landowner. As stated in the Washington Practice Manual on Real Estate:

Whereas a conditional use is a permitted use, one listed in the zoning ordinance as permitted upon a special permit, a variance permit allows the applicant to do something the zoning ordinance would otherwise forbid.

17 Wash. Prac., Real Estate § 4.25 (2d ed.). *See, also*, 83 Am. Jur. 2d Zoning and Planning. “*Would otherwise forbid...*” If the factual predicate to the argument that the City was simply approving private development under existing regulations were in fact true, that construction of the Substation was consistent with existing land use regulations, then PSE would not have needed any variances. The simple and entirely uncontested fact here is the City’s existing regulations would not have allowed construction of the Substation. The City bent the rules for PSE.

The public is supposed to be able to rely on those rules. A purchaser of one of the homes effectively assumes the risk that anything that is permitted under existing regulations might be built. The circumstances under which a conditional use is permitted are enumerated in the zoning code. The problematic use is grandfathered/vested and the scope of that use could be determined by a potential purchaser in advance. That is not the case here. By looking at the existing regulations, a potential purchaser would have no conception that a monster substation violating various express restrictions could be built in his backyard, devaluing his property, because those existing regulations, in fact, prohibit this kind of

structure. This is precisely the kind of situation where the *Phillips* Court would have found liability.

B. The LUPA Issue.

The fundamental question here is really very simple. The City and the Association assert that LUPA requires a landowner aggrieved by a land use decision to complete a LUPA appeal before asserting a claim to compensation. Appellants contend that LUPA was intended as an expedited process where that aggrieved landowner seeks the remedy of invalidating or modifying the land use decision wholly separate from an action seeking the remedy of compensation, explicitly not included within the scope of LUPA. The question for this Court is which interpretation is most consistent with the intent of the Legislature and the language of LUPA.

Under the interpretation of LUPA by the City and the Association, an aggrieved landowner could not pursue a claim for compensation except as part of or following a LUPA appeal. But, that is contrary to the express language of LUPA. RCW 36.70C.030(1) provides that it is the exclusive method for review of land use decisions, but RCW 36.70C.030(1)(c) specifically exempts claims for compensation and exempts such claims from the procedural requirements of LUPA:

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(c) Claims provided by any law for monetary damages or *compensation*. If one or more claims for damages or compensation are set forth in the same complaint with a

land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition.

RCW 36.70C.030 (*Emphasis added*). LUPA says that an aggrieved landowner can assert a claim for compensation at the same time that the aggrieved landowner challenges a land use decision, but LUPA clearly does not require the landowner to do so. Nor, is there any language in LUPA that could be interpreted as requiring the landowner to challenge the validity of the land use decision as a pre-condition to seeking compensation. We have yet to hear a cogent explanation from any of the City or the Association, or the Trial Court for that matter, as to why this provision does not mean exactly what it says – that a claim for compensation, such as a claim for compensation under Article 1, § 16, of the State Constitution, is separate and exempt from LUPA.

Under RCW 36.70C.130(2) which governs the standards for granting relief under LUPA: “A grant of relief [under LUPA] by itself may not be deemed to establish liability for monetary damages or compensation.” Once again, LUPA distinguishes between claims challenging the validity of the land use decision under LUPA and claims for damages or compensation.

RCW 36.70C.130(1)(a)-(f) enumerates six bases for granting relief - all of which go to the validity of the land use decision. In *Asche v. Bloomquist*, 132 Wn. App. 784, 800, 133 P.3d 475 (2006), the Court specifically held that claims which are not based on the validity of the land use decision are not barred by the failure to appeal the land use decision

under LUPA. Invalidity of the government action is *not* an element of an inverse condemnation claim. There is no authority in Washington holding that the conduct of the government must be illegal or unconstitutional as a pre-condition for compensation under Article I, § 16, of the State Constitution.

The relief available under LUPA does not include monetary relief under RCW 36.70C.140:

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

Finally, the interpretation of LUPA urged by the City and the Association would compel any aggrieved landowner to pursue a LUPA appeal even where the landowner only wanted compensation and not to challenge the land use decision. It essentially compels that property owner to expend time and resources the property owner may either wish not to expend or be incapable of expending. The result practically is going to limit the ability of some property owners to obtain redress.

The result is also fundamentally at odds with the express purpose of LUPA as stated expressly by the Legislature in RCW 36.70C.010:

The purpose of this chapter 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.

Instead of promoting expedited review of land use decisions, requiring an aggrieved landowner to pursue a LUPA appeal even where the landowner only wanted compensation would only promote unnecessary litigation – exactly what LUPA is supposed to prevent.

Overall, it seems very clear that the Legislature was intending to disengage the issue of the validity from land use decisions from the issue of compensation for a taking to minimize the litigation expense incurred by jurisdictions making land use decisions. The City and the Association want to tie the two back together again. This position is not just unreasonable, it is ultimately not in the best interests of either and is particularly against the interests of property owners.

III. CONCLUSION

Without action by the City, construction of the Substation could not have occurred. The City acted for the purpose of creating a benefit to the public and the fact that the benefit would result from the activities of a private corporation should not be material to the outcome here where the use is, as a matter of law, a public use.

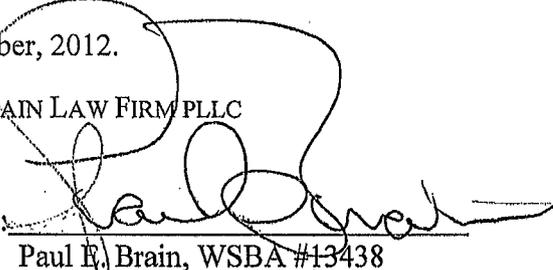
The potential impact on the value of Appellants' properties was known to the City *before* it took the action to grant the variances. Exhibit F to the Hearing Examiner's Decision, and also part of the City's record on appeal, is a letter to the City from William Rynd, an experienced real estate agent in the applicable market area, that states construction and operation of the Substation would have a substantial adverse impact on the value of Appellants' properties. (CP 1457).

The result predicted by Mr. Rynd is exactly what happened. The construction of the Substation resulted in an immediate and significant devaluation of Appellants' properties. In the case of Appellant Michael Heslop, the assessed value of his home went from \$337,000 (*CP 1509*) to \$172,000 (*CP 1511*) – a drop of 51%. Under these circumstances, Appellants should be entitled to redress.

The Association's arguments regarding LUPA would stand LUPA on its head, accomplishing exactly the opposite of the clear intent of the Legislature. Instead of minimizing and expediting litigation over land use decisions, interpreting LUPA as urged by the City and the Association would proliferate unnecessary litigation.

DATED this 5th day of October, 2012.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of October, 2012, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

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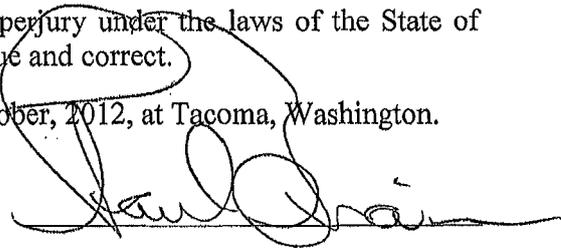
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of October, 2012, at Tacoma, Washington.



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Subject: Lakey, et al. v. PSE, et al. - Answers to Amicus Curiae Briefs

Good afternoon. Attached for filing and consideration by the Court are the following:

1. Appellants' Answer to the *Amicus Curiae* Brief of the Washington State Association of Municipal Attorneys; and
2. Appellants' Answer to the *Amicus Curiae* Brief of Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Snohomish County, Washington; the Washington Public Utility Districts Association; and the City of Seattle by and through its City Light Department.

These Answers are hereby being served on counsel pursuant to the parties' agreement to accept service by email. Please confirm receipt of this email. Please let me know if you have any questions. Thank you.

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