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COURT OF APPEALS
DIVISION III
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Nos. 331962-III, 332381-III and 332390-III (consolidated)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Respondent,

v.

GBI HOLDING CO., STATE OF WASHINGTON, and
CITY OF CHELAN,

Appellants.

REPLY BRIEF OF CROSS-APPELLANT CITY OF CHELAN

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I. INTRODUCTION

Nothing in the briefs of GBI or the State shows that the superior court erred when it ruled on summary judgment that the Three Fingers Fills were a public nuisance and not entitled to the protection of RCW 90.58.270(1). CP 1557-61, 1613-22. Similar to their failure to present any facts opposing summary judgment to the superior court, GBI and the State provide little argument that the Three Fingers Fills do not constitute a public nuisance. Rather, the State and GBI have made the validity of RCW 90.58.270(1) under *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.3d 989 (1987) the centerpiece of their appeals.

The Court need not reach the validity of RCW 90.58.270(1) given the superior court's alternative conclusion of public nuisance or the City's position that the statute only applies to "retention and maintenance of…fills." In the event the Court reaches the issue of RCW 90.58.270(1)'s validity, as interpreted by GBI and the State, the statute fails the safeguards for public access rights enshrined in the Public Trust Doctrine, embedded in the Washington Constitution, and analyzed pursuant to *Caminiti*.

In contrast to the City's position that RCW 90.58.270(1)'s validity need not be reached, GBI and the State argue that RCW 90.58.270(1) "authorizes", "validates", or "consents to" the placement of all pre-1969

fills, regardless of past violations of nuisance statutes and regardless of future development activities. This far-extending and unprecedented interpretation of RCW 90.58.270(1) amounts to a blanket consent that cannot be sustained under *Caminiti*. GBI and the State's position that the legislative "fix" to the *Wilbour* "problem" was blanket consent of all *Wilbour*-type offensive structures by legislative fiat runs directly headlong into the *Wilbour-Caminiti*-SMA protections that protect against such wholesale abdications of the *jus publicum*.

II. ARGUMENT

A. The State and GBI should bear the burden of persuading the Court that RCW 90.58.270(1) promotes and protects the public's interest in the navigable waters of Lake Chelan that are displaced by the Three Fingers Fill.

The State agrees the Court's review is *de novo*. *Weden v. San Juan Co.,* 135 Wn.2d 678, 689, 958 P.2d 273 (1998). State's Br. 13. The City disagrees with the State's position that the burden of persuasion and a presumption of validity apply here in the same manner as in a solely constitutional challenge. The Public Trust Doctrine, as the State recognizes, "invites *another form* of heightened judicial scrutiny, not necessarily based on constitutional foundations but on historical common law traditions…". State's Reply Br. 15 (State's emphasis).

In the context of a hybrid Public Trust Doctrine challenge, the Court should embrace both review standards: 1) the burden of persuasion and presumption from a constitutional challenge, and 2) the heightened scrutiny of the Public Trust Doctrine, manifested by the *Caminiti* test. The "heightened scrutiny" under *Caminiti* takes a critical eye toward protecting the public's interest in navigable waters.

The State, as custodian of the Public Trust, is inherently conflicted when there is legislation that questionably violates that Public Trust Doctrine. Based on its conflicting roles, the State should bear the burden under heightened scrutiny to demonstrate why the defended legislation either promotes or at least does not impair the public interest in the State's navigable waters, which the State is also obligated to protect. Requiring the State to bear the burden aligns with the plan language of the second prong of the *Caminiti* test. Otherwise, and as the State would have it, the challenger would be burdened with proving that "the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it." *Caminiti,* 107 Wn.2d at 670, 732 1.3d 989. That does not make sense. The State must minimally bear the burden of proof regarding the second element.

B. The Court should avoid the issue of whether RCW 90.58.270(1) is valid on this record.

The Three Fingers Fills are nearly factually identical to the offensive *Wilbour* fills that the Supreme Court ordered removed in 1969. *Wilbour v. Gallagher*, 77 Wn.2d 361, 163 P.3d 806 (1969). In the intervening 45 years, the law (but not the Public Trust Doctrine or Washington Constitution) has changed, including the 1971 adoption of the Shoreline Management Act ("SMA"). Despite the SMA's adoption, the validity of RCW 90.58.270(1) need not be tested on the facts and proceedings in this lawsuit. The Court construes statutes to avoid constitutional doubt. *Utter v. Building Industry Ass'n of Wash.,* 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015).

1. The City's alternative interpretation of RCW 90.58.270(1) is based on the plain language of the statute, supported by its legislative history and intent, and avoids the invalid interpretation proffered by GBI and the State.

The Court need not reach the validity issue because RCW 90.58.270(1) only applies to "retention and maintenance" of fills, not GBI's efforts to expand, develop, or construct upon the Three Fingers Fills.

RCW 90.58.270(1) provides[1]:

> [...] the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights

[1] The State has not set out the statute at issue in full, nor addressed the important "retention and maintenance" language that qualifies the scope of consent. The superior court erred when it denied the City's motion for summary judgment on this interpretation in the proceedings below. CP 236:15-17; 442-47.

> incidental thereto, **caused by the retention and maintenance** of said structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes. (Emphasis added).

The City's primary position on motions for summary judgment in the superior court was that RCW 90.58.270(1)'s application is limited to the "retention and maintenance" of the Three Fingers Fill. CP 236:15-17; 442-47. This case began with efforts by GBI toward development of the Three Fingers Fills, not as a matter of their "retention and maintenance." In fact, the genesis of this case was Chelan Basin's objection to GBI's earlier application for a 40-unit planned development district, which was later substituted with the present 6-parcel short plat application. CP 272. Chelan Basin appealed the City's decision on GBI's short plat, which decision concluded that the City did not have jurisdiction to order the Three Fingers Fills be removed. CP 317-322. Chelan Basin then dismissed its administrative appeal and filed this lawsuit. CP 323.

The City sought summary judgment and argued that the phrase "retention and maintenance" qualified the scope of RCW 90.58.270(1). CP 236:15-17; 442-47. The particularly phrase "retention and maintenance" has not been interpreted by Washington courts, but it has been applied by the Washington Shoreline Hearings Board. *In re Reed v. State of Wash.,*

1988 WL 161202, 3 (May 10, 1988). There, the Hearings Board concluded that a remnant log pile, that had been constructed prior to December 1969, could not be upgraded into a functional bulkhead under the auspices of RCW 90.58.270(1). The Hearings Board reasoned that the upgrade was neither retention nor maintenance. Similarly, GBI cannot avail itself of protections under RCW 90.58.270(1), which applies only to "retention and maintenance" of the Three Fingers Fill. GBI's current endeavors to develop, plat, sub-divide, or expand the use and structure of the Three Fingers Fills does not constitute "retention and maintenance" and cannot fall within the plain language of RCW 90.58.270(1)'s consent for "retention and maintenance of…fills."

This text-based interpretation of RCW 90.58.270(1) avoids the unconstitutional and invalid interpretation promoted by GBI and the State. This text-based interpretation also gives meaning to the phrase "retention and maintenance." *See e.g. State v. Roggenkamp,* 153 Wn.2d 614, 624-25, 106 P.3d 196 (2005) (reciting "well-settled principle of statutory construction" that "each word of a statute is to be accorded meaning"). Finally, this text-based interpretation promotes the perceived statutory intention of alleviating concerns of water-fronting landowners in the wake of *Wilbour*. Such landowners might then rest in the authorization for their then-existing, non-nuisance structures, but only insofar as the landowners

retained them and maintained them as the structures existed as of the *Wilbour* decision. A landowner would lose the protection if the landowner attempted to expand or develop the use or condition of the structure, as is the case with GBI in this lawsuit.

Based on its plain language, history, and perceived intent, RCW 90.58.270(1) does not apply to GBI's development of the Three Fingers Fills and, therefore, provides no protection to Chelan Basin's claims.

2. The Court also need not consider whether RCW 90.58.270(1) is valid because the superior court made an alternate dispositive ruling based on public nuisance.

The consent of RCW 90.58.270(1) expressly does not apply to fills which are in violation of state statutes. This is an express proviso of the statute:

> PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or **in violation of state statutes**. RCW 90.58.270(1) (emphasis added).

"State statutes" include the nuisance statutes at RCW 7.48. The State's argument that the Court can ignore these statutes for sake of convenience is not persuasive. State's Reply Br. 3, 7. Nor is the State's argument that the superior court's reasoning is circular. State's Br. 43; State's Reply Br. 3. The nuisance statutes are "state statutes". RCW 7.48.

The legislature is presumed to know the law when it enacts a new law. *Wynn v. Earin,* 163 Wn.2d 361, 371, 163 P.3d 806 (2008).

The logic is not circular. Rather, the superior court conducted a public nuisance analysis, which considers the reasonableness of an offensive structure or condition based on a totality of facts and circumstances. *MJD Properties, LLC v. Haley*, No. 71691-3-I (Sept. 8, 2015, Div. I) (citing *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952)(overruled on other grounds). Though not commonly resolvable on summary judgment, the superior court's conclusion rests on the fact that both GBI and the State failed to provide more than a "mere scintilla of evidence" to contest Chelan Basin's claim of public nuisance. CP 1622. GBI and the State's failure to submit evidence followed 1.5 years' worth of opportunity to do so, including the superior court's February 15, 2013 reconsideration decision which specifically permitted GBI the opportunity to put on evidence that the Three Finger Fills serve any public benefit.

Finally, if the superior court did error, such was invited error by GBI and the State, given their failure to note the matter for trial or evidentiary hearing or to present more than a "scintilla of evidence" to refute Chelan Basin's motion for summary judgment on public nuisance.

Humbert/Birch Creek Const. v. Walla Walla Cnty., 145 Wn.App. 185, 192, 185 P.3d 660 (2008).

C. GBI's and the State's expansive proffered construction of RCW 90.58.270(1) cannot withstand scrutiny under the Public Trust Doctrine because it does not promote or protect the public's interest in navigable waters displaced by historic fill.

1. The *Caminiti* test requires protection of the public interest in navigable waters of the State.

Though a common law doctrine with ancient origins, the Public Trust Doctrine also overlaps Article 17, Section 1 of the Washington Constitution. *See Caminiti,* 107 Wn.2d at 669, 732 P.2d 989. The state cannot "convey or give away" the *jus publicum* interest. *Id.* at 669-670. In the event the state abdicates its control over the *jus publicum*, the abdication is invalid unless it (a) promotes the public's interest in the *jus publicum*, or (b) has not substantially impaired it. *Id.* at 670, 732 P.2d 989. The burden is on the State to prove the promotion or lack of substantial impairment. Again, the State has conflicting interests in the case and should bear the burden under heightened scrutiny. *See, supra,* p. 2-3.

2. The construction of RCW 90.58.270(1) that provides a blanket consent to fills is an abdication of the public's interest in the waters displaced by the Three Fingers Fill.

Applying *Caminiti* to the blanket consent interpretation of RCW 90.58.270(1) can only be viewed as the state's abdication of total control

of the *jus publicum* in the waters displaced by the Three Fingers Fills. The superior court provides the most concise recognition:

> [T]he inescapable conclusion that must be reached is the first part of the *Caminiti* test is met: that is, by granting a blanket authorization to any fills or other improvements existing as of December 4, 1969, the state has surrendered its right of control over the *jus publicum*. RCW 90.58.270(1) makes no effort of any kind at qualitative analysis as to the effect these fills and other improvements might have on the public's rights in the state's navigable waters; rather, the statute simply accepts impairment of the public's right, no matter the magnitude. The legislature simply waved the white flag and conveyed away the public's interest in contravention of the public rights doctrine. CP 836.

In the superior court proceedings, GBI and the State did not dispute that the first prong of the *Caminiti* test was satisfied. See e.g. City's Opening Br. 17-18 (consistently pointing out that neither "GBI nor the State have ever argued otherwise"). The post-facto authorization for three massive fills in Lake Chelan leads to only one common sense conclusion: the blanket authorization was a "giving up of control" over the public interests in those waters displaced by the Three Fingers Fill. However, the State has raised several arguments, for the first time in its reply brief, that focus on the first element of *Caminiti.* State's Reply Br. 17-19 (arguing that the first *Caminiti* element is satisfied because (1) the statute only bars a seldom-used cause of action, (2) the statute was passed 45 years ago, (3) there is no conveyance of title to real property by the

statute, and (4) the SMA's "net" effect is increased governmental control). State's Reply Br. 17-19.

These new arguments are disingenuous. First, the State's reading of RCW 90.58.270 not only precludes a *Wilbour*–type action, but also, it purports to authorize all *Wilbour*-type offensive structures. Such a sweeping consent defies the *Wilbour* Court's insistence on careful, thoughtful, local planning and development, which is manifested in the SMA. *See* RCW 90.58.020, *infra,* p. 14-15; *Eastlake Community Council v. Roanoke Associate, Inc.*, 82 Wn.2d 475, 499, 513 P.2d 36 (1973).

Second, statutory analysis does not turn on a straw poll of how frequently a cause of action has been used. That a statute affects fills that are over 50 years old evidences that GBI did nothing with the fills for all these years. If anything, GBI's application to develop the Three Fingers Fills triggered the challenge and evidences the public's concern.

Third, that RCW 90.58.270(1) does not convey lakebed title is not relevant. In making this point, the State confuses the *jus privatum* and *jus publicum* aspects of the right of navigation. The *Caminiti* analysis is concerned only about the forfeiture of the *jus publicum* aspect. The first prong of the *Caminiti* test analyzes whether the state action has given up control over the public's interest in protected waters, not about the conveyance of lakebed title. More relevant is the *Caminiti* Court's

recognition that the dock permits at issue in *Caminiti* were revocable, that the docks could only serve private residential use, and that the permits expressly required that the public be able to pass under, over, or around the dock constructions simultaneously with the use of the dock. *Caminiti,* 107 Wn.2d at 673-74, 732 P.2d 989. The Three Fingers Fills are not subject to a revocable permit, where the City or State can assess whether the use should continue. Further, the Three Fingers Fills is zoned for commercial development, and the public is not able to use the navigable waters. See Chelan Basin Response Br. 48-49, fn. 25.

Fourth, the first *Caminiti* prong is a bright line test, not an analysis of "net" benefit or "net loss of control". See State's Reply Br. 18. Either the State abdicated control over the waters displaced by fills, or it did not. None of the State's new arguments detract from the inescapable conclusion that RCW 90.58.270, as a blanket consent provision, entirely "gives up control" over those waters of Lake Chelan displaced by the Three Fingers Fills.

3. The blanket abdication of control over waters displaced by fills by RCW 90.58.270(1) does not promote the public's interest in those waters and substantially impairs that interest.

Since RCW 90.58.270(1) abdicated the State's control of fills, the next point of review is the weighing of RCW 90.58.270(1)'s impact on the

public's interest in "the *jus publicum.*" In this case, the *jus publicum* is the public's interest in the water displaced by historical fills. Therefore, under *Caminiti,* the Court reviews RCW 90.58.270(1) to determine if it promotes the public interest in those displaced waters or does not substantially impair the public's interest in them.

In the superior court proceedings, since GBI and the State conceded that control over the displaced waters had been relinquished by RCW 90.58.270(1), the superior court focused GBI and the State on the second prong of *Caminiti*: public benefit or lack of impairment. CP 1254, 1271. The State and GBI raised irrelevant collateral benefits created by the Three Fingers Fills themselves. See e.g. State's Br. 42-43; GBI's Reply Br. 18. Their arguments confused and mislead the proceedings. The collateral benefits of the Three Fingers Fills, if any, are not relevant under *Caminiti.* The focus should be on RCW 90.58.270(1) and whether RCW 90.58.270(1) promotes or at least does not impair the public interest in waters displaced by fills.

The City has repeatedly insisted that the *Caminiti* decision and its progeny analyze the public benefit/lack of impairment of the legislation at issue, not individual structures. See City's Opening Br. 2, 14-17. The State now concedes that *Caminiti* analyzes questioned legislation, not structures: "this case asks what benefits are promoted by RCW 90.58.270,

not whether this particular fill promotes the public trust." State's Reply Br. 20.

Notwithstanding this concession, the State does not illustrate there is any *public* benefit to the legislation. The State argues that RCW 90.58.270(1) creates the following benefits: (1) certifying that then-existing structures are exempt from the SMA, (2) eliminating a cloud over historic development, and (3) promoting investment in historic fills. State's Reply Br. 20-22. These "three ways" are one in the same: a blanket consent and super-exemption status for those who violated the public's interests by displacing the public's waters with fill before the SMA was enacted in 1971. The blanket consent does not benefit the public. It benefits private landowners.

Public benefits associated with the SMA are set out in the policy statement of the SMA as stated in RCW 90.58.020:

> The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the

> same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.
>
> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
>
> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance.[2]

GBI and the State fail to show, under review of heightened scrutiny, that the blanket consent of RCW 90.58.270(1) for any fills existing on December 4, 1969 "promotes and enhances the public's interest" or provides for "coordinated planning" that is a "rational and concerted" effort to protect the public's interest in the navigable waters displaced by these historic fills. At best, the only saving grace for RCW 90.58.270(1) is that it is part of the SMA. However, *Caminiti* requires RCW 90.58.270(1) independently to promote the public interest in waters

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[2] Lake Chelan's shorelines are statutorily and administratively classified as "shorelines of statewide significance." RCW 90.58.030(2)(f)(iv); WAC 173-20-030(2); see specific classification at WAC 173-20-110(5).

displaced by historic fills. The blanket abdication of waters displaced by historic fills is neither a coordinated nor a rational planning effort. It does not recognize the paramount interest of the public in Lake Chelan's shorelines of statewide significance. Rather it exemplifies the "unrestricted construction on shorelines" that the Court and the Legislature have recognized not to be in the public's interest. The superior court correctly concluded that "any benefit inures only to defendant's private interest":

> [T]he second part of the test is also met. Specifically, there is no evidence whatsoever that the surrender of jus publicum to a private party vis-à-vis the Three Fingers Fill in any way promotes the public interest. As persuasively noted by plaintiff, this fill area does not preserve the natural character of shoreline, does not protect the resources or ecology of the shoreline and does not enhance or increase public access to the shoreline or navigable waters of Lake Chelan. To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability to utilize that portion of the lake for navigation and recreation. The impairment can only be characterized as substantial and any benefit inures only to defendant's private interest. CP 836.

III. CONCLUSION

The Court should avoid ruling on RCW 90.58.270(1)'s validity on this record. The superior court entered a dispositive ruling on public nuisance such that the Court need not address RCW 90.58.270(1)'s validity. Furthermore, as proposed by the City, RCW 90.58.270(1) does not apply in the first place, because GBI is taking development activity on

the fills far in excess of the "retention and maintenance" permitted by the plain language of the statute.

If the Court reaches the validity issue, the superior court's July 11, 2012 decision correctly concluded that RCW 90.58.270(1) fails the *Caminiti* test as applied to the Three Fingers Fills. CP 827-37. Based on the *Caminiti* test, RCW 90.58.270(1) does not promote the interests of the public in the *jus publicum* of the waters of Lake Chelan displaced by the Three Fingers Fill and also substantially impairs those public interests. The test requires a legal determination, not analysis of the benefits of a specific development.

Because GBI has not appealed the superior court's conclusion that removal is the appropriate abatement remedy, the City believes that this Court can resolve the assignments of error on appeal without remand to the superior court.

Respectfully submitted this 23rd day of October, 2015.

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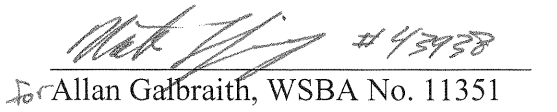

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