

No. 74738-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COMMUNITY TREASURES d/b/a
CONSIGNMENT TREASURES, a
Washington not for profit
corporation, JOHN EVANS and
BONITA BLAISDELL, on behalf of
themselves and all others similarly
situated,

Appellants,

v.

SAN JUAN COUNTY, a political
subdivision of the State of
Washington,

Respondent.

FILED
November 23, 2016
Court of Appeals
Division I
State of Washington

SUPPLEMENTAL BRIEF OF APPELLANTS

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

To the extent that *Verns F. Sims Family Limited Paternship I et al v. City of Burlington et al*, 194 Wn. App. 1048, 2016 WL 3675835 (July 5, 2016), relates to the case before this court, it highlights the differences between land use decisions and application processing fees. As such, this case supports the Plaintiffs' arguments, not San Juan County's.

IV. ARGUMENT

Sims concerns so called "latecomer agreements." A land developer and land use agency may enter into a "latecomer agreement" when the developer will improve street infrastructure beyond that which would be required to mitigate the impact of the developer's proposed project. RCW 35.72.010, .020. The agreement then provides for owners of nearby property to reimburse the developer when those owners later develop their properties. RCW 35.72.020. The amount of an owner's late contribution to the already-completed infrastructure project is based on the benefit that the owner receives as a result of the earlier infrastructure work. RCW 35.72.030. Once the land use agency determines the "assessment reimbursement area," the owners of property within that area are bound by that determination unless they appeal the determination to the jurisdiction's legislative body within 20 days after notice of the determination is mailed to them. RCW 35.72.040.

In *Sims*, Costco received a permit to construct a store in Burlington. *Sims* at *2. As a condition of its permit, Costco made certain traffic improvements to roads adjoining the project. *Id.* Several years later, the Burlington city council passed a resolution establishing an assessment reimbursement area around the new Costco store. *Id.* at *3. Notice was mailed to the affected property owners. *Id.* Some of the owners appealed the determination to the city council within the 20 day limit. *Id.* The city council denied the appeal. *Id.*

The owners filed a complaint for a writ of certiorari and other relief 18 months later. *Id.* at *4. The trial court dismissed the complaint as untimely under the Land Use Petition Act (LUPA). *Id.*

San Juan County argues in its Statement of Additional Authorities that *Sims* applies by analogy to support the County's assertion that application processing fees are "final land use decisions" under LUPA. Stmt. of Add. Auth., filed November 15, 2016, at 2. The County is mistaken.

First, the applicability of *Sims* to the case at bar is limited. When the *Sims* court considered whether a determination of an "assessment reimbursement area" was a "land use decision," it only considered two statutory subsections not at issue in the case before this court. *See Sims* at

*2 (quoting RCW 36.70C.020(2)(b) & (c) ¹, not RCW 36.70C.020(2)(a)²);
see also Sims at *5 (citing only RCW 36.70C.020(2)(b) in its holding).

The County latches onto a passage of the opinion addressing the appellants' argument that LUPA will not apply to them until they develop their property and are then required to pay "latecomer fees" as conditions of their permits. *Sims* at *5 (citing RCW 36.70C.020(2)(a)). The court stated, "We agree that a final land use decision for LUPA purposes is made when a property owner applies for a permit, and the City calculates and imposes the property owner's actual assessments." *Id.* (citing *James v. County of Kitsap*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) and related cases). Citing this dicta, the County claims an analogy between latecomer fees and application processing fees. This analogy does not hold.

Latecomer fees are very similar to the impact fees analyzed in *James* and very different than application processing fees:

¹ RCW 36.70C.020(2)(b) relates to "[a]n interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property." RCW 36.70C.020(2)(c) relates to "[t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property." Application processing fees do not regulate the improvement, etc. of real property.

² The County argues that RCW 36.70C.020(2)(a) applies, defining a "land use decision" as "a final determination" by the local jurisdiction "on [a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used"

- Like impact fees, latecomer fees are charged to fund infrastructure projects that mitigate the impact of development. *See* RCW 35.72.010, .020(1) (allowing latecomer agreements for street projects). Latecomer fees constitute partial reimbursement for a developer's financing of these infrastructure projects. RCW 35.72.030. Therefore, the fees charged on development relate directly to the impact of that proposed development. *See id.* (requiring payment for an infrastructure project based on benefit received from that project). In contrast, application processing fees only mitigate the cost to the government for processing applications and are not directly related to the impact of the development being applied for. RCW 82.02.020.
- Like impact fees, latecomer fees are charged as a condition of development. RCW 35.72.020(1)(d). If a permit is issued that includes a condition requiring payment of a latecomer fee, the applicant need not pay the fee if the applicant abandons the project. In contrast, application processing fees are prerequisites of the processing of the permit application and must be paid whether or not the project is completed.
- Additionally, like impact fees, latecomer fees are charged only if a permit is issued. There is no requirement to pay these fees if the

permit application is denied. In contrast, an applicant must pay an application processing fee whether or not the application is approved and the permit is granted.

These contrasts between latecomer fees and application processing fees reflect the difference in their purposes. Latecomer fees facilitate the efficient mitigation of the impacts of development. By providing for the partial reimbursement of the costs of an infrastructure project that benefits nearby future development, these infrastructure projects can be executed more efficiently than if they were executed piecemeal. In contrast, application processing fees fund government's regulatory oversight as their only purpose.

V. CONCLUSION

Comparison of the latecomer fees in *Sims* to application processing fees reveals the same differences as those between impact fees and application processing fees. Application processing fees are not land use decisions.

Respectfully submitted,

BRANDLI LAW PLLC

Dated: November 23, 2016

By: 

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No. 74738-0

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DECLARATION OF
DELIVERY

I declare under penalty of perjury under the laws of the State of
Washington that on the date signed below I delivered by hand the
following documents:

Supplemental Brief of Appellants
This Declaration of Delivery

to the following person(s):

Randall Gaylord
San Juan County Prosecutor
PO Box 760
Friday Harbor, WA 98250-0760

at the office of the same.

DECLARATION OF DELIVERY, 1 of 2.

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DECLARATION OF DELIVERY, 2 of 2.

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