LAND USE CASE LAW UPDATE 2021-22

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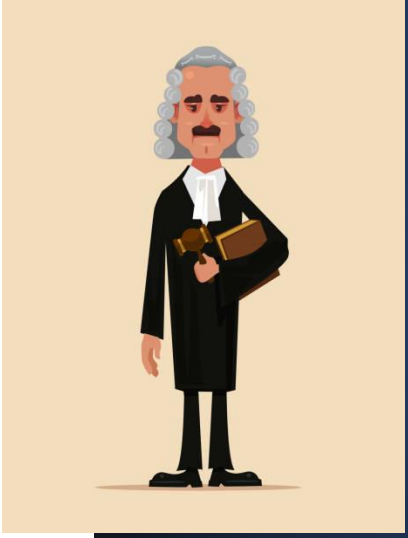

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Case Law Overview

Kanam v. Kmet, taxpayer standing takes status of jurisdiction as taxpayer, resident or property owner.

Kenmore MHP LLC v. City of Kenmore, deference due agency interpretation of its regulations; failure to make service deadline on City by one day justifies dismissal of GMA appeal.

Austin v. Reagan National Advertising, US Supremes say we can pick on billboards

Viking JV, LLC v. City of Puyallup, *two-tiered examiner system A-OK.*

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Case Law Overview

Westridge-Issaquah II LP v. City of Issaquah, general facility charges aren't subject to vesting or individual proportionality requirements.

City of Puyallup v. Pierce Cnty., assumption of lead agency SEPA status doesn't invalidate all intermediate permitting decisions.

Glenrosa Ass'n v. Spokane Cnty., superior court has jurisdiction over land use cases from other counties.

New Harvest Christian Fellowship v. City of Salinas, can't pick on churches.

3

Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Standing – Avoiding the Self-Appointed Zoning Code Enforcers

RCW 36.70C.060

Standing to bring a land use petition under this chapter is limited to the following persons:

(1) The applicant and the owner of property to which the land use decision is directed;

(2) Another person **aggrieved or adversely affected** by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision….

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Facts:

Kanam resides in Thurston County, but not Tumwater

In September 2019, Kanam wrote Tumwater asking if a specific building within the City could be used for storage.

City wrote the building could only be used for storage as a nonconforming use after approval of a conditional use permit.

Kanam then asks Attorney General to prevent Tumwater from spending public funds on enforcing its nonconforming/conditional use requirement

Attorney General declined.

Kanam then files for declaratory judgment and injunctive relief, including in his claims that the ordinances governing the use of the building he wished to purchase involved an illegal expenditure of public funds.

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Facts:

City seeks motion to dismiss on lack of standing

Kanam argues he has taxpayer standing as a Thurston County resident, because Tumwater entered into a joint comprehensive plan with Thurston County. One of those joint policies provided as follows:

> *Ensure the processing of applications for development permits in a timely and fair manner, and* coordinate processing between the City of Tumwater and Thurston County to enhance predictability.

Superior court dismisses case due to lack of standing, finding that Kanam had to be resident, taxpayer or property owner in Tumwater.

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Legal Principles:

Taxpayer standing requires a plaintiff to be a taxpayer, in addition to making a request to the attorney general to take action, and have that request denied. A mere disagreement with governmental action is not enough to confer standing.

Kanam argues that he has standing under the Thurston County/Tumwater joint comprehensive plan because the agreement makes Tumwater processes Thurston County processes. The Court disagreed:

> *Kanam cites no authority to show that Thurston County adopted the Tumwater ordinances or to show that joint comprehensive plans make city municipal processes binding on counties or county residents. Nor does Kanam show that the mere existence of a city-county joint plan confers taxpayer standing on county residents to sue a city.*

Court affirms dismissal, holding that Kanem had to be property owner, taxpayer or resident of Tumwater for taxpayer standing.

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Unique Injury Requirement for Taxpayer Standing:

A litigant seeking to challenge a discretionary government act, as opposed to an allegedly unlawful act, must show a special injury, i.e. that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers. *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wash. App. 105, 120 (2014).

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Injury Requirement for Standing in General:

Must establish injury in fact, must show that that "the land use decision has prejudiced him, or is likely to." *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662 (2016).

Must establish "*a specific and perceptible harm*." *Id*. Must how that harm "*will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing*." *Id*. Harm to an appellant must be proved, and not presumed. Id. at 664.

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

Seattle Public Schools standing policy for SEPA appeals:

8. Appeals

a. Any aggrieved person may appeal the district's compliance with Chapter 43.21C RCW and Chapter 197-11 WAC by filing a notice of appeal with the responsible official within 15 days of the date of public notice of issuance of a final DNS or availability of a final EIS. ***A person is aggrieved within the meaning of this section only when the following conditions are present: (a) the interest that the person is seeking to protect is within the zone of interests that are protected or regulated by SEPA; and (b) the person has alleged "injury in fact," i.e., that he or she will be "specifically and perceptibly harmed" by the proposed action…***

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Kanam v. Kmet, 508 P.3d 1071 (Wash. Ct. App. 2022)

A tale of two cities and a school district:

Seattle Public Schools and the Billion Dollar Levies

Sequim and the Regional Methadone Clinic

Lakewood and the Ubiquitous Rare Gary Oak Tree

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Kenmore is a good case for municipalities because:

1. It arguably makes it easier to require a court to give deference to agency interpretation; and

2. It makes it easier to justify dismissal of an administrative appeal due to failing to meet filing and service deadlines.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Primary Holding:

Failure to meet service deadline on City by one day doesn't qualify as "substantial compliance" and justifies dismissal.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Facts:

On April 15, 2019, Kenmore adopts Ordinance No. 19-0481, which amended the municipal code and updated the City's zoning map to rezone certain areas as a "manufactured housing community" zoning district.

The ordinance stated, among other things, that manufactured homes and mobile homes were "*allowed only in manufactured housing communities*." The ordinance was published on April 18, 2019.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Facts II:

A couple mobile home park owners appeal the ordinance to the Growth Management Hearings Board by filing a petition on June 14, 2019, a Friday. On the same day, that afternoon, the owner also gave its petition to a legal messenger to serve on the City. The legal messenger was unable to get to the City on time that day because of traffic. The City didn't receive notice of the petition until June 17, the following Monday.

City files motion for summary judgment on July 29, 2019 to have appeal dismissed on basis that it was untimely.

Board grants motion to dismiss.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Statutes and Regulations:

RCW 36.70A.290(2) provides the statute of limitations for petitions to the Board, mandating that petitions for review of a city ordinance must be filed with the board "*within sixty days after publication*" of the city's notice that it has adopted an ordinance.

WAC 242-03-230(2)(a) provides, in pertinent part that "[*a] copy of the petition for review shall be served upon the named respondent(s) and must be received by the respondent(s) on or before the date filed with the board*." WAC 242-03-230(4) states, "*The board may dismiss a case for failure to* ***substantially comply*** *with this section*."

60 days after publication is June 14, 2019 – the day the mobile home park owners properly served the Board, but failed to serve Kenmore.

Board concludes that failure to serve City on time was failure to **substantially comply** with WAC 242-03-230.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Failure to Substantially Comply:

First, deference to Board interpretation of its own WAC required:

"*Where we deem a regulation ambiguous, we may resort to statutory construction, legislative history, and case law to resolve the ambiguity. However, we uphold an agency's interpretation of ambiguous regulatory language so long as the agency's interpretation is plausible and consistent with the legislative intent. Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the opposite conclusio*n."

(Citations and quotation marks omitted).

Beware: This holding is for GMA Hearing Board Appeals – Deference Standards are arguably different for appeals of permit decisions.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Court reviews how "substantial compliance" is interpreted by different agencies and shows that it can be subject to multiple interpretations.

GMA Board adopts the test used by federal courts to determine if a party has substantially complied with the service requirements of the federal rules of civil procedure:

> *(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.*

Borzeka v. Heckler, 739 F.2d , 447 (9th Cir. 1984)

Kenmore Court agrees with Board interpretation:

> *This definition is plausible, relates to a service rule, is consistent with the statutory language of the GMA, and has not been overturned. Accordingly, we defer to the Board's interpretation of what it is to "substantially comply" with the regulation.*

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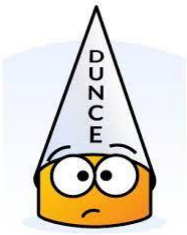
Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

> *(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a **justifiable excuse** for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.*

Board holds standards above not met because failure to serve on time by handing off petition to a messenger on afternoon of due date IS NOT JUSTIFIABLE EXCUSE

TRAFFIC???? IN PUGET SOUND??? REALLY???



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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Precedent? Who cares about a stinking Precedent?

Mobile home park owners argue that deference not due because the Board's interpretation was new and conflicts with past Board rulings.

Court doesn't find precedent to be that important:

> *Division One of this court has noted that agencies have a "not inconsiderable realm of reasonable discretion" that they possess to "determine how to apply [their] own past precedents. Additionally, stare decisis plays only a limited role in agency context, although agencies should strive for equality of treatment.*
>
> *Here MHP makes no showing that stare decisis binds the Board to a prior decision. Moreover, they cite to no law that prohibits an agency from adopting a new definition of a previously undefined regulatory term. Where a party does not cite to such authority, we assume there is none.*

(Citations and quotations omitted).

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Precedent? Who cares about a stinking Precedent?

Mobile home park owners cited to a case that basically held that agencies should provide "like treatment under like circumstances."

But, owners provide no example of an inconsistent prior holding of the Board.

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

How about arbitrary and capricious then?

Administrative Procedures Act, RCW 34.05.570(3)(d) provides that an agency decision/order can be reversed if the decision/order is "arbitrary and capricious."

> *…an agency's decision is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." The Board's decision here was not willful and unreasoning.*
>
> *The Board examined the record and applied a legal test that it adopted from the federal courts. Applying that test to the facts, the Board determined that MHP did not substantially comply because it failed one element of the test: a justifiable excuse. Accordingly, we hold that the Board took a reasoned approach to the decision and that its decision to dismiss was not arbitrary and capricious.*

(Citations and quotation marks omitted).

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Takeaways -- Does the deference given under the Administrative Procedures Act for GMA review apply to local permitting decisions subject to review under the Land Use Petition Act?

Maybe, but look at how deference is treated under LUPA:

RCW 36.70C.130(1)(b), a LUPA statute, limits deference to "*such deference as is due the construction of a law by a local jurisdiction with expertise*."

> *The statute does not require a court to show complete deference , but rather, "such deference as is due." Thus, deference is not always due—in fact, even a local entity's interpretation of an ambiguous local ordinance may be rejected. Instead, the interpreting local entity bears the burden to show its interpretation was* ***a matter of preexisting policy****. No deference is due a local entity's interpretation that was not part of a pattern of past enforcement, but a by-product of current litigation. A local entity's interpretation need not be memorialized as a formal rule but the entity must prove an established practice of enforcement.*

Ellensburg Cement Prods., Inc. v. Kittitas Cnty. & Homer L. (Louie) Gibson, 317 P.3d 1037, 1047 (2014)(citations omitted, emphasis added).

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Kenmore MHP LLC v. City of Kenmore, No. 54915-8-II (Wash. Ct. App. Feb. 8, 2022)

Takeaways – Untimely Administrative Appeals.

Ideally, time limits for appeal in local code should be written to clearly state that an appeal will be dismissed if not timely filed and served on the appropriate persons, similar to LUPA:

RCW 36.70C.040(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:*

However, even without strict language similar to above, the Kenmore case now makes it fairly easy to defend dismissal. In *Kenmore*, even with the "substantial compliance" language for service, the reviewing court still upheld dismissal for being just a day late.

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Kenmore MHP v. City of Kenmore - DEFERENCE

- What do you do when you have an ambiguous code?
- How can you protect your agency when you make interpretations of that code?

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Code Interpretation Example

The City of Buckley determines wetlands buffers based on the intensity of the adjacent use.

Adjacent residential development with more than 2du/ac is considered a high intensity use.

Land Use Impact "Intensity" Based on Development Types

Rating of impact from proposed changes in land use	Types of land uses that cause the impact based on common zoning categories
High	Commercial, urban, industrial, institutional, retail sales, residential with more than two units/acre, new agriculture (high-intensity processing such as dairies, nurseries and green houses, raising and harvesting crops requiring annual tilling, raising and maintaining animals), high intensity recreation (golf courses, ball fields), hobby farms
Moderate	Residential with two units/acre or less, moderate-intensity open space (parks), new agriculture (moderate-intensity such as orchards and hay fields)
Low	Forestry, open space (low-intensity such as passive recreation and natural resources preservation)

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Code Interpretation Example

A category III wetland next to a high intensity residential use (more than 2 du/acre) has a mandatory 100-foot buffer.

Buffers can be averaged or reduced with mitigation, not both.

Alternative 2 Buffer Widths, Based Upon Category and Land Use Intensity

Category (2014 Wrn. WA Rating System)	Total Points in Rating System	Alternative 2 Buffer Category + Land Use Intensity (lo/mod/hi)
I	>23	lo 150, mod 225, hi 300
II	20 – 22	lo 150, mod 225, hi 300
III	16 – 19	lo 50, mod 75, hi 100
IV	<16	lo 25, mod 30, hi 50

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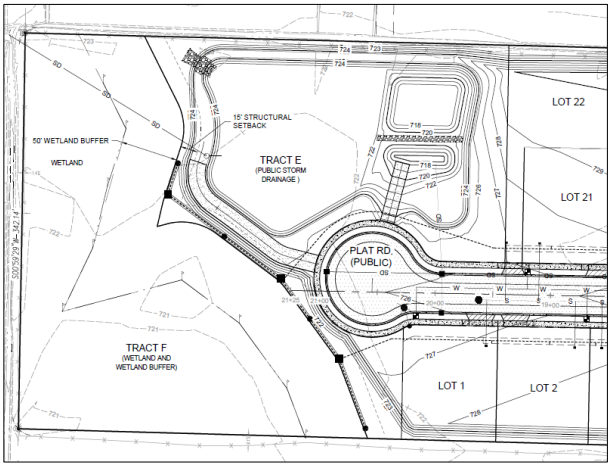
Code Interpretation Example

A developer recently attempted to argue that because the wetland was adjacent to only one lot and a storm pond that the adjacent use was Moderate (rather than High) intensity and therefore should only be subject to a 75-foot buffer and that should then be further reduced to a 50-foot buffer.



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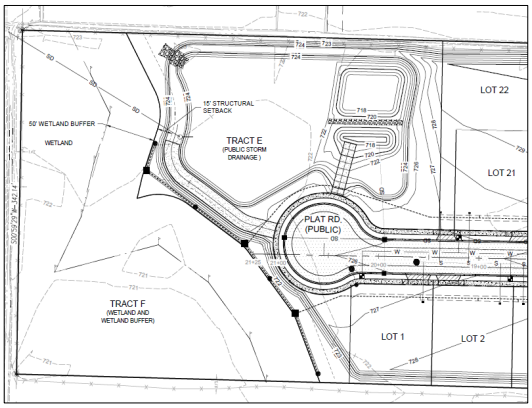
Code Interpretation Example

The City's past practice, which can be demonstrated all over town, is that the adjacent use is the subdivision itself, a high intensity use which requires a baseline 100-foot buffer.

The pond, cul-de-sac and the tiny triangle of 'open space' are part of the larger subdivision and not uses in themselves.



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Kenmore MHP v. City of Kenmore - DEFERENCE

- What should I do to cure this?
  - Create a Director's Interpretation that clearly states the underlying use of the entire project, not its individual components, defines the intensity of adjacent use.
  - Provide clarity in my code.

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Kenmore MHP v. City of Kenmore – APPEAL TIMELINES

Provide a deadline for appeals and/or comments with a date, time, location and format.

> *"Any person with standing may appeal the final decision. Appeal materials should be physically delivered to the Buckley Planning Department, 811 Main Street, Buckley, WA 98321, and stamped received no later than 4 pm, March 3, 2022."*

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The Prequel: Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Primary Gilbert Holding:

Content Based Sign Regulations Subject to Strict Scrutiny (= likely invalidation)

But what is content-based regulation?

- Post-Gilbert some courts apply "have to read it" test
- Off-premises fails test

Austin Gives Us a Break = Off-premises ok, "read it" out, content based = regulation based on topic or idea

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The Prequel: Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Facts:

Gilbert has a sign code that prohibits the display of outdoor signs without a permit, with 23 exemptions, three relevant to the Gilbert analysis:

"Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions.

"Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season.

"Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," with the following restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Facts:

Good News Community Church, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday.

The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Ruling: Gilbert Exceptions "Content Based"

Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.

Gilbert is content-based because it defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Content-Based Regulation Subject to Strict Scrutiny:

Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests (strict scrutiny).

A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Gilbert Fails Strict Scrutiny:

Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive:

Gilbert cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem.

Gilbert has not shown that temporary directional signs pose a greater threat to public safety than ideological or political signs.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Thomas Plurality Opinion – what's ok:

"Ample" Content-Neutral Options for safety and aesthetics:

- Can regulate size, building materials, lighting, moving parts, and portability.
- "May" be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner.
- An ordinance narrowly tailored to protect the safety of pedestrians, drivers, and passengers—*e.g.*, warning signs marking hazards on private property or signs directing traffic "well might" survive strict scrutiny. *[This is the court's wording – I would say that most traffic and other public safety signs will easily meet strict scrutiny and survive First Amendment challenge!]*

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Alito Concurring Opinion – What's ok:

Rules regulating the size of signs.

Rules regulating the locations in which signs may be placed.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Reed Applicable to Commercial Speech?

Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience," or as "speech proposing a commercial transaction." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

Federal district courts are already ruling that *Reed* does not apply to commercial speech. See, e.g., *Contest Promotions, LLC v. City and County of San Francisco*, 2015 WL 4571564 (N.D. Cal. 2015)(off-premises sign restrictions not subject to strict scrutiny under Reed)

If Reed was intended to apply to commercial speech, why wasn't it and the years of case law setting an intermediate standard for commercial speech even mentioned in the decision?

Austin doesn't directly resolve the commercial speech issue, but cases like Contest Promotions still give us fairly good confidence that intermediate scrutiny still applies to commercial speech.

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Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

"Intermediate Scrutiny" for Commercial Speech

The validity of a restriction on commercial speech depends on the following factors:

(1) "whether the expression is protected by the First Amendment," which requires the speech to "concern lawful activity and not be misleading";

(2) "whether the asserted governmental interest is substantial";

(3) "whether the regulation directly advances the governmental interest asserted"; and

(4) "whether [the regulation] is not more extensive than is necessary to serve that interest."

See, e.g., Ballen v. City of Redmond, 463 F.3d 1029 (2006)(ban on sandwich boards invalid since similar types of other commercial signs such as real estate signs allowed).

Ballen still a problem after Austin

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City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Holding: Reed wasn't that bad at all!

Just because you may have to read a sign to apply a sign code rule doesn't mean the rule is content based

Ok to pick on billboards.

42

City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Facts:

Plaintiffs, owners of two billboard companies, applied for permits to digitize some of their existing billboards.

Austin prohibits new billboards but allows existing billboards to remain. Owners of existing billboards could change the face of the sign, but could not increase the degree of nonconformity, including changing the method or technology used to convey a message. The city's regulations did allow digitization of on-premises signs in some circumstances.

Austin denies the permits because they increased nonconformity, changed method/technology.

Plaintiffs sue, arguing that the on/off-premises distinctions were content-based and therefore unconstitutional pursuant to Reed.

5th Circuit Court of Appeals rules Austin regulations are contrary to Read. It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. The court then reviewed the City's on-/off-premises distinction under strict scrutiny, and it held that the City failed to satisfy that onerous standard.

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City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Justice Sotomayor writes for the majority and invalidates the "if you have to read it, it's content based" test:

The Court of Appeals interpreted Reed to mean that if "[a] reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is automatically content based… ***This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent****. Unlike the regulations at issue in Reed, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.*

Austin at 6.

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City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Justice Sotomayor further concludes that off-premises restrictions aren't content based and therefore not subject to strict scrutiny:

Unlike the sign code at issue in Reed, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. Reed does not require the application of strict scrutiny to this kind of location-based regulation.

Austin at 8.

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City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Disposition:

The Court remands the case back to the Court of Appeals to determine whether the regulations could meet the intermediate scrutiny test for content-neutral regulations.

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City of Austin v. Reagan National Advertising, US Supreme Docket No. 20-1029

Take Aways:

Ok to pick on billboards

Austin helps ease the Collier political sign conundrum – can now meet Austin content neutrality by authorizing temporary signs in right of way but prohibiting off-premises signs. Probably ok to prohibit commercial signs in right of way as well under 9th circuit cases.

As identified in the Ballen/Redmond case, intermediate scrutiny can still be a difficult standard to meet. Content based regulations even for commercial speech must be handled with great care. Exemptions for real estate signs and the like may still cause problems.

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The Terrell Take

Bremerton – defines signs by type of speech

20.52.085 NONCOMMERCIAL SPEECH SIGNS.

Noncommercial speech signs express noncommercial speech such as public community events, religious, political, social, or other philosophical messages.

Noncommercial speech signs do not promote commercial products or services. The content of such signs is not regulated, but is subject to the following requirements:

(a) The sign area of noncommercial speech signs shall not exceed thirty-two (32) square feet.

(b) The maximum height is limited to six (6) feet.

(c) Noncommercial speech signs that do not comply with the requirements of this section shall be subject to the permit requirements, sign area, setback and other provisions of this chapter. All noncommercial speech signs shall comply with general sign regulations per BMC 20.52.090. (Ord. 5312 §4 (part), 2016)

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Covington – defines signs by types of speech

CMC 18.55.010(2) Purpose:

(c) Recognize free speech rights by regulating signs in a content-neutral manner;

CMC 18.55.030 Interpretation

(1) This chapter is not intended to, and shall not be interpreted to, restrict speech based on its content, viewpoint, or message.

(2) No part of this chapter shall be construed to favor commercial speech over noncommercial speech.

CMC 18.55.020(2) Exclusions:

(c) Signs required by local, State, or Federal law if the sign is no more than 32 square feet in area or is painted directly on a pavement.

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Covington

CMC 18.55.040 Definitions:

"Commercial sign" means any sign, display, or device designed, intended or used to encourage or promote purchase or use of goods or services.

"Noncommercial sign" means a sign which contains no message, statement, or expression related to commercial interests. Noncommercial signs include, but are not limited to, signs expressing political views, religious views, or information about and/or announcements of nonprofit organizations.

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Covington

CMC 18.55.190 Temporary signs – ROW and public spaces.

(1) Right-of-Way. Except as prohibited pursuant to CMC 18.55.050, temporary signs may be placed in the right-of-way if they meet all the following standards:

(a) Noncommercial Copy. All temporary noncommercial copy signs in public right-of-way shall abide by subsections (1)(c) through (1)(i) of this section, and shall not be limited in quantity or duration;

(b) Commercial Copy. All temporary commercial copy signs in public right-of-way shall abide by subsections (1)(c) through (1)(i) of this section, and shall:

(i) Be limited in quantity to no more than six signs per open house, business, or event at any time;

(ii) Be limited for display from sunrise to sunset and only when an owner, agent, or employee is on site and the open house, business, or event location is open to the public;

(iii) Be allowed to be displayed up to seven days per week;

(iv) Require a temporary sign permit. The temporary sign permit for temporary commercial signs displayed in public ROW shall be valid for 365 days from the date of sign issuance;

51

Fircrest – attempts total neutrality

Fircrest is also attempting to be content neutral (FMC 22.26.001(b)(3)).

FMC 22.26.002 Applicability and interpretation.

This chapter is not intended to, and shall not be interpreted to, restrict speech on the basis of its content, viewpoint, or message. Any classification of signs in this chapter that purports to permit speech by reason of the type of sign, identity of the sign user or otherwise, shall be interpreted to allow commercial or noncommercial speech on the sign. No part of this chapter shall be construed to favor commercial speech over noncommercial speech. To the extent that any provision of this chapter is ambiguous, the term shall be interpreted not to regulate speech on the basis of the content of the message.

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Fircrest

FMC 22.26.021 Temporary Signs.

(d) Location.

(2) City Right-of-Way Outside of the Roadway. Temporary signs on city right-of-way placed outside of the roadway must comply with the following requirements:

(A) Placement. Allowed only between the property line and the back of the nearest curb, or where no curb exists, between the property line and the nearest edge of the pavement. Signs may not be placed on traffic islands, or on sidewalks, driveways or other paved areas designed for pedestrian or vehicular use, or as conditioned in a right-of-way use permit.

(B) Approval of Abutting Owner. Approval of the abutting owner is required.

(C) Type. Signs on stakes that can be manually pushed or hammered into the ground are allowed. All other signs are prohibited, unless specifically allowed by a right-of-way use permit.

(D) Area and Height. Maximum four square feet in area and three feet in height.

53

Gig Harbor and Milton– provide neutrality by silence

Gig Harbor's new sign code is completely silent on non-commercial vs. commercial signage, doesn't make accommodation for political signage and is silent on off-premises signs.

It does regulate signs by location, type, materials and the other items allowed under strict scrutiny equally for all sign types.

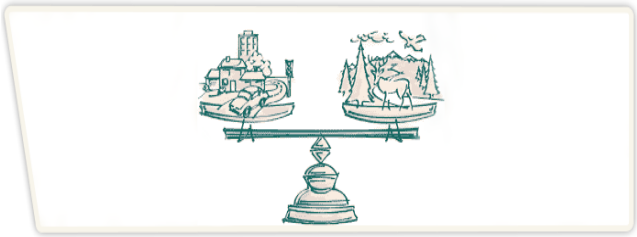
Milton, like Gig Harbor, survives strict scrutiny by treating all signs equally – though it doesn't make accommodations for political signs and with respect to *Austin*, bans all off-premises signs.

54

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Primary Holding:

Two-tiered examiner system authorized by state statute



City of Ferndale website picture

55

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

City of Puyallup really likes hearing examiners, for impact fee appeals has one hold the open record hearing and authorizes closed record appeal to second examiner.

Viking assessed $388,725 park impact fees for a 450,000 square foot warehouse. Asserts that fee excessive because using long-term storage, which results in significantly less employees than estimated by park impact fee ordinance for warehouse space

56

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

Viking appeals impact fee determination to hearing examiner, who rules in favor of City.

Viking then goes straight to superior court via petition under Land Use Petition Act, Chapter 36.70C RCW (LUPA) and fails to appeal to appellate examiner as authorized by Puyallup code

57

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

Puyallup seeks dismissal of LUPA appeal on basis that LUPA requires exhaustion of administrative remedies for standing, i.e. that Viking had obligation to exhaust its appellate examiner remedy.

Viking argues it didn't have to exhaust appellate examiner option because appellate examiner not authorized by law.

58

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

Puyallup seeks dismissal of LUPA appeal on basis that LUPA requires exhaustion of administrative remedies for standing, i.e. that Viking had obligation to exhaust its appellate examiner remedy.

Viking argues it didn't have to exhaust appellate examiner option because appellate examiner not authorized by law.

59

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Analysis:

Issue of whether two-tiered examiner system authorized is dependent on two statutes:

Planning and Zoning in Code Cities, Chapter 35A.63, which authorizes hearing examiners; and

Regulatory Reform Act, Chapter 36.70B RCW, which sets parameters on local land use permit review.

60

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

RCW 35A.63.170(2)(Planning and Zoning in Code Cities):

(2) Each city legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

(a) The decision may be given the effect of a recommendation to the legislative body;

(b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or

(c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative body.

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Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Court rules that Puyallup two-tiered system also fully compatible with Regulatory Reform Act:

RCW 36.70B.050(2) requires that local land use permitting review processes "*provide for no more than one open record hearing and one closed record appeal*."

RCW 36.70B.020(3) provides that an *"[o]pen record hearing*" is "*a hearing, conducted by a single hearing body **or officer** authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information*."

RCW 36.70B.020(1) provides that a "*[c]losed record appeal*" is "*an administrative appeal on the record to a local government body **or officer** , including the legislative body, following an open record hearing on a project permit application*."

Examiner is an "officer" and hence no problem in having an examiner serve in original or appellate jurisdiction under Regulatory Reform Act above.

62

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Viking tries to argue that the three options in RCW 35A.63.170(2) don't include an examiner "intermediate" type decision that is appealable to another examiner. Court finds that under RCW 35A.01.010, which requires liberal construction of grant of authority under Title 35A statutes, and the Reg Reform specific references to "officer," that Reg Reform and RCW 35A.63.170(2) can be harmonized to authorize two-tiered examiner system by construing un-appealed decision of first examiner as a final land use decision for purposes of RCW 35A.63.1702c.

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Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Takeaway – Hire lots and lots of Examiners!

Arguably not necessary to do so – two good examiners will consistently give you the same or very similar rulings so need for second tier debatable.

Jefferson County used to have two-tiered system. Ask them or Puyallup for advantages/disadvantages.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Primary Holdings:

General facility charges not subject to vested rights doctrine

Claims that general facility charges exceed equitable share to property owners must be based upon property owners as a class, not individually

65

Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Facts:

Issaquah Highlands subject to development agreement (DA) that set the amounts for general facility charges (GFC) for water, sewer and stormwater facilities for its 20-year term in exchange for developers constructing some of the facilities.

For single-family residences, the DA waived the water and sewer GFCs for single-family residences and imposed a $165.06 GFC for stormwater.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Facts:

The DA had a term of 20 years following first final plat approval and would continue thereafter until terminated by one of the parties.

DA approved in 1996, termination requested by developer in 2016 and termination finally executed on March 19, 2018 by passage of ordinance.

On July 14, 2017, prior to termination, developer submits 73 lot preliminary plat application. The plat was approved in 2018.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Facts:

After DA terminated, developer submits several building permit applications in which developer seeks to connect several single-family homes to City utility systems. City bills developer for adopted charges in place at time of request, i.e. water GFC of $6, 029, a sewer GFC of $2, 024, and a stormwater GFC of $1, 256.

Developer pays fees under protest.

68

Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Issue: Developer submitted its plat application prior to termination of the DA. Were GFCs vested by the preliminary plat application?

69

Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

What is vesting?:

In Washington, vesting refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.

I.E. Grandfathering

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Subdivision Vesting:

Developer asserts that preliminary plat application vested the DA GFCs, because it filed its preliminary plat application before the DA expired.

Court rules this doesn't work, because preliminary plat vesting statute doesn't apply to fees:

RCW 58.17.033(1): *A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and **zoning or other land use control ordinances**, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.*

A land use control ordinance is an ordinance that limits the use of land or resembles a zoning law. GFCs do neither and therefore are not land use control ordinances. Court has previously ruled that transportation impact fees aren't land use control laws and in another case that water GFCs aren't subject to judicial vesting.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Subdivision Vesting (Applicability to Fees):

Developer also argues that since it had disclosed single-family use in its preliminary plat application, it was vested to the standards applicable to single-family homes when it submitted its building permit application. This was based upon *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269 (1997), which ruled that the **extent** of subdivision vesting works as follows:

> *Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a **specific use**, then the applicant has a right to have **that application** considered under the zoning and land use laws existing at the time the completed plat application is submitted.*

Noble Manor, 133 Wn.2d at 285 (emphasis added)

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Subdivision Vesting (Identification of single-family use):

Court rules that vesting only applies to preliminary plat review ("that application"), not subsequent building permit review.

Request to connect to connect to utilities was only made as part of building permit applications and thus was not vested under preliminary plat application.

Prior cases have held that preliminary plat applications vest planned unit development (PUD) applications as well, but this was only because PUD applications are "inextricably linked" to the preliminary plat application. Building permit applications are not inextricably linked to the subdivision applications.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Subdivision Vesting (Fees Only Vest Upon Connection and Application):

Court ruled that another reason developer did not vest via plat application was because pursuant to prior case law fees don't vest until connection application and payment made. This is because connection and application was required by City's municipal code to secure service.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Charges Don't Exceed Equitable Share

Developer argues that shouldn't be made to pay the higher GFCs because it had fully mitigated the impacts of the plat under its development agreement. Developer argues the GFCs aren't reasonable and exceed its "equitable share" required by governing statute, RCW 35.92.025:

> *Cities and towns are authorized to charge property owners seeking to connect to the water or sewerage system of the city or town as a condition to granting the right to so connect, in addition to the cost of such connection, such **reasonable** connection charge as the legislative body of the city or town shall determine proper in order that such property owners shall bear their **equitable share** of the cost of such system.*

RCW 35.92.020(1) defines sewerage systems to include stormwater systems.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Charges Don't Exceed Equitable Share

Court rules that GFCs reasonable and equitable share not exceeded because share computed per class of property owners, not individual owners.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Charges Don't Exceed Equitable Share

Analysis:

GFC Ordinances presumed valid, but presumption no longer exists when evidence discloses that the basis on which the ordinance establishes the fee is not the proper basis the statute authorized.

Courts will sustain a legislative determination if they can conceive of any state of facts that justify the determination.

To successfully challenge GFCs enacted pursuant to RCW 35.92.025, a party must adduce evidence disclosing that the basis on which the ordinance establishes the fee is not the proper basis authorized by the statute.

From the court:

> *The statute requires connection charges established by ordinance to be "reasonable" such that "property **owners** shall bear **their** equitable share of the cost of" the city's utility system. RCW 35.92.025 (emphasis added). This language contemplates the equitable share of property owners as a class, not what is equitable to charge an individual property owner based on that particular owner's impact on the city utility system.*

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Charges Don't Exceed Equitable Share

Court defers to validity of GFC ordinance because it is the result of legislative action:

> *This reading of the statute is supported by the fact that adopting a fee ordinance for connection charges is a purely legislative function under RCW 35.92.025. Indeed, area-wide actions, such as the adoption of comprehensive plans and zoning ordinances, involving the exercise of the legislative body's policy-making role, are generally considered legislative. Notably, such actions are not made quasi-judicial simply because they affect specific individuals. Although legislative decisions may appear adjudicatory when groups focus on how the particular decisions will affect their individual rights, all policy decisions begin with the consideration and balancing of individual rights.*

(citations and quotation marks omitted).

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Charges Don't Exceed Proportionality Requirements of RCW 82.02.020:

Developer argues that since it already mitigated its impacts via development agreement that GFCs violated proportionality imposed by RCW 82.02.020, which requires in pertinent part as follows:

> *Nothing in this section prohibits counties, cities, or towns from imposing or permits counties, cities, or towns to impose water, sewer, natural gas, drainage utility, and drainage system charges. However, no such charge shall exceed the proportionate share of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged. Furthermore,* ***these provisions may not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.***

Court rules RCW 82.02.0202 not applicable, because RCW 35.92.025 was adopted prior to RCW 82.02.020 and thus could not be "contracted" by proportionality requirement of RCW 82.02.020.

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Westridge-Issaquah II LP v. City of Issaquah, (Wash. Ct. App. Dec. 6, 2021)

Takeaways:

Decision clarifies, a little, extent of vesting in preliminary plat applications, but still debatable issues. E.g., Do building envelopes vest setbacks? (arguably no) Do delineated critical area buffers vest (probably yes). Are minimum lot sizes vested (in most if not all situations yes).

Be very careful to not lock in GFC charges into preliminary plat decisions. If a preliminary plat decision make a finding that a GFC is "$X," that will likely lock the amount into $X because the findings of a final decision can't be challenged unless timely appealed.

80

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Puyallup Redux I:

Primary Holding/Concept:

Invalidation of SEPA determination doesn't invalidate all intermediate permitting decisions.

81

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Facts:

In prior ruling, court invalidated an MDNS issued by Pierce County on the basis that Pierce County had improperly refused to transfer lead SEPA agency status to Puyallup for review of a warehouse and distribution facility bordering Puyallup.

The court had previously held that Puyallup was entitled to assume lead agency status because the project was located within water and sewer utilities operated by Puyallup, and Puyallup approval was required for design elements pertaining to the infrastructure.

Prior to MDNS invalidation, Pierce County had approved a short plat and stormwater permit for the project, a warehouse and distribution facility bordering Puyallup.

82

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Issue: What impact does invalidation of MDNS have on prior decisions made by Pierce County?

During remand in superior court, City presented proposed order invalidating all County decisions pertaining to the project. County proposed order that limited invalidation to final decisions and decisions based upon the MDNS. The superior court adopted the County's order.

83

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

City Proposed Order:

All County reviews, decisions, permits, and approvals related to the Knutson Farms project are null and void ab initio. The underlying review processes may be recommenced once the Final EIS is issued by the City of Puyallup. Until then, all County reviews, decisions, permits, and approvals for the Knutson Farms warehouse project are on hold.

84

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

County Proposed Order:

Decisions by Pierce County based upon the MDNS issued for the Knutson Farms warehouse project are null and void, and the applications are returned to the status of pending applications. Pierce County shall issue no final decisions on the Knutson Farms warehouse project until an EIS is completed.

85

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Analysis:

Decisions based on a void SEPA determination are also void.

However, case law establishes that new SEPA review can rely upon prior SEPA review decisions. Agencies can rely upon information gathered in the former SEPA review process.

WAC 197-11-948(2) provides that upon assumption of lead agency status, the new DS "shall be based only upon information contained in the environmental checklist attached to the DNS transmitted by the first lead agency, and any other information the new lead agency has on the matters contained in the environmental checklist."

86

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Analysis II:

WAC 197-11-070(2) provides that agencies empowered to make permitting decisions may make decisions throughout the application process so long as they do not *"(a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives*."

87

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Holding:

…when an agency assumes lead agency status and issues a DS, the prior agency's determination and decisions made in reliance on it are voided. But the regulations do not require courts to void non-SEPA related decisions, even if a court determines an EIS violates SEPA. Nor does it prevent reliance on information gathered or reviews generated during the prior process.

(citations omitted)

88

City of Puyallup v. Pierce Cnty., 54474-1-II (2021)

Takeaways:

Puyallup case can be applied to situations where have to redo SEPA because of inadequate notice or other procedural errors. You're not always stuck going back to square one for failure to follow process.

89

The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Superior Court subject matter jurisdiction extends throughout Washington for land use cases.

** But venue for actions against County limited to the superior court of that county or one of the two nearest judicial districts per RCW 36.01.050.

90

The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Facts:

Glenrose association files appeal over approval of sports complex by Spokane County in neighboring Lincoln County.

On motion of Spokane County, Lincoln County superior court dismisses on grounds of lack of subject matter jurisdiction.

91

The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Legal Analysis:

Jurisdiction = power to hear and determine a case.

There are two types of jurisdiction – subject matter and personal.

Subject matter and personal jurisdiction are defined by constitutional restrictions. Legislature has no power to restrict the constitutional reaches of jurisdiction.

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The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Legal Analysis:

Article IV, Section 6 of WA constitution confers superior courts with broad jurisdiction over original actions, appellate jurisdiction over cases arising from inferior courts and justices of the peace, and jurisdiction over various writs.

The Land Use Petition Act (basis of sports complex challenge) is based on constitutional writ of review, which can be exercised by any superior court in the state.

93

The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Legal Analysis:

Spokane County argues that jurisdiction limited to Spokane County Superior Court by WA Const. art. IV, Section 6:

> *The superior court . . . shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law*

But, Spokane decision issued by hearing examiner, who is not an inferior "court".

94

The Glenrose Ass'n v. Spokane Cnty., No. 38376-8-III (Wash. Ct. App. June 7, 2022)

Holding – case sent back to Lincoln County Superior Court, who could still consider change in venue.

Note that venue for actions against county limited by RCW 36.01.050 as follows:

(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.

95

New Harvest Christian Fellowship v. City of Salinas, No. 20-16159 (9th Cir. Mar. 22, 2022)

Primary Holding:

Zoning ordinance prohibiting church from holding religious services on first floor of building doesn't create substantial burden on exercise of religion in violation of Religious Land Use and Institutionalized Persons Act (RLUIPA).

Zoning ordinance prohibiting church from holding religious services on first floor of building while authorizing theaters and other similar uses to accommodate groups of people violated equal treatment of RLUIPA.

96

New Harvest Christian Fellowship v. City of Salinas

Facts:

New Harvest purchases two-story Beverly Building in 2018 in hopes of using it for religious services on first floor with classrooms and other uses on second.

Beverly Building is located in "Downtown Core," an area with zoning restrictions that prohibits *"[c]lubs, lodges, places of religious assembly, and similar assembly uses*" from operating on the "*ground floor of buildings facing Main Street within the Downtown Core Area*."

97

New Harvest Christian Fellowship v. City of Salinas

Facts:

City amended code to ensure that New Harvest could conduct worship services on first floor so long as it added a café or similar use to the front of the building and held the services in the back.

New Harvest refused to take advantage of the amendment.

98

New Harvest Christian Fellowship v. City of Salinas

RLUIPA Substantial Burden Prohibition:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest

99

New Harvest Christian Fellowship v. City of Salinas

RLUIPA Substantial Burden Prohibition:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest

100

New Harvest Christian Fellowship v. City of Salinas

RLUIPA Substantial Burden Prohibition:

Court notes that challenged regulation must impose more than inconvenience on religious exercise.

Factors to consider are whether imposition is arbitrary such that it could be easily applied to future applications; the alternatives available to the organization; whether those alternatives would entail substantial uncertainty, delay or expense; and whether alternative sites are available.

Court looks to totality of circumstances.

101

New Harvest Christian Fellowship v. City of Salinas

RLUIPA Substantial Burden Prohibition:

Court finds no substantial burden:

1. New Harvest was able to conduct services on first floor by reconfiguring that floor as suggested by City and also could do the services on the second floor;
2. New Harvest could have conducted its services at another building site; and
3. New Harvest purchased the Beverly Building knowing of the restrictions.

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New Harvest Christian Fellowship v. City of Salinas

RLUIPA Equal Treatment Requirement:

"*No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution*."

103

New Harvest Christian Fellowship v. City of Salinas

Judicially imposed review standard for RLUIPA equal treatment:

(1) there must be an imposition or implementation of a land-use regulation,
(2) by a government,
(3) on a religious assembly or institution, and
(4) the imposition or implementation must be on less than equal terms with a nonreligious assembly or institution.

104

New Harvest Christian Fellowship v. City of Salinas

Court finds violation of equal treatment clause because it permits certain nonreligious assemblies like theaters to operate on the ground floor of the Main Street Restricted Area while forbidding religious assemblies from doing the same

Analysis (oversimplified):

To meet that burden with respect to the contested fourth element, the City must show that any nonreligious assembly permitted to operate on the first floor of the downtown core area is not similarly situated to a religious assembly with respect to an accepted zoning criterion

Salinas argues that churches should be lumped with clubs and lodges as prohibited from first floor use because they do not contribute to the pedestrian focused objective of the planning area, while more public uses such as theaters do. However, court finds that churches are open to the public like theaters and do attract nonmembers.

105