

No. 70542-3
King County Superior Court # 12-2-18714-2 SEA
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

THE CITY OF KIRKLAND, a Washington municipal corporation,
Appellant,

vs.

POTALA VILLAGE KIRKLAND, LLC, a Washington limited
liability company, and LOBSANG DARGEY and TAMARA
AGASSI DARGEY, a married couple,

Respondents.

RESPONDENTS' OPPOSITION TO MOTION OF WASHINGTON
STATE MUNICIPAL ATTORNEYS AND FUTUREWISE FOR
PERMISSION TO FILE AN AMICIAE CURIE BRIEF

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Respondents Potala Village respectfully objects to the Motion for Permission to File an *Amici Curiae* Brief submitted by the Washington Association of Municipal Attorneys and Futurewise on three grounds:

1. The Motion has not been filed in a timely manner.
2. The Motion seeks to raise an issue which is well beyond the scope of the issues addressed in the briefs of both the Petitioner and Respondent in this case, and in fact is inconsistent with the arguments of both the City and Potala Village.
3. The Motion and proposed *Amici Curiae* brief raises an issue of statewide importance that, if it is to be considered, should be addressed in a manner which allows the issue to be fully developed and which allows many other parties potentially affected by the decision to intervene or submit *Amici Curiae* briefs.

I. THE MOTION IS UNTIMELY

Petitioner City of Kirkland filed its Opening Brief in this matter on October 18, 2013.

Respondent Potala Village filed its Brief on December 6, 2013.

The City of Kirkland filed its Reply Brief on January 10, 2014.

This matter is set for oral argument on June 6, 2014, with oral argument limited to ten minutes per side.

The Motion for Permission to File an *Amici Curiae* Brief was filed and served on May 7, 2014; four months after the last briefs of the parties were filed and less than a month before oral argument. If the Motion is

granted, the timing of the motion is such that the Respondent will not even have the normal 30 days allowed by RAP 10.2 to submit a response brief in advance of oral argument, let alone allow the Court time to review and analyze that brief in advance of oral argument. The lack of adequate time to prepare a response brief is aggravated by the fact that the attorney who has represented Potala Village throughout this case, Duana Koloušková, is out of the country and will not return until May 21.

The parties seeking permission to file an amici curiae brief could easily have filed their motion and proposed brief months ago, as the case has been fully briefed since early January. By waiting until it is too late for Potala Village to have adequate time to prepare and submit a timely response brief, the petitioning parties seek to obtain a tactical advantage.

The Court should not reward the moving parties for their tardiness or allow them to exploit a tactical advantage and should deny the Motion for Permission to file an amici curiae brief.

II. THE MOVING PARTIES SEEK TO RAISE AN ISSUE NOT ARGUED OR BRIEFED BY THE PARTIES

The issues raised in this case are whether, under the vested rights doctrine, as adopted by the Washington courts and clarified, in part, by the Legislature, the City of Kirkland's rules for processing shoreline permits and other land use permits, allow the City to piecemeal the vesting of applications in a manner that forces an applicant to process applications sequentially and, while the first application in the sequence is being processed, modify its codes so as to allow denial of subsequent applications

even though the first application complied with all of the development regulations in effect when the first permit was submitted.

Both the Petitioner and the Respondent based their arguments on analyses of both the common law of vested rights, which has been the law in the State of Washington for at least four decades, and on recent legislation which has attempted to clarify some, but not all, of the common law principles on which the vested rights doctrine is based.

The *Amici Curiae* Brief proposed by the Moving Parties raises an entirely new and far-reaching argument – that the common law doctrine of vested rights and all of the judicial precedents on which it is based, has been superseded because the legislature has recently attempted to clarify some aspects of the doctrine. On this basis, the moving parties ask this Court to declare that the legislature has effectively repealed the entire body of case law regarding the vested rights doctrine. This theory was not raised at the trial court, it was not argued at the trial court, it was not briefed by the parties, and, in fact, it is inconsistent with the arguments of both the City of Kirkland and Potala Village, both of which relied up and argued the case law regarding the common law vested rights doctrine in their briefs submitted in this case.

The Supreme Court has made it clear that appellate courts should not consider amicus briefs with present issues which are not raised by and addressed by the parties to the case. *City of Tacoma v. Luverne*, 118 Wn.2d 826, 832, 827 P.2d 1374 (1992).

Since the issue and argument raised by the Motion for Permission to File an *Amici Curiae* Brief and the Brief proposed by the moving parties raises only an issue and request for relief that was not only not addressed by the parties, moreover, it is inconsistent with the positions of both parties, the Motion should be denied.

III. THE MOTION AND AMICI CURIAE BRIEF RAISES AN ISSUE OF STATEWIDE IMPORTANCE

The vested rights doctrine is one of the most fundamental principles of land use law in the State of Washington, affecting virtually every permit application submitted in the State of Washington which proposes any new development. Not surprisingly, municipalities and their legal counsel are frustrated by some aspects of the doctrine because it limits the ability of local governments to change the law after a controversial application is submitted and tends to prevent local elected officials in cases like the present one, from appeasing strident opponents of proposed development projects by passing new rules to stymie projects that comply with existing code requirements. And not surprisingly, environmental organizations, like Futurewise, are not fond of the vested rights doctrine because it sometimes prevents them from pressuring local officials into changing regulations to stop pending projects. But on the other hand, the doctrine also protects property owners from wasting tens of thousands of dollars on permit applications, only to find that the local government has, at the last minute, changed the rules. As the City of Kirkland itself acknowledges in its Opening Brief at p.17, the vested rights doctrine is “a delicate balancing of

interests,” striking a “balance between the public’s interest in controlling development and the developer’s interest in being able to plan their conduct with reasonable certainty.”

In this particular case, assuming the Court opted to address the sweeping claim by the moving parties that the Court should simply declare the common law doctrine to have been abolished, the outcome would affect literally tens of thousands of property owners, both public and private, who rely on the vested rights doctrine to guide their plans to acquire property, prepare plans for permits and submit and process permit applications. The moving parties seek to have the Court address this argument in a vacuum, without the benefit of argument by either of the parties to this case, neither of which made such an argument in this case, or from the many other interest groups that would be affected by such a decision. It is perhaps not surprising that the moving parties waited until the eve of oral argument to submit their proposed *amici curiae* brief, knowing that the timing would prevent any party interested in submitting a brief in opposition to their position from having time to respond properly and thoughtfully before the case was argued and decided by the Court.

The Court should recognize that this is not the proper situation or manner in which to address an issue of statewide significance. If the moving parties wish to pursue their argument, they should do so in a case where the issue is properly framed, fully briefed and all parties with an interest have an equal opportunity to present their positions and theories to the Court.

CONCLUSION

Based on the foregoing analysis, Potala Village respectfully requests this Court deny the Motion for Permission to file an Amici Curiae Brief.

DATED this 13th day of May, 2014.

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