No. 100952-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82720-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re:

JDH INVESTMENT GROUP, LLC

Receivership Debtor.

PETITION FOR REVIEW

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A. Identity of Petitioners.

The petitioners are JDH Investment Group, LLC ("JDH"), and Thomas Downie, appellants in the Court of Appeals.

B. Court of Appeals Decision.

Petitioners seek review of the Court of Appeals' March 25, 2022, Order Granting Motion to Lift Stay and Dismiss Appeal, which dismissed petitioners' appeal under RCW 7.60.260(5) because they did not post security to stay an order approving a purchase and sale agreement between the receiver appointed to sell an 80-acre parcel owned by JDH and respondent Pulte Homes of Washington, Inc. ("Pulte"). (App. 1-2) The Court of Appeals denied petitioners' timely motion for reconsideration on April 22, 2022. (App. 3-4)

C. Issues Presented for Review.

1. RCW 7.60.260(5) provides that the reversal of an order authorizing the sale of receivership property "does

not affect the validity of a sale . . . under that authorization to an entity that purchased . . . the property in good faith." Did the Court of Appeals erroneously rely on RCW 7.60.260(5) to dismiss this appeal in the absence of any "sale" to respondent—Pulte has not closed on its purchase of JDH's property and may never do so because the purchase and sale agreement contains multiple contingencies that allow Pulte to abandon the purchase without consequence?

2. Does the Court of Appeals' decision undermine RCW 7.60.260(5)'s purpose to protect actual purchasers of property at judicial sales and not those that have not yet—and may never—pay for the property?

D. Statement of the Case.

This appeal arises from a receivership over appellant JDH and its sole asset—an 80-acre tract of developable

land ("the property") in the Auburn area. (CP 1, 2195)[1] In 2017, the City of Auburn approved a preliminary plat for the property allowing construction of 200 single-family homes conditioned upon acquiring reasonable use waivers for encroachments into critical areas or removing the proposed encroachments. (CP 36, 712-39) As of October 2019, the land's appraised value was between $19,000,000 and $21,845,000, according to a 101-page appraisal report. (CP 591-691, 1686, 1689) This value reflects years of effort spent by JDH and its principal, Downie, obtaining the preliminary plat designation. (CP 592, 1320)

In the fall of 2019, one of JDH's creditors, its former attorney Michael Zeno, initiated foreclosure proceedings and scheduled a foreclosure sale of the property over roughly $200,000 in unpaid legal bills based on a third-

[1] Citations in this petition are to the Clerk's Papers and the relevant pleadings and rulings in the Court of Appeals, which are attached to this petition as an appendix.

position lien. (CP 2, 2377) Believing that a distressed foreclosure sale would harm JDH's senior secured creditors, who held $5 million in debt secured by the property, as well as JDH and Downie, JDH petitioned the superior court to appoint a general receiver under RCW 7.60 and RCW 7.08 for the benefit of its creditors. (CP 1-12) Downie hoped the receivership would give him breathing room to refinance JDH's debt to pay off its creditors and develop the property. (CP 77-78)

After the trial court presiding over the receivership established a procedure for the sale of the property, the Receiver pushed for a sale to Pulte. (CP 130-34, 222-39, 1674-1701, 1763-1844, 1950-62) Over JDH's and Downie's objections, the trial court directed the Receiver to negotiate exclusively with Pulte, with an open auction to occur only if the "Receiver and Pulte are not able to negotiate a Purchase and Sale Agreement." (CP 1693)

After further negotiations, the Receiver and Pulte submitted a proposed purchase and sale agreement ("PSA") to the trial court for approval. (CP 1799-1844) Under the PSA, which the trial court ultimately approved, Pulte has three years to close on its purchase of the property and it will pay between $10,425,000 and $13,750,000 for the property, depending on whether Pulte obtains a reasonable use exception, modification approval, or new plat approval to develop the property. (CP 1801-02)[2] Pulte made no earnest money deposits, and the PSA does not require it to do so until after Pulte determines in its "sole and absolute discretion" that the purchase is feasible. (CP 1809) Pulte's feasibility determination, which starts the clock on the three-year closing period, has no set

[2] The purchase and sale agreement originally submitted to the trial court for approval contained two possible closing periods, the three-year option and a 120-day closing option. (CP 1801) The trial court selected the three-year closing option. (CP 2216)

deadline—Pulte is not required to make its feasibility determination until 90 days after all appeals of the trial court's orders "hav[e] been dismissed to Buyer's reasonable satisfaction." (CP 1803, 1809) The trial court also allowed the Receiver to hire its affiliate as the property's broker and approved a commission brokerage fee schedule that would net the Receiver's affiliate a commission of over $300,000 under the PSA. (CP 25-27; *see also* CP 1820)

The PSA contains numerous other contingencies that allow Pulte to abandon its purchase any time before the three-year closing deadline. For example, the PSA allows Pulte to unilaterally back out if it determines that it will be unable to obtain approvals for engineering plans and a new plat. (CP 1812) Other contingencies included approval by Pulte's parent company; the availability of sewer, water, electricity, and other infrastructure; and discovery of hazardous waste. (CP 1802-03) Were Pulte to exercise any

of the contingencies and abandon its purchase, the receivership estate would receive either nothing or, at most, a $350,000 earnest money deposit that, as noted, Pulte has not yet made and is not required to make until after its feasibility determination. (CP 1799)

JDH and appellant Bridges West, who became JDH's largest creditor after purchasing the $4.3 million first-position lien against the property, proposed an alternative to the Pulte sale—a refinancing plan that would pay the other creditors' claims and the receiver's administrative costs, and then terminate the receivership without JDH losing the property. (*See* CP 1702-18, 1724-42, 1753, 2089-100) To support this refinancing plan, Bridges West's owners wired $2.7 million to their attorney's trust account to pay the remaining claims, including brokerage fees (if allowed) and the receiver's administrative and legal fees, which totaled $2,656,000, according to the receiver. (CP 1957-59, 2077-78) Bridges West's owners, who are

experienced real estate developers, also confirmed they had completed due diligence on the property and were, unlike Pulte, not asking for any contingencies. (CP 1716-17, 1867-68, 2084, 2096) The refinancing plan provided for a closing date within 21 days of the court approving the plan. (CP 2098) Unlike the deal with Pulte, the Receiver would not receive a commission under the refinance. (*Compare* CP 2089-100, *with* CP 25-27)

In May 2021, the trial court entered orders authorizing the receiver to sell the property to Pulte and rejecting the refinance proposal. (CP 2192-218) JDH, Downie, and Bridges West appealed these orders. (CP 2152-257)

After filling their appeal, appellants asked the Court of Appeals to enter a limited stay under RAP 8.1 and RAP 8.3 that would prevent the closing of the sale pending their appeal. (App. 5-29) Appellants also argued that because the property has substantial value, having been appraised

for between $19 million and almost $22 million in 2019, it could fully secure any loss and thus no additional security should be required under RAP 8.1(c)(2). (App. 16-18) Respondents opposed appellants' request for a stay and insisted that any stay, if granted, should be conditioned on posting between $3.3 million and $16.3 million in security. (App. 61-62, 77) Respondents' arguments against using the value of the property to secure a stay were premised on their allegation that the property's "value will drop like a rock" after its preliminary plat approval expired in February 2022. (App. 50, 63)

On September 15, 2021, the Court of Appeals granted appellants' motion staying the closing of the purchase and sale agreement, but not otherwise restraining "[t]he rights of Pulte Homes to act under the purchase and sale agreement." (App. 57-60) The Court of Appeals also set the appeal for expedited consideration and remanded to the trial court to "determin[e] whether the property at issue

may fully or partially secure any loss and the form and amount of other appropriate security, if any." (App. 60)

The parties then litigated the amount and form of security in the trial court. The trial court rejected appellants' argument that the value of the property was sufficient to secure any stay, and instead ordered appellants to post $5,905,000 million as security for the stay. (App. 81-92) Appellants challenged this amount in the Court of Appeals under RAP 8.1(h) and the Court of Appeals reduced it to $3,565,500. (App. 119-21) The Court of Appeals also ruled that appellants should post the reduced security by January 31, 2022. (App. 121)

Despite their best efforts, JDH and Downie were unable to post the required security by the January 31 deadline. However, with the trial court's approval and at the expense of Downie, JDH applied for a one-year extension of the property's preliminary plat approval, which the City of Auburn granted on February 4, 2022.

(*See* CP 3648-56 (trial court order allowing JDH and Downie to apply for plat extension); App. 174, 180-85) Pulte, in contrast, made no efforts to renew the property's plat extension and was apparently content to let it expire, a result that would lower the purchase price Pulte paid from $13.75 million to $10.425 million. (*See* CP 1801)

On February 3, 2022, a month before oral argument had been scheduled in Division One, Pulte filed a motion to dismiss the appeal as moot, relying on RCW 7.60.260(5). (App. 122-36)[3] The Court of Appeals then struck the oral argument setting, requested additional briefing on Pulte's motion, and extended the deadline for appellants to post the required security to March 17, 2022. (App. 140-41, 186-

[3] RCW 7.60.260(5) states: "The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal."

87) Appellants were again unable to post the required security but nonetheless opposed Pulte's motion on the grounds that even in the absence of a stay, an appeal is not moot under RCW 7.60.260(5) where, as here, the purchaser has not closed on the sale authorized by the order challenged on appeal. (App. 142-70)

On March 25, 2022, the Court of Appeals granted Pulte's motion and dismissed the appeal, reasoning that "under the particular circumstances here, including the interests of the receiver and the creditors, equitable review compels compliance with the supersedeas bond previously ordered." (App. 2) The Court of Appeals ultimately concluded that "[c]onsistent with RAP 8.3 . . . the failure to post the bond warrants the dismissal of the appeal." (App. 2) The Court of Appeals then denied JDH and Downie's motion for reconsideration. (App. 3-4)

E. This Court should grant review and interpret RCW 7.60.260(5) to preclude an appeal only where a sale has been completed—a result that comports with its plain language and the receivership statute's purpose to protect creditors.

Neither the language of RCW 7.60.260(5) nor its underlying purpose supported the dismissal of this appeal given the undisputed fact that Pulte has not closed on its purchase of the property and can, until at least 2025, walk away from it for any number of reasons, including if it decides in its "sole and absolute discretion" that the purchase is not feasible. (CP 1809; *see also* CP 1799-804, 1811-12) The Court of Appeals' decision to the contrary conflicts with settled precedent governing statutory interpretation and raises an issue of substantial public interest in adopting an interpretation of RCW 7.60.260(5) that allows would-be purchasers to speculate on property sold at judicial sales to the detriment of the debtor and its

creditors. This Court should grant review. RAP 13.4(b)(1)-(2), (4).

1. The Court of Appeals decision conflicts with the plain language of RCW 7.60.260(5).

The Court of Appeals decision nowhere addresses the language of RCW 7.60.260(5). But when interpreting a statute, a court "start[s] with the statute's plain language and ordinary meaning." *Washington State Ass'n of Ctys. v. State*, 199 Wn.2d 1, 10, ¶ 14, 502 P.3d 825 (2022) (internal quotation and quoted source omitted).

The plain language of RCW 7.60.260(5) confirms that the statute is meant to protect actual purchasers of receivership property, not parties that might someday purchase receivership property. RCW 7.60.260(5) provides that in the absence of a stay "the validity of a *sale*" "to an entity that *purchased*" the property is not affected by a reversal on appeal:

> The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.

(emphasis added). The definition of "sale" is "the transfer of ownership of and title to property from one person to another *for a price*." Sale, *Merriam-Webster.com Dictionary* (emphasis added)[4]; *see also* Sale, *Black's Law Dictionary* (11th ed. 2019) ("The transfer of property or title for a price."). Likewise a "purchase" requires the payment of money. Purchase, *Merriam-Webster.com Dictionary* ("to obtain by paying money or its equivalent").[5]

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[4] Available at https://www.merriam-webster.com/dictionary/sale (last visited May 19, 2022)

[5] Available at https://www.merriam-webster.com/dictionary/purchase (last visited May 19, 2022).

Here, the Court of Appeals erred in dismissing the appeal despite the absence of a "sale." Pulte has not closed on its purchase by paying the purchase price and in exchange receiving title to the property. (*See* CP 1815 (providing that "[a]t closing" seller shall "transfer[] to Buyer all of Seller's right, title and interest in and to" the property and that "[a]t Closing, Buyer shall deposit . . . in Escrow . . . the Purchase Price")) *See also Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn. App. 459, 465, ¶ 20, 191 P.3d 76 (2008) (purchase and sale agreements "do not themselves convey title; instead, purchase and sale agreements are promises to convey title in the future.") (citing 18 Stoebuck & Weaver, *Washington Practice*, § 16.1, at 216 (2nd ed. 2004)). Indeed, Pulte has yet to make even an earnest money deposit and there is no assurance that it ever will, even with the dismissal of this appeal, because of the numerous contingencies and conditions in the

purchase and sale agreement. (*See* CP 1799-804, 1809, 1811-12)

The Court of Appeals also ignored the use of the past tense "purchased" in RCW 7.60.260(5), in conflict with Washington precedent governing statutory interpretation. As both this Court and the Court of Appeals have recognized, "[a] legislative body's use of a verb tense holds significance in construing statutes." *Crown W. Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wn. App. 2d 710, 738, ¶ 57, 435 P.3d 288 (citing *U.S. v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1354, 117 L. Ed. 2d 593 (1992)), *rev. denied*, 193 Wn.2d 1030 (2019); *see also Dependency of D.L.B.*, 186 Wn.2d 103, 116-18, ¶¶ 33-35, 376 P.3d 1099 (2016) (interpreting statute based on its use of the present tense); *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433-35, ¶¶ 14-16, 275 P.3d 1119 (2012) (interpreting statute based on its differing use of the present tense and present perfect tense). Had the Legislature intended for the

statute to apply to sales that will close in the future, it would have used the future tense, not the past tense, in describing the entities protected by the statute.

Rather than rely on the plain language of the statute, the Court of Appeals apparently relied on the federal cases cited by Pulte in its motion to dismiss interpreting 11 U.S.C. § 363(m), the federal bankruptcy analogue to RCW 7.60.260(5).[6] But federal courts interpreting the virtually identical language of 11 U.S.C. § 363(m) have relied on "traditional equitable principles" to hold that it protects "one who purchases in 'good faith' and for '*value*.'" *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3rd Cir. 1986) (emphasis added); *see also* William Norton,

[6] Like RCW 7.60.260(5), 11 U.S.C. § 363(m) states that the reversal on appeal of an authorization to sell bankruptcy estate property "does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

2 *Norton Bankr. L. & Prac. 3d* § 44:37 n.1 (April 2022 update) ("courts generally have followed traditional principles in holding that a good faith purchaser is one who buys in good faith and for value.").

Under traditional equitable principles "the uniform rule at common law is that an executory promise (secured or unsecured) is not value for purposes of bona fide purchase." *Restatement (Third) of Restitution and Unjust Enrichment* § 68 cmt. e (2011); *see also* 18 Stoebuck & Weaver, *Washington Practice*, Real Estate § 14.9 (2nd ed. May 2022 update) ("a mere promise to pay in the future is generally not valuable consideration"). Rather, "the purchaser who promises a future performance gives value *when the promise is later performed*." *Restatement (Third) of Restitution and Unjust Enrichment* § 68 (emphasis added); *Restatement (First) of Restitution* § 173 cmt. e (1937) ("It is not the making but the performance of the promise which constitutes value."). Thus, a person is

considered a good faith purchaser only if "before reversal, he has obtained the legal title and *has paid value therefor*.'" *Ehsani v. McCullough Fam. P'ship*, 160 Wn.2d 586, 592, ¶ 8, 159 P.3d 407 (2007) (quoting *Restatement (First) of Restitution* § 74 cmt. i; emphasis added); *see also In re Old Cold LLC*, 879 F.3d 376, 386 (1st Cir. 2018) ("*paying* the auction price is sufficient evidence of having paid value") (emphasis added).

Here, all that Pulte has given the receivership estate is a conditional promise: ***if*** Pulte does not exercise any of the numerous contingencies allowing it to abandon its purchase, it will pay the agreed upon purchase price. That is not "value" and Pulte is unequivocally not a good faith "purchaser."

The Court of Appeals decision ignores the language of the statute, as well as traditional principles governing who qualifies as a good faith purchaser for "value," in conflict with Washington precedent. This Court should

grant review under RAP 13.4(b)(1)-(2), and remand for a decision on the merits.

2. The Court of Appeals' decision is inconsistent with the purpose of RCW 7.60.260(5) to increase the value purchasers provide receivership estates.

The Court of Appeals' decision undermines the purpose of RCW 7.60.260(5), raising an issue of substantial public interest. RAP 13.4(b)(4). Like all rules promoting the finality of judicial sales, RCW 7.60.260(5) is meant to increase the value paid for receivership assets by eliminating the risk that an appellate court will deprive good faith purchasers of their property after they have paid the purchase price and taken title.[7] That intent is consistent with the general purpose of a receivership "to obtain the best possible price for the property of the insolvent."

[7] "As an officer of the court, a receiver's sale is a judicial sale." *Umpqua Bank v. Shasta Apartments, LLC*, 194 Wn. App. 685, 698, ¶ 34, 378 P.3d 585, *rev. denied*, 186 Wn.2d 1026 (2016).

Yakima Fin. Corp. v. Thompson, 171 Wash. 309, 312-13, 17 P.2d 908 (1933). But far from increasing the value provided to the receivership estate, the Court of Appeals allowed Pulte to force the receivership debtor and creditors to the bear the risk of its speculative "purchase" that may never come to fruition.

Courts follow the rule that good faith purchasers at judicial sales will not be deprived of their title based on an appellate reversal because "no one would buy" property at judicial sales if a reversal meant they "would lose both [their] property and [their] money." *Prince v. Mottman*, 84 Wash. 287, 296, 146 P. 841 (1915); *see also Guardado v. Taylor*, 17 Wn. App. 2d 676, 691, ¶ 39, 490 P.3d 274 (2021) (courts "promote the public policies of finality and trust in the courts" because otherwise "no person would purchase real property involved in a judicial proceeding") (internal quotation and quoted source omitted). In other words, "[i]t is the policy of the law to protect third parties who in good

faith and *for value* become purchasers at judicial sales, so that the highest and best price may be obtained at such sales." *Prince*, 84 Wash. at 295 (emphasis added).

Dismissing this appeal did nothing to further the purpose of RCW 7.60.260(5) when Pulte has yet to provide any "value" to the receivership and has not taken title to the property. There is no risk that Pulte could lose either its money or the property, let alone both. As one scholar has explained, speculators like Pulte who have promised to pay money for property in the future do not need protection as a good faith purchaser because they still have the "ability to get a release from [their] executory contract to pay." George Bogert et al, *Bogert's The Law of Trusts and Trustees* § 887 (June 2021 update); *see also Restatement (First) of Restitution* § 173 cmt. e ("If the transferee is compelled to surrender the property, he is relieved of his liability to pay the purchase price, having the defense of failure of consideration.").

Keying the protection of RCW 7.60.260(5) to the payment of the purchase price and transfer of title makes sense because that is the point in time that a purchaser provides value to the receivership estate. Promoting higher bids at judicial sales is pointless if it "amount[s] to nothing more than putting a price on a piece of property." *Williams v. Cont'l Sec. Corp.*, 22 Wn.2d 1, 12-14, 153 P.2d 847 (1944) (sheriff acted reasonably in selling property to second-highest bidder after first bidder failed to procure the amount of his bid because "[u]ntil and unless the bidder makes . . . payment he acquires no interest in the property."); *cf.* RCW 6.21.100 (buyer at sheriff's sale "shall forthwith pay the money bid to the officer").

An interpretation requiring closing on a purchase of property before RCW 7.60.260(5) applies is also consistent with long-standing principles for superseding enforcement of judgments. The consequence of failing to supersede a decision affecting property is that the appellant takes "the

risk that title to the property would pass . . . during the period of appellate review." *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 770, 27 P.3d 1233, *as modified*, 33 P.3d 84 (2001) (emphasis added); *see also* RAP 12.8 ("An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision."). Here, the risk that title to the property will transfer during the appeal is still just that—a risk that has yet to materialize because Pulte has not closed on its purchase. *See Spahi*, 107 Wn. App. at 773 (party was a good faith purchaser because he "obtained legal title and *paid value* . . . before the reversal of the judgment occurred."); *see also Prince*, 84 Wash. at 289 (party was a good faith purchaser because "[t]he sale was confirmed, and distribution of the proceeds was made"). Where, as here, a decision affecting property is not stayed, the equitable principles of restitution embodied in RAP 12.8 do not protect the inchoate interests

of a would-be purchaser because, as noted above, a party only becomes a good faith purchaser if "*before reversal*, he has obtained the legal title and has paid value therefor.'" *Ehsani*, 160 Wn.2d at 592, ¶ 8 (quoting *Restatement (First) of Restitution* § 74 cmt. i; emphasis added).

Here, Pulte has not paid the purchase price, nor has it paid any of the property's carrying costs. JDH and Downie instead incurred the expense of renewing the property's plat extension. Pulte is plainly speculating on whether real estate market conditions will be favorable at some point in the next few years and imposing the risk of its speculation on JDH and the creditors who will be empty-handed if Pulte—as expressly allowed by the trial court's erroneous orders—decides to walk away from its purchase without paying anything.

Thus, "equitable review" did not, as the Court of Appeals ruled, "compel[] compliance with the supersedeas bond previously ordered," nor was dismissal "[c]onsistent

with RAP 8.3" (App. 2), which allows an appellate court to issue orders necessary "to insure effective and equitable review." To the contrary, dismissing the appeal unjustly afforded Pulte the protections of RCW 7.60.260(5) even though it has yet to provide value to the receivership estate and may never do so, and ignored that the purpose of the RAPs is "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). It also elevated the interests of a would-be purchaser above those of the receivership debtor and creditors, contrary to well-established law. *See Ferree v. Fleetham*, 7 Wn. App. 767, 772, 502 P.2d 490 (1972) (when exercising discretion to approve the sale of a debtor's property, a court must exercise "equal concern for the rights of both creditor and debtor"), *rev. denied*, 81 Wn.2d 1010 (1973).

The federal bankruptcy analogue to RCW 7.60.260(5) confirms that dismissing this appeal was not consistent with the statute's purpose. Courts refer to 11

U.S.C. § 363(m) as creating a "bankruptcy mootness" rule, because if it applies "the court has no remedy that it can fashion even if it would have determined the issues differently." *In re Gucci*, 105 F.3d 837, 840 (2nd Cir. 1997) (internal quotation and quoted source omitted), *cert. denied*, 520 U.S. 1196 (1997). But federal courts universally stress that closing marks the point at which a purchaser is entitled to the protection of 11 U.S.C. § 363(m) and the dismissal of an appeal as moot. *See, e.g.*, *Gucci*, 105 F.3d at 840 ("denial of a requested stay has the effect of precluding this Court from reviewing those issues . . . *if the sale has closed in the interim*") (emphasis added); Hon. William Norton Jr. & William Norton III, 11 *Norton Bankr. L. & Prac. 3d*, Fed. R. Bankr. P. 8007 (Jan. 2022 update) ("Without a stay, *the completion* of such a transaction with a party who acted in good faith will render moot an appeal"; "*consummation* of such a sale or credit

transaction renders it impossible for an appellate court to grant any relief") (emphasis added).[8]

Moreover, because bankruptcy mootness, like traditional mootness, is premised on the inability of a court to provide relief it does not apply where the property remains within the jurisdiction of the court because the

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[8] *See also In re ICL Holding Co., Inc.*, 802 F.3d 547, 554 (3rd Cir. 2015) (refusing to dismiss as moot appeal seeking redistribution of funds in escrow because "[t]he provision stamps out only those challenges that would *claw back* the sale from a good-faith purchaser") (emphasis added); *In re Nashville Sr. Living, LLC*, 620 F.3d 584, 593 (6th Cir. 2010) ("Because the sale to Five Star has *closed*, the Committee cannot now 'impugn the validity' of the bankruptcy's court's authorization of the sale") (emphasis added); *In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001) ("In bankruptcy appeals, the 'finality rule' within 11 U.S.C. § 363 (1994) prevents the overturning of a *completed* sale") (emphasis added); *In re La Prea Lanette Allen*, No. BAP CC-13-1315, 2014 WL 1426596, at *2 (B.A.P. 9th Cir. Apr. 14, 2014) ("Courts consistently hold that a *consummated* sale of real property to a good faith third-party purchaser moots review") (emphasis added) (cited per GR 14.1(b); FRAP 32.1(a)); *In re Stanford*, 17 F.4th 116, 125 (11th Cir. 2021) ("The Stanfords failed to stay the sale, and the sale was *completed*. Accordingly, we cannot undo the sale by reversing or modifying the authorization order.") (emphasis added).

purchaser has not yet consummated its purchase. *In re Wintz Companies*, 219 F.3d 807, 811 (8th Cir. 2000) (11 U.S.C. § 363 "reflects the inability of courts to supply a remedy once property has left the bankruptcy estate"). Unless and until Pulte provides value to the receivership estate by paying the purchase price, the property remains within the receivership estate and an appellate court could provide appellants effective relief by reversing the trial court's orders.

The Court of Appeals' decision upends the settled reasons for protecting good faith purchasers for value at judicial sales and instead favors the interests of would-be purchasers that have yet to provide the receivership estate any value. This Court should grant review under RAP 13.4(b)(4).

F. Conclusion.

This Court should grant review, reverse the Court of Appeals' order dismissing this appeal, and reinstate the appeal.

I certify that this petition is in 14-point Georgia font and contains 4,860 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 23rd day of May, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 23, 2022, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd of May, 2022.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

Index to Appendix

Date	Description	App.
02/03/22	Respondent Pulte Homes' Motion to Lift Stay and to Dismiss Appeal	122-39
02/10/22	Ruling re: Response to Motion to Lift Stay and Dismiss	140-41
02/15/22	Joint Response to Respondents' Motion to Lift Stay and to Dismiss Appeal	142-72
02/15/22	Declaration of Ian C. Cairns, attaching Exhibit C only	173-85
02/18/22	Ruling re: Replies in Support of Motion to Lift Stay, Supersedeas Bond, and Oral Argument	186-87

IN THE COURT OF THE APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Receivership of: JDH INVESTMENT GROUP, Receivership Debtor BRIDGES WEST INVESTMENT GROUP, LLC, a Washington limited liability corporation; JDH INVESTMENT GROUP, LLC, a Nevada limited liability corporation; and THOMAS DOWNIE, Appellants, v. ELLIOTT BAY ASSET SOLUTIONS, LLC, a Washington limited liability corporation; PULTE HOMES OF WASHINGTON; LAW OFFICE OF G. MICHAEL ZENO, JR.; JTP SERVICES, INC., a Washington corporation; and JEFFREY PARKS, Respondents.	No. 82720-1-I (Consolidated with No. 82721-9-I; 82785-5-I) DIVISION ONE ORDER GRANTING MOTION TO LIFT STAY AND DISMISS APPEAL

On February 2, 2022 respondent, Pulte Homes of Washington, filed a motion to lift stay and dismiss the appeal after appellants JDH Investment Group failed to post the supersedeas bond ordered as a condition of the stay entered by this court on September 16, 2021. Respondent JTP service Inc. filed a joinder to this motion.

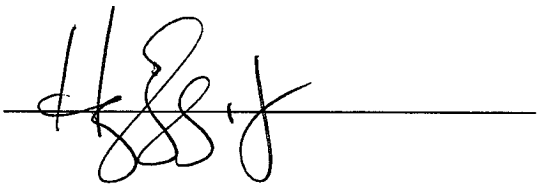
Appellant, JDH Investment Group, filed a response to the motion. The panel then called for further responses from the parties.

The panel has reviewed the responses filed by the parties. The status reports filed by the parties confirm that the required supersedeas bond has not been filed. Ordinarily the failure to post a supersedeas bond does not impact the viability of an appeal. But this appeal involves the trial court order approving a sale of property subject to a general receivership. And under the particular circumstances here, including the interests of the receiver and the creditors, equitable review compels compliance with the supersedeas bond previously ordered. Consistent with RAP 8.3 and the panel's February 17, 2022 order, the failure to post the bond warrants the dismissal of the appeal. Therefore, it is

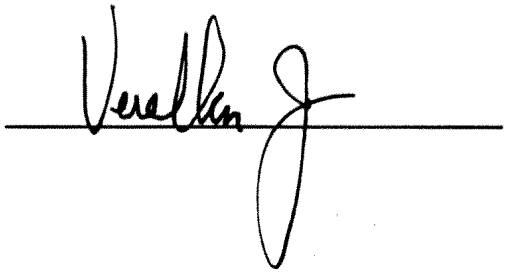
ORDERED that the respondent's motion to lift stay is granted; and it is further

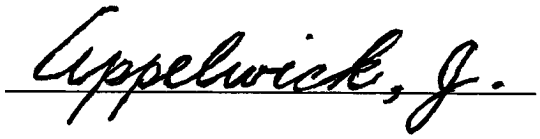
ORDERED that this appeal is dismissed.

FOR THE COURT:



WE CONCUR:





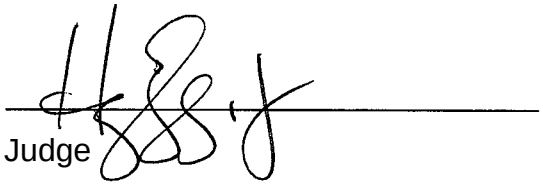
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JDH INVESTMENT GROUP, Receivership Debtor, BRIDGES WEST INVESTMENT GROUP, LLC, a Washington limited liability corporation; JDH INVESTMENT GROUP, LLC, a Nevada limited liability corporation; and THOMAS DOWNIE, Appellants, v. ELLIOTT BAY ASSET SOLUTIONS, LLC, a Washington limited liability corporation; PULTE HOMES OF WASHINGTON; LAW OFFICE OF G. MICHAEL ZENO, JR.; JTP SERVICES, INC., a Washington corporation; and JEFFREY PARKS, Respondents.	)	No. 82720-1-I (Consolidated with No. 82721-9-I; 82785-5-I) DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, JDH Investment Group, LLC, filed a motion for reconsideration of the order filed on March 25, 2022, granting the motion to lift stay and dismiss the appeal. The appellant, Bridges West Investment Group, LLC, filed a joinder to the motion. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



Judge

No. 82720-1-I
(Consolidated with No. 82721-9-I)

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re

JDH INVESTMENT GROUP, LLC,

Receivership Debtor.

APPELLANTS' JOINT MOTION FOR A STAY

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A. INTRODUCTION

In this receivership case, appellants request a stay of the trial court's decision affecting 80 acres of developable land with an appraised value exceeding $20 million. Last month, the court authorized the receiver to accept a conditional purchase offer for the property with a closing date in 2024. The trial court simultaneously rejected a refinancing plan presented jointly by appellants (the debtor, its equity holder, and its largest, senior creditor).

A stay is necessary to preserve the fruits of a successful appeal. Appellants are entitled to a stay as a matter of right under RAP 8.1(b)(2), and this Court also can and should use its discretionary authority to grant a stay under RAP 8.1(b)(3) and RAP 8.3 to prevent irreparable harm. *See* RCW 7.60.260(5) (providing that the sale of a property in receivership cannot be unwound unless a stay is entered pending appeal).

A stay should be without a supersedeas bond or cash. First and foremost, the scale of the potential losses to the respondent creditors is relatively small. The largest and senior-most creditor has joined in this appeal; it will not assert any potential losses that require security pending appeal. Meanwhile, the respondent junior creditors hold a fraction of the creditors' overall claims, and they have no reasonable expectation of recouping payment until closing in 2024, if ever. As for the putative

purchaser, the distant closing date means that any stay impedes no active development of the property. And the property's value—and appellants' equity—would adequately secure any compensable losses from delays.

B. IDENTITY OF MOVING PARTIES

Appellants—Bridges West, LLC (the largest, senior creditor), JDH Investment Group, LLC (the receivership debtor), and Thomas Downie (JDH's owner and equity holder)—bring this joint motion.

C. RELIEF REQUESTED

Appellants jointly request a limited stay of the sale order under review, secured by the receivership property. The stay should provide that:

1. The purchase and sale agreement ("PSA") may not close pending appeal and may be invalidated if this Court reverses the trial court's decisions under review. The purchaser, Pulte Homes, shall otherwise have the right to proceed under the PSA pending appeal, including by conducting due diligence and seeking land-use approvals.

2. The stay shall be without a supersedeas bond or cash. The real property and the proceeds of the sale, if it is upheld and closes, shall serve as security for the respondents' interests.

D. FACTS RELEVANT TO MOTION

The real property is 80 acres of undeveloped land in the Auburn area. (App. 296.) Its appraised value was between $19,000,000 and

$21,845,000 as of October 2019. (App. 30, 125, 128.) The property has received a preliminary plat designation allowing a developer to build 200 single-family houses. (App. 10, 40.) If developed, 200 homes sold for $750,000 each would generate $150 million.

The property's owner, appellant JDH, petitioned the superior court in fall 2019 to appoint a general receiver under RCW 7.60 and 7.08. (App. 1.) The court granted the petition, appointing as receiver Elliott Bay Asset Solutions, LLC. (App. 4.) The receiver tabulated total creditors' total claims of about $6.4 million: Sue Jones, $4,261,457.19; Betty Frye, $848,385.97; The Law Offices of M. Zeno Jr., P.S., $440,221.00; Randall Jackson, $229,457.08; JTP Services, $530,000.00; and Jeff Parks, $30,000.00 (App. 177, 267.) JDH also owed $118,385 in taxes. (App. 2.) JDH's owner, Downie, hoped to refinance JDH's debt and develop the property. (App. 8.) Then the pandemic started.

Meanwhile, the receiver asked the court to approve the receiver itself and Land Advisors Organization as co-brokers for listing the property for sale. The court granted the motion, allowing the receiver to collect brokerage fees from a property sale on top of the receiver's fees for administering the receivership estate. (App. 5–7.). From then on, the receiver wore two hats—one as the receiver administering the estate, and the other as a broker hired to sell the estate's property. The court's order

approved a brokerage fee structure where the commission percentage decreased if the brokers secured a higher price for the property. (*Id.*) Based on the math of the court-approved fee structure, the brokers would receive the same amount for a $7.5 million sale as they would a $10.5 million sale. (*See id.*) But, as Downie pointed out, the receiver and its co-broker would not receive brokerage fees if the creditors' claims were eventually paid without need for a property sale. (App. 11.)

After the case lagged for several months during the pandemic's initial phase, the real estate market heated up as interest rates lowered and the economy began reopening. Two plans then emerged—one, a refinancing plan, and two, a private sale of the property (no judicially-approved public bidding process) to a national conglomerate homebuilder.

An expert with experience as a bankruptcy trustee opined that "an option for a receivership debtor to refinance out of the Property for the full amount of the debt … would be appropriate …." (App. 179.) After the expert submitted that opinion, appellants JDH, Downie, and Bridges West jointly moved the court to approve a refinancing plan that would pay the other creditors' claims and the receiver's administrative costs, and then conclude the receivership without JDH losing the Auburn property. (App. 141–42, 268-74, 291–92.) Bridges West's owners had experience developing residential subdivisions in King County and an 800-acre

planned community in Chelan County. (App. 246.) Bridges West had become JDH's largest and senior-most creditor when Sue Jones assigned her rights to Bridges West. (App. 163–69.) Bridges West also paid the claim of creditor Randall Jackson, who then filed a satisfaction of judgment and release of proof of claim. (App. 154, 159–62.)

As part of the refinancing option, Bridges West's owners submitted a commitment letter for a loan to JDH to cover the remaining claims and the receivership's unpaid administrative costs. (App. 170–73, 281–84.) And these committed lenders wired $2.7 million to their attorney trust account to close the refinance plan. (App. 275–76.) The remaining claims, including brokerage fees (if allowed) and the receiver's administrative and legal fees, totaled $2,706,000 ($30,000 of which were later disallowed), according to the receiver. (App. 254–56.) JDH's plan, with Bridges West's support, provided for a closing date within 21 days of the court granting JDH's motion. (App. 288.) Bridges West's owners confirmed they had completed due diligence on the property already and were not asking for any contingencies that could scuttle a swift closing. (App. 155–56, 282, 286, 288.) The receiver and his co-broker objected, fearing this refinance plan would preclude them from receiving a brokerage fee for a sale of the property. (App. 239–40, 251.) The receiver's response also asserted additional concerns. (App. 247–59.)

The trial court adopted a series of orders establishing a sale procedure for the property, and the receiver pushed a sale to national homebuilder Pulte. (App. 12–16, 17–25, 113–40, 185–238, 247–59.) Over JDH and Downie's objections, the court directed the receiver to negotiate exclusively with Pulte, with an open auction and judicial sale to occur only if "Receiver and Pulte are not able to negotiate a Purchase and Sale Agreement by March 24, 2021." (App. 130–39.) The receiver then moved for approval of the private sale to Pulte, presenting an unsigned PSA that set out two paths to closing. (App. 193–238.). One path set out a 120-day closing option, which could be extended into 2022 under certain conditions. (App. 195.) For that option, the purchase price for the property was $7.5 million in addition to some interest and the receivership's administrative costs. (*Id.*) The other path set out a three-year closing date. For that option, the purchase price was $10.425 million or $13.750 million. (App. 195–96.) The final price was tied to the City of Auburn's future land-use decisions that lay within the control of Pulte and administrative requests that it made. (*Id*.) Both options included several contingencies, including a feasibility period of up to 135 days, allowing Pulte to back out before closing. (App. 195–98, 203.)

Pulte's two-tiered offer contrasted with an offer from Oakridge Homes, a developer based in Pierce County, for $7.7 million with shorter

feasibility and closing periods of 60 days and up to August 5, 2021, respectively. (App. 256–57.) The receiver and other co-broker had not sought Oakridge's proposal; Oakridge submitted it on its own initiative. (*Id.*). The receiver did not ask for court approval to negotiate with Oakridge.

Months before the court heard the receiver's motion to approve a sale to Pulte, JDH's attorney emailed the receiver to supply information that the receiver had requested about the refinance plan. (App. 174-76.) In a follow-up email, Bridges West's attorney confirmed that Bridges West would cover all allowed creditors' claims and the receiver's fees, with one critical exception—Bridges West would not pay a brokerage fee to the receiver individually for the transaction because "no sales transaction would take place." (App. 278–79.) Neither the receiver nor his attorney responded to this email. (App. 276.)

The other parties' positions were mixed. Zeno supported a sale to Pulte Homes and requested the shorter closing date. (App. 260–64.) Zeno conceded that "one certainly can and should consider an offer that comes in at the last minute," but still Zeno urged the court to disapprove the Oakridge offer and the JDH/Bridges West refinance plan. (App. 263–66.) JTP Services opposed the refinance plan but did not take a position on the sale to Pulte. (App. 241–45.) No party in interest expressly supported the Pulte option for a closing date in 2024. Pulte Homes filed nothing with the court.

Over the objections of the largest, senior creditor (Bridges West) and the debtor (JDH), and without the support of any other party in interest, the trial court approved the option for the three-year closing period and authorized the receiver to enter the PSA. (App. 303–05.) The court concluded the sale was in "good faith," and the court rejected the JDH/Bridges West refinance option. (App. 301–02, 305, 307–19.)

During the hearing, JDH's counsel asked whether the court's decision was "without prejudice to any appellate rights," and the trial court then discouraged an appeal. (App. 320.) While recognizing that an aggrieved party could come to this Court "at any time for any reason," the trial court warned against an appeal. (*Id*.) The court stated that "you are taking a risk that you're squandering the assets of this receivership property, not to mention maybe your own property, with all of this squabbling." (*Id*.) The court closed by stating that "now trying to derail" the receiver's sale "is counterproductive for a lot of people, including the debtor itself." (App. 320–21.)

A few days later, Bridges West noticed the listing was still on NWMLS and submitted a purchase-and-sale agreement to the receiver offering $7.5 million. (App. 328, 330, 347–49.) Based on that offer and additional grounds, Bridges West moved for reconsideration. (App. 322–27.) The trial court denied that motion. (App. 352–53.)

JDH and Bridges West filed notices of appeal, which were consolidated into a single appeal. (App. 350–51.) Downie then filed a notice of appeal too. (App. 354.) After the trial court's remarks discouraging an appeal, appellants elected to file this joint motion in this Court.

E. GROUNDS FOR RELIEF AND ARGUMENT

This Court should grant the stay, whether as a matter of right under RAP 8.1(b)(2) or as a matter of discretion under RAP 8.1(b)(3) and 8.3.

(1) This Court Should Grant a Stay as of Right Without Bond or Cash

A stay of "a decision affecting real … property," like the trial court's decision here, is a matter of right. RAP 8.1(b). Appellants JDH and Bridges West are therefore entitled to a stay.

(a) The Real Property and the Contract Purchase Price Have Sufficient Value to Secure Any Losses That the Non-Appealing Parties Might Incur Pending Review if the Appeal Is Unsuccessful

The only question is whether a supersedeas bond or cash is necessary. The answer is no. Under RAP 8.1(c), the amount of the security must be enough to cover the outlays and potential losses defined in RAP 8.1(c). Here, there is no money judgment. (App. 293–319.) And no party, except perhaps for the receiver, has the right to claim attorney fees on appeal, while the costs awarded are likely to be relatively small. So the correct measure of the necessary security should mainly be "the amount of

loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review." RAP 8.1(c); *see also, Norco Const., Inc. v. King Cty.*, 106 Wn.2d 290, 296, 721 P.2d 511 (1986) (stating that the measure of a prevailing party's damages after an unsuccessful appeal is "damages resulting from the delay in enforcement.").

The potential damages from the delay in enforcement are nil. The senior and largest creditor—Bridges West—wants the stay. So do the receivership debtor, JDH, and the holder of the equity in the debtor, Thomas Downie. The court-appointed receiver has no compensable interest in enforcement of the PSA. And neither the respondent creditors nor the brokers would face any potential losses because the closing date is three years from now. Until the deal closes, they have no reasonable expectation of recovering a penny because the agreement itself is a contingent one. Likewise, Pulte Homes cannot assert any potential loss because its own purchase offer assumes that the deal will be profitable for Pulte even if the closing date is in 2024. "Ordinarily," states RAP 8.1(c)(2), "the amount of loss will be equal to the reasonable value of the use of the property during review." But here, the property is undeveloped, not being put to any use, and will not be used until the far-off closing date. Pulte cannot complain that a broad stay would prevent Pulte from closing within three years

because appellants seek a narrowly tailored stay that would permit Pulte to proceed on its pre-closing work under the PSA.

In short, given this record, the respondents do not have any exposure to potential damages that would warrant a supersedeas bond or cash.

In any event, the property's value, along with the proceeds from the sale if it closes, would cover any potential losses from a stay pending appeal. An appraiser valued the property at nearly $22 million. (App. 26–109.) And at least two bidders—Pulte Homes and Oakridge Homes—offered to buy the land with a quicker closing date and a price exceeding $7 million. If this desirable property attracted bids at that level through the receiver's limited efforts, a more-rigorous sale process would surely fetch as much, and likely more. Simply put, the property suffices as security without need for a bond or cash. *See* RAP 8.1(c) ("If the property at issue has value, the property itself may fully or partially secure any loss and the court may determine that no additional security need be filed or may reduce the supersedeas amount accordingly.").

Appellants thus have a right to a stay. The property should be approved as alternate security for any future claims that respondents might assert for being unable to enforce the PSA pending appeal.[1]

[1] RAP 8.1 and 8.3 empower this Court to give that approval in the first instance. RAP 8.1(b)(4) confirms that either "the trial court *or* the appellate court may authorize a

(2) This Court Also Can and Should Enter a Discretionary Stay Under RAP 8.1(b)(3) and RAP 8.2

Besides the automatic stays set out in RAP 8.1, this Court also has the discretion to grant a stay under other rules. Because a receivership is an equitable proceeding, *Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 179, 381 P.3d 71 (2016), the trial court's decision may be stayed under RAP 8.1(b)(3). And under RAP 8.3, a stay is discretionary when a decision is not "supersedable of right under RAP 8.1." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 290, 716 P.2d 956 (1986). RAP 8.3's catchall authority "prevent[s] destruction of the fruits of a successful appeal." *Wash. Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). Regardless of whether a discretionary stay is considered under RAP 8.1(b)(3) or RAP 8.3, the criteria are the same: (1) "debatable issues are presented on appeal" and (2) "the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998) (citation omitted); *see also*, RAP 8.1(b)(3)(i)–(ii). This appeal meets both criteria.

party to post security other than a bond or cash, … or may authorize any other reasonable means of securing enforcement of a judgment." *Id.* (emphasis added). RAP 8.3's general grant of authority applies too.

(a) A Stay Is Appropriate Because Appellants Will Suffer Irreversible Harm and Because the Other Parties Would Not Be Harmed

If Bridges West and JDH are denied a stay, they risk the transaction closing and the property title transferring to Pulte Homes. *See Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 770, 27 P.3d 1233, *as modified*, 33 P.3d 84 (2001) ("By failing to supersede the judgment, [the appellant] took the risk that title to the property would pass into the hands of a third party during the period of appellate review."). The receivership statute confirms that this risk is not only real, but also that the title transfer would be irreversible. *See* RCW 7.60.260(5) ("The reversal or modification on appeal of an authorization to sell … estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal."). It's now or never.

Meanwhile, the respondents' interests are fully protected by the property itself. And with a distant closing date in 2024, the appeal would conclude before the PSA would close. A narrowly tailored stay that permits Pulte Homes to otherwise proceed under the PSA would mitigate any prejudice, as long as the stay makes clear that closing is stayed and that this Court's stay satisfies the proviso in RCW 7.60.260(5) regarding the sale's

validity. Pulte Homes might believe that its pre-closing work would make the property more valuable, and thus it would be inequitable for the appeal to move forward unless Pulte received assurances that it would be equitably compensated if the Court reverses and invalidates the deal. But should Pulte prove such an equitable right following return of the mandate, the property itself would be valuable enough to cover any such claim.

The bottom line is that the equities favor a stay.

(b) A Stay Is Appropriate Because this Appeal Presents Debatable Issues

When determining whether an issue is "debatable," the appellate court does not decide the merits. *Kennett v. Levine*, 49 Wn.2d 605, 606, 304 P.2d 682 (1956) (pre-rule case applying the identical pre-rule "debatable issues" standard). Rather, the court ascertains only whether the appellant's arguments are "colorable." Wash. State Bar. Ass'n, *Washington Appellate Practice Deskbook*, at 8-5 (4th ed. 2016). This threshold is even lower in this appeal because the equities strongly favor a stay. As this Court has recognized, "if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). This appeal easily meets that minimal standard.

While the trial court's authority under the receivership statute is largely discretionary, its authority is not "'absolute or arbitrary.'" *Chengdu Gaishi Elecs., Ltd. v. G.A.E.M.S., Inc.*, 11 Wn. App. 2d 617, 624-25, 454 P.3d 891 (2020) (quoting *Union Boom Co. v. Samish River Boom Co.*, 33 Wash. 144, 152, 74 P. 53 (1903). Rather, that authority "should be exercised with caution 'in view of all the facts and circumstances of the particular case.'" *King Cty. Dep't of Cmty. & Human Servs. v. Nw. Defs. Ass'n*, 118 Wn. App. 117, 122, 75 P.3d 583 (2003) (quoting *Union Boom*, 33 Wash. at 152). A trial court's exercise of discretion is reversible error unless it rests on tenable or reasonable grounds. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). Here, the trial court abused its discretion.

To start, the court's order violated RCW 7.60.260(2), which prohibits the court from approving a general receiver's sale of estate property if "[t]he owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale." RCW 7.60.260(2)(ii). To override such an objection and approve the sale, the court must determine whether "the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale." *Id.* Put another way, the court cannot approve the sale if an alternative arrangement would yield a quicker and better return for the objecting party.

Here, JDH's and Bridges West's objections triggered RCW 7.60.260(2)(ii), and the trial court had no reasonable basis to override their objections. Bridges West and JDH both made clear that they preferred a 21-day refinance rather than a slow-closing sale to a third party. Neither the receiver nor any party in interest offered any evidence to contradict JDH's and Bridges West's assessments of their own interests. The receiver's preferred deal of $7.5 million to Pulte was barely enough to cover the unpaid claims, administrative costs, taxes, and brokers' fees, which the receiver estimated would be $7,447,826. (App. 110–12.) So JDH—and Downie, as JDH's equity holder—would have gotten little in return from a property appraised at nearly $22 million. Even under the court-approved option with a purchase price up to $13.750 million, JDH and Downie were worse off. JDH still would lose the valuable property, and Downie would lose the profits from developing the property. Meanwhile, the additional interest that would accrue over three years, which JDH would owe to Bridges West and its other creditors, would cut away at the proceeds from the higher sale price. Despite these problems, the court cited no specific evidence and made no factual findings that complied with RCW 7.60.260(2)(ii). (App. 303, 317.) Without support, the court's conclusion was "arbitrary." *Union Boom*, 33 Wash. at 152.

Besides running afoul of RCW 7.60.260(2), the sale order was

manifestly unreasonable. No creditor asked the court to approve the deal with the closing date in 2024. Yet the court let the sale languish until then, violating the statutory directive to "liquidate the estate with reasonable dispatch." RCW 7.08.030(1). The distant closing date also elevated the risk from the contingencies in the PSA. The creditors, debtor, and equity holder could wait for three years to get paid, only to find that Pulte decides not to close. These flaws made the sale order an unreasonable choice.

The relatively low purchase price made it even worse—a dispositive defect, because a court-approved sale must "not deprive a judgment debtor of the fair market price for his property." *Ferree v. Fleetham*, 7 Wn. App. 767, 772, 502 P.2d 490 (1972). Under federal bankruptcy law, a large disparity between a sale price and the appraised value indicates the sale is error. Of course, a sale for less than appraised value, such as 75% of the appraised value, may be deemed adequate consideration. *In re Abbotts Dairies of Pennsylvania, Inc.,* 788 F.2d 143, 149 (3d Cir. 1986). But here, Pulte's offer was to pay *at most* approximately 65%, and as little as about 50%. Federal bankruptcy law bars a private sale earning such a small return in a bankruptcy proceeding. *See* 28 U.S.C. § 2001(b) ("No private sale shall be confirmed at a price less than two-thirds of the appraised value."). While not controlling, federal bankruptcy law persuasively shows the unreasonableness of the court's decision.

Although the receiver supported the Pulte deal, that is not a business judgment entitled to any deference. In a transaction of this magnitude, with the senior and largest creditor objecting, the trial court has the ultimate responsibility for the approval. *See, e.g.*, *Simantob v. Claims Prosecutor, LLC (In re Lahijani),* 325 B.R. 282, 290 (B.A.P. 9th Cir. 2005) (stating that a bankruptcy court must "assure that optimal value is realized by the estate" and that "in the face of opposition by creditors, the requirement of court approval means that the responsibility ultimately is the court's"); RCW 7.60.055(1) (vesting the trial court with "the exclusive possession and right of control with respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed"). The court's approval is not meant to be a rubber stamp.

And the court should have been especially vigilant about the price given the receiver's conflict of interest, which was compounded by the receiver's brokerage-fee percentage, which decreased as the sale price increased. (App. 6.). The receiver had little personal incentive to negotiate a better sale. And because the receiver stood to gain personally from a sale to Pulte, the receiver had no incentive to pursue a refinancing plan that would pay all creditors but deprive the receiver of a commission.

Given these circumstances, a finding of "good faith" was crucial. Under federal bankruptcy law, a court must find the sale was in "good

faith"—a requirement that protects against collusion and depressed sale prices. *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149–51 (3d Cir. 1986). Misconduct may include "collusion between the purchaser and … the trustee." *Id.* at 147. But the trial court's findings of good faith here were baren; the order cited no specific evidence. (App. 301–02.) And the receiver's motion for approval contained no evidence regarding the good faith of Pulte and the receiver. (App. 185–92.)

The court and the receiver overlooked the central imperative of receivership law: "equal concern for the rights of both creditor *and* debtor." *Ferree v. Fleetham*, 7 Wn. App. 767, 772, 502 P.2d 490 (1972) (emphasis added). The receiver urged the court to effectively punish the debtor, to disregard the wishes of Bridges West, and to benefit an unrelated third party, Pulte. In fact, the receiver criticized the refinance plan on the ground that JDH would "get the property back for a song, and reap significant profits when it is either developed or sold." (App. 251.) The receiver also attacked JDH for questioning the fees of the "professionals working to resolve this dispute" (i.e., the receiver as broker and the co-broker) and for deigning to question the amount of some of the creditors' claims. (*Id.*) In short, the receiver blasted JDH for seeking to benefit from the $22 million property it owned and for not willingly paying whatever amount the creditors claimed. In this way, the receiver picked sides and failed to guide

the court toward an option that gave equal concern to JDH, its equity holder, and its largest creditor.

Contrary to the receiver's apparent view, *Ferree* makes clear that a receivership should *help* debtors: "when economic conditions are severely imbalanced, basic concepts of justice require that equity intervene to aid the debtor at the expense of the creditor." 7 Wn. App. at 772. And the expert bankruptcy trustee confirmed that if "the debtor/equity can satisfy all estate indebtedness (including the court's approved calculation of all costs of administration) in full through a refinancing, then facilitating a refinance would be the appropriate avenue in which to proceed." (App. 180.) As this expert explained, "[n]o party-in-interest other than perhaps real estate brokers can complain of a short-term process such as a refinance that ensures that all creditors are paid 100% of what they are owed." (App. 182.)

In sum, the court boxed itself into a private sale that favored the real estate brokers and a developer that was not a creditor. In doing so, the court arbitrarily overrode the wishes of the largest, senior-most creditor and failed to secure fair market value for the debtor. That was an abuse of discretion.

F. CONCLUSION

This stay motion should be granted.

DATED this 18th day of June, 2021.

Respectfully submitted,

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NO. 82720-1-I
(Consolidated with No. 82721-9-I)

COURT OF APPEALS, DIVISION ONE,
FOR THE STATE OF WASHINGTON

In re JDH INVESTMENT GROUP, LLC, Receivership Debtor.	RESPONDENT PULTE HOMES' RESPONSE TO JOINT MOTION FOR A STAY

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I. INTRODUCTION

The Motion to Stay should be denied and remanded to the trial court for determination. First, requests for a stay arising under RAP 8.1(b)(2) (i.e., as of right), should be decided by the trial court.

Second, a discretionary stay is unwarranted. Appellants cannot establish a debatable issue for appeal because their position is contrary to well-established law, and they lack the legal right to pursue the alternative relief of refinancing the debt.

Third, a stay necessitates posting a supersdeas bond or cash to protect Pulte and the receivership estate because the preliminary plat approval for the Property will expire during this appeal. This plat expiration eviscerates Appellants' exaggerated valuation of the Property. Consequently, the trial court, which is most familiar with the Property, should decide what the security should be.

II. STATEMENT OF ADDITIONAL FACTS

A. The history of the Property and JDH's financial trouble.

JDH Investment Group borrowed $2 million from widow, Sue Jones, so that it could buy approximately 80 acres located in Auburn ("Property"). JDH purchased the property from Tom Downie's[1] former mother-in-law, Betty Frye. JDH purchased the property in 2013 for $3

[1] Mr. Downie is the sole remaining member of JDH. *Frye,* 12 Wn. App. 1077.

million by using Ms. Jones' $2 million loan and financing the remaining $1 million with Ms. Frye through promissory notes, both secured by the Property. *Frye v. JDH Investment Grp., LLC,* 12 Wn. App. 2d 1077 (Div. 1, 2020).[2]

On February 8, 2017, JDH obtained preliminary plat approval for the Property from the City of Auburn. *Id.* Preliminary plat approvals are valid for five years. Auburn City Code § 17.10.110(A), Appendix 1. They may be extended in one year increments, up to three times, but are subject to certain conditions and are not guaranteed. *Id.* § 17.10.110(C).

In 2017, JDH received a letter of intent from Toll Brothers proposing to buy the Property for $7.8 million. That deal fell through when Ms. Frye sued JDH for unpaid loans and recorded a lis pendens on the Property. *Frye,* 12 Wn. App. 2d 1077. In that litigation, JDH claimed that Toll Brothers' offer constituted a business expectancy.

The Law Offices of G. Michael Zeno represented JDH in the *Frye* litigation. Zeno was provided a deed of trust on the Property. When JDH failed to pay for legal services, Zeno started foreclosure. Appendix 3.

On the day before the foreclosure sale, JDH entered into an an assignment for the benefit of creditors with the Receiver. *Id*. The assignment recites that JDH was "unable to pay debts as they become

[2] *Frye* is an unpublished decision that is cited only for its recitation of facts.

due…" Appendix 6. Through the assignment, JDH granted, assigned, conveyed, and transferred all property to the Receiver. Appendix 7. The assignment reads: "The assignee shall take possession and administer the estate, […] and convert the estate into money through a sale disposition …" *Id.* (emphasis added). The assignment "irrevocably" appointed the Receiver "with full power and authority to do all acts and things which may be necessary" to effectuate the assignment, including the powers to grant and convey the Property. Appendix 8.

B. The receivership proceeding before the trial court.

The Order Appointing General Receiver–drafted by JDH–empowered the Receiver "with exclusive possession and control" over the Property. Appendix 15. This included the power to "market, list and sell the Property in the Receiver's discretion." *Id.* (emphasis added), *see, also,* Appendix 18, 20-21. Nothing states that the Receiver was to merely hold the Property out of reach of the creditors while JDH pursued refinancing.

When it came to selling the property, "[t]he Receiver, the Court approved real estate brokers, and JDH/Downie extensively marketed the Real Property since the receivership was filed in September 2019." Appendix 24. The Receiver solicited the creditors and parties' input on marketing the Property, but no pro-active suggestions were made. *Id*. Consequently, the brokers sent an offering to 27 likely purchasers, e-

mailed announcements to 10,568 real estate professionals, personally contacted 25 builders, and posted the Property on internet listings exposing it to over 30,000 broker subscribers. At least 582 brokers viewed the listing. Appendix 37.

The trial court instructed the Receiver and its brokers to analyze any offers they received, negotiate such, and select an offer to present to the court for approval. Appellants' Appendix 15. The trial court made clear: the offer selected must satisfy all of the creditors' claims in full at the time of closing. *Id.* The trial court reaffirmed this in later orders. Appellants' Appendix 19 & 22. The Receiver filed a pleading outlining the criteria it would consider for evaluating offers. Appendix 25-27.

C. Pulte makes an offer.

Pulte Homes of Washington, Inc. ("Pulte") submitted an offer satisfying the Receiver's criteria. Pulte is an established builder who has successfully entitled, developed, and sold homes in the City of Auburn. Appendix 31. Pulte met with the City about the specific Property since 2019. Having received favorable feedback about its plans for the Property, Pulte submitted a draft purchase agreement to the Receiver on November 2, 2020. The offer was nearly $3-6.25 million more than all of the creditors' claims combined. Appellants' own "expert" testified that an offer satisfying all creditors' claims is a "rare event." Appendix 46.

When JDH realized the Property would be sold, it immediately attempted to derail the sale to Pulte. JDH began by sending Pulte a subpoena for documents and to sit for a deposition. Appendix 33. JDH attempted to use legal process to obtain Pulte's internal valuation of the property, Pulte's internal feasibility analyses, and other trade secrets. *Id.*

JDH's efforts failed, and on November 3, 2020, the Receiver sought court approval to sell the Property to Pulte. JDH came up with a purported offer from a third party (Argo Development), and also proposed refinancing the debt. Appendix 42-44. The Receiver vetted the proposals and then informed the trial court:

> The Receiver was/is willing to talk to any credible option to maximize the value of the receivership estate for the benefit of creditors. However, after years of misrepresentations, lack of cooperation, and refusal (inability) to provide any credible lender information, inclusion of financing procedures in a sales process serves no purpose and just becomes confusing and distracting.

Appendix 44. Some of the creditors agreed.

D. Now enter Scrivanich & Bridges West.

Meanwhile, Pulte revised its offer to provide two pathways forward. Under the first, Pulte would pay $7.5 million plus the costs of receivership with a 120 day feasibility period. Under the second, it would pay between $10.425 and $13.75 million, dependent upon what

entitlement concessions it may obtain from the City of Auburn, but provided for a closing in up to three years. Both amounts would satisfy all of the creditors' claims.

On March 24, 2021, the Receiver filed its motion to approve the sale to Pulte. On the day before, JDH re-emerged with a new proposal to refinance the Property, and then filed a competing motion for refinancing. Appendix 58. The Receiver expressed openness to the concept of a refinancing, but pointed out certain conditions it required were not met. Appendix 64, 66. Namely, the lender Scrivanich refused to place the loan funds into the Court Registry because it wanted to collect interest on its money in the event it decided not to fund the refinance, and did not want to part with the funds for more than 60 days. Appendix 85. Second, the Receiver was concerned about old and insufficient information about Scrivanich's wherewithal to loan the money. Appendix 66.

Creditor JTP Services opposed JDH's proposed refinance, pointing out that only the Receiver had the legal authority to enter a loan agreement due to the assignment for benefit of creditors and the terms of the Order Appointing Receivership. Appendix 62. JTP also expressed concern that the proposal lacked procedural safeguards to ensure creditors would get paid. The Receiver echoed these same sentiments. Appendix 66.

E. The trial court's approval of the Pulte offer.

Just over two weeks before the hearing, the Receivership received an unexpected and unanticipated offer to purchase the property from Oakridge Homes Ltd, in the amount of $7,700,000.00, with a 60-day feasibility contingency. The Receiver immediately shared this offer with all the parties and advised Oakridge to retain counsel to intervene. Appendix 65. Oakridge declined to do so and did not show up at the hearing. Appendix 76, 83-84.

In advance of the hearing, the Receiver laid out the four options available, and gave his analysis as to the pros and cons to each. Appendix 65-66.

At the hearing, there was no serious criticism of Pulte's offer, nor a suggestion that Pulte's offer was the result of fraud or some irregularity in the proceedings. The Receiver and some of the creditors expressed support for the Pulte offer. JDH was directly asked by the trial court which of Pulte's proposed two pathways JDH preferred: the short closing for $7.5 million, or a longer closing for $10.425 to $13.75 million? JDH had no answer. Appendix 87. Accordingly, the trial court selected the latter because it not only paid all creditors but also provided JDH with substantial surplus proceeds. Appendix 89-90.

III. ARGUMENT

A. This motion should be decided by the trial court.

Appellants advance two bases in their motion. First, Appellants contend they are entitled to a stay as a matter of right per RAP 8.1(b)(2), but the rules indicate the trial court decides the issue. Second, Appellants request a discretionary stay under RAP 8.1(b)(3) & 8.3, which is unnecessary here.

1. Appellants' request to stay as of right under RAP 8.1(b)(2) must be remanded to the trial court.

Requests for a stay arising under RAP 8.1(b)(2) (i.e., as of right), are decided by the trial court. RAP 7.2(h) confers authority to the trial court to act on requests for supersedeas, stays, and bonds brought under RAP 8.1:

> **Supersedeas, Stay, and Bond.** The trial court has authority to act on matters of supersedeas, stays, and bonds as provided in rules 8.1 and 8.4, CR 62(a), (b), and (h), and RCW 6.17.040.

This is bolstered by the terms of RAP 8.1(b). For instance, RAP 8.1(b)(2) addresses decisions affecting property, and instructs parties to file "in the trial court" a supersedeas bond or cash. Similarly, if alternative security is proposed, then it must be "approved by the trial court pursuant to subsection (b)(4)." (Emphasis added). The amount of the bond is a discretionary determination by the trial court. *IBEW Health & Welfare Trust of SW Wash. v. Rutherford,* 195 Wn. App. 863, 865, 381 P.3d 1221

(Div. 2, 2016). Indeed, RAP 8.1(h) provides that if a party objects to the trial court's setting of supersedeas then it may pursue relief in this court, which reinforces that the decision is to first be made by the trial court.

Subsection (b)(4) does provide that the trial court "or" appellate court may authorize a party to post security other than a bond or cash. However, Subsection (b)(2) controls because it is more specific in that it relates to requests to stay decisions affecting property, whereas Subsection (b)(4) is generic and addresses the procedure for using an alternative form of the supersedeas to use.

RAP 8.1(c)(3) states that the trial court fixes the amount of supersedeas for requests to stay only a portion of a judgment. Appellants cherry pick only portions of the trial court's order they want stayed, all to their benefit. Specifically, Appellants want Pulte to move forward with entitlements and due diligence but prevent closing from happening. This is a request for a partial stay, and RAP 8.1(c)(3) makes plain that the trial court must decide what supersedeas is appropriate.

In an emergency appeal, this Court remanded to a trial court the decision as to what amount should be fixed for a supersedes bond in *Seventh Elect Church of Israel v. Rogers,* 34 Wn. App. 105, 111, 660 P.2d 280 (Div. 1, 1983). The *Rogers* decision reflects a sensible division of labor as the trial court is most familiar with the facts of the underlying

case and the likelihood and amount of harm that may occur if a decision is stayed. Tegland agrees. TEGLAND, KARL, 2A WASH. PRAC., RULES PRACTICE RAP 8.1 (7th ed.)("As mentioned, requests for stays of monetary judgments and judgments affecting property are addressed to the trial court […] By contrast, requests for discretionary stays under subdivision (b)(3) are addressed to the *appellate court*").

Appellants' request for a stay as of right under RAP 8.1(b)(2) must be denied.

2. There is nothing unique in this case warranting a discretionary stay.

Appellants seek a discretionary stay under RAP 8.1(b)(3) and RAP 8.3. There is no reason for this Court to entertain a discretionary analysis at this stage when the issue should first be addressed by the trial court under RAP 8.1(b)(2). Compounded on this, any stay should be accompanied by a supersedeas bond or cash, and that is also decided by the trial court. Further, RAP 8.1(b)(3) plainly applies to decisions that are not money judgments or decisions affecting property. Although receiverships are actions at equity, the "decision" on appeal is one affecting Property. RAP 8.1(b)(3) simply does not apply.

a. Appellants cannot establish the merits of their appeal or demonstrate a debatable issue.

Nevertheless, should this Court engage in RAP 8.1(b)(3)'s two part analysis, the relief should be denied.

(1) Appellants have a lack of rights problem.

JDH cannot legitimately complain about the denial of its motion to refinance because JDH has no right to refinance the Property. JDH lost that right when it executed the assignment for benefit of creditors, which conveyed the Property and all of its rights, to the Receiver. This was reiterated by the Order Appointing Receiver that JDH prepared.

An assignment for the benefit of creditors passes to the assignee all property and every right of the assignor. *First Federal Sav. & Loan Ass'n of Coeur D'Alene v. Marsh,* 19 Wn.2d 438, 444, 143 P.2d 297 (1943). "An assignment for the benefit of creditors vests the legal title of the debtor's property in the assignee and places the property beyond the control of the debtor or the reach of any of the debtor's creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate." 6 AM. JUR.2D ASSIGNMENTS FOR BENEFIT OF CREDITORS § 78 (emphasis added); *see also, Id.* at § 73. Thus, once the assignment was completed, JDH lost the right to use or refinance the Property.

As JDH's member, Mr. Downie has no authority to enter a refinance either.

Bridges West seeks to wear two hats. Under one, it is a senior

secured creditor by virtue of recently buying Sue Jones's claim, but there is no authority that a senior lien holder can compel a refinance. Under the other hat, Bridges West is a late and disgruntled bidder. It is incongruous for Bridges West, as a bidder, to argue the refinance motion should have been accepted. The only reason Bridges West might prefer the refinance is so that it can participate with JDH in development of the Property, but doing so is precariously close to running afoul with the Department of Revenue. JDH represented to the DOR that its proposed refinancing was not a veiled transfer designed to avoid excise tax, and that there would be no sale or transfer of the property by JDH to Bridges West (or Scrivanich, Inc.) should its refinancing motion be granted. Appendix 67-69.

(2) On the merits, Appellants have no supporting authority, and their position is contrary to established caselaw.

Not one authority is cited for the position that a trial court commits an abuse of discretion by choosing an offer that has a three year closing with contingencies, when it will pay off all creditors and return up to $6.25 million to the debtor. Similarly, not one authority is cited for the position that it is an abuse of discretion to deny a motion for refinance.

Appellants omit the high hurdle their appeal faces. They also omit that the success of their appeal hinges on convincing this Court to overturn precedent that has existed for over 120 years. In *Krutz v. Batts,* the Court

took up objections to a sheriff's sale of property to enforce a debt. 18 Wn. 460, 51 P. 1054 (1898). The Court observed that the only question which the court has a right to investigate are irregularities in the proceedings concerning the sale. *Id.* at 463-64. The Court noted that "[t]he law is plain and imperative on that proposition,…" *Id.*

Krutz was construed and reaffirmed in subsequent caselaw. *See, e.g., Booth v. Summit Coal Mining Co.,* 59 Wn. 610, 110 P. 536 (1910)(applying in receivership action the rule that the only question that can be reviewed on appeal from an order of confirmation is the regularity of the proceedings concerning the sale). On point is *In re Spokane Savings Bank,* 198 Wn. 665, 89 P.2d 802 (1939), which was a case where a bank, acting as liquidator of real property in the same manner as the Receiver in this case, petitioned the trial court for instructions on how to deal with competing bids for the property. The Court drew a line of demarcation on timing: the rights of parties and objectors differ before the confirmation of a judicial sale than after the confirmation of sale.

> Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids.

> This rule is so firmly established that it is no longer debatable, and the cogent and all-sufficient reason for it is that judicial sales would become farces, and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices, ...

Id. at 671 (quoting *Morrison v. Burnette,* 154 F. 617, 624 (8th Cir)).

The Washington Supreme Court held: "After confirmation of a judicial sale, the rights of the purchasers are vested, and nothing except fraud or mistake will avoid the sale." *Id.* at 672. This was repeated in *Walton v. Severson,* 100 Wn.2d 446, 452-53, 670 P.2d 639 (1983)(applying this general rule to receivership sales).

This is a very high burden for Appellants, who fail to even mention it. They can only set aside the sale by demonstrating substantial mistake, fraud, or gross irregularity by the bidder – i.e., by Pulte. *Id.* at 673. This they cannot do, nor does their motion indicate that is what they intend to show. The closest Appellants come to pointing to an irregularity is complaining that the Receiver seeks compensation through a commission from the sale. Yet, it was JDH who made that recommendation when it petitioned for a receivership. Appendix 20. Moreover, there is no suggestion that Pulte engaged in any wrongdoing.

b. Appellants do not have an adequate record to support the argument they would be better off if the sale was reversed.

As for Appellants' argument relying on RCW § 7.06.260(2) – that their mere objection is enough to show reversible error – that will fail as well. Appellants argue if the sale is reversed, then JDH will get to redevelop the Property and somehow gain the equity of $19-21 million. The problem with this argument is that it assumes that if the sale to Pulte is reversed, the default alternative will be a refinance. Not so. As articulated above, neither JDH nor Bridges West can compel a refinance; that decision is left to the Receiver and the trial court. So, there is no certainty that reversal of the sale will leave JDH and Bridges West better off.

JDH relies on an outdated appraisal which assumed preliminary plat approval remained in place and that there would be 200 lots available to sell after final plat approval was obtained. There is nothing in the record to show how JDH would obtain final plat approval or what the costs would be. To the contrary, the evidence before the trial court showed that final plat approval might not be attainable without a reasonable use exception or modification because the preliminary plat required construction of an unbuildable road. Appendix 57.

c. The harm to the non-moving parties outweighs the harm to Appellants if a stay is granted,

which also warrants the imposition of a significant supersedeas bond or cash deposit.

At first blush, Appellants' argument that they will suffer irreparable harm if the sale is not stayed appears persuasive. However, bankruptcy decisions applying federal law mirroring the receivership code reject Appellants' position.[3] "[W]ithin bankruptcy, a majority of courts have concluded that mootness does not demonstrate irreparable injury." *In re Gardens Regional Hospital & Medical Ctr., Inc.,* 567 B.R. 820, 831 (C.D. Cal. 2017). Indeed, one bankruptcy court observed that staying a sale could put the estate in a "precarious financial position" because it could cause the sale to collapse, and deprive the estate of much-needed funds. *Id*. at 832. That is a very real possibility here.

Also, a stay and supersedeas is designed to preserve the status quo. Appellants had no right to use, possess, or develop the Property before the Order of Sale; those rights were assigned away in 2019.

B. Because of the expected harm that this appeal's delay will cause, a supersedeas bond or cash is required.

The Appellants' argument that the Property itself is adequate security for supersedeas is superficially attractive, but nonetheless wrong. The primary purpose of a supersedeas is to delay enforcement while ensuring the ability to satisfy the judgment will not be impaired during the

[3] RCW § 7.60.260(5) is substantially the same as 11 U.S.C. § 363(m).

appeal. *Rogers,* 34 Wn. App. at 120; *see, also, Norco Constr., Inc. v. King County,* 106 Wn.2d 290, 296, 721 P.2d 511 (1986)("a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement").

After the Receiver's extensive marketing of the Property there was no offer remotely close to JDH's appraised value of $19-21 million. The offers ranged from $7.5 to $7.8 million, with the exception of the approved sale to Pulte.

Also, JDH's appraisal is premised on there being 200 lots to sell, which in turn hinges on preliminary (and later final) plat approval. However, during the pendency of this appeal, preliminary plat approval will expire on February 8, 2022. Auburn C.C. § 17.10.110(A). Once the plat expires, the value will drop like a rock. This jeopardizes the Pulte transaction and the likelihood of the creditors getting paid in full. Appellants' brief is silent on this point.

The Receiver has no money because JDH crafted the Order Appointing Receiver to only transfer the Property. Appendix 15. The Receiver has no financial means to apply for a one-year plat extension. Thus, the receivership estate must rely entirely on the willingness of Pulte advancing such costs to the Receiver to renew the plat. Yet, there is little

incentive for Pulte to advance these costs and efforts when Appellants' present appeal seeks to reverse the sale to Pulte. The Order of Sale approved the PSA's provision of a "breakup fee" to compensate Pulte for its due diligence (which does not necessarily involve extending the plat approval). Appendix 50. However, because Appellants seek to reverse the Order of Sale, a successful appeal voids the PSA and eliminates the breakup fee, meaning that Pulte gets stiffed for its work and costs advanced. Why would Pulte assume that risk and burden?

Appellants appear to recognize this risk, which is why their request is crafted to merely prevent Pulte from closing, but otherwise permits Pulte to continue its due diligence during the pendency of this appeal. For the reasons explained above, there is no incentive for Pulte to do this. Moreover, this appeal pauses Pulte's due diligence timeline, as discussed below.

C. The amount of supersedeas.

Auburn's code provides: "A plat granted preliminary approval, but not filed for final plat approval within the applicable time period or extended time period, shall be null and void." Auburn C.C. § 17.10.110(E), Appendix 1. This means that someone must advance the current entitlements from preliminary plat to engineering approvals, develop the property with all improvements, and apply for final plat

approval. This presents a huge problem because the construction season for performing the work necessary to achieve final plat approval is very limited for the site due to the rainy season. Appendix 75. This appeal will likely take 12-18 months, and so will eat through at least one of the three allowable plat extensions available and presents a significant risk that all of the work necessary to obtain final plat approval will not occur because of the narrow construction season for the work needed. An additional $500,000 security should be required for burning through one of the three plat extensions.

Moreover, Pulte's period of feasibility has not started yet because of this appeal. *c.f.* Appendix 53 (defining "Final Court Sale Approval") *with* Appendix 55 (triggering feasibility period after Final Court sale Approval). So, this appeal will further delay closing by however long this appeal takes. This will delay payment to the creditors for another 12-18 months. The supersedeas amount "shall" include "interest likely to accrue during the pendency of the appeal". RAP 8.1(c). Consequently, Appellants should post bond on the total purchase price for the 12-18 months that this appeal will likely take.

IV. CONCLUSION

The Motion to Stay should be denied and remanded to the trial court to decide. RAP 8.1(b)(2) plainly makes the determination one that

the trial court is to decide first, and RAP 8.1 as a whole contemplates trial courts making the initial decision on the form and amount of supersedeas. A discretionary stay is unwarranted at this juncture for the same reasons, as well as that Appellants have failed to carry their burden.

DATED this 28th day of June, 2021.

TOUSLEY BRAIN STEPHENS PLLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2021, I caused to be served true and correct copies of the foregoing to all parties registered via Court of Appeals E-filing system.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

EXECUTED this 28th day of June, 2021, at Seattle, Washington.

s/ Linsey M. Teppner
Linsey M. Teppner, Legal Assistant

TOUSLEY BRAIN STEPHENS PLLC

June 28, 2021 - 3:02 PM

Transmittal Information

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Appellate Court Case Number:	82720-1
Appellate Court Case Title:	JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp

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Case #: 827201
JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp
King County Superior Court No. 19-2-23961-1

Counsel:
The following notation ruling by Commissioner Jennifer Koh of the Court was entered on September 15, 2021 regarding appellant's motion for stay:

"Appellants Bridges West, LLC, JDH Investment Group, LLC, and Thomas Downie jointly request a limited stay of a purchase and sale agreement approved by the trial court in this dispute over real property that is the subject of receivership proceedings. Respondents Pulte Homes, Elliott Bay Asset Solutions (Receiver), JTP Services, Inc., and interested party the Law Office of G. Michael Zeno Jr. have objected to a stay. The parties have provided substantial briefing and reference materials. The motions to file overlength briefing on the motion for stay are hereby granted.
Under RAP 8.1(b)(4), a party may file a motion in the appellate court to authorize a reasonable means of securing enforcement of a judgment with the equivalent effect of filing a supersedeas bond with the trial court. Where the judgment at issue involves real property that has value, the court may determine whether "the property itself may fully or partially secure any loss" and whether "additional security need be filed." RAP 8.1(c(2). Under RAP 8.3, an appellate court may issue orders and grant injunctive relief or other relief to ensure effective and equitable review. "The purpose of [these rules] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal." Wash. Fed'n of State Emps. v. State, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). The exercise of discretion in such circumstances "is in no way meant to resolve the merits of the underlying" litigation. Id. Such relief generally requires a showing (1) that the appeal raises a debatable issue and (2) that the harm without a stay outweighs the harm that would result from it. In balancing the parties' relative harm, this Court considers whether the requested relief is necessary to maintain the status quo and preserve the fruits of a

successful appeal in light of the equities of the situation. See Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985).

Despite extensive discussion focused on disputing factual matters that appear to be tied up with the merits of the appeal and disputing the authority of this Court to determine the appropriate form and amount of security warranted in a particular case, the two central questions posed here are (1) whether this Court should stay the closing of the sale pending this appeal, such that the sale may be invalidated if a panel ultimately reverses the trial court's order; and (2) whether the property itself may fully or partially secure any loss, such that a supersedeas bond is not necessary.

As to the first question, the parties do not appear to dispute that (1) Appellants are pursuing this appeal to prevent the sale of the property according to the purchase and sale agreement approved by the trial court; and (2) the fruits of a successful appeal - that is, prevention of this sale - will be lost if the sale closes while the appeal is still pending. Respondents focus on their view of Appellants' arguments as lacking merit, but I am not persuaded that Appellants cannot present a debatable issue for appeal or that the closing of the sale before this appeal is decided will not destroy the fruits of a successful appeal.

As to the second question, the parties appear to agree that "the property at issue has value," see RAP 8.1(c)(2), but dispute the precise value of the property - at least with regard to their characterizations of past, present, and potential near future valuations. Although I agree with Appellants that this Court generally has the authority to determine the form and amount of security in the first instance, I also agree with Respondents that the trial court is generally in a better position to make factual determinations as to the value of property and the potential for loss over the course of an appeal.

Accordingly, the closing of the purchase and sale agreement described in the trial court's May 4, 2021order authorizing sale is hereby stayed pending resolution of this appeal or further order of this Court, on condition that Appellants obtain by October 18, 2021 an order from the trial court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any. The rights of Pulte Homes to act under the purchase and sale agreement are not otherwise restrained. Additionally, this appeal is appropriate for expedited consideration. As the record was deemed ready on September 7, 2021, the parties should not anticipate extensions of time in the briefing schedule."

Sincerely,

Lea Ennis
Court Administrator/Clerk

ssd

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re Receivership of: JDH INVESTMENT GROUP LLC, a Nevada limited liability company	Cause No.: 19-2-23961-1 SEA ZENO P.S.'S AND JTP SERVICE'S RESPONSE TO JOINT MOTION TO DETERMINE BOND

I. RELIEF REQUESTED

An order (a) denying the appellants' motion and (b) setting the amount of the bond necessary to supersede the judgment at $3,300,000, with a provision that the bond will be paid to the Receivership for the benefit of the administrative claimants and junior creditors only.

II. STATEMENT OF FACTS—RECENT PROCEDURAL HISTORY

On May 4, 2021, the Court approved the sale of the receivership property to Pulte Homes (Dkt. 474) and denied JDH/Debtor's "Omnibus Motion" (Dkt. 475). JDH/Debtor, Downie, and Bridges West appealed.

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On June 18, 2021, the appellants moved to stay the Court's order approving the sale ("Appellants' Joint Motion for Stay," Ex. 1 to Zeno's Declaration).[1] The Commissioner of the Court of Appeals conditionally granted the Motion in a letter ruling dated September 16, 2021 (Ex. 2 to Zeno's Decl.). The condition was that the "Appellants obtain by October 18, 2021 an order from the trial court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any." The Court of Appeals later extended the October 18 date to November 30, 2021.

On October 20, 2021 the appellants brought the instant motion asking that the property be deemed sufficient to support the stay of the order of sale or, alternatively, that a bond of $500,000 be considered adequate.[2] [Dkt. 573.] This is Zeno P.S.'s and JTP Service's ("JTP") response to that motion.

III. ISSUES

A. Is the bond amount proposed by the appellants insufficient to protect the administrative and junior claimants against loss, given the extreme adverse consequences of delay for the project?

B. Should the bond amount, based on the amount of the administrative and junior claims (with interest and attorney's fees) be $3,300,000?

C. Is the market's actual response to the Receiver's marketing efforts a better indication of the property's value than the outdated O'Connor Consulting appraisal?

IV. EVIDENCE RELIED ON

Declaration of G. Michael Zeno, Jr. re: Supersedeas Bond.

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[1] Zeno P.S. is providing copies of the certain filings from the appeal.

[2] Although it is styled a Joint Motion, only Bridges West's attorney signed it.

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V. ARGUMENT

A. The bond amount proposed by Appellants is insufficient to protect the administrative and junior claimants against loss because the delay carries extreme adverse consequences for the project.

Under RAP 8.1(c), the supersedeas amount should cover, among other things, "the amount of loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review." In our case, administrative claimants and junior creditors will suffer loss if the sale to Pulte Homes is stayed. Likely they will suffer a total loss, as will be described in more detail below.

The most immediate concern is the expiration of the preliminary plat approval on February 8, 2022. According to Pulte, "[o]nce the plat expires, the value will drop like a rock." [Page 21 of "Respondent Homes' Response to Joint Motion for Stay," (Ex. 3 to Zeno Decl.).] The Receiver does not have the financial resources to make these expenditures and Pulte would not have the motivation to make them (*Id*. at 21-22).

Without preliminary plat approval, the steeply sloped, unimproved Auburn property is likely to be worth no more than the "bottom feeder" price of $3,800,000 offered by the Richmond American Homes (Dkt. 350). This is significantly less than the amount of the first deed of trust, originally owned by Sue Jones and later purchased by Downie's collaborator, Bridges West; therefore, all other claimants will receive nothing.

More generally, further delay increases the probability that Pulte will lose interest and walk away. Again, the administrative and junior claimants are likely to receive

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nothing in that scenario.[3] The amount of the bond needs to be sufficient to account for these risks.

B. The bond amount, based on the amount of the administrative and junior claims (with interest and attorney's fees), should be $3,300,000.

The dollar amount of the supersedeas bond should be set at **$3,300,000,** a reasonable estimate (with a 20% cushion) of the amount of the administrative and junior creditor claims that will likely go unpaid because of the stay of the Court's order approving the sale to Pulte.

The derivation of this amount is set forth in ¶ 2 of Zeno's Declaration. The calculation starts with the Receiver's recap of claims from Exhibit C to his January 20, 2021 Declaration (Dkt. 359), which estimates the claims as of December 31, *2020*. [4] Zeno P.S. revised the recap in the following ways: (a) the figure for Zeno's claim was increased to include a larger amount for attorney's fees; (b) Jackson's claim was removed; (c) Frye's claim for $125,647, which is not believed to be legitimate, was removed, (d) JTP Services' two claims for $30,000 were removed; (e) JTP Services' unsecured claim was increased to include interest; and (f) expenses, including commissions, relating to sale were removed. The figure was then brought forward to

[3] The appellate commissioner's letter ruling says that "this appeal is appropriate for expedited consideration," but does not say what that means. No order has been entered by the Court of Appeals accelerating the briefing schedule, the scheduling of oral argument, or the time the case will be decided.

[4] The Heath Declaration says that the calculation is "Exhibit E," but it is actually Exhibit C to Dkt. 359. A copy is attached as Exhibit 5 to Zeno's Declaration filed herewith.

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December 31, 2021 by adding interest and additional attorney's fees and property taxes. Finally, a cushion of 20% was added and the final figure rounded to the nearest $100,000.

The cushion of 20% is appropriate given the uncertainty of the estimates used in the computation. It is important to guard against uncertainty for the supersedeas bond to serve its purpose of protecting the respondents against the adverse effect of staying the court's order[5]:

> The setting of the bond amount necessarily involves uncertainty in its calculation because the types of damages that may be caused by a stay of execution are not always apparent at the time the stay is granted. Until such damages are actually incurred, the actual amount of damages caused by a stay pending appeal, if any, are unknown and need not be established with mathematical certainty until, and if, a surety is required to pay on a bond. Thus, viewed within the context of an unpredictable future, the Rule is intended to ensure that the amount of the bond is sufficient to maintain the status quo while the case is pending on appeal.

Grassie v. Roswell Hosp. Corp. 144 N.M. 241, 244-45, 185 P.3d 1091, 1094-95 (2008).

The proposed order provides that Bridges West or any subsequent holder of the first deed of trust is not to benefit from the bond. Otherwise the bond would need to be increased by over $4M to cover their claim as well as those of the respondents in the appeal.

[5] "The purpose of supersedeas bond conditions is to assure that, pending the outcome of an appeal, the *economic risk* of the appeal is not borne by the party that prevailed below. (Italics added.)" *Cty. of Blue Earth v. Wingen*, 684 N.W.2d 919, 923 (Minn. Ct. App. 2004)

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It should also be noted that in asking for this, Zeno P.S. and JTP are asking no more than the appellants have offered to give. In their proposal to force the abandonment of the property (Dkt. 412)--which they call a "refinance"—Downie et. al. proposed to reserve amounts sufficient to pay administrative and junior claimants, though the manner and amount of provision was inadequate. Their appeal, which continues to advocate for the so-called "refinance," is based on the premise that the appellants are still willing to put up enough money to satisfy these claims. [The appellant's opening brief is attached as Ex. 4 to Zeno's Decl.] It is fair and reasonable for them to make good on this. Nor should there be any hardship, since they presumably have the financial wherewithal to do so, given the position they have taken in this case.

C. The market's actual response to the Receiver's marketing efforts is a better indication of the property's value than the outdated O'Connor Consulting appraisal.

The appellants rely on a two-year-old appraisal by O'Connor Consulting (Ex. 6, Zeno Decl.) for their contention that the property's value is adequate to ensure that the receivership claimants will not suffer a loss if the Pulte sale is stayed. The assurance offered by that appraisal is a mirage.

An appraisal offers an *opinion* of market value. Where, as here, we have *facts* about how much a current buyer is willing to pay, there is no good reason to resort to a third party's opinion on the question. These *facts* are the fruits of the Receiver's vigorous marketing efforts, summarized in the Declaration of Stuart Heath dated March 24, 2021(Dkt. 418).

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Even the appraisal itself recognizes that market transactions are the touchstone for determining value. It states, at page 74, in its discussion of the "Sales Comparison Approach":

> The sales comparison approach provides an indication of property value in what is perhaps the most direct manner possible: it measures what someone is willing to pay for it. *An essential premise of the Sales Comparison Approach is that the market will determine the price of the property* being appraised in the same manner it determines the price for comparable, competitive properties. (Italics added.)

Of course, the appraiser did not have the benefit of Receiver's marketing history in formulating his opinion.

Furthermore, the appraisal, which has not yet been vetted by cross-examination, has serious flaws.

--It assumes the property has the necessary entitlements to be developed, whereas (a) the preliminary plat approval expires on February 8, 2022, and (b) the appraiser seems unaware of the other significant approvals that have not yet been obtained, such as those from the Army Corps of Engineers and Washington Department of Fisheries and Wildlife.

--It takes almost no account of the huge cost of site improvements to the steeply sloped Auburn property. The appraiser merely discounts the price of the Auburn property by 5% relative to each of the "comparable" properties because of "topography." [Page 82 of Appraisal, Ex. 6 to Zeno's Decl.] This adjustment is ludicrously small. To put it another way: if the aggregate sale price of the finished lots would be $20,000,000 and the cost of site improvements $15,000,000, no one will pay $20,000,000 for the property.

--The appraisal states on page 3 that "the developer of the site has spent an additional $2,370,000 in costs beyond the initial $630,000 that was spent to obtain

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preliminary plat approval." This is false. Downie had spent next to nothing besides the initial $630,000.

In light of the foregoing, the appraisal cannot and should not be used as a measure of the property's value for the purpose of determining the bond amount (or for any purpose, really).

VI. CONCLUSION

The Court should require a supersedeas bond or deposit of $3,300,000 to stay the sale pending appeal, in order to protect the administrative and junior claimants against the risk of loss because of (a) the expiration of the preliminary plat approval, and (b) the possibility that Pulte Homes will lose interest in the project.

DATED this 3rd day of November, 2021.

LAW OFFICE OF G. MICHAEL ZENO, JR., P.S.

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We certify that this Response has 1882 words, in compliance with KCLR 7.

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The Honorable John R. Ruhl
Hearing Date: November 9, 2021 at 1:30 p.m.

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re JDH INVESTMENT GROUP, LLC, Receivership Debtor.	NO. 19-2-23961-1 SEA RECEIVER'S RESPONSE TO APPELLANT'S JOINT MOTION TO SET SUPERSEDEAS BOND

COMES NOW, Elliott Bay Asset Solutions, LLC, the Court Appointed General Receiver (the "Receiver"), by and through its attorneys-of-record Michael Spence and Kevin Khong of Helsell Fetterman LLP, to submit this Response to the collective Appellant parties' Joint Motion to Determine Amount of Bond on Appeal and respectfully requests the following relief:

I. RELIEF REQUESTED

The Supersedeas amount to be set by the Court should cover three potential areas of loss to the Receivership that could occur as a result of the Appellant's appeal: (1) Security for the potential loss of the sale to Pulte Homes in the form of $13,750,000.00, because the Appellants have not offered any other form of alternative security in the event of the loss of the sale; (2) Security to cover the $500,000.00 that would result in the delay in enforcement because of the appeal; and (3) Security for the estimated interest on the creditor claims and administrative fees and costs for three years at 12% per annum, plus attorney fees, costs, and other

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expenses incurred by the Receivership during the pendency of the appeal which would be inequitable to allocate to the Receivership.

The greater amount of either (1) or (2) should be the framework by which the Court sets the base amount for the supersedeas bond in order to ensure adequate security for damages resulting from the appeal. In addition, (3) should be added to the base amount of damages which will occur regardless of the outcome of the appeal for interest that will accrue during the pendency of the appeal, as well as attorney fees, costs, and other expenses incurred by the Receiver.

II. STATEMENT OF FACTS

The Court is intimately familiar with the substantive background of this case, having made several thorough and detailed rulings to date. But to briefly summarize the activity since the Court's May 4, 2021 Orders denying the Receivership Debtor's Motion to allow a "refinance" of the property and authorizing the sale of the Property to Pulte Homes, several things have happened:

- On May 6, 2021, only two days after the Court's ruling, senior creditor Bridges West submitted an offer to purchase the Property for the ostensible price of $7,500,000.00, with no financing contingency and a closing date set for three days after court approval of the sale. Although the purchase price was represented to be $7,500,000.00, a custom addendum to the offer stated that the purchase price was a tender of the Sue Jones promissory note with a declared balance of $4,261,457.19, and the balance coming from Bridges West. Since the Court had approved the Pulte sale on May 4, the Receiver did not respond to this offer. (Declaration of Veronica Morss, Exhibit "A")
- On May 14, 2021, Bridges West filed a Motion to Reconsider the May 4 Order with this Court. That Motion was denied on May 24, 2021.

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- On May 26, 2021, Bridges West filed another Motion to Reconsider, this time with King County Ex Parte, noting a hearing date of June 21, 2021. This Motion was denied by this Court on August 9, 2021.
- Receivership debtor JDH filed a Notice of Appeal on June 2, 2021, the last possible day to file. Senior lienholder Bridges West filed an appeal the following day. JDH supplemented their Notice of Appeal to include omitted documents on June 9, 2021. Thomas Downie joined the appeals on June 16, 2021. The appeals were consolidated by the Court of Appeals on June 30, 2021.
- On June 18, 2021, the Appellants filed a Joint Motion to Stay the Pulte transaction with the Court of Appeals. Pulte Homes, the Receiver, JTP Services and G, Michael Zeno responded on June 28, 2021.
- On June 30, 2021, the date the reply brief was due, the Appellants filed a Joint Motion for a 7-day extension to file their reply brief, which was ultimately filed on July 8, 2021.
- On September 16, 2021, the Court of Appeals issued an order holding in part that,

> the closing of the purchase and sale agreement described in the trial court's May 4, 2021 order authorizing sale is hereby stayed pending resolution of this appeal of further order of this Court, on condition that Appellants obtain by October 18, 2021, an order from the trial court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any.

- According to an October 8, 2021 Declaration, Appellant Thomas Downie admits to having taken no action for at least two weeks after the Appellate

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Commissioner's order to obtain a motion date before this Court within the timeline set by the Court of Appeals until October 5, 2021, at which point it was discovered that Judge Ruhl was on leave. Following that, Downie admits that, the "Appellants attempted to obtain an updated appraisal but could not secure such an appraisal in time to comply with the Order of Stay." However, it is not clear the Appellants would have been able to obtain an appraisal that values the property more than the current Pulte Homes price.

- After a number of impermissible ex parte contacts with the Court's bailiff, the Appellants took no further action until 12 days later, on October 20, 2021, when they filed the "Joint Motion to Determine Amount of Bond on Appeal" that is the subject of this Response. Despite being labelled a "Joint Motion", it was signed only by counsel for Bridges West. And similar to their earlier and untimely Motion to Reconsider, it was filed in Ex Parte, rather than with this Court and only properly noted afterward.

III. ISSUES PRESENTED

1. Given that the supersedeas bond should be set to secure the potential loss of the Pulte Homes transaction and Petitioners have not offered any form of alternate security, should the Court set the supersedeas bond to include the sale price of $13,750,000.00, which appropriately sets the scope of potential damages that would result from the potential loss of the sale?
2. Given that the supersedeas bond should be set to secure the damages resulting from the delay of enforcement if Pulte Homes follows through with the sale, should the Court set the supersedeas bond to include the $500,000.00 in damages Pulte Homes estimates it will cost to obtain a plat extension?

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3. Given that the supersedeas bond should be set to secure the interest, attorney fees, costs, and receiver expenses during the pendency of appeal, should the Court set the supersedeas bond to include $2,700.000.00 in interest that will accrue during the pendency of the appeal and $250,000.00 to cover the interest, fees, costs, and expenses likely to accrue in litigating the appeal?

IV. EVIDENCE RELIED UPON

This Response relies upon the Receiver's appellate response to the Motion to Stay, Judge Ruhl's May 4, 2021, Order Authorizing Sale of Real Property Commonly Known as Diamond Valley Estates Free and Clear of Liens and Rights of Redemption, and the pleadings and records on file with the Court.

V. AUTHORITY

RAP 8.1(b) permits a party to seek to stay enforcement of any trial court civil decision, whether that decision is a money judgment, one affecting property, or any other type. In addition, RAP 8.3 permits an appellate court to issue orders and grant injunctive or other relief to ensure effective and equitable review. "The purpose of [these rules] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal." *Cronin v. Cent. Valley Sch. Dist.*, 12 Wn. App. 2d 123, 129–30, 456 P.3d 857, 860–61, *review denied*, 195 Wn.2d 1031, 468 P.3d 613 (2020). A supersedeas bond does not operate against a judgment but against its enforcement. The purpose of such a bond is to stay further proceedings, such as execution on a judgment, and to maintain the status quo. *Ryan v. Plath*, 18 Wn.2d 839, 140 P.2d 968 (1943).

1. The supersedeas bond should cover the loss of the potential sale to Pulte Homes.

The preliminary plat approval is at risk of expiring during the pendency of appeal and as a result may result in a significant devaluation of the property

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regardless of the result of the appeal if the Pulte Homes sale were to fall through. *See Receiver's Status Report*, dated October 16, 2020; *Receiver's Status Report*, dated December 7, 2020. As a result, the supersedeas bond needs to cover the complete loss of the Pulte Homes sale, which may occur from the further delay of the appeal. *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 768-773, 27 P.3d 1233, 1237, *modified*, 33 P.3d 84 (2001) (Recourse for former landowner upon successful appeal, whose property was sold to third-party purchaser by marshal's sale after United States gained title in quiet title action during pendency of appeal, was against United States for actual sale price of property at marshal's sale.)

Here, the Appellants' offer of a mere $500,000.00 is only sufficient to cover the potential delay in enforcement (as discussed in the next section), not the damages that would result if Pulte Homes were to exercise an exit contingency that would result in the complete loss of the sale regardless of the success or failure of the appeal. Like the U.S. government in *Spahi*, the Appellants are responsible for the damages that result from their pursuit of this appeal if the Pulte Homes transaction were to fall through regardless of the result of the appeal if no other offer makes up the differential for the proceeds lost.

The Appellants are also well aware that under Section 4.1.14 of the Pulte transaction, the sale of the property is conditioned on a Court Order approving the sale of the property, "without appeal being filed, or if such appeals were filed, having been dismissed to Buyer's reasonable satisfaction …". This appeal may well drag the Pulte transaction out until Pulte simply abandons the project, allowing Appellants to cause the secured creditors, the unsecured creditors, the real estate brokers and the Receiver to go unpaid. This may explain the countless delays, requests for extensions, inappropriate ex-parte filings and communications,

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untimely filings and other procedural antics of the Appellants. The Court should not sanction this conduct and should set the supersedeas at the highest possible figure.

It is undisputed that there are no other offers that would be available that would come remotely close to the Pulte Homes offer if that sale were to fall through. The Appellants' October 24, 2019 appraisal showing an "as is" value of $21,845,000.00 is based on an overstated unit count and fails to take topography, lot frontages, road configurations, geotechnical issues and other land use impediments into account and is grossly overstated. (Declaration of Scott Cameron at 3). The Appellants' inability to offer alternative security for the supersedeas amount under RAP 8.1(c) should result in the Court setting the supersedeas cash bond at a minimum of $13,750,000 because there is no other way to guarantee the potential loss of the Pulte Homes offer if it were to walk away from the sale through their exit contingency.

2. The supersedeas bond should cover the undisputed damages that would result in delay of enforcement.

Pursuant to RAP 8.1(b)(2), a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement. *Norco Const., Inc. v. King Cty.*, 106 Wn.2d 290, 296, 721 P.2d 511, 514 (1986).

In their Motion, the Appellants claim that no security is necessary because the Appellants are the largest creditors and the Receivership Debtor, who have a substantial stake in the property. They also claim that creditors JTP and Zeno have no interest because the Pulte transaction is contingent.

However, the Appellants concede that there would be at least $500,000.00 of damages that would result in the delay of enforcement in the event that Pulte

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Homes follows through with the offer in the event that the appeal is successfully defeated. The Court could therefore also set the supersedeas bond to cover the potential damages that would result in the delay in enforcement resulting from Pulte Homes' understandable delay in starting the feasibility assessments and other preliminary improvements on the property during the pendency of the appeal. *See Malo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828, 830–31 (1969) (Supersedeas amount should cover expenses of removing encumbrances from property and other modifications necessary to prevent the loss of value in the property during the pendency of the appeal). However, there is no guarantee that Pulte will follow through with the offer given the substantial delay caused by Appellant's appeal, especially if the preliminary plat approval expires in the meantime. As a result, the Court should reject this as the lesser of the two options and order the greater amount under the first option of $13,750,000.00 as the base amount of the bond.

3. The supersedeas bond should cover the attorney fees and costs and other Receiver expenses to be incurred in litigating the appeal.

RAP 8.1(c) requires additional factors for consideration in setting a supersedeas amount, which includes: interest, attorney fees, costs, and expenses likely to accrue during the pendency of the appeal. Determination of these other factors necessarily requires the trial court to exercise its discretion in estimating not only the amount likely to accrue but to estimate the length of the appeal. *IBEW Health & Welfare Tr. of Sw. Washington v. Rutherford*, 195 Wn. App. 863, 866, 381 P.3d 1221, 1223 (2016) ("Indeed, a trial court's determination of interest and attorney fees, without the added estimate of the cost of additional legal work and the length of appeal, is reviewed for an abuse of discretion.").

Each of the secured and unsecured creditors have interest accruing at a rate of 12% per annum on obligations owed to them. As of January 2021, the principal

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obligations are already at approximately $7,500,000.00. *Declaration of Stuart Heath,* **Exhibit C**. (Dkt. 418). 12% interest on $7,500,000.00 results in approximately $900,000.00 in interest accruing annually during the pendency of this appeal. The Court should therefore take into consideration the interest accruing upon those obligations for the period of delay during the pendency of the appeal in this amount. *Id.* The Court should therefore add $2,700,000.00 in interest for the estimated three-year period of this appeal in order to take into account a potential appeal to the State Supreme Court.

In addition to the interest and regardless of the outcome of the appeal, the Receiver will have had to expend attorney fees and costs, as well as other expenses that should not fall upon payment by the Receivership Estate at the expense of other creditors. The Court should set the supersedeas amount to include an additional $250,000.00 on top of the potential loss of sale and delay of enforcement damages that frames the supersedeas amount to cover the attorney fees, costs, and other expenses of the Receiver during the pendency of the appeal.

VI. CONCLUSION

For the reasons outlined above, the Court should set a supersedeas bond of $16,367,000.00, consisting of the larger base amount of $13,750,000 that may be lost through the Pulte deal falling through, the $2,700,000.00 in interest that would accrue during the pendency of the appeal, and the $250,000.00 that would be needed to cover attorney fees, costs, and other expenses of the Receiver during the pendency of the appeal.

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Respectfully submitted this 3rd day of November, 2021.

I certify that this memorandum contains 2,574 words in compliance with the Local Civil Rules.

HELSELL FETTERMAN LLP

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In Re the Receivership of: JDH INVESTMENT GROUP, LLC	No. 19-2-23961-1 SEA **ORDER SETTING AMOUNT OF SUPERSEDEAS BOND [PROPOSED]**

This matter came before the Court for a hearing upon motion of the Receivership Debtor and Senior Lienholder, to set the amount of a supersedeas bond regarding the Real Property commonly known as Diamond Valley Estates consisting of approximately 80 acres located on the north and south sides of Evergreen Way SE, between Quincy and Udall Avenue SE, in Auburn, Washington 98092 (the "**Real Property**").

The Court has considered the files and records in this case including the Note For Motion Docket; the Joint Motion to Determine Amount of Bond on Appeal the Declaration of Scott Cameron in support thereof of Real Property Commonly Known as Diamond Valley Estates; and any opposition to the Receiver's Motion. Notice of the hearing on the Receiver's Motion was proper and sufficient under the circumstances.

The Court deems itself fully advised. The Court, being fully informed, makes the following Findings:

The supersedeas bond for the above-captioned appeal is set at the amount of $_____

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DATED this 3rd day of November, 2021

THE HONORABLE JOHN RUHL
KING COUNTY SUPERIOR COURT

Presented by:

HELSELL FETTERMAN, LLP

Michael Spence
WSBA #15885
Attorney for Receiver Elliott Bay Asset Solutions, LLC

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re:	No. 19-2-23961-1 SEA
JDH INVESTMENT GROUP, LLC.	ORDER SETTING AMOUNT OF BOND ON APPEAL

The Court of Appeals has referred this matter to this court for consideration of a Joint Motion to Determine Amount of Bond on Appeal (Dkt. 573) ("**Motion**") filed by Bridges West, LLC ("**Bridges West**"); the Debtor, JDH Investment Group ("**JDH**"); Thomas Downie, JDH's sole owner (referred to below as the "**Appellants**").

For the reasons explained below, the court will require the Appellants to file with the Clerk of the King County Superior Court a supersedeas bond in a form acceptable to this court (and/or deposit funds into the registry of the Clerk of the King County Superior Court) in the total amount of **$5,905,000.00.**

1. Documents Considered

The court has considered the pleadings and other documents filed by the parties to date; and, in particular, the following items, along with the exhibits attached thereto:

Pleading	**Dkt. No.**
Joint Motion to Determine Amount of Bond on Appeal	573
Declaration of Clay M. Gatens in Support of Joint Motion to Determine Amount of Bond on Appeal	574

Pleading	Dkt. No.
Pulte Homes' Opposition to Joint Motion to Determine Amount of Bond on Appeal	579
Receiver's Response to Appellants' Joint Motion to Set Supersedeas Bond	585
Zeno P.S.'s and JTP Service's Response to Joint Motion to Determine Bond	587
Declaration of Michael Zeno, Jr., re: Supersedeas Bond	588
Receiver's Response to Appellants' Joint Motion for a Stay (filed in Court of Appeals Case No. 82720-1-I)	590
Joint Reply of Bridges West, JDH Investment Group, and Tom Downie in Support of Joint Motion to Determine Amount of Bond on Appeal	591

2. Background

In June 2021, the Appellants filed appeals from certain orders by this court that relate to the Receiver's efforts to sell the real property of the Receivership Estate (the "**Real Property**") to Pulte Homes of Washington, Inc. ("**Pulte Homes**").

In June, 2021, the Appellants filed with the Court of Appeals, Division I, a motion to stay the closing of the sale to Pulte Homes pending the outcome of the appeal.

In a letter ruling dated September 16, 2021, the Court Administrator/Clerk of the Court of Appeals, Division One, communicated a notation ruling by Commissioner Jennifer Koh. Commissioner Koh's ruling provides, in part:

> [T]he parties appear to agree that "the property at issue has value," see RAP 8.1(c)(2), but ***dispute the precise value of the property - at least with regard to their characterizations of past, present, and potential near future valuations***. … [T]he trial court is generally in a better position to make factual determinations as to the value of property and the potential for loss over the course of an appeal. Accordingly, the closing of the purchase and sale agreement described in the trial court's May 4, 2021 order authorizing sale is hereby stayed pending resolution of this appeal or further order of this Court, on condition that Appellants obtain … ***an order from the trial***

> ***court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any***. The rights of Pulte Homes to act under the purchase and sale agreement are not otherwise restrained. [Emphasis added]

Letter from Court of Appeals at 4, September 16, 2021, attached as Ex. 2 to the Declaration of G. Michael Zeno, Jr. re Supersedeas Bond (Dkt. 588).

On October 20, 2021, the Appellants filed their current Motion in this court. Below, the court will address the two questions posed by the Court of Appeals.

A. The Real Property's value would be insufficient to fully secure the losses that the Respondents likely would incur if the stay were to prevent the Receiver from closing the sale of the Real Property.

RAP 8.1(c)(2) provides that in an appeal involving a "decision affecting property," the amount of a supersedeas bond, cash, or alternate security

> shall be the amount of any money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs, and expenses likely to be awarded on appeal entered by the trial court ***plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review***. Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review. A party claiming that the reasonable value of the use of the property is inadequate to secure the loss which the party may suffer as a result of the party's inability to enforce the judgment shall have the burden of proving that the amount of loss would be more than the reasonable value of the use of the property during review. ***If the property at issue has value, the property itself may fully or partially secure any loss and the court may determine that no additional security need be filed or may reduce the supersedeas amount accordingly***. [Emphasis added]

RAP 8.1(c)(2).

The Appellants argue that no supersedeas bond is necessary because the Real Property currently has sufficient value to fully secure all potential losses that the Respondents might incur. Their argument appears to be based, in part, upon an October 2019 appraisal that JDH

filed earlier this case (the "**JDH Appraisal**"), which indicates that the Real Property is worth approximately $21,845,000, and which they argue "demonstrates that there are no potential damages from a delay in enforcement of the Sale Order." Motion at 3 (Dkt. 573).

Alternately, the Appellants argue that if a supersedeas bond is issued, it should not exceed $500,000.00, which is the amount of loss that Pulte Homes has asserted it will sustain as a result of the Appellants' appeal. Motion at 4 (Dkt. 573); *see also* Respondent Pulte Homes' Resp. to Joint Motion for a Stay at 19 (Ex. 3 to Zeno Decl. (Dkt.. 588).

The Receiver, Zeno, P.S., and JTP Service respond that the JDH Appraisal provides a "grossly overstated" value with respect to the Real Property, and that a supersedeas bond or cash deposit is the only way to insure against the substantial losses that the Respondents would incur if the closing of the sale of the Real Property were to be delayed or canceled by reason of the Court of Appeals' stay order. Receiver's Response at 7-8 (Dkt. 585); Zeno P.S.'s & JTP Services' Response at 3-4 (Dkt. 587).

The Receiver requests the court to require a supersedeas bond or cash deposit in the total amount of $16,700,000.00, consisting of:

> $13,750,000.00 that may be lost through the Pulte deal falling through, the $2,700,000.00 in interest that would accrue during the pendency of the appeal, and the $250,000.00 that would be needed to cover attorney fees, costs, and other expenses of the Receiver during the pendency of the appeal.

Receiver's Response at 9 (Dkt. 585).

Creditors Zeno P.S. and JTP Service request the court to require the Appellants to post a supersedeas bond or cash deposit in the amount of $3,300,000.00, with a provision that if the appeal is unsuccessful, the bond funds shall be paid only to the Respondents, but not to the Appellants (including Appellant Bridges West, which has purchased former creditor Sue Jones' $4.3 million senior against the Real Property),

> to protect the administrative and junior claimants against the risk of loss because of (a) the expiration of the preliminary plat

> approval, and (b) the possibility that Pulte Homes will lose interest in [purchasing the Real Property].

Zeno P.S.'s and JTP Service's Response at 8 (Dkt. 587).

The court agrees with the Receiver's and the creditors' criticisms of the 2019 JDH Appraisal. The court finds that the JDH Appraisal does not provide an accurate or reasonable estimate of the value of the Real Property, and that the Real Property's current value would be insufficient to fully secure the losses that the Respondents likely would incur if the stay were to delay or prevent the scheduled closing of the sale of the Real Property.

The court concludes that there should be a supersedeas bond or cash deposit in an amount that will be sufficient to pay the Respondents' claims and all administrative claims if the Appellants' appeal causes such a lengthy delay of the closing of the sale of the Real Property that Pulte Homes decides to abandon the purchase contract.

If Pulte Homes were to abandon the Purchase and Sale Agreement because of delay of the closing caused by the stay, the Receiver would be required to start over with its efforts to market the Real Property and procure new bids, which would require several months or more. Presumably, the Receiver eventually would be able to sell or otherwise dispose of the Real Property, but any such eventual transaction likely would require several additional months, or even years (not including even more delay if JDH were to initiate another appeal of a later order approving another proposed sale).

If, at that point, the only bids were to be in the range of the bids that JDH and its collaborators have promoted to this court to date (such as Argo Development, LLC's $7,125,000.00 offer,[1] or Richmond American Homes' 3,800,000.00 offer;[2] or Oakridge Homes, Ltd.'s $7,700,000.00 offer;[3] or Bridges West, LLC's $7,500,000.00 offer[4]), then the

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[1] *See* Dkt. 350 (Receiver's Disclosure of Offers), Ex. A; and Dkt. 365 (Decl. of Ryan Schaper, sole member of Argo Development, LLC).

[2] *See* Dkt. 350 (Receiver's Disclosure of Offers), Ex. B.

[3] *See* Dkt. 590 (Receiver's Response to Appellants' Joint Motion for Stay) at 4.

[4] *See* Dkt. 486 (Decl. of Veronica Morss), Ex. A and Ex. B.

net sale proceeds likely would only be sufficient to pay Appellant Bridges West's first-position lien claim, and almost certainly would be insufficient to pay the Respondents' junior claims (which by then would have accrued several more years of interest) and the Estate's administrative claims.

In sum, the court concludes that it is reasonable and appropriate to require a supersedeas bond to insure against the potentially substantial losses that the Respondents would incur if the stay order were to prevent the Receiver from closing the sale with Pulte Homes according to the schedule in the Purchase and Sale Agreement – including the losses that potentially would be sustained if Pulte Homes were to walk away from the Agreement because of that delay.

B. It is appropriate to require a supersedeas bond or cash security deposit in the amount of $5,905,000.00

The amount of a supersedeas bond or cash security deposit must be sufficient to cover the financial injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3)(ii). *See Norco Construction, Inc. v. King County,* 106 Wn.2d 290, 296, 721 P.2d 511 (1986) ("[A] party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement."); *see also Spahi v. Hughes NW, Inc.,* 107 Wn.App. 763, 768-773, 27 P.3d 1233 (2001) (After a successful appeal, the recourse for a former landowner, whose property was sold to third-party purchaser in a marshal's sale after the United States gained title in a quiet title action while the appeal was pending, was against the United States for the actual sale price of the property at the marshal's sale).

Calculation of a supersedeas bond necessarily involves uncertainty. In *Grassie v Roswell Hosp. Corp.,* 144 N.M. 241, 185 P.3d 1091 (2008), the court explained:

> The setting of the bond amount necessarily involves uncertainty in its calculation because the types of damages that may be caused by a stay of execution are not always apparent at the time the stay is granted. Until such damages are actually

> incurred, ***the actual amount of damages caused by a stay pending appeal, if any, are unknown and need not be established with mathematical certainty*** until, and if, a surety is required to pay on a bond. Thus, viewed within the context of an unpredictable future, the rule is intended to ensure that the amount of the bond is sufficient to maintain the *status quo* while the case is pending on appeal. [Emphasis added]

144 N.M. at 244-45, 185 P.3d 1091.

The court concludes that it is appropriate to require a supersedeas bond or cash security deposit that is calculated based primarily upon the amounts of the Respondents' claims that currently are pending against the Receivership Estate, plus interest and estimated potential attorneys' fees and costs.

The court will require a supersedeas bond or cash security deposit in the amount of **$5,905,000.00**, as calculated in **Appendix A**, attached. Following are comments with respect to the figures listed on Appendix A.

a. For purposes of calculating the bond amount, the court has accepted and used most of the dollar amounts that are proposed in the Declaration of G. Michael Zeno, Jr. (Dkt. 588), which are based upon the Receiver's earlier summary of the claims that have filed against the Receivership Estate (*See* Declaration of Stuart Heath, Ex. C, January 20, 2021 (Dkt. 359)).

b. The court agrees with the Appellants that it is not necessary to include the dollar amount of Appellant Bridges West, LLC's approximately $4,300,000.00 first-position lien claim against the Real Property, which Bridges West recently purchased from creditor Betty Frye. Appellants' Reply at 2-3 (Dkt. 591).

c. Pulte Homes' claimed potential $500,000.00 loss is included as part of the bond amount. Respondent Pulte Homes' Resp. to Joint Motion for a Stay at 19 (Ex. 3 to Zeno Decl. (Dkt.. 588)).

d. The court finds that it is reasonable to include estimated accrued interest on the claims for 2021, 2022, 2023, 2024, and 2025. The reason is that Pulte Homes'

closing deadline does not occur until three years after the Receiver has procured a final court order approving the sale.[5] Thus, for example, if the appeal is unsuccessful, and if the Receiver obtains a final court order approving the sale in late 2022 or early 2023, then Pulte Homes' three-year period of feasibility will begin at that point, which means that the three-year the closing of the sale will not occur until late 2025, which in turn will delay payments to the creditors until at least 2025.

e. The court finds that it is reasonable to include an additional amount of estimated accrued interest on the claims for 2026 and 2027. The reason is that there is a potential for an appeal to the Washington Supreme Court, which, if review were to be granted, presumably would add at least two years to the current appeal period, resulting in a corresponding delay of the payments to the creditors until approximately 2027.

f. The Receiver estimates that the Estate will incur a total of approximately $250,000.00 of fees and costs for past and future services provided or to be provided by the Receiver and its legal counsel prior to the closing of the sale of the Real Estate. Receiver's Response at 9 (Dkt. 585). That estimate is included in the calculation.

g. The court agrees with Zeno P.S., that it is reasonable to add a "cushion" of 20% to the total bond amount.

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[5] The clock does not begin to run with respect to Pulte Homes' "Three-Year Closing Option" unless and until the current appeal is adjudicated in the Respondents' favor. Pulte Homes' Purchase and Sale Agreement provides that under the Three-Year Closing Option, the closing date may occur up to "three (3) years from the date of Buyer's delivery of the Feasibility Approval Notice." Purchase and Sale Agreement at §8.1.2 (Ex. B to Receiver's Motion to Approve Terms of sale Free and Clear of Liens and Rights of Redemption (Dkt. 416)). The Feasibility Approval Notice is not due to be provided to the Receiver until "90 days after the Final Court Sale Approval has been obtained." *Id* § 6.1. The term "Final Court Sale Approval" is defined as the date on which "all appeal periods related to the Court Sale Order have expired without appeal being filed, or, if such appeals were filed, having been dismissed to Buyer's reasonable satisfaction." *Id*. at §4.1.14.

Summary

To summarize, the court finds and concludes that the Real Property's value would be insufficient to fully secure the losses that the Respondents very likely would incur if the appellate stay were to prevent the Receiver from closing the sale of the Real Property; and that it therefore is appropriate to condition the Court of Appeals' stay of the Receiver's enforcement of the Order Authorizing Sale of Real Property (Dkt. 474) upon the Respondents filing a supersedeas bond and/or cash security deposit in the total amount of **$5,905,000.00**.

Order

In response to the Court of Appeals' letter ruling dated September 16, 2021, and for the reasons explained above, the court orders as follows.

1. To stay the enforcement of this court's Order Authorizing Sale of Real Property (Dkt. 474) and any other orders that the Appellants have appealed to the Court of Appeals to date, the Appellants shall, no later than 14 days after the date of this order, file with the Clerk of the King County Superior Court a supersedeas bond in a form acceptable to this court in the amount of **$5,905,000.00**;or deposit funds into the registry of the Clerk of the King County Superior Court, in the total amount of **$5,905,000.00**.

2. The Appellants may satisfy the above requirement by making a cash deposit in an amount less than the total bond amount stated above, so long as the Appellants also file a supersedeas bond for amount equal to the difference between the amount of cash deposited and the total bond amount stated above.

3. The supersedeas bond and/or cash deposit shall be maintained for the benefit of the Respondents in Case No. 827201-1-I, pending before the Washington Court of Appeals, Division I, to reimburse the Respondents, in the event that the Appellants do not prevail in their appeal, for any loss or injury that the Respondents will have incurred as a result of their inability to enforce the court's order(s) while the appeal was pending.

4. The proceeds of the supersedeas bond and/or the cash deposit held by the Clerk shall not be paid to any creditor of the Receivership Estate that is not a Respondent in the pending appeal.

5. Proceeds of the supersedeas bond and/or the cash deposit held by the Clerk shall not be withdrawn by or disbursed to any party except by order of this court or by order of the Court of Appeals, upon proper notice and hearing.

Date: November 17, 2021.

s/ John R. Ruhl
John R. Ruhl, Judge

Appendix A

Calculation of Supersedeas Bond Amount

Claims	**Amounts**	**Source:**
Betty Frye (secured claim)(12/31/20)	$ 720,738.97	Dkt. 361 Ex. D-1 p. 5-6
G. Michael Zeno Jr., P.S. (secured claim)(12/31/20)	$ 425,000.00	Dkt. 361 Ex. E-5 p. 180
Zeno (unsecured claim)(12/31/20)	$ 57,824.00	Dkt. 361 Ex. E-5 p 180
JTP Services (incl. interest to 12/31/20)	$ 600,000.00	Dkt. 359 Ex. D-3 p. 189
King Co. Property Tax (12/31/20)	$ 133,917.00	Dkt. 359 Ex. D-5 p. 215, 216
Receiver's Claimed Fees (12/31/20)	$ 166,869.81	Dkt. 359 Ex. C, .pdf. p. 11
Subtotal (12/31/2020)	**$ 2,104,349.78**	
Interest on 12/31/2020 Subtotal (2021) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2022) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2023) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2024) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2025) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2026) (@12%)	$ 252,521.97	
Interest on 12/31/2020 Subtotal (2027) (@12%)	$ 252,521.97	
Pulte Homes of Washington, Inc.'s Potential Loss	$ 500,000.00	Pulte Homes' Resp. to Stay Mot. at 19 (Ex. 3 to Zeno Decl. (Dkt. 588)
Property Taxes and Penalties (2021-2027)($32,000/year)	$ 224,000.00	Dkt. 359 Ex. D-5 p. 215-216
Additional Fees & Costs (Zeno P.S.)	$ 75,000.00	Dkt. 588 at 3
Additional Fees & Costs (Receiver and Outside Counsel)	$ 250,000.00	Dkt. 585 at 9
Subtotal:	**$ 4,921,003.60**	
Plus: 20% Cushion	$ 984,200.72	
Total	**$ 5,905,204.31**	
Amount of Supersedas Bond or Cash Deposit (rounded)	**$5,905,000.00**	

King County Superior Court
Judicial Electronic Signature Page

Case Number:	19-2-23961-1
Case Title:	JDH INVESTMENT GROUP vs ELLIOTT BAY ASSET SOLUTIONS
Document Title:	ORDER RE -ORDER SETTING SUPERSEDEAS BOND

Signed By:	John Ruhl
Date:	November 17, 2021

Judge: John Ruhl

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	6A525D55EB6EDD1D8D3683F58F2E80754B69D73B
Certificate effective date:	3/18/2019 8:27:16 AM
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NO 82720-1-I
(Consolidated with 82721-9-I and 82785-5-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re

JDH INVESTMENT GROUP, LLC,

Receivership Debtor.

RESPONSE OF RECEIVER TO APPELLANTS' JOINT MOTION FOR REVIEW OF ORDER SETTING AMOUNT OF BOND ON APPEAL

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I. IDENTITY OF RESPONDING PARTY

Elliott Bay Asset Solutions, LLC, in its capacity as the Court-Appointed General Receiver for JDH Investment Group, LLC, by and through its attorney of record, Kevin Khong of Helsell Fetterman LLP, asks for relief requested in Part 2 of this Response.

II. RELIEF REQUESTED

The Receiver respectfully requests the Court deny the Appellants' Motion for Review of the Honorable Judge John R. Ruhl's Order Setting Amount of Bond on Appeal and uphold the $5,905,000 amount ordered for the supersedeas bond.

The debt owed to the creditors, for property taxes, and the receivership administration fees ($2,104,349.78), in addition to the delay resulting in the high likelihood of damage from the plat approval expiring ($3,325,000) to the Receivership already puts the potential damages of delay up near the amount originally set by the trial court. The addition of the potential damages to Pulte

of $500,000, $252,521.97[1] of interest already accrued for 2021, and $252,521.97 of interest for 2022, none of which the Appellants dispute, result in the base damages already being more than $5,905,000 set by the trial court for the bond, even before the calculation of future interest, property taxes, and fees and costs.

The Appellants continue to delay the proceedings knowing that (1) expiration of the preliminary plat approval is looming that would significantly devalue the property and that (2) interest on the creditor claims continue to accrue at a significant rate for each passing day for which the sale is delayed. Judge Ruhl thoroughly and meticulously calculated the bond amount based upon these two factors and ordered an amount of $5,905,000 which is reasonable (and may be conservative) in light of the facts of this case and is well within the trial court's discretion

[1] Judge Ruhl did not include Bridges West LLC's creditor claim in the calculation of interest for purposes of the supersedeas bond since they are one of the Appellants seeking the bond.

under RAP 8.1. The Court should deny the Appellants' RAP 8.1(h) Motion for Review of Order Setting Amount of Bond on Appeal and affirm the supersedeas bond amount ordered by Judge Ruhl.

III. FACTS RELEVANT TO RESPONSE

The Receiver relies upon the Order Setting Amount of Bond on Appeal entered by Judge John Ruhl on November 17, 2021, as attached as **Appendix A of the Appellants' motion**. To the extent that additional facts are needed, they have been interlineated directly into the argument below with specific clerk's papers and report of proceedings citations.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The trial court did not abuse its discretion because the supersedeas bond amount must account for the Respondents' potential loss from the delay of the property sale.

"[P]ursuant to RAP 8.1(b)(2), a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement." Norco Const., Inc. v.

King County, 106 Wn.2d 290, 296, 721 P.2d 511 (1986). It is the "trial court's duty . . . 'to exercise its *discretion* and fix the amount of the bond to stay.'" IBEW Health & Welfare Trust of Southwest Washington v. Rutherford, 195 Wn. App. 863, 865–866, 381 P.3d 1221 (2016) (citing State v. Benson, 21 Wn. 580, 582, 59 P. 501 (1899) (emphasis added)).

The trial court is required "to exercise its discretion in estimating not only the amount likely to accrue but *to estimate the length of the appeal*." IBEW Health, 195 Wn. App. at 866. (emphasis added). "[A] trial court's supersedeas bond amount determination is reviewed for an abuse of discretion." Id. The trial court did not abuse its discretion in setting the supersedeas bond amount at $5,905,000. For decisions affecting real property, the supersedeas bond amount must include "the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review." RAP 8.1(c).

First, the Appellants misrepresent this Court's characterization of how to determine loss in Spahi v. Hughes-Northwest. 107 Wn. App. 763, 770, 27 P.3d 1233 (2001). The Appellants state that the purpose of the supersedeas bond amount as "to secure the attendant loss the respondent may incur if the judgment is affirmed on appeal." Joint Motion for Review of Order Setting Amount of Bond on Appeal, p. 7 (citing Spahi, 107 Wn. App. at 770). However, the Spahi Court specifically identified two purposes of a supersedeas bond: (1) "it serves the interest of the judgment debtor by delaying the execution of the judgment," and (2) "it serves the interest of the judgment creditor by ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired during the appeal process." Spahi, 107 Wn. App. at 769.

The amount of loss recoverable by a supersedeas bond is not that which "may incur if the judgment is affirmed on appeal"—as the Appellants contend—but rather "a secure source of reimbursement for any loss incurred by the [Respondents] as

a result of [their] inability to enforce the judgment during review." Spahi, 107 Wn. App. at 769 (noting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2905, which stated "that the amount of bond usually will be set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay"). *See also* Seventh Elect Church in Israel v. Rogers, 34 Wn. App. 105, 120, 660 P.2d 280 (1983) (citing Murphree v. Rawlings, 3 Wn. App. 880, 882, 479 P.2d 139 (1970); Malo v. Anderson, 76 Wn.2d 1, 4, P.2d 828 (1969)) ("The primary purpose of a supersedeas bond is . . . to guarantee that the debtor's ability to satisfy the judgment cannot be altered pending outcome of the appeal"). Thus, the amount of supersedeas bond should reflect the amount necessary to hold Appellants accountable, taking into account the damages incurring from the creditors' claims and the damages which may arise in risking the sale of the property through delaying the proceedings.

This is precisely what Judge Ruhl held: "The Court concludes that there should be a supersedeas bond or cash deposit in an amount that will be sufficient to pay Respondents' claims and all administrative claims if the Appellants' appeal causes such a lengthy delay of the closing of the sale of the Real Property that Pulte Homes decides to abandon the purchase contract." **Appellants' App. A** – Order Setting Amount of Bond on Appeal, p. 5. Pulte's 90-day feasibility period would have run in the summer of 2021 but for the appeal by the Appellants. CP 1009. Thus, it is incorrect to say that the Appellants are without fault if Pulte were to walk away from the sale. The trial court did not abuse its discretion and the bond it set should be upheld.

The creditors' claims and administrative fees in jeopardy alone amount to $2,104,349.78. **Appellants' App. A**[2]. The trial court appropriately included the entirety of these claims and

[2] The superior court set the principal claim amounts for the creditors according to estimates made as of December 31, 2020. These were last estimated by the Receiver in a declaration filed on January 20, 2021. CP 1070.

excluded the Appellants' claims because while the status quo which existed after the May 4, 2021, orders would have allowed an avenue for which these creditor claims would all be paid off, the delay in the sale through the pendency of the appeal could result in the loss of that sale with no alternate option which could guarantee that these claims would be paid.

In addition, the preliminary plat approval is at risk of expiring during the pendency of appeal, and such expiration would result in a significant decrease in the value of the property. The plat of the subject property was granted preliminary approval by the City of Auburn on February 8, 2017. CP 739. Therefore, under AMC 17.10.110(A), the preliminary approval expires on February 8, 2022. Under AMC 17.10.110(C)(1), the deadline to apply for an extension of the plat is January 8, 2022. The uncertainty of the appeal has directly impacted the plat extension. Under Auburn city code, an extension is for only one year and then requires another application and another

discretionary review by the Auburn City examiner, which has no guarantee of being granted. Id.

It is important to remember that the Pulte transaction contains three pricing tiers, depending on which land use entitlement is appropriate to pursue its plans. CP 230, 1001. If it decides to pursue and obtain a Reasonable Use Exception, the purchase price is $13,750,000. Id. If it decides to pursue and obtain a plat modification, the purchase price is $10,750,000. Id. If it decides to apply for and obtain a new preliminary plat approval, the purchase price is $10,425,000. Id. Without a plat extension, the reasonable use exception or plat modification options are no longer available because the plat becomes "null and void" under AMC 17.10.110(D). Pulte's only option will therefore be limited to pursuing a new preliminary plat approval, resulting in a loss to the estate of either $325,000 or $3,325,000, depending on which option Pulte foregoes because of the preliminary plat expiration. Judge Ruhl conservatively set the potential loss to Pulte for this occurrence to be $500,000, but the

trial court did not take into account the loss to the Receivership of either the $325,000 or $3,325,000 that would result from the loss of the plat approval.

Asking the Appellants to provide a $5,905,000 bond is appropriate given that the debt owed to the creditors ($2,104,349.78) and the delay resulting in the high likelihood of damage from the plat approval expiring ($3,325,000) already puts the potential damages of delay up near the amount originally set by the trial court even absent accounting for "interest, attorney fees, costs, and expenses likely to accrue during the pendency of the appeal." The addition of the potential damages to Pulte of $500,000, $252,521.97 of interest already accrued for 2021, $252,521.97 of interest for 2022, none of which the Appellants dispute, result in the base damages already being more than $5,905,000 set by the trial court for the bond, even before the calculation of future interest, property taxes, and fees and costs. Accordingly, the Court should uphold the already conservative supersedeas bond amount set by the trial court.

B. The trial court did not abuse its discretion because the supersedeas bond amount must account for interest, attorney fees, costs, and expenses that would accrue during the pendency of the appeal.

The Appellants' contention that the trial court abused its discretion in calculating interest, fees, costs, and expenses is unfounded. The Appellants claim that the trial court erred in accounting for interest and property taxes for years 2021-2027, a cushion, and $325,000 in attorney's fees in determining the supersedeas bond amount. However, for decisions affecting real property, the supersedeas bond amount must include "money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs, and expenses likely to be awarded on appeal" pursuant to RAP 8.1(c).

The Appellants do not cite to any authority where the trial court was found to have abused its discretion in awarding interest, fees, costs, expenses, or a cushion amount determined to be reasonable by the trial court. The IBEW Health Court specifically held that a trial court does not abuse its discretion by "accounting for the possibility of post-judgment and appellate

attorney fees and costs." IBEW Health, 195 Wn. App. at 867. The Court also stated that "the estimated amount of post-judgement interest and attorney fees and costs likely to accrue pending appeal necessarily are subjective" and "[b]ased on the amounts at issue." Id. at 867. Judge Ruhl did not abuse his discretion in setting the estimated period of interest and property taxes that would accrue as a result of the appeal, nor did the Judge error in the estimated calculation of the fees, costs, and expenses that would be incurred by the Respondent parties pending the appeal.

1. The Trial Court's Period of Interest and Property Tax Calculations were reasonable.

The trial court's supersedeas bond calculation is reasonable and should be upheld because its calculation of time for interest accrued is also reasonable. First and foremost, the Appellants are incorrect in stating only one year of interest needs to be included in the bond amount because the claims were calculated with a value date as of December 31, 2020. CP 1070. One year of interest would make the claims current as of

December 31, 2021. There is no way in which an appellate decision would be rendered by then, considering the Appellants' reply brief is due on January 3, 2022.

Second, the trial court was correct that, "if the appeal is unsuccessful, and if the Receiver obtains a final court order approving the sale in late 2022 or early 2023, then Pulte Homes' three-year period of feasibility will begin at that point, which means that the three-year the (sic) closing of the sale will not occur until late 2025, which in turn will delay payments to the creditors until at least 2025." **Appellant's App. A**. While the Appellants claim that the three-year closing period would exist regardless of the appeal, they do not seem to understand that the three-year closing period occurring between May 2021 and May 2024 is drastically different from a potential timeframe for closing period of 2023 through 2026. The factors which may change between the two timeframes which impacts the feasibility decision-making is what Judge Ruhl reasonably considered and

there is no dispute that the Appellants are the cause of the change in the feasibility timeframe through the appeal.

The feasibility period of the Pulte purchase and sales agreement reads as follows:

> 6.1 **Feasibility of Purchase**. On or before 5:00 p.m., Pacific Time, on the date that is 90 days after the form of this Agreement is finally approved by the Superior Court of Washington for King County and all appeals periods related to such approval have expired without appeal being filed, or, if such appeals were filed, having been dismissed to Buyer's reasonable satisfaction ("**Feasibility Expiration Date**") (the period of time running from the Effective Date to such date and time is referred to herein as the "**Feasibility Period**"), Buyer shall have the right to determine, in the sole and absolute discretion of Buyer, whether to proceed with the closing of the transaction contemplated herein. During the Feasibility Period, Buyer and its employees, representatives, agents, consultants and contractors (collectively, "**Buyer Parties**") may review, among other things, the physical aspects of the Property, the Due Diligence Documents (as defined in Section 6.3), market conditions, development costs and tests and studies conducted by Buyer Parties to consider the suitability of the Property for Buyer's intended use and development of the same. If Buyer elects to proceed with closing of the transactions contemplated by this Agreement, then Buyer shall issue to Seller a written notice ("**Feasibility Approval Notice**") on or before expiration of the Feasibility Period, confirming to Seller that Buyer's review conducted under this Section is satisfactory and waiving the conditions set forth in this Section. If Buyer fails to issue the Feasibility Approval Notice on or before the stated deadline, then Buyer shall be deemed to have terminated this Agreement and the Parties shall be fully and finally released from all obligations under this Agreement. Buyer shall not be obligated to provide Seller with an explanation for its decision not to issue the Feasibility Approval Notice. Following Buyer's delivery of the Feasibility Approval Notice, if this Agreement terminates for any reason except for Buyer's default, then Seller shall promptly reimburse Buyer for its out-of-pocket, third-party due diligence costs.
>
> Buyer shall have the right to extend the Feasibility Period 1 time for 45 days ("**Feasibility Period Extension**") by (i) delivering notice of exercise of such Feasibility Period Extension to Seller on or before the then-scheduled last day of the Feasibility Period; and (ii) within 5 business days after delivering the applicable notice, depositing with Escrow Holder $50,000 which amount will be treated as part of the Deposit for all purposes of this Agreement.

CP 1009.

If the Appellants did not appeal, feasibility would have begun to run the day after the entry of the May 4, 2021, Order for a period of 90-days, which have expired on August 3, 2021. Thus, it is incorrect to say that the Appellants are without fault if Pulte were to walk away from the sale because it is their appeal which still leaves Pulte the option to walk away from the sale based upon the feasibility period. In the current status quo as of the time of this Response, the U.S. economy is seeing a 6% inflation with a corresponding increase in interest rates possible, all of which may dramatically impact the marketability and sale of the property and all of which are possibilities as the direct result of their appeal. The Appellants should not be allowed to assume that the hottest real estate market in decades which fostered the Pulte sale will continue on indefinitely unaffected by Covid-19, the economy, interest rates, or any number of international or national events.

Finally, the trial court was well within its discretion to include the timeframe of a potential appeal to the Washington

State Supreme Court as part of its decision in setting the supersedeas bond. The purpose behind the amount of the bond is to set the amount for the period in which the enforcement of the trial court decision is stayed, pending the appeal. RAP 8.1(b). A mandate affirming the May 4, 2021, trial court orders which would lift the stay would not enter until the appeal has been exhausted, whether through reconsideration by this Court and/or through denial of discretionary review by the State Supreme Court. The feasibility section of the purchase and sales agreement also states that the feasibility period only starts when the appeal is "dismissed to [Pulte's] reasonable satisfaction." It was therefore not an abuse of discretion for Judge Ruhl to consider these factors because they impact the period in which the trial court decision is stayed and when the feasibility period may begin to run. CP 1009.

As a result, the trial court's order which includes interest and property taxes calculated from 2021-2027 was not an abuse of discretion, and should be upheld.

2. The Trial Court did not abuse its discretion in setting attorney and administrative fees and costs for the amounts requested by the Respondents.

The Receiver's attorney fees and costs of its counsel and its own administrative fees for past and future services provided from the inception of the Receivership through the closing of a sale on the real property were appropriate and it was not an abuse of discretion of the trial court to rely upon the estimates given by the Respondent parties as to estimated fees and costs incurred. IBEW Health, 195 Wn. App. at 867. The Receiver's claimed fees as calculated by Judge Ruhl's order through December 31, 2020, were already $166,869.81. **Appellant's App. A.** This amount does not factor in work for the 2021 year, which includes the Receiver and its attorney: (1) getting an order authorizing the sale, (2) negotiating the sale with Pulte, (3) moving for confirmation of sale; (4) investigating the Appellants' omnibus motion for their "refinance" concept; (5) getting the May 4, 2021, Orders confirming the sale to Pulte and denying the omnibus motion; (6) litigating the various aspects of this appeal, including

the numerous pleadings on the bond issue; and (7) moving for instructions from the trial court in regards to the pending preliminary plat expiration. Given the amount of attorney fees and costs accrued up through December 31, 2020, and for the significant amount of work done in 2021 that will likely continue through at least the next two to three years of possible appeal and the three-year closing period afterwards, the trial court's estimate for the fees and costs of the Receiver and its attorney of $250,000.00 was reasonable.

Due to the litigiousness of this Receivership since it began, every administrative step of the Receiver has taken extraordinary efforts to accomplish. The Receiver initially moved for establishment of sales procedures on June 26, 2020, which ultimately were delayed by disagreements by the interested parties, resulting in the sales procedures not being approved until September 4, 2020. CP 28, 130-34.

After receiving offers, the Receiver first moved for authorization to sell the Property on November 3, 2020. CP 229-

39. Authorization of that sale was again repeatedly delayed, this time by the Appellants' attempt to short-circuit the sale through the promotion of a sale through their shell corporation, ARGO Development, LLC. CP 304, 307-09, 1370, 1376-78, 1385-87. The Appellants were utilizing the Argo offer to inappropriately issue subpoenas to the Receiver, Co-Brokers, and Pulte seeking confidential and proprietary information in an effort to discourage the sale. CP 305, 441057, 1539, 1668-70, 1672-74. The act was so bizarre that the trial court had to step in to prohibit discovery without prior written approval from the trial court. CP 1700. These delays ultimately resulted in an order authorizing sale not being entered until February 26, 2021, more than 3.5 months after the Receiver's original motion. CP 1674-1701.

After negotiations with Pulte, the Receiver moved for confirmation of the sales terms on March 24, 2021. CP 1763-70. The Appellants responded by filing their competing omnibus motion advocating their "refinance" concept with Bridges West LLC which is the subject of this appeal. CP 1702-13. The

Receiver had to investigate the "refinance" as a result, finding the same red flags that were apparent with all of the previous "refinance" concepts. CP 2168; RP 37:7-41:23, 61:3-61:21, 64:7-67:4. The orders on the confirmation of the sales terms and rejection of the omnibus motion advocating the "refinance" concept would not be entered until May 4, 2021.

Even in the current effort to simply establish a possible stay, and a bond for that stay, what started with a motion on June 18, 2021, still has not been resolved in lead up to the end of the 2021 year. In a case that is made up of over 3500 pages of clerk's papers over the sale of one real property, which represents just a fraction of the administrative work the Receiver has and will have to do to manage and put the Receivership matters in a stable condition subject to the appellate decision becoming final, the estimate of $250,000 for fees and costs of the Receiver and its attorney is a reasonable estimate given which the trial court reasonably followed based upon its intimate knowledge of the difficulty of the matters dealt with thus far. IBEW Health, 195

Wn. App. at 867. The Court should deny the Appellants' motion to revise the trial court's order on the supersedeas bond.

C. The Trial Court did not abuse its discretion by ordering the Appellants obtain a bond withing two weeks because they should have started the process when they first attempted the stay back in June 2021.

As outlined above, the Appellants first moved for a stay on June 18, 2021. It is clear that their mismanagement in failing to obtain a bond at this point was not a result of good faith efforts to do so, but more of the same pattern of delay towards the ultimate goal of derailing the sale altogether. The fact that the Appellants had done nothing in preparation for obtaining this bond in anticipation of how large it would need to be (they have not even applied yet) is not an abuse of discretion of the trial court, it's a simple matter of mismanagement on their part for which revision of the trial court is not appropriate.

V. CONCLUSION

The debt owed to the creditors, for property taxes, and the receivership administration fees ($2,104,349.78), and the delay resulting in the high likelihood of damage from the plat approval

expiring ($3,325,000) to the Receivership already puts the potential damages of delay up near the amount originally set by the trial court. The addition of the potential damages to Pulte of $500,000, $252,521.97 of interest already accrued for 2021, $252,521.97 of interest for 2022, none of which the Appellants dispute, result in the base damages already being more than $5,905,000 set by the trial court for the bond, even before the calculation of future interest, property taxes, and fees and costs.

For the reasons outlined above, the Court should deny the Appellants' Motion for Review of Order Setting Amount of Bond on Appeal because the amount set for the bond is already appropriate and may even be conservatively low, given the potential damages at issue.

Respectfully submitted this 13th day of December, 2021.

I certify that this Response produced using word processing software contains 3,659 *words in compliance with RAP 18.17, exclusive of the title sheet, appendices, this certification of compliance, certificate of service, and signature blocks, as calculated by the word processing software used to prepare this Response.*

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December 13, 2021 - 1:46 PM

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Case #: 827201
JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp
King County Superior Court No. 19-2-23961-1

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on December 30, 2021, regarding joint Motion for Review of Order Setting Amount of Bond on Appeal:

> Appellants JDH Investment Group, LLC, Bridges West, LLC, and Thomas Downie jointly request revision under RAP 8.1(h) of the trial court's November 17, 2021 supersedeas decision setting a $5.9 million appeal bond. Respondents Elliot Bay Asset Solutions (the court-appointed receiver), Zeno P.S. and JTP Services, Inc. (creditors), and Pulte Homes (the buyer) have filed answers, and Appellants have filed a reply.
> Under RAP 8.1(h), this Court may review the trial court's supersedeas decision on a party's motion. The trial court's supersedes decision is discretionary and will not be disturbed absent a showing of an abuse of discretion. IBEW Health & Welfare Trust v. Rutherford, 195 Wn. App. 863, 866, 381 P.3d 1221 (2016).
>
> I have reviewed the parties' arguments and the presented materials and agree that the trial court abused its discretion in calculating six years of interest and property taxes for the time of appeal based on the potential for a petition for review in the Washington Supreme Court. A party has a right to stay enforcement of a judgment "pending review." RAP 8.1(b). The only review proceeding currently pending is before this Court. Following resolution of the appeal in this Court, any party wishing to stay enforcement of any particular decision while seeking Supreme Court review may do so. This Court generally does not estimate the time for an appeal as more than 18 months. As this Court has already granted expedited consideration of this matter and the briefing is expected to be complete in January 2022, estimating two years from the May 4, 2021 entry of the initial order identified in the notice of appeal for this appeal is more than sufficient for calculating interest and property taxes. Accordingly, I will reduce the

amounts based on the six-year estimate by two-thirds, resulting in a deduction of $1,010,087.88 ($252,251.97 times 4) of interest and $128,000 ($32,000 times 4) of property taxes.

Similarly, the trial court's addition of a 20% "cushion" is an abuse of discretion. Calculation of the bond is based on estimates that are sufficiently generous to make such a cushion untenable. Accordingly, I will strike the $984,200.72 cushion.

I also agree with Appellants that an estimate of $325,000 for appellate attorney fees is unreasonable for this case. Accordingly, I will reduce that amount by approximately two-thirds to $108,000.

The estimate for the expenses of appeal is hereby reduced to $3,565,915.72 and further rounded down to a bond amount of $3,565,500.

As to Appellants' additional requests for relief addressed in their reply and at oral argument, I am not persuaded that review for abuse of discretion under RAP 8.1(h) justifies any additional adjustments with regard to the use of the property at issue as collateral. Acknowledging both the Respondents' arguments regarding the usual timeframe for determining the amount of a bond under RAP 8 and the Appellants' request for additional time to obtain a bond, the Appellants request for extension of time to post the bond is granted to January 31, 2022.

ORDERED that the motion to revise the bond order under RAP 8.1(h) is granted; the bond amount is reduced to $3,565,500, which Appellants should file by January 31, 2022.

Sincerely,

Lea Ennis
Court Administrator/Clerk

NO. 82720-1-I
(Consolidated with No. 82721-9-I)

COURT OF APPEALS, DIVISION ONE,
FOR THE STATE OF WASHINGTON

In re JDH INVESTMENT GROUP, LLC, Receivership Debtor.	RESPONDENT PULTE HOMES' MOTION TO LIFT STAY AND TO DISMISS APPEAL

I. RELIEF REQUESTED

After multiple extensions and months to post a supersedeas bond, Appellants have not posted the supersedeas bond that was a condition to the stay this Court entered on September 16, 2021. Because Appellants have not satisfied the condition to the stay, Pulte Homes moves for an order lifting the stay.

Pulte Homes also moves that this appeal be dismissed.

There is a firm public policy favoring finality of judicial sales of property in receiverships. If the order of sale is not stayed, then the appeal is moot. Accordingly, the court should dismiss this appeal so that the transaction may be completed, the creditors get paid, and this receivership can be wrapped up.

II. STATEMENT OF FACTS

A. The relevant procedural history.

Appellant JDH Investment Group purchased 80 acres located in Auburn ("Property"). On February 8, 2017, JDH obtained preliminary plat approval for the Property from the City of Auburn. JDH could not complete the development of the Property and ran into financial problems. On September 12, 2019 – the day before JDH was to lose the Property to foreclosure – JDH executed an assignment for the benefit of creditors with the Receiver. (App. 5-8). The assignment reads: "The assignee shall take possession and administer the estate, […] and convert the estate into money through a sale disposition …" (App. 6) (emphasis added).

B. The receivership proceeding before the trial court.

The Order Appointing General Receiver–drafted by JDH–empowered the Receiver "with exclusive possession and control" over the Property. (App. 11). This included the power to "market, list and sell the Property in the Receiver's discretion." *Id.* (emphasis added), *see, also,* (App. 13).

Pulte Homes submitted an offer for the Property on November 2, 2020. The offer was nearly $3-6.25 million more than all of the creditors' claims combined. When JDH realized the Property would be sold, it attempted to derail the sale. JDH began by sending Pulte Homes a subpoena for documents and to sit for a deposition. (App. 18). JDH's efforts failed, and the Receiver sought court approval to sell the Property.

On March 24, 2021, the Receiver filed its motion to approve the sale to Pulte Homes.

On May 4, 2021, the trial court approved the sale to Pulte Homes for a price of $10.425-13.75 million because it not only paid all creditors in full but also provided JDH with substantial

surplus proceeds.

On June 3, 2021, a notice of appeal was filed.

On June 18, 2021, Appellants filed a motion to stay the trial court's Order of Sale pending this appeal. Appellants requested a stay from this Court instead of the trial court, and asked to be excused from depositing a supersedeas.

After vigorous briefing, this Court granted the stay on September 16, 2021. The stay was conditioned on Appellants obtaining an order from the trial court on what supersedeas, if any, should be posted:

> Accordingly, the closing of the purchase and sale agreement described in the trial court's May 4, 2021 order authorizing sale is hereby stayed pending resolution of this appeal or further order of this Court, on condition that Appellants obtain by October 18, 2021 an order from the trial court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any. […]

(App. 23) (emphasis added).

On October 8, 2021, Appellants filed a status report with this Court, advising they had not filed a motion with the trial court because they were unable to obtain a hearing date. This Court *sua sponte* granted Appellants another 6 weeks, or until November 30, 2021, to secure an order from the trial court. (App. 25).

Appellants filed their motion to set a supersedeas with the trial court on October 20, 2021. It was considered by the trial court without a hearing.

On November 17, 2021, the trial court entered an order setting the supersedeas bond amount at $5.905 million. Taking exception to the order, Appellants filed an emergency motion with this Court for additional time to post the bond so that Appellants could in the interim file a RAP 8.1(h) motion with this Court seeking to modify the trial court's order on the bond. Creditor-Respondent Zeno responded by questioning whether Appellants had the ability to post a bond. On December 1, 2021, this Court granted Appellants additional time. (App. 27-29).

After Appellants filed their motion to modify with this Court, four respondents opposed modifying the trial court's bond determination or giving Appellants yet another extension. Pulte Homes observed that it was unlikely Appellant JDH could obtain a bond given that it was broke, and that Bridges West did not appear to be participating in the bond application effort. Regardless of those observations, Pulte Homes alerted everyone that if a supersedeas could not be posted, then Appellants' appeal should be dismissed for mootness. (App. 31).

On January 4, 2022, this Court reduced the bond amount. In granting this relief, this Court "ordered" that Appellants were to post a bond of $3,565,500, "which Appellants should file by January 31, 2022." (App. 38).

No bond was posted.

III. ARGUMENT & GROUNDS FOR RELIEF

A. Appellants have not posted the supersedeas and the stay should be dissolved.

The stay was conditioned on Appellants posting a supersedeas. Although there has been much motion practice over

what the appropriate supersedeas should be, this Court ended any dispute on the amount on January 4, when it set the bond amount at $3,565,500. This Court gave Appellants until January 31 to post the bond, or 27 days. In the normal course for an appeal, a judgment is stayed 14 days, after which time the judgment creditor may proceed with enforcing the judgment if no supersedeas is posted. CR 62. Here, Appellants were given nearly twice the usual amount of time to post the bond after ascertaining the exact amount. Moreover, Appellants had since November 17, 2021, to start working on the bond application, which is when the trial court entered its decision on the bond amount. Although Appellants offered declarations in December advising on what steps they were taking to apply for a bond, they have not apprised this Court or Respondents on whether (1) an application has been filed; or (2) a bond surety has given any indication it would issue a bond for $3,565,500. Thus, Respondents are left to assume that Appellants have not, or cannot, obtain the supersedeas bond that this Court stated was a

condition to the stay.

"The primary purpose of a supersedeas bond is to delay execution of the judgment while ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired pending appeal." *Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys.,* 105 Wn.2d 376, 378, 715 P.2d 1131 (1986). The Receiver advises that interest is accruing at $2,700 per day. (App. 35). Thus, over $367,000 in interest has accrued since Appellants first filed their motion to stay on June 18, 2021, and now there is no bond to secure this interest. Consequently, the primary purpose of a supersedeas procedure has been thwarted.

The impact of this harm is mitigated if the Receiver is able to close on the Purchase and Sale Agreement with Pulte Homes. However, it cannot close because of the present stay order. Although an "appellant is not obligated to supersede a judgment; it *must*, however, post security if it desires to stay enforcement of an adverse judgment pending appeal, …" *Lampson,* at 378-

79 (emphasis in original). There is no balancing of harms or inquiry into what prejudice the respondents may experience if the judgment is not stayed. The RAP and case law are clear on this point. RAP 7.2(c); *Lampson*; *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 770, 27 P.3d 1233 (Div. 1, 2001). The security "must" be posted, and here it was not.

Appellants may argue that it is unfair for the stay to be lifted because if the stay is lifted then the Property will pass to Pulte Homes and Appellants will lose the fruit of their appeal; i.e., they will not be able to reclaim the Property. Such an argument fails for numerous reasons. First, Appellants took the risk that title to the Property will pass to Pulte Homes during the appeal when they did not post a bond. *Spahi,* at 770. Second, RAP 7.2(c) and 12.8 have established what happens when judgments are reversed, and they cannot be displaced here. Third, the Legislature provided that a successful appeal will not undo a receivership sale if it is not stayed. RCW § 7.60.260(5). That is a legislative policy that cannot be circumvented by

Appellants' failure to post the bond. Fourth, case law is replete with holdings that a judicial sale will not be undone even if the judgment is subsequently reversed unless there is proof of fraud by the buyer. *In re Spokane Savings Bank,* 198 Wn. 665, 89 P.2d 802 (1939); *Grand Inv. Co. v. Savage,* 49 Wn. App. 364, 369, 742 P.2d 1262 (Div. 1, 1987)(citing and quoting authorities since 1898 discussing the public policy to instill confidence in judicial and execution sales to encourage maximum bidding).

Similarly, in this state, a trial court judgment is presumed valid. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 44, 802 P.2d 1353 (1991). In other words, one cannot assume that Appellants will succeed on their appeal, and if they will not post the supersedeas then the sale should move forward to closing. Finally, on the facts, even if Appellants do succeed in their appeal and reverse the trial court's order, they are not assured of getting the property because JDH assigned the Property to the Receiver. Reversal of the Order of Sale does not guarantee that the trial court will be instructed on remand to grant Appellants'

competing refinance proposal.

B. Once the stay is lifted, this appeal should be dismissed.

Once the stay is lifted, the Receiver and Pulte Homes can proceed with executing the Purchase and Sale Agreement that was stayed by this Court. Therefore, this appeal should be dismissed as moot under RCW § 7.60.260(5). The bankruptcy code contains language substantially similar to RCW § 7.60.260(5):

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

RCW § 7.60.260(5) reads:

> The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease

> under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.

Bankruptcy authorities addressing this language have held that failure to stay an order of sale results in a moot appeal. *Algeran, Inc. v. Advance Ross Corp.,* 759 F.2d 1421 (9th Cir. 1985)(Bankruptcy case applying the judicial doctrine of mootness to an appeal where the appellants failed to obtain a stay against the sale order); *In re Old Cold LLC,* 879 F.3d 376, 383 (1st Cir. 2018); *In re 255 Park Plaza Assoc. Ltd. P'Ship,* 100 F.3d 1214 (6th Cir. 1996). Accordingly, RCW § 7.60.260(5) should be similarly construed to mean that once the stay is lifted, then Appellants' appeal is moot.

While dismissal of the appeal for mootness may seem a harsh outcome, there is, again, a strong public policy to not disrupt judicial sales because doing so harms competitive bidding and results in lower prices to compensate creditors. *In re Spokane Savings Bank*, 198 Wn. at 670–71. Similarly, in the

bankruptcy context, a majority of courts have concluded that mootness does not demonstrate irreparable injury requiring a stay.[1] *In re Garden Reg. Hospital & Medical Ctr., Inc.,* 567 B.R. 820, 831-832 (C.D. Cal. 2017)(citing cases, and noting that there "is a great public interest in the efficient administration of the bankruptcy system. […] As noted, a stay could cause the sale to collapse, seriously injuring the estate"). Moreover, the harshness is tempered by the ability to secure a stay by posting a supersedeas. Here, Appellants knew since September 16, 2021, that the stay was conditioned on posting a supersedeas. They secured multiple extensions as the parties argued over how much the supersedeas should be. Appellants had since January 4, 2022, to post the exact amount of supersedeas, which is nearly double the time afforded under CR 62. Further, Pulte Homes put

[1] Bankruptcy courts utilize a four-factor discretionary test for deciding whether to grant a stay of sale pending appeal, but Washington has not adopted that test. Consequently, bankruptcy authorities addressing whether 11 U.S.C. § 363(m) moots an appeal absent a stay are very persuasive because the language is nearly identical to RCW § 7.60.260(5), but bankruptcy authorities are not persuasive for evaluating whether a discretionary stay should issue because they utilize a different test than what Washington state courts follow.

Appellants on notice that their appeal would be moot if they did not post a supersedeas. (App. 31). Consequently, Appellants knowingly bore the risk of their appeal being dismissed when they failed to proceed with securing the bond.

The public policy favoring finality of judicial sales trumps the competing policy to decide appeals on their merits. That is why courts have adopted the mootness doctrine for this situation, and the Legislature enacted RCW § 7.60.260(5).

Finally, selling the Property and paying off the creditors was the whole point of Appellant executing the Assignment for Benefit of Creditors and this Receivership action. (App. 5-8). It is not an unjust result to dismiss this appeal for mootness when doing so accomplishes the entire purpose of this Receivership; that is, to sell the Property and pay off the creditors.

IV. CONCLUSION

Appellants have not satisfied the condition of posting a supersedeas bond. Consequently, the stay against enforcement must be lifted. Because the stay will be lifted, this appeal of the

Order of Sale is moot. This moot appeal should be dismissed.

DATED this 3rd day of February, 2022.

TOUSLEY BRAIN STEPHENS PLLC

By: _____

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I certify that this motion is in 14-point Times New Roman font and contains 2,397 words, in compliance with the Rules of Appellate Procedure. RAP 18.7(b).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2022, I caused to be served true and correct copies of the foregoing to all parties registered via Court of Appeals E-filing system.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

EXECUTED this 3rd day of February, 2022, at Seattle, Washington.

s/ Linsey M. Teppner
Linsey M. Teppner, Legal Assistant

TOUSLEY BRAIN STEPHENS PLLC

February 03, 2022 - 3:03 PM

Transmittal Information

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Appellate Court Case Number:	82720-1
Appellate Court Case Title:	JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp

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Motion to Lift Stay and Dismiss Appeal

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Case #: 827201
JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp
King County Superior Court No. 19-2-23961-1

Counsel:

The following notation ruling by Court Administrator/Clerk Lea Ennis of the Court was entered on February 9, 2022, regarding Respondent's Motion to Lift Stay and Dismiss:

> At the direction of the panel, appellants shall file a response to respondents' motion to lift stay and dismiss appeal no later than February 15, 2022.

Sincerely,

Lea Ennis
Court Administrator/Clerk

No. 82720-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re: JDH INVESTMENT GROUP, LLC Receivership Debtor	JOINT RESPONSE TO RESPONDENTS' MOTION TO LIFT STAY AND DISMISS APPEAL

1. Introduction.

Appellants JDH Investment Group, LLC, Thomas Downie, and Bridges West, LLC, ask this Court to deny respondent Pulte's Motion to Lift Stay and Dismiss Appeal. Rather than grant Pulte's motion, this Court should exercise its discretion under RAP 8.1(b)(3) and RAP 8.3 to grant a stay without a bond because the respondents' primary justification for requiring a bond—the imminent expiration of the property's preliminary plat approval—has been mooted by the City of Auburn's recent

extension of the property's plat. At a minimum, this Court should deny Pulte's motion to dismiss as premature because Pulte has yet to pay anything for the property and thus Pulte is not—as it assumes—entitled to the protections afforded bona fide purchasers under RCW 7.60.260(5). Put another way, because the transaction has not closed and title has not transferred, no "sale" within the meaning of the statute has occurred. This Court can thus still grant effective relief on appeal and the appeal is not moot.

2. Facts Related to Motion.

On January 4, 2022, the parties received Commissioner Koh's ruling granting appellants' motion under RAP 8.1(h), reducing the amount of the supersedeas bond ordered by the trial court to stay this appeal from $5,905,000 to $3,565,500. (*See* Declaration of Ian Cairns, Ex. A (Commissioner's Ruling), Ex. B (trial

court's order setting bond amount))[1] Commissioner Koh also ruled that appellants should file the reduced bond by January 31, 2022. (Cairns Dec., Ex. A at 3) JDH and its principal Downie applied for a bond but unfortunately have yet to obtain a letter of credit that is a prerequisite to obtaining the bond. (*See* Declaration of Bill Sunderland)

JDH and Downie have also been working to resolve the claims of receivership creditors during this appeal, which must be adjudicated regardless of the outcome in this appeal. In particular, JDH and Downie have reached an agreement with Zeno P.S., a respondent in this appeal and JDH creditor, that would resolve its outstanding claims. (Declaration of Jay Kornfeld at 2) This agreement is subject only to final documentation (which is

[1] The Commissioner's ruling and relevant trial court pleadings are attached as exhibits to the declaration of JDH's counsel filed contemporaneously with this motion. Other declarations filed contemporaneously with this motion are cited by the declarant's name. The parties' previous pleadings in this Court and other rulings from this Court are cited by their date and title.

substantially completed) and approval by the Receivership Court, after notice and hearing to other creditors and parties-in-interest in the Receivership. Declaration of Jay Kornfeld at 2) The $3.565 million bond includes $425,000 for a secured claim of Zeno, $57,824 for an unsecured claim of Zeno, roughly $115,000 for two years' interest on these claims, and $25,000 for Zeno's appellate fees. (*See* Cairns Dec., Ex. A at 3, Ex. B at 11)

JDH also, with the trial court's approval and at the expense of its principal Downie, applied for a one-year extension of the preliminary plat approval for the disputed property, which the City of Auburn granted on February 4, 2022. (*See* CP 3648-56 (trial court order allowing JDH and Downie to apply for plat extension)) Cairns Dec., Ex. C (plat extension approval from the City of Auburn)) JDH was forced to apply for a plat extension after Pulte failed to do so despite previously representing to this Court that it would incur $500,000 in costs

extending the property's plat approval. (*See* June 28, 2021, Pulte Homes' Response to Joint Motion for a Stay at 19) Pulte's representation to this Court was echoed by the Receiver after this Court directed the trial court to determine the amount of the bond and incorporated into the trial court's $5.9 million bond. (*See* Cairns Dec., Ex. B at 11; Cairns Dec., Ex. D at 4 (Receiver's argument to the trial court that it should include in the bond "the $500,000.00 in damages Pulte Homes estimates it will cost to obtain a plat extension."))

Oral argument in this case is scheduled for March 3, 2022.

3. Response Argument.

a. This Court should exercise its discretion under RAP 8.1(b)(3) and RAP 8.3 to grant a stay without a bond.

Despite JDH's and Downie's best efforts, they were unable to post a bond by the date ordered by Commissioner Koh. Nevertheless, for the reasons

discussed below—chiefly the extension of the property's plat approval and the settlement of a major creditor's claims—a bond is no longer necessary to protect respondents from any loss that might occur by virtue of the stay and this Court should allow the stay to continue without bond and address this appeal on its merits.

RAP 8.1(b)(3) gives this Court authority in cases involving equitable relief, such as receivership cases, "to stay enforcement of the trial court decision upon such terms as are just." Similarly, under RAP 8.3 "[e]xcept when prohibited by statute, the appellate court has authority to issue orders . . . to insure effective and equitable review." The purpose of these rules is "to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent destruction of the fruits of a successful appeal." *Washington Fed'n of State Emps., Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983).

The criteria for granting a stay are the same under both rules: (1) whether "debatable issues are presented on appeal" and (2) whether "the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998) (citation omitted); *see also* RAP 8.1(b)(3)(i)–(ii). "[I]f the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986).

Contrary to Pulte's assertion that a supersedeas bond *must* be posted to obtain a stay (Motion at 8), both RAP 8.1(b)(3) and RAP 8.3 state that the grant of a stay will "ordinarily" be conditioned on the furnishing of a supersedeas bond or other security, and thus grant this Court discretion to order a stay without security.

Consistent with RAP 1.2(a), which provides that the RAPs will be "liberally interpreted to promote justice and facilitate the decision of cases on the merits," this Court should exercise its discretion under RAP 8.1(b)(3) and RAP 8.3 and grant a stay despite the absence of a bond.

As explained in appellants' briefs, the issues on appeal are more than "debatable"—the trial court clearly erred in approving the sale to Pulte based on the wrong legal standard and an unfair double standard that improperly favored the interests of a would-be purchaser instead of those of the receivership debtor and its creditors. And, as Pulte's motion confirms, without a stay there is a risk that Pulte will close on its purchase and the fruits of this appeal will be lost.

Pulte, in contrast to appellants, would suffer no harm from a stay even without a bond. The only harm Pulte has ever alleged it would incur because of this appeal is the $500,000 it told this Court it would cost to

extend the property's plat approval. But when the deadline for renewing the property's plat approval actually came, Pulte refused to spend a single dollar, knowing that by letting the property's plat expire it could lower the purchase price it paid for the property by $3.3 million. (*See generally* Joint Reply Brief of Appellants at 17-20) This Court's stay did not preclude Pulte from pursuing an extension of the plat, because the Court's ruling only stayed closing and confirmed that "[t]he rights of Pulte Homes to act under the purchase and sale agreement are not otherwise restrained." (September 16, 2021, Ltr. Granting Stay at 4) Pulte's actions now confirm that the $500,000 in damages Pulte alleged for the appeal-related delay are, and always have been illusory, and that the bond should never have included that amount.

Nor would the creditors, whose claims are being settled and paid as this very moment, be harmed by a stay

without a bond. (*See* Kornfeld Dec.) Indeed, after the settlement with Zeno is finalized, the bond amount will include $1.125 million more than could possibly be necessary—$500,000 for Pulte's nonexistent damages and another $625,000 for Zeno's claims that have been resolved.

The extension of the property's plat approval—thanks to JDH and Downie—is further evidence that creditors do not need the protection of a bond. The respondents' opposition to appellants' suggestion that the property itself could secure the appeal was based on the erroneous assumption the property's plat approval would expire during the appeal and thus its value would "drop like a rock." (*See* June 28, 2021, Respondent Pulte Homes' Response to Joint Motion for a Stay at 17; *see also* December 13, 2021, Response of Receiver to Appellants' Joint Motion for Review of Order Setting Amount of Bond on Appeal at 2 (arguing bond was necessary because

"expiration of the preliminary plat approval is looming that would significantly devalue the property"); Cairns Dec., Ex. E at 3 (Zeno's argument to the trial court that the value of the property "will drop like a rock" after the plat expires); *see also* RAP 8.1(c)(2) ("If the property at issue has value, the property itself may fully or partially secure any loss"))

Pulte also argued to this Court that a bond was necessary because "[t]he plat expiration will damage the receivership estate by at least $3.325 million" by lowering the purchase price Pulte paid for the property from $13.75 million to $10.425 million. (December 13, 2021, Response to Joint Motion for Review of Order Setting Amount of Bond on Appeal at 7-8) The Receiver likewise argued the receivership estate would suffer a $3.325 million loss because of the plat expiration. (December 13, 2021, Response of Receiver to Appellants' Joint Motion for Review of Order Setting Amount of Bond on Appeal at 9)

But we now know that the property's plat did not expire – it was renewed because of JDH's and Downie's efforts. (Cairns Dec., Ex. C) Respondents' own arguments confirm that the extension of the property's plat—which occurred after this Court's January 4th ruling on the bond amount—mooted the need for a bond and that no security beyond the value of the property itself is needed to protect respondents.

In short, granting a stay without a bond would be equitable and just under RAP 8.1(b)(3) and RAP 8.3 because JDH and Downie have protected the creditors during this appeal by extending the property's plat approval and working to expeditiously resolve their claims. In contrast, granting Pulte's motion would be entirely unjust when it has done *nothing* to preserve the value of the property or protect creditors (despite its representations in this Court and the trial court it would

do so), and when this Court is just a few weeks away from hearing argument in this case.

Further, in light of Pulte's position that lifting the stay automatically results in dismissal of the appeal, a position with which appellants disagree (*see* § 3.b, *infra*), this Court should grant a stay without bond to facilitate a decision of this case on the merits, as is the intent of RAP 1.2. As this Court has acknowledged, an "appellate court[] should normally exercise its discretion to consider cases and issues on their merits unless there are compelling reasons not to do so." *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 213, 962 P.2d 839 (1998), *rev. denied*, 137 Wn.2d 1022 (1999).

b. Pulte's motion is premature because it has not closed on its purchase of the property.

Even should this Court deny appellants' request for a stay without a bond, it should still deny Pulte's motion to dismiss because this appeal is not moot under RCW

7.60.260(5). That statute applies only where an actual "sale" occurs, *i.e.*, after the contested transaction has closed and title to the property has transferred to the purchaser. This transaction has not closed; Pulte has yet to pay the Receiver anything. This Court can grant appellants effective relief by reversing the trial court's orders approving Pulte's purchase and sale agreement and rejecting the refinance plan proposed by the appellants.

"An issue is not moot if [the appellate court] can provide any effective relief." *Yakima Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 700, ¶ 38, 279 P.3d 434 (2012). RCW 7.60.260(5) states "[t]he reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew

of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal." RCW 7.60.260(5). This provision mirrors a federal bankruptcy statute, 11 U.S.C. § 363(m).

Even if this Court lifts the stay, this appeal will not be moot. Unless and until Pulte takes title to the property by closing on its purchase and paying the agreed upon purchase price to the Receiver, this Court can still provide appellants effective relief by reversing the trial court's orders. Pulte nowhere explains why this Court would be impeded from providing appellants relief when the relief they seek is to maintain the status quo—JDH's ownership of the property.

As this Court has explained, the consequence of failing to supersede a decision affecting property is that the appellant takes "the *risk* that title to the property would pass . . . during the period of appellate review." *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 770, 27

P.3d 1233, as modified, 33 P.3d 84 (2001) (emphasis added) (cited at Motion 9). The risk that title to the property will transfer during the appeal is still just that—a risk that has yet to materialize because Pulte undisputedly has not closed on its purchase. Indeed, Pulte has never given this Court or the trial court any indication that it intends to close any time before the end of the three-year closing period authorized by the trial court.

Rather than explain why this Court cannot grant appellants effective relief, Pulte simply assumes that the failure to supersede an order approving a sale under RCW 7.60.260 automatically renders an appeal moot even where—as here—the appellant still holds title to the property. But the plain language of the statute confirms this appeal is not moot. The statute states that in the absence of a stay "the validity of a *sale*" "to an entity that *purchased*" the property is not affected by a reversal on appeal. RCW 7.60.260(5) (emphasis added). Here there is

not yet a consummated "sale," nor has Pulte "purchased" anything. Pulte has simply promised that it will pay the Receiver at some indefinite point in the future ***if*** it does not exercise any of the numerous contingencies allowing it to abandon the purchase and sale agreement without paying the Receiver anything. (*See* CP 1799-804, 1809, 1811-12)

The dictionary definition of "sale" confirms that an appeal becomes moot under RCW 7.60.260(5) only if the transaction closes and title is transferred to the purchaser. *See Guillen v. Pearson*, 195 Wn. App. 464, 471, ¶ 14, 381 P.3d 149 (2016) ("If a statutory term is undefined, we may use a dictionary to determine its plain meaning.") (citation omitted). The first dictionary definition of "sale" is "the transfer of ownership of and title to property from one person to another for a price." *Sale*, Merriam-Webster's Collegiate Dictionary 1097 (11th ed. 2014). Besides this lay definition, Black's Law Dictionary's first

definition of "sale" is "[t]he transfer of property or title for a price." *Sale*, Black's Law Dictionary 1603 (11th ed. 2019); *see also Zink v. City of Mesa*, 17 Wn. App. 2d 701, 709-10, 487 P.3d 902 (2021) (relying on Black's Law Dictionary's to construe a statute). Thus, the defining features of a "sale" under the statute must be a closed transaction where the seller transfers title. Here, no such transfer of tile has occurred; as Pulte and the other respondents must admit, the deal remains highly contingent and Pulte can still back out at its "sole and absolute discretion" until at least 2025. (CP 1809; *see also* CP 1799-804, 1809, 1811-12)

This case's procedural history confirms that this case is not moot under RCW 7.60.260(5). Since the initial motion to stay, appellants have requested a stay only of closing, not of the remainder of the purchase-and-sale agreement's provisions. (*See* June 18, 2021, Appellants' Joint Motion for Stay at 2 (requesting a stay against

closing but providing that Pulte "shall otherwise have the right to proceed under the PSA pending appeal, including by conducting due diligence and seeking land-use approvals"). This Court's ruling granted a stay along these lines:

> [T]he closing of the purchase and sale agreement described in the trial court's May 4, 2021 order authorizing sale is hereby stayed pending resolution of this appeal or further order of this Court, on condition that Appellants obtain by October 18, 2021 an order from the trial court determining whether the property at issue may fully or partially secure any loss and the form and amount of other appropriate security, if any. The rights of Pulte Homes to act under the purchase and sale agreement are not otherwise restrained. Additionally, this appeal is appropriate for expedited consideration.

(September 16, 2021, Ltr. Granting Stay at 4)

Despite the limited scope of the stay focusing only on the closing of the transaction, neither Pulte nor any other respondent has ever argued that this appeal was moot under RCW 7.60.260(5). Thus, the respondents have all tacitly admitted that this Court can grant effective

relief on appeal as long as closing does not occur. In this respect, nothing has changed despite the lack of a bond. In other words, unless this transaction closes before this Court issues its opinion, the appeal is not moot.

The cases cited by Pulte underscore that the transfer of title marks the point at which a reversal will no longer affect the validity of a court approved sale. For example, in *Grand Inv. Co. v. Savage*, 49 Wn. App. 364, 368, 742 P.2d 1262 (1987), title to the disputed property transferred during appeal to a bona fide purchaser via a sheriff's deed.[2] Similarly, the cases Pulte cites interpreting the federal bankruptcy analogue to RCW 7.60.260(5) involve consummated sales and often significant actions by the purchaser based on the validity of its purchase. *See*

[2] Pulte also cites *In re Spokane Savings Bank*, 198 Wash. 665, 89 P.2d 802 (1939), but that case does not address an appellate court's ability to reverse a judicial sale—or the consequences of a reversal on appeal—and instead addresses a trial court's ability to set aside its own prior order. (*See* Joint Reply Brief of Appellants at 3-5)

Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985) (following purchase of corporate stock former directors resigned and purchaser's directors replaced them); *In re Old Cold LLC*, 879 F.3d 376, 387 (1st Cir. 2018) ("It is undisputed that the sale closed in the absence of any stay."); *In re 255 Park Plaza Assocs. Ltd. P'ship*, 100 F.3d 1214, 1218 (6th Cir. 1996) (appeal was moot after state law redemption period expired and transfer of title became irrevocable).

Other cases construing analogous federal law confirm that mootness hinges on whether the transaction has closed and money has exchanged hands between the buyer and seller. *See, e.g., In re ICL Holding Co., Inc.*, 802 F.3d 547, 554 (3d Cir. 2015) (refusing to dismiss as moot appeal seeking redistribution of funds in escrow because "[t]he provision stamps out only those challenges that would *claw back* the sale from a good-faith purchaser") (emphasis added); *In re Nashville Sr. Living,*

LLC, 620 F.3d 584, 593 (6th Cir. 2010) ("*Because the sale to Five Star has closed*, the Committee cannot now 'impugn the validity' of the bankruptcy's court's authorization of the sale") (emphasis added); *In re Stanford*, 17 F.4th 116, 125 (11th Cir. 2021) ("The Stanfords failed to stay the sale, and *the sale was completed*. Accordingly, we cannot undo the sale by reversing or modifying the authorization order.") (emphasis added).

As the court explained in *Algeran*, the mootness doctrine is intended to prevent a court from unwinding consummated judicial sales when there has been "a comprehensive change in circumstances" that would "render it inequitable for th[e] court to consider the merits of the appeal." *Algeran*, 759 F.2d at 1423 (internal quotation and quoted source omitted). That is not the case here. To the contrary, the parties are in virtually the same position as when the trial court entered the

challenged orders on May 4, 2021—Pulte has yet to pay the Receiver anything and title to the property has not transferred. Nor has Pulte invested any resources in the property. Instead, Pulte has refused to invest in the property, forcing JDH and Downie to bear the costs of renewing the property's plat extension. Pulte has also never informed this Court or the trial court that it is on the precipice of closing or has any urgent need to close.

Pulte's appeal to the public policy favoring the finality of judicial sales is thus meritless. (*See* Motion at 12-14) "It is the policy of the law to protect third parties who, in good faith and *for value*, become *purchasers* at judicial sales so the highest and best price may be obtained." *Grand Inv. Co.*, 49 Wn. App. at 368-69 (emphasis added). Pulte has yet to provide "value" to anyone. It is simply speculating on whether real estate market conditions will be favorable at some point in the next few years and imposing the risk of its speculation on

JDH and the creditors who will be empty-handed if Pulte—as expressly allowed by the trial court's erroneous orders—decides to walk away from its purchase without paying a dime.

Accordingly, this Court should deny Pulte's motion, which asks this Court to compound the trial court's errors by placing the interests of a would-be purchaser before those of the receivership debtor and creditors, contrary to well-established law. *See Ferree v. Fleetham*, 7 Wn. App. 767, 772, 502 P.2d 490 (1972) (when exercising discretion to approve the sale of a debtor's property, a court must exercise "equal concern for the rights of both *creditor and debtor*") (emphasis added), *rev. denied*, 81 Wn.2d 1010 (1973).

4. Conclusion.

This Court should deny Pulte's motion to lift the stay and dismiss this appeal, and should grant a stay without a bond.

I certify that this response is in 14-point Georgia font and contains 3,805 words, in compliance with the Rules of Appellate Procedure. RAP 18.7(b).

DATED this 15th day of February, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 15, 2022, I arranged for service of the foregoing Joint Response to Respondents' Motion to Lift Stay and Dismiss Appeal, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of February, 2022.

Rowyn Henning

SMITH GOODFRIEND, PS

February 15, 2022 - 4:20 PM

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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re: JDH INVESTMENT GROUP, LLC Receivership Debtor.	DECLARATION OF IAN C. CAIRNS

I, IAN C. CAIRNS, hereby declare and states as follows:

1. I am over the age of 18, have personal knowledge of all facts contained in this declaration, and am competent to testify as a witness to those facts.

2. I am counsel for appellant JDH Investment Group, LLC. I make this declaration to provide true and correct copies of the following documents:

3. Attached as **Exhibit A** is Commissioner Koh's ruling regarding the appellants' joint Motion for Review of

Order Setting Amount of Bond on Appeal, sent to the parties on January 4, 2022.

4. Attached as **Exhibit B** is the trial court's Order Setting Amount of Bond on Appeal, entered on November 17, 2021.

5. Attached as **Exhibit C** is an email from the City of Auburn extending the disputed property's preliminary plat approval for one year, dated February 4, 2022.

6. Attached as **Exhibit D** is the Receiver's Response to Appellants' Joint Motion to Set Supersedeas Bond filed in the trial court on November 3, 2021.

7. Attached as **Exhibit E** is Zeno P.S.'s and JTP Service's Response to Joint Motion to Determine Bond, filed in the trial court on November 3, 2021.

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

DATED this 15th day of February, 2022, at Seattle, Washington.

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 15, 2022, I arranged for service of the foregoing Declaration of Ian C. Cairns, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of February, 2022.

Rowyn Henning

February 4, 2022

Via Email

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Stuart Heath
Elliot Bay Asset Solutions, LLC.
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Re: **Application for the Preliminary Plat Extension for Diamond Valley Estates Plat City of Auburn File No. MIS22-001, Related Files No. PLT14-0006 (preliminary plat) and VAR16-0001 (critical areas variance) (King County Parcel No. 3221059011)**

Dear Mr. Barghausen and Mr. Heath:

This correspondence is in response to the letter request dated January 7, 2022, e-mailed to the City of Auburn on January 7, 2022, requesting an extension of time from the date of approval of the preliminary plat in order to apply for a final plat. The Diamond Valley Estates Preliminary Plat was approved by the City of Auburn Hearing Examiner on February 8, 2017 (City File No. PLT14-0006) and the associated critical areas variance (City File No. VAR 16-0001) was denied on the same date. The preliminary plat consisted of a request for a residential subdivision of a 79.45-acre parcel located on the north and south sides of Evergreen Way SE, between Quincy and Udall Ave SE. The proposal also requested a variance to build a road and grading within a Class IV Landslide Hazard and variance to the applicable minimum four units per acre residential density requirement to 3.35 dwelling units per acre. The proposal also considered requests for approval of three deviations to street and stormwater as provided for in the Engineering Design Standards.

Despite the request for preliminary plat extension not being submitted to the city correctly using the city's on-line electronic application submittal process within the 30-day in advance deadline and despite the application not accompanied by an accurately completed property owner authorization form, the City is acting on the request. The property owner authorization form was signed by Barghausen Consulting Engineers when Elliot Bay Asset Solutions LLC has been appointed by King County Superior Court on September 12, 2019, as the general receiver having "exclusive possession and control" over the property.

Findings of Fact and Conclusions

1. The Diamond Valley Estates Preliminary Plat was approved by the City of Auburn Hearing Examiner on February 8, 2017 (City File No. PLT14-0006) and the associated critical areas variance (City File No. VAR 16-0001) denied on the same date.

2. According to ACC 17.10.110, a preliminary plat approved after January 1, 2015, shall be valid for a period of five (5) years. The Diamond Valley Estates subdivision received approval on February 8, 2017, and is therefore expires on February 8, 2022, as provided in the following:

"ACC 17.10.110 (Preliminary Plat) Time limitations.

A. Preliminary approvals for subdivisions shall be valid for a period of seven years following the date of the notice of final decision if the date of the preliminary plat approval is on or before December 31, 2014, and within five years of the date of preliminary plat approval if the preliminary plat approval is on or after January 1, 2015.

B. If the preliminary plat approval is on or before December 31, 2007, then the final plat shall be submitted to the city for approval within nine years of the date of preliminary plat approval and not subject to requirements adopted under Chapter 90.58 RCW.

C. Extensions. The director or designee may administratively authorize through a Type I land use action extensions to preliminary plat approvals. For purposes of this section, the authority to issue extensions shall apply to preliminary plat approvals previously issued by the city. Extensions shall be issued in one-year increments up to a maximum of three years, subject to the following criteria and conditions:

1. An applicant for an extension shall make a written request for the extension a minimum of 30 calendar days prior to expiration of the preliminary plat approval.

2. The director or designee shall in consideration of granting an extension find:

a. There have not been any substantial changes in the laws governing the development of the plat, with which lack of compliance would be contrary to the public health, safety and welfare; or

b. The applicant has pursued final platting diligently, as evidenced by progress on final surveying, engineering, construction or the financial security of improvements; or

c. There have been substantial changes in economic conditions and market forces that have substantively limited the ability of the applicant to pursue final platting.

3. A condition of any extension approval shall be that the subdivision shall comply with state or federal mandates required of the city and/or life, health and safety requirements of the city in effect at the time of any extension approval.

D. At the same time the director or designee is considering the extension, they may add conditions or requirements upon factual determination that the addition of conditions or requirements will benefit the public health, safety and welfare."

3. Pursuant to code section given above, the City may grant up to three, one-year extensions.

4. Also, pursuant to code section above, the request must meet at least one of the criteria for consideration of approval. The letter request citing ACC 17.10.110(C)(2)(C), states that there have been "substantial changes in economic conditions and market forces that have limited the ability of the applicant to pursue final platting." The letter request states:

   "The Diamond Valley Estates property was originally planned for development in conjunction with other plats along Kersey Way S.E. known as the Kersey III properties prior to and after the great recession of 2008/2009. The current preliminary plat application was filed in 2014, but the slow economic recovery that followed contributed to the delay in getting preliminary plat approval until February 2017."

   "Unfortunately, litigation was filed soon after the preliminary plat was approved. The first filing occurred on August 24, 2017, involving creditors "Frye and Duty" along with the owner (JDH Investment Group, LLC), disputing amounts due to pay off underlying Notes. The property was subject to other creditor disputes which continued into 2019, eventually resulting in the transfer of ownership and control of the Diamond Valley Estates property from the JDH Investment Group, LLC to a court appointed Receiver on September 12, 2019. The Receiver was given full authority to protect the value of the asset with the intent of securing a purchaser for the subject property to continue with final engineering design and subsequent development of the project."

   "Since taking control, the Receiver has worked in good faith to seek a purchaser for the subject property but unfortunately, those efforts stalled when the COVID-19 pandemic hit in the spring of 2020, bringing tremendous uncertainty to the real estate market and economy in general. As the pandemic unfolded over the balance of 2020 and into 2021, discussions were re-started, and the Receiver was finally able to negotiate a purchase and sale agreement with Pulte Homes in the late spring of 2021. However, by then it was clear that sufficient progress could not be made on final engineering and/or starting construction before the plat would expire."

   The City concludes this criterion is met.

5. The letter request citing ACC 17.10.110(C)(2)(A), states that the request also meets the criteria for consideration of approval based on *". . .we are unaware of any substantive changes in the regulations governing the plat".* However, contrary to this statement, there have been substantive changes in State and City regulations (ACC 13.48) regarding the management of stormwater quantity and quality. There have also been substantive changes in the city's regulations contained in the Engineering Design Standards (ACC 12.04) for infrastructure such as those regulating roadways and utilities and substantive changes in environmental critical area regulations (ACC 16.10), such as those applicable to streams and wetlands.

6. Also, pursuant to code section given above, the City Planning Director or designee may add conditions that the subdivision comply with state or federal mandates required of the city and/or life, health, and safety requirements of the city that are in effect at the time of any extension approval. There have been substantive changes in state-mandated regulations regarding the management of stormwater quantity and quality.

7. The letter request for extension of the preliminary plat states:

   "If the extension is granted, the property will be ready for a purchaser to move forward with final engineering design in 2022 with the intent of starting construction in the spring of 2023. With this additional progress, the applicant will be eligible for another extension in early 2023 with the goal of having the plat constructed and recorded in late 2023."

   While this proposed timing may be optimistic, at the time of all future requests for plat extension the city will evaluate whether the applicant has pursued final platting diligently, as evidenced by demonstration of progress on final surveying, engineering, construction, or the financial security of improvements. Demonstration shall be required at any extension requests.

Decision

Under authority granted by Auburn City Code (ACC) 17.10.110(C), which allows the Planning Director or designee to administratively authorize through a Type I land use action, an extension to the lifetime of the preliminary plat approval for Diamond Valley Estates (PLT14-0006), a one-year extension shall be granted with an expiration date of **February 8, 2023.**

Per ACC 17.10.110(D), the Planning Director or designee may add conditions or requirements upon factual determination that the addition of conditions or requirements will benefit the public health, safety, and welfare. Therefore, the extension shall be subject to the following:

General

1. The project shall be subject to the forty-one (41) conditions contained in the original Hearing Examiner decision (PLT14-0006) dated February 8, 2017.

Conditions due to mandated federal or state requirements for public health, safety, and welfare and/or city-determined requirements for public health, safety, and welfare.

2. Per Section S5.C.4.a of the 2013-2018 City of Auburn National Pollutant Discharge Elimination System (NPDES) Phase II Permit, runoff from new developments that applied before January 1, 2017, are required to comply with (Stormwater) Low Impact Development (LID) requirements unless development construction started before January 1, 2022. These requirements apply to the Diamond Valley Estates project. These requirements are described in Auburn City Code and in Ecology's 2019 Surface Water Management Manual for Western Washington (SWMMWW) and the City of Auburn Supplemental Manual, collectively known as the City of Auburn Surface Water Management Manual (SWMM). Note that the SWMM contains new provisions for stormwater vaults and for stormwater ponds that are applicable to this project.

3. The Washington Department of Health's Water System Design Manual Section 6.3.4 contains new separation requirements between potable and non-potable pipelines to protect public health and safety. These requirements are reflected in the 2022 City of Auburn Design Standards.

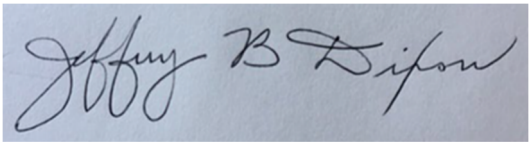
4. If the proposed connection between the proposed plat of Diamond Valley Estates and the existing (constructed) plat of Forest Glen located to the east, via the proposed Road F, connecting to 54th Street SE, is not able to be completed with the Diamond Valley Plat, then the portion of the project served by Road B will be limited to a maximum of 30 dwelling units since a second access will not be provided to this portion of the plat in accordance with Section 10.01.03 in the Engineering Design Standards. The roadway serving these dwelling units shall be limited to 800 feet in length and terminate in a permanent cul-de-sac (Per Section 10.01.06 in the Engineering Design Standards).

Conclusion

While the City approves an extension, please note that the City must consider the application null and void if the City does not receive either a complete final plat application or another written request for extension of the preliminary plat a minimum of 30 days prior to its expiration, noted above, as allowed by ACC 17.10.110 ((Plat) Time Limitations) and as modified by state law, Chapter 90.58 RCW.

If you have any questions, please feel free to contact me at jdixon@auburnwa.gov or (253) 804-5033.

Sincerely,



Jeff Dixon, Planning Services Manager
Community Development Dept.

Cc: Steven Sturza, Development Review Engineer, City of Auburn
Jacob Sweeting, City Engineer/Assistant Public Works Director, City of Auburn
Ingrid Gaub, Public Works Director/City Engineer, City of Auburn
Jeff Tate, Community Development Director, City of Auburn
Lisa Tobin, Utilities Engineering Manager, City of Auburn
Dave Casselman, Fire Marshal, Valley Regional Fire Authority
File Copies MIS22-0001 & VAR16-0001

APPEAL OF ADMINSTRATIVE DECISION

14.13.010 Administrative appeals.
Any administrative appeal of the project decision, combined with any environmental determinations, which are provided by the city shall be filed within 14 days after the notice of the decision or after other notice that the decision has been made and is appealable. The city shall extend the appeal period for an additional seven days, if state or city rules adopted pursuant to Chapter 43.21C RCW allow public comment on a determination of non-significance issued as part of an appealable project permit decision. (Ord. 4835 § 1, 1996.)

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 18, 2022

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Case #: 827201
JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp
King County Superior Court No. 19-2-23961-1

Counsel:

The following notation ruling by Court Administrator/Clerk Lea Ennis of the Court was entered on February 17, 2022:

> At the direction of the panel, Respondents Pulte Homes & JTP Services are directed to reply to Appellants' response to their motion to lift stay and dismiss appeal. The replies should specifically address mootness and be filed no later than 5 business days from the date of the ruling.
>
> Further, Appellants are ordered to post the supersedeas bond in the amount required by Commissioner Koh no later than March 17, 2022. Failure to post bond by that date will result in dismissal of the appeal.
>
> The hearing set for March 3, 2022 is stricken. As such, the motion for additional time for oral argument filed by G. Michael Zeno, Jr., P.S. and JTP Services, Inc. is denied.

Sincerely,

Lea Ennis
Court Administrator/Clerk

SMITH GOODFRIEND, PS

May 23, 2022 - 2:59 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82720-1
Appellate Court Case Title:	JDH Investment Group, App v. Elliott Bay Asset Solutions et al, Resp

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