

No. 69414-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT,

Appellant,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

RESPONSE BRIEF OF YARROW BAY

Nancy Bainbridge Rogers, WSBA No. 26662
Randall P. Olsen, WSBA No. 38488
E-Mail: nrogers@cairncross.com
E-Mail: rolsen@cairncross.com
CAIRNCROSS & HEMPELMANN, P.S.

524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Attorneys for Respondents, BD Lawson Partners,
LP and BD Village Partners, LP

2018 JUN -3 PM 4:00

COURT OF APPEALS
STATE OF WASHINGTON


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I. INTRODUCTION

This appeal by Toward Responsible Development, Inc. (“TRD”) relates to Yarrow Bay’s¹ two master planned developments in the City of Black Diamond (“City”). TRD has challenged the developments in several different administrative and judicial forums by appealing certain permit approvals issued by the City. On October 11, 2010, TRD first appealed the Master Plan Development (“MPD”) permit approvals for the developments. After a long delay incurred to resolve a jurisdictional question, TRD’s MPD permit appeal was denied on August 27, 2012 when the Superior Court affirmed the City’s approvals. TRD then appealed the matter to this Court, and that appeal currently is fully briefed and awaiting assignment to a panel for review (Case No. 69418-9-I).

This case (Case No. 69414-6-I) involves TRD’s appeal of procedural rulings by the Superior Court related to TRD’s attempted appeal of two development agreements between Yarrow Bay and the City of Black Diamond.² This case presents two issues for the Court to resolve. First, whether the Superior Court abused its discretion when it denied TRD’s motion for a stay of proceedings. Second, whether the Superior Court abused its discretion when it dismissed the case after TRD refused to comply with the Superior Court’s three separate orders to pay for production of the administrative record, as required by statute.

The Superior Court received substantial briefing on TRD’s

¹ Respondents BD Lawson Partners LP and BD Village Partners LP are referred to herein collectively as “Yarrow Bay.”

² The Development Agreements were approved in December of 2011.

requested stay, including TRD's allegations that its own appeal was moot but should be stayed rather than dismissed. The court weighed the equities and denied the stay. Then, instead of advancing its case, TRD refused to comply with three Superior Court orders. The Superior Court provided clear warning to TRD that a third failure would put its case in significant jeopardy of dismissal, but TRD refused to comply and conceded that dismissal was warranted. The Superior Court did not abuse its discretion denying TRD's requested stay and dismissing TRD's case. This Court should affirm the Superior Court's orders.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

TRD's assignments of error and the issues pertaining to the assignments of error are listed at pages 3 and 4 of TRD's Opening Brief (hereinafter "TRD Brief"). The issues, along with the applicable standard for this Court's review, are summarized and restated as follows:

- A. Was the Superior Court's denial of TRD's motion for a stay of proceedings an abuse of discretion—i.e., manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons?
- B. Was the Superior Court's dismissal of TRD's LUPA appeal after TRD refused to comply with three separate orders of the Superior Court to pay the cost of the administrative record, as required by statute, an abuse of discretion—i.e., manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons?

III. RESPONSE TO STATEMENT OF THE CASE

A. Yarrow Bay's Master Planned Developments.

Over 20 years ago, the City of Black Diamond ("City") began planning for major growth. The City's first annexation of 783 acres of land was affirmed after appeal all the way to the Supreme Court. *See King County v. Boundary Review Board*, 122 Wn.2d 648, 665, 860 P.2d 1024 (1993) (noting that the lands at issue were "destined for development"). Ultimately, in 2009, the City adopted an updated comprehensive plan and development regulations which set the final standards and procedures for processing permits for large master planned developments ("MPDs"). *BD Lawson Partners, LP v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 165 Wn. App. 677, 680-81, 269 P.3d 300 (2011) *rev. denied* 173 Wn.2d 1036, 277 P.3d 669 (2012).

B. The City of Black Diamond Approved Yarrow Bay's MPD Permits after Determining that they were Consistent with the City's Comprehensive Plan and Regulations.

Consistent with the City's 2009 amended comprehensive plan and development regulations, Yarrow Bay sought approval of two MPDs, each with mixed residential and non-residential uses. *BD Lawson*, at 681. The Villages MPD encompasses 1,196 acres of land and the Lawson Hills MPD encompasses 371 acres of land. *Id.* Notably, all of the land within The Villages MPD site and the Lawson Hills MPD site is located inside the City of Black Diamond and, therefore, is within the City's Urban Growth Area. *Id.*

Yarrow Bay has invested millions of dollars in the MPD projects, including \$127 million in the real estate alone. CP 685, ¶ 5. On September 20, 2010, the Black Diamond City Council approved The Villages MPD and the Lawson Hills MPD (collectively “MPD Permits”), determining that the two permit applications met the standards previously established in the City’s 2009 amended comprehensive plan and regulations. *BD Lawson*, at 681.

C. TRD Challenged the MPD Permits in Multiple Forums.

TRD challenged the MPD Permits in two different forums. TRD appealed under both the Land Use Petition Act, Ch. 36.70C RCW (“LUPA”), as well as bringing an appeal to the Growth Management Hearings Board (“Growth Board”). *BD Lawson*, at 681. The LUPA appeal was stayed in Superior Court while the Growth Board appeal proceeded, eventually reaching this Court. *Id.* This Court held that The Villages MPD and Lawson Hills MPD approvals were project permits, and that the Growth Board lacked jurisdiction to review those permits. *Id.* at 690. TRD petitioned for review of this Court’s decision, and the Supreme Court denied review. *BD Lawson*, 173 Wn.2d 1036 (2012).

After rejection of its challenge to the Growth Board, the stay was lifted from TRD’s LUPA appeal of the MPD Permits, and the matter was litigated in the King County Superior Court (“MPD LUPA Appeal”). On August 27, 2012, the MPD LUPA Appeal was decided by Judge Oishi. CP 541-48. Judge Oishi affirmed the City’s approval of both The Villages and Lawson Hills MPD Permits and affirmed the City’s determinations

that the environmental impact statements (“EISs”) prepared for the MPD Permits were adequate, and dismissed TRD’s MPD LUPA Appeal with prejudice. CP 541-48. TRD appealed the case to this Court, where it is fully briefed and awaiting assignment to a panel for review, Case No. 69418-9-I.

D. TRD Chose not to Seek a Stay of the City’s Implementation of the MPD Permits, Allowing Yarrow Bay to Continue Processing Additional Permits Required for Development.

RCW 36.70C.100³ allows a petitioner, like TRD, to seek a stay of the implementation of the permit decision, so as to maintain the *status quo* while the LUPA appeal goes forward. As part of its MPD LUPA Appeal, TRD failed to seek, let alone obtain, a stay of any subsequent activities implementing the MPD Permits for The Villages and Lawson Hills. Therefore, Yarrow Bay and the City of Black Diamond continued processing other permits to implement physical development of the land. CP 685-86, ¶¶ 5-11. Yarrow Bay is obligated to pay City expenses associated with the MPDs, which costs are significant and ongoing. CP 685-86, ¶¶ 5-12.

³ The full text of RCW 36.70C.100 provides:

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

- (a) The party requesting the stay is likely to prevail on the merits;
- (b) Without the stay the party requesting it will suffer irreparable harm;
- (c) The grant of a stay will not substantially harm other parties to the proceedings; and
- (d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

E. Yarrow Bay also sought and obtained the Next Phase of Required City Approvals to Develop The Villages and Lawson Hills MPDs, a Development Agreement for each Project. TRD also Appealed those Development Agreements.

Because TRD did not obtain the available LUPA statutory stay of actions to implement the MPD Permits, Yarrow Bay proceeded with the next step in the phased permitting process and, in 2011, the City Council approved Development Agreements for each project. CP 15-21, CP 145-151. In late December 2011, TRD filed a LUPA appeal challenging the approval of the Development Agreements for The Villages and Lawson Hills, King County Cause No. 11-2-44800-2 KNT (“DA LUPA Appeal”). CP 1-14.

After procedural wrangling, in early March of 2012, the parties drafted, and Judge Oishi signed, an Agreed Order to stay TRD’s DA LUPA Appeal until the MPD LUPA Appeal was decided by the Superior Court.⁴ CP 492-96. Then, after Judge Oishi rejected all of TRD’s claims in the MPD LUPA Appeal, TRD sought a new stay⁵ of its DA LUPA Appeal, at least until this Court reviewed TRD’s MPD LUPA Appeal. CP 497-502.

Yarrow Bay opposed TRD’s Motion to Stay the DA LUPA Appeal. CP 658-63. Following oral argument on September 24, 2012,

⁴ At page 8 of TRD’s Brief, TRD mischaracterizes this Agreed Order for stay as having been entered “because a decision in the MPD Permits Appeal would directly affect and would likely be dispositive of the Development Agreements Appeal.” That may have been TRD’s point of view at the time, but no such rationale is stated in the Agreed Order, nor should that rationale be attributed to any other party.

⁵ TRD refers to its request for a stay as a Motion to Continue Stay of Proceedings, but TRD admits that the stay to which the parties initially agreed had expired and thus TRD’s motion in fact asked the Superior Court to impose a new stay. TRD Brief at 9.

Judge Oishi denied TRD's motion for stay of the DA LUPA Appeal. CP 757-58. Judge Oishi also entered an Order Granting Yarrow Bay's Motion to Dismiss Certain Claims and Limit Issues, which substantially limited the issues remaining for consideration in TRD's appeal. CP 761-65. In addition, at the close of the hearing on September 24, 2012, Judge Oishi entered an order setting the case schedule. CP 759-60.

The case schedule order provided that TRD was to provide the entire record of the proceedings below, subject to any agreement of counsel to exclude documents and/or transcripts, and that Respondents Yarrow Bay and the City would not contest a motion by TRD to adjust the case schedule if necessitated by counsel for TRD's trial schedule in an unrelated case. CP 760. However, the case schedule order provided specifically that "Respondents may contest the extent or length of any requested case schedule adjustment." CP 760.

The case schedule set a deadline of October 10, 2012 for TRD to pay to the City of Black Diamond the cost of producing the administrative record, as required by RCW 36.70C.110(3).⁶ CP 760. TRD chose not to make that court-ordered and statutorily required payment by October 10, 2012. Pursuant to RCW 36.70C.110(3)'s "grounds for dismissal" for failure to pay for the record, Yarrow Bay brought a motion to dismiss for failure to pay for the administrative record. CP 806-817. Judge Oishi denied Yarrow Bay's First Motion to Dismiss and, instead, set a new

⁶ RCW 36.70C.110(3) provides: "[t]he petitioner shall pay the local jurisdiction the cost of preparing the record before the local jurisdiction submits the record to the court. Failure by the petitioner to timely pay the local jurisdiction relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition."

deadline of November 2, 2012. CP 942-44. For a second time, TRD chose not to pay the court-ordered and statutorily required payment.

Yarrow Bay brought a second motion to dismiss, which Judge Oishi again denied, choosing instead to order yet another, third deadline of November 26, 2012 for TRD to pay for production of the record. CP 954-60, CP 1091-92. This time, Judge Oishi's order stated expressly that "[s]hould TRD fail to comply with this third court-ordered payment deadline, it will place petitioners in significant jeopardy of case dismissal." CP 1092. TRD did, in fact, fail to comply with the third court-ordered deadline and Yarrow Bay brought a third motion to dismiss. CP 1096-1103.

After its third failure to pay for the record, even TRD conceded that dismissal was warranted. CP 1107. Accordingly, Judge Oishi dismissed TRD's DA LUPA Appeal, noting that "TRD in its response to the third motion to dismiss concedes that dismissal is warranted to allow issues to be resolved by the Court of Appeals." CP 1127. TRD did file its promised appeal to this Court, and later moved for a stay, which was denied by this Court on May 20, 2013.

F. Yarrow Bay Continues to be Prejudiced by Delays in Resolving TRD's Appeals.

Not only is Yarrow Bay paying the City's expenses, but the specter of this appeal of the Development Agreements (as well as the pending appeal regarding the MPD Permits) severely limits Yarrow Bay's ability to enter into contracts with contractors and builders to help construct the MPDs. CP 686, ¶ 10; *See also*, Declaration of Brian Ross in Support of

Yarrow Bay's Response Opposing Appellants' Motion to Stay Appeal (Case No. 69414-6-I), dated March 29, 2013, ¶ 9. This continued litigation also jeopardizes the massive amount of capital Yarrow Bay has invested in the MPDs. CP 685, ¶¶ 5-7. These negative impacts from the appeals will exist for so long as the appeals remain pending in the court system. CP 686 ¶¶ 10-12.

IV. ARGUMENT

A. Standard of Review.

LUPA provides that “[t]he court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties.” RCW 36.70C.090. LUPA does not define what constitutes a showing of good cause sufficient to override the statute's mandatory expedited review procedures.

TRD suggests that “good cause” may exist when the circumstances attending the request are anomalous rather than typical of the administration of justice. TRD Brief at 13, n. 11 (citing *In Re Kirby*, 65 Wn. App. 862, 868, 829 P.2d 1139 (1992) (holding that the trial court did not abuse its discretion in finding that good cause existed to grant a three-day continuance so that doctor who evaluated patient could testify at involuntary commitment hearing, since unavailability of doctor and delay in holding hearing were anomalous to the typical administration of justice)). *In Re Kirby* and the criminal cases it cites all stand for the proposition that it would be abuse of discretion to find that good cause

existed for granting a continuance if the good cause is based upon circumstances that are typical of the administration of justice. *Id.* at 868-69 (holding it was not abuse of discretion where the circumstances indicate unavoidable and unusual delay attributable to the particular case before the court that day); *see also State v. Mack*, 89 Wn.2d 788, 795, 576 P.2d 44, 48 (1978) (holding good cause did not exist warranting setting trial beyond the mandated 60-day period where the good cause was based upon circumstances typical of the administration of justice, such as docket congestion, difficulties inherent in jury selection, or concern for minimizing expense).

In addition to the standard in RCW 36.70C.090 for setting a different date for LUPA's expedited hearing, courts have inherent power to grant a stay of proceedings. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350, 16 P.3d 45 (2000). Whether to grant or deny a stay is within the sound discretion of the trial court. *Id.* at 348. On appeal, a trial court's ruling on a motion for a stay will be upheld unless the trial court abused its discretion. *Id.* While no reported decision discusses the standard of review for dismissal under RCW 36.70C.110(3), generally case dismissals are reviewed for abuse of discretion. *See e.g., Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002).

In *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006), the Washington Supreme Court explained:

An abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for

untenable reasons. A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.

(internal citations omitted). Courts have explained further that “[a] trial court’s decision is manifestly unreasonable if it is outside the range of acceptable choices.” *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 284, 279 P.3d 943, 953 (2012) (holding trial court did not abuse its discretion with regard to award of attorneys’ fees).

Under an abuse of discretion standard, the burden rests on the appellant to establish that the trial court’s decision was manifestly unreasonable. *Port of Seattle v. Equitable Capital Group*, 127 Wn.2d 202, 214, 898 P.2d 275, 281 (1995) (holding trial court did not abuse its discretion in denying continuance). An abuse of discretion is never presumed. *In re Marriage of Tower*, 55 Wn. App. 697, 705, 780 P.2d 863 (1989) (citing *Abel v. Abel*, 47 Wn.2d 816, 818-19, 289 P.2d 724 (1955)) (holding trial court did not abuse its discretion in making property distribution).

A party seeking review has the burden of perfecting the record so that the court has before it all evidence relevant to the issue on appeal. RAP 9.2(b); *State ex rel. Dean by Mottet v. Dean*, 56 Wn. App. 377, 382, 783 P.2d 1099 (1989) (rejecting appellant’s argument where appellant failed to include relevant orders and evidence in the record on appeal). Matters not in the record will not be considered by the appellate court. *Id.*

B. The Superior Court did not abuse its discretion in denying TRD's motion for a stay of proceedings.

Judge Oishi's order denying TRD's motion for stay was well within the bounds of discretion afforded to the court whether measured under LUPA's "good cause" standard or the court's inherent power to issue a stay. Under *In Re Kirby*, the two cases present a normal, not an anomalous, situation for the processing of expedited LUPA appeals of permits granted serially, where the petitioner fails to seek or obtain a stay of actions taken to implement the first permit. LUPA's good cause standard for approving a stay is not met. Here, the Superior Court weighed the equities and denied TRD's requested stay. Nothing in *In Re Kirby* supports a finding of abuse of discretion under the facts of this matter.

In *King v. Olympic Pipeline*, the court discussed the factors that should be considered when determining whether to grant a stay to protect a party's Fifth Amendment rights when parallel civil and criminal proceedings are pending. 104 Wn. App. at 345. Here, the proceedings at issue (the MPD LUPA Appeal and the DA LUPA Appeal) are serial, rather than parallel, involve different permit approvals, and both are civil cases. However, certain factors discussed in *Olympic Pipeline* may be relevant to the analysis of a stay in separate civil cases, including: (1) the interests of proceeding expeditiously and the potential prejudice of a delay; (2) the burden on the parties of proceeding absent a stay; (3) the convenience of the court in the management of its cases and the efficient use of judicial resources; and (4) the interest of the public and persons not

parties to the litigation. *Id.* at 353. When viewed in light of these factors, the Superior Court's denial of TRD's requested stay plainly was not an abuse of discretion.

1. The interests of proceeding expeditiously and the potential prejudice of a delay support the Superior Court's denial of TRD's requested stay.

State law requires that LUPA cases receive expedited review. The purpose of LUPA is "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. To serve that purpose, RCW 36.70C.090 states: "The court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties."

The expedited review mandated by LUPA is consistent with and supports the Superior Court's decision to deny TRD's requested stay. Contrary to LUPA's expedited review requirements, TRD's litigation strategy to delay has prevented the court's ability to provide, and Yarrow Bay's ability to receive, "consistent, predictable, and timely judicial review." After three years of litigation, TRD's MPD LUPA Appeal is still awaiting a final appellate court decision. Similarly, TRD filed its DA LUPA Appeal on December 30, 2011 and that matter continues to await a final decision by this Court. CP 1-14. Yarrow Bay, the City of Black

Diamond, and its citizens deserve to have TRD's appeals resolved. Given LUPA's expedited review requirements, it was not an abuse of discretion for the Superior Court to deny TRD's requested stay.

As Yarrow Bay made plain in its briefing in opposition to TRD's motion for stay before the Superior Court, if the DA LUPA Appeal had proceeded to conclusion rather than been delayed by TRD's delay and numerous motions, as well as TRD's counsel's unavailability, the DA case likely would have concluded by now and the matter could have been briefed and heard on the same schedule as the MPD LUPA Appeals currently pending before this Court. CP 668. Briefing the limited issues⁷ remaining in the DA LUPA Appeal would not require an extraordinary effort on the part of the parties. In fact, the amount of time and effort that TRD has spent seeking a stay, filing responses to Yarrow Bay's motions to dismiss for failure to pay for the record, and filing appeals and briefing to this Court in order to avoid litigating its case may already have exceeded the amount of time and expense TRD would have incurred to pay \$6,000 for the full administrative record and prosecute its case on the merits in the first place.⁸ The Court should give little weight to TRD's claims of prejudice, which rest on TRD's unique argument that it was abuse of discretion for the Superior Court to deny TRD's stay because TRD should not be forced to prosecute its allegedly "moot" appeal.

⁷ See CP 761-65 (Order Granting Yarrow Bay's Motion to Dismiss Certain Claims and Limit Issues).

⁸ See Appendix A to Yarrow Bay's Response (listing only TRD's filings and the Court's orders subsequent to the Court's denial of TRD's Motion for Stay of Proceedings); See also TRD's Motion to Stay Appeal in this matter.

As even TRD concedes (TRD Brief at 14, 19-20), TRD's DA LUPA Appeal is not moot. Unlike TRD's perplexing mootness arguments regarding prejudice, the prejudice to Yarrow Bay is obvious. Prior to denying TRD's requested stay, this matter had been waiting on the sidelines for resolution and the Superior Court recognized that TRD should not be allowed to interject further delay.

Given this first factor for determining the reasonableness of a stay, the Superior Court's decision was not an abuse of discretion. To show abuse of discretion, TRD must establish that the court's decision was (a) manifestly unreasonable because the court adopted a view that no reasonable person would take; (b) exercised on untenable grounds because the court relied on unsupported facts; or (c) exercised for untenable reasons because the court applied the wrong legal standard. TRD has failed to make such a showing and the Court should affirm the Superior Court's orders.

2. The relative burden on the parties supports the Superior Court's decision to deny TRD's requested stay.

TRD claims that proceeding absent a stay would be a "complete waste of the parties' and the court's resources." TRD Brief at 14. But if TRD truly believed litigating the DA LUPA Appeal was a waste, then TRD simply could have withdrawn and dismissed its appeal. Further, TRD fails to acknowledge that only a few issues remain in the DA LUPA Appeal after the Superior Court's September 24, 2012 Order Granting Yarrow Bay's Motion to Dismiss Certain Claims and Limit Issues. CP

761-66. But perhaps the most important point is that whatever the burden on TRD, that burden is the direct result of TRD's litigation strategy.

TRD had the option to seek a stay of any actions taken to implement the MPD Permits under RCW 36.70C.100 but TRD chose not to do so. TRD made the decision to not seek a stay at its own peril. By not obtaining a stay, the Development Agreements (and a subsequent subdivision application) were processed and approved. After TRD chose not to seek a stay of actions taken to implement the MPD Permits, it appealed the approved Development Agreements and asked the Superior Court to halt the processing of that appeal until after a decision is rendered in the MPD LUPA Appeal. Notably, such a stay would prevent the expeditious review required by LUPA, and prevent the DA LUPA Appeal from receiving a timely final decision. Viewing the facts presented to it, the Superior Court decided that TRD's requested stay was unwarranted.

Viewing the relative burdens of the parties related to the stay, the Superior Court's decision to deny TRD's requested stay was not an abuse of discretion. To show abuse of discretion, TRD must establish that the court's decision was (a) manifestly unreasonable because the court adopted a view that no reasonable person would take; (b) exercised on untenable grounds because the court relied on unsupported facts; or (c) exercised for untenable reasons because the court applied the wrong legal standard. TRD has failed to make such a showing and the Court should affirm the Superior Court's orders.

3. The convenience of the court in the management of its cases and the efficient use of judicial resources support the Superior Court's denial of TRD's requested stay.

TRD expressly acknowledges that courts have inherent power “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” TRD Brief at 13 (quoting J. Cardozo, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). TRD then argues that the Superior Court's decision to require TRD to proceed with its case would not be an efficient use of the court's and the parties' resources and, therefore, the court abused its discretion in denying TRD's requested stay. TRD Brief at 14. But the Superior Court has discretion to control the disposition of the cases on its dockets and, in choosing to deny TRD's requested stay, the Court decided that proceeding would be more efficient for the parties involved (which also includes Yarrow Bay and the City) than postponing the case in contravention of statutory requirements under LUPA for expedited proceedings.

TRD's arguments about efficient use of judicial resources are surprising given its litigation strategy, which has caused extraordinary delays and inefficiencies. Certainly, the amount of briefing TRD devoted to its stay, related appeals and protests have wasted many hours of the parties' time and the court's time.⁹ The Superior Court determined that proceeding with the DA LUPA Appeal was more efficient than further delay.

⁹ See footnote 8 *supra*.

This Court should not reverse for abuse of discretion based upon a second guessing of how the Superior Court chooses to manage its own cases. To show abuse of discretion, TRD must establish that the court's decision was (a) manifestly unreasonable because the court adopted a view that no reasonable person would take; (b) exercised on untenable grounds because the court relied on unsupported facts; or (c) exercised for untenable reasons because the court applied the wrong legal standard. TRD has failed to make such a showing and the Court should affirm the Superior Court's orders.

4. The interest of the public and persons not parties to the litigation supports the Superior Court's denial of TRD's requested stay.

The MPD Permits and the Development Agreements are the culmination of over 20 years of planning for the City of Black Diamond's growth. TRD's appeals continue to delay the certainty regarding the future of the City for everyone not a party to the litigation, including regional planners and other developers and builders interested in the project.

Despite LUPA's expedited appeal requirements, the MPD LUPA Appeal remains without a final appellate determination nearly three years after the initial appeal. TRD's appeals at the administrative and judicial levels have been denied over and over again, but the City and Yarrow Bay still await a final decision on these matters. TRD may find it more efficient to avoid or delay prosecuting its DA LUPA Appeal pending resolution of the MPD LUPA Appeal, but for everyone else with an

interest in this matter, including the City and Yarrow Bay as well as others who are not party to the litigation, a final resolution is preferable.

The Superior Court's denial of TRD's requested stay indicates that the court found that TRD's interests were not superior to that of the City and Yarrow Bay or others who are not party to the litigation. This matter deserves resolution instead of further delay. Given the interests at stake, the Superior Court's denial of TRD's requested stay was not an abuse of discretion. To show abuse of discretion, TRD must establish that the court's decision was (a) manifestly unreasonable because the court adopted a view that no reasonable person would take; (b) exercised on untenable grounds because the court relied on unsupported facts; or (c) exercised for untenable reasons because the court applied the wrong legal standard. TRD has failed to make such a showing and the Court should affirm the Superior Court's orders.

C. The Court does not need to reach a conclusion on TRD's unsupported legal theories and inconsistent statements regarding the effect of the MPD LUPA Appeal on this matter in order to resolve this appeal.

TRD devotes six pages of its eight pages of argument to arguments that its DA LUPA Appeal will be mooted by this Court's resolution of the MPD LUPA Appeal. TRD Brief at 14 – 20. But TRD's arguments that it should be estopped from prosecuting the DA LUPA Appeal upon losing the MPD LUPA Appeal are not the same as a CR 2A stipulation or agreement not to pursue the claim; no such agreement has been sought, let alone obtained. Similarly, TRD peppers its brief with the unsupported assertion that the Development Agreements rest on the MPD Permits for

their validity. *See e.g.*, TRD Brief at 7, n. 8. Yet, TRD simultaneously argues that this case should not be dismissed because it will not be moot because it will provide a forum for TRD to argue that the Development Agreements are void in the event that the Court reverses the Superior Court's decision affirming the City's approval of the MPD Permits and/or their related environmental determinations. TRD Brief at 14, 19-20. Thus, TRD argues that the Superior Court erred by denying TRD's requested stay because the DA LUPA Appeal will be moot, but it should not be dismissed because it will not be moot.

The Court should not be distracted by TRD's mootness theories and arguments. The Superior Court properly exercised its discretion to deny TRD's requested stay based upon the issues and briefing presented to it. TRD's current arguments to this Court gloss over the complexities of TRD's mootness theory. For example, TRD argues to this Court that the DA LUPA Appeal will be mooted except for "ministerial" matters. However, TRD's final briefing on this same topic to the Superior Court stated that "issues in this case will need to be addressed if both of the following events occur: (1) the MPD ordinances are struck down on appeal and (2) the Superior Court then determines that the Development Agreements survive the voiding of the MPD ordinances." CP 771 (TRD Motion for Reconsideration).

Instead of conceding that the Development Agreements may remain valid upon a reversal of the MPD Permits, TRD argues to this Court that "the effect of voiding the MPD Permits is obvious. If the MPD

Permits had no legal effect from their beginning (*i.e.*, they are void), then they may not be relied upon in this case to justify the City's approval of the Development Agreements." TRD Brief at 19. Contrary to TRD's arguments to this Court, TRD's justification for overturning the Superior Court's exercise of discretion depends upon a legal theory that is far from obvious, and is an argument that, should it become relevant and be properly presented for review, Yarrow Bay will fully brief and argue.¹⁰

Here, Yarrow Bay simply notes that TRD's legal theory is even more doubtful given this Court's recent decision in *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013) *rev. granted* --- P.3d ----, (2013) (holding that a property owner's development permit application vested to the county's regulations at the time of application despite the later determination that the county did not earlier fully comply with the State Environmental Policy Act). While the *Town of Woodway* case involved review under the Growth Management Act, it illustrates the complexity of tiered systems of review and permitting and highlights the important protections provided to vested project permit

¹⁰ To avoid dismissal of this case from the outset, as well as to avoid arguments of misuse of the court system, TRD is forced to concede that the DA LUPA Appeal is not moot. *See, e.g., Harbor Lands v. City of Blaine*, 146 Wn. App. 589, 592-93, 191 P.3d 1282 (2008) (holding that LUPA appeal of code enforcement orders was moot, because the code enforcement orders had been rescinded and the affected building was constructed, and explaining that the attempt to obtain a ruling on the moot LUPA case so as to inform separate federal court litigation over a damages claim was a "misuse of the state court system and an abuse of the citizens whose tax payments fund our courts"). TRD's concession renders unnecessary any briefing by Yarrow Bay regarding the mootness issues argued by TRD. Yarrow Bay will not brief these issues in detail unless presented with the real issue of a loss in the MPD LUPA Appeal followed by some sort of motion in the DA LUPA Appeal -- if the case survives -- or by a separate declaratory judgment action to void the Development Agreements -- which case itself would be subject to dismissal motions because of the relief that should have been sought under LUPA -- or by some other legal maneuvering that properly presents the issue for review.

applications.¹¹ Regardless, because even TRD concedes its DA LUPA Appeal was not moot, the Court does not need to address the merits of TRD's mootness arguments to determine whether the Superior Court's denial of TRD's requested stay was a manifest abuse of discretion.

D. The Superior Court did not abuse its discretion when it dismissed TRD's DA LUPA Appeal after TRD refused to comply with three separate court orders to pay the cost of the administrative record, as required by statute.

RCW 36.70C.110(3) provides specific grounds for dismissal of a petition filed under LUPA: "Failure by the petitioner [here TRD] to timely pay the local jurisdiction [the cost of preparing the record for review] relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition." RCW 36.70C.110(3) (emphasis added). Thus, the Court had statutory grounds for dismissal and its decision to dismiss TRD's appeal was within the Court's discretion.

Here, TRD conceded that the Court acted within its discretion when dismissing TRD's DA LUPA Appeal. CP 1127. TRD now assigns error to the Superior Court's dismissal only on the basis that "[h]ad the Superior Court granted TRD's motion for a stay, the case never would have progressed to the point of requiring TRD to pay for the administrative record."¹² TRD Brief at 21. Thus, if the Court determines

¹¹ The Court in *Town of Woodway* explained: "Here, even if the urban center development regulations had violated the GMA's requirements and were later declared invalid, all development permit applications submitted prior to the County's receipt of the invalidity determination would remain vested to the invalidated development regulations." *Id.* at 661.

¹² At page 4 of its brief, TRD also alleges as an error, but then later fails to present argument pertaining to the assertion that the Superior Court should have granted TRD's October 22, 2012 Motion to Adjust the Case Schedule to provide TRD a "workable date" to pay for the record, and possibly shorten it. TRD had three opportunities to pay for the

that it was not an abuse of discretion for the Superior Court to deny TRD's requested stay, then TRD appears to concede that the Superior Court's dismissal was not an abuse of discretion.

TRD argues that it is "highly likely that the issues in [the DA LUPA Appeal] may be resolved as facial challenges to the Development Agreements, thus obviating the need to produce the entire record or even substantial portions of it." TRD Brief at 21 (citing TRD's email re facial challenges at CP 879, but failing to include counsel for Yarrow Bay's emails in response). This same argument was made by TRD and rejected as unrealistic and burdensome by counsel for Yarrow Bay, Nancy Bainbridge Rogers, in emails attempting to agree on how or if the record could be shortened. CP 1038-50, CP 1061-63.

Labeling TRD's challenge as a "facial" challenge does not eliminate the need for a record. For example, TRD may make a "facial" challenge arguing that the Development Agreements were required to contain certain information or parameters. To respond, Yarrow Bay would need to cite to expert testimony and evidence in the record that establishes why the Development Agreements do not contain such information. Essentially, TRD's facial challenge would shift to Yarrow Bay the burden of producing the portions of the record needed to defend against TRD's arguments, rather than requiring TRD to produce the record, as required by statute. RCW 36.70C.110. The Court should give

record and more than sufficient time to negotiate to shorten the record. CP 1038-50, CP 1061-63.

little weight to TRD's statement that the entire record or substantial portions of it would be eliminated by a facial challenge.

While there is no reported case applying the dismissal rule of RCW 36.70C.110, *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 201 P.3d 346 (2009) provides additional support for the Superior Court's exercise of discretion here. In *Horizon Fisheries*, a seaman voluntarily dismissed an initial action against a ship owner under the Jones Act, alleging that he was injured while working on the ship, and then filed a second, identical action against the owner. The Superior Court judge awarded the owner costs and entered a stay preventing the seaman from prosecuting his second action until he paid the owner's costs for defending the initial action. After the seaman failed to comply with the cost order and the case schedule, the court dismissed the second action. On appeal, this Court affirmed the decision of the Superior Court, holding that it was not abuse of discretion for the Superior Court to dismiss the case for failure to pay the costs ordered by the Court. Here, the Superior Court did not abuse its discretion when it dismissed TRD's appeal after TRD refused to comply with three court orders to pay the cost to produce the record.

E. Yarrow Bay requests its attorneys' fees on appeal.

Under RCW 4.84.370(1)(a)-(b), "reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals...of a decision by a...city...to issue...a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or

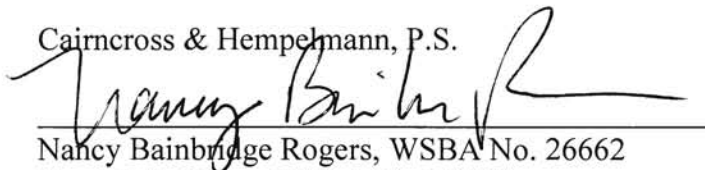
similar land use approval or decision.” Yarrow Bay prevailed in all prior proceedings. If the Court affirms the decision of the Superior Court, Yarrow Bay will be entitled to an award of attorneys’ fees and costs under RCW 4.84.370. Pursuant to RAP 18.1, Yarrow Bay asks the Court to enter an award of attorneys’ fees and costs against Toward Responsible Development, a Washington nonprofit corporation.

V. CONCLUSION

The Superior Court did not abuse its discretion when it denied TRD’s motion to stay proceedings below and dismissed the case after TRD refused to comply with three separate orders to pay for production of the administrative record, as required by statute. The Superior Court received substantial briefing on TRD’s requested stay, weighed the equities, and denied the stay. Even TRD conceded that dismissal was appropriate given its failure to comply with three court orders. The Superior Court did not abuse its discretion and this Court should affirm the Superior Court’s orders.

DATED this 3rd day of July, 2013.

Cairncross & Hempelmann, P.S.



Nancy Bainbridge Rogers, WSBA No. 26662

Randall P. Olsen, WSBA No. 38488

Attorney for Respondents, BD Lawson Partners, LP
and BD Village Partners, LP

Certificate of Service

I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on July 3, 2013, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

Attorneys for Appellants:

David A. Bricklin
Bricklin & Newman, LLP
1001 Fourth Ave., Ste. 3303
Seattle, WA 98154
Email: bricklin@bnd-law.com

Attorneys for City of Black Diamond:

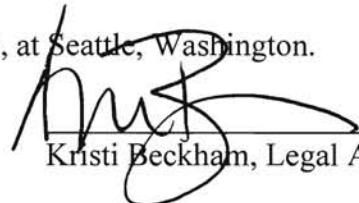
Bob Sterbank
Michael R. Kenyon
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Email: bob@kenyondisend.com
mike@kenyondisend.com
margaret@kenyondisend.com

Other Necessary Party:

Attorneys for City of Maple Valley:

Jeffrey B. Taraday
Lighthouse Law Group
1100 Dexter Avenue N., Suite 100
Seattle, WA 98109
Email: jeff@lighthouselawgroup.com

DATED this 3rd day of July, 2013, at Seattle, Washington.



Kristi Beckham, Legal Assistant

APPENDIX A

Appendix A
Yarrow Bay Response Brief

CP	Date	Name of Pleading	Filed by
CP 757-758	9/24/12	ORDER Denying Petitioners' Motion to "Continue" Stay of Proceedings	Court
CP 769-773	10/2/12	Petitioner's Motion for Reconsideration	Bricklin & Newman
CP 774-796	10/2/12	Declaration of David A. Bricklin in Support of Motion for Reconsideration	Bricklin & Newman
CP 797-800	10/2/12	Notice for Discretionary Review to Court of Appeals, Division I	Bricklin & Newman
CP 874-876	10/18/12	Response of Toward Responsible Development to Yarrow Bay's Motion to Dismiss Case	Bricklin & Newman
CP 877-891	10/18/12	Declaration of David A. Bricklin in Opposition to Motion to Dismiss	Bricklin & Newman
CP 905-906	10/22/12	Notice for Hearing – Motion to Adjust Case Schedule	Bricklin & Newman
CP 901-903	10/22/12	Petitioners' Motion to Adjust Case Schedule Because of the Unavailability of Petitioners' Counsel	Bricklin & Newman
CP 904	10/22/12	Declaration of David A. Bricklin	Bricklin & Newman
CP 945-951	10/29/12	Toward Responsible Development's Reply in Support of Motion to Adjust Case Schedule	Bricklin & Newman
CP 942-944	10/29/12	ORDER Denying Yarrow Bay's Motion to Dismiss Case – Signed by Judge Oishi	Court
CP 952-953	10/31/12	ORDER Adjusting Case Schedule	Court
CP 1067-1069	11/9/12	Petitioner Toward Responsible Development's Motion to Shorten Time	Bricklin & Newman
CP 1070-1072	11/9/12	Petitioner Toward Responsible Development's Response to Yarrow Bay's Second Motion to Dismiss Case	Bricklin & Newman
CP 1073-1073	11/9/12	Declaration of Claudia M. Newman	Bricklin & Newman
CP 1091-1092	11/19/12	Court's Order Denying Yarrow Bay's Second Motion to Dismiss Case	Court

Appendix A
Yarrow Bay Response Brief

CP 1088	11/19/12	Court's Order Vacating the 11/13/12 Order Denying Yarrow Bay's Second Motion to Dismiss and 11/13/12 Order Granting Motion to Shorten Time	Court
CP 1089-1090	11/19/12	ORDER Granting Motion to Shorten Time	Court
CP 1096-1100	12/3/12	Petitioner Toward Responsible Development's Response to Yarrow Bay's Third Motion to Dismiss Case	Bricklin & Newman
CP 1126-1128	12/5/12	ORDER Granting Yarrow Bay's Third Motion to Dismiss Case	Court