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NO. 78292-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SCOTT BLOMENKAMP,

Appellant,

vs.

CITY OF EDMONDS, a municipal corporation, Leif Bjorback, Edmonds City Building Official, and KAUTZ ROUTE LLC,

Respondents.

RESPONDENT KAUTZ ROUTE LLC'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In 2015, Respondent Kautz Route, LLC ("Kautz Route") cleared and graded its own property in preparation for construction of duplexes, pursuant to valid permits from the City of Edmonds (the "City"). The clearing and grading severed tree roots growing over the property line from Mr. Blomenkamp's property onto Kautz Route's property. Although Kautz Route's actions were allowed under Washington law, the parties immediately consulted arborists, who opined at the time that the three trees might have been damaged and recommended their removal.

At Mr. Blomenkamp's option, the trees were never removed. There is no dispute that the stand of trees on Mr. Blomenkamp's property continues to grow, including all three trees that the arborists recommended removing. The trees have survived windstorms and rainy seasons, and appear to thrive on the increased sunlight resulting from the removal of trees on Kautz Route's property. The duplexes were constructed pursuant to valid permits are and now fully occupied.

Kautz Route has endured over four years of litigation with Mr. Blomenkamp in which he brought unsupported grievances against the City of Edmonds and Kautz Route claiming damages regarding these trees. Mr. Blomenkamp has lost all of his challenges: an administrative hearing,

multiple motions for reconsideration, two LUPA Petitions, a Complaint for Damages, and two appeals to the Court of Appeals, one of which is challenged here. In every challenge, Mr. Blomenkamp pursued claims arising from issuance of the 2014 building permits, impermissible collateral attacks alleging the City's failure to enforce clearing codes and ordinances.

He does the same here. *See* Petition for Review, p. 5.

II. STATEMENT OF THE CASE

Mr. Blomenkamp failed to meet any of the criteria for review and his Petition should be denied. Mr. Blomenkamp incorrectly yet consistently has presented the same arguments through two LUPA appeals and now again in his Petition for Review. Regardless the finality granted to land use decisions within LUPA, Mr. Blomenkamp disagrees with the City's decision to grant the initial development permits.

Here, his perfunctory and unpersuasive arguments that the criteria of RAP 13.4 applies are simply a mechanism for him to present his arguments that the development permits should not have been granted back in 2014. He has not provided this Court a credible reason to accept review, and his Petition for Review should be denied.

III. STATEMENT OF FACTS

Kautz Route incorporates by reference the facts presented in the

Answer to Petition of the City of Edmonds. Facts pertinent to Kautz Route are highlighted here.

A. Kautz Route obtained approval in 2014 to construct a five-duplex project.

Development review of Kautz Route's duplex project began in 2013. Kautz Route submitted an application for design review before the Architectural Design Board ("ADB") in early 2014 and obtained approval after a public hearing. CP 1627:1-3 (Hearing Examiner Finding). The deadline to challenge the ADB approval was within 10 working days of its issuance. CP 1666 (COA decision No. 75737-7-1-I citing Edmonds Community Development Code 18.45.030).[1] No challenge was made. CP 1666-68. The City of Edmonds granted five building permits for development of the site in December 2014. CP 1627:4-7 (HE Finding[2]). Those permits also were not challenged. CP 1666-68. Mr. Blomenkamp did not own the neighboring property at that time; he acquired the property in

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[1] The unpublished decision is in the record at CP 1660-73. It is also available as *Blomenkamp v. City of Edmonds*, 199 Wn. App. 1062, 2017 WL 3142424 (Wash. Ct. App. Div. I 2017) (unpublished). Citation to this decision throughout this brief is relevant to the specific procedural history between these parties. The decision is also cited for purposes of res judicata and collateral estoppel. The case is not cited as precedent and the considerations of GR 14.1 do not apply.

[2] "HE Finding" is a reference to the September 2015 findings of the Hearing Examiner.

mid-May 2015. CP 1622:1-2 (HE Testimony). Site development began in May 2015. CP 1627:7 (HE Finding).

B. Kautz Route lawfully cut tree roots extending onto its own property, as demonstrated by the findings of the Hearing Examiner who addressed Mr. Blomenkamp's original complaints.

During the clearing and grading of its property in May 2015, Kautz Route legally severed tree roots that had grown into Kautz Route's property from Mr. Blomenkamp's property. The Hearing Examiner found: "Trees on Mr. Blomenkamp's property were damaged when roots from the trees located on the project site were damaged during project grading." CP 1626:29-30 (HE Finding). After the roots were severed, Kautz Route immediately spoke with Mr. Blomenkamp and offered to have any damaged trees removed at its expense. CP at 1617-18 (8/19/15 Planning Division Report & Recommendation to the Hearing Examiner). Mr. Blomenkamp refused the offers. *Id*.

After a staff review, Mr. Blomenkamp elevated the dispute to the Hearing Examiner for review of the project to determine whether the severing of the tree roots had created a nuisance. CP 1629:15-18. The Hearing Examiner in September 2015 reviewed arborist reports commissioned by the City and Kautz Route "to assess the damage to the trees…." CP 1627:11-12 (HE Finding). The Hearing Examiner adopted "a

conservative position on level of risk" (CP 1629:1) and determined that three trees should be removed. CP 1633 ¶ 1 (HE Decision).

On reconsideration, the Hearing Examiner further identified that the scope of Kautz Route's activities was limited to clearing within Kautz Route's property, stating:

> *It is uncontested that Kautz cleared within the areas authorized by the ADB in its approval.* Consequently, any code compliance issues pertaining to clearing on the Kautz project site cannot be reconsidered under *Nykreim* and *Habitat Watch*. All of Mr. Blomenkamp's arguments that on-site clearing violated provisions of Chapter 18.45 ECDC are precluded by principles of finality on that basis, because *Kautz limited its clearing activities to the areas authorized by the ADB, including those areas that involved severance of Mr. Blomenkamp's tree roots*.

CP 1639:20-24 (HE Decision on Reconsideration) (emphasis added). The finding establishes that Kautz Route acted within the boundaries of its own property.

C. Mr. Blomenkamp attempted to use the tree issue to seek revocation of the development permits, which were no longer subject to challenge.

Mr. Blomenkamp's challenges have been an effort to halt all development on Kautz Route's parcel.

1. Procedural history up to the first LUPA appeal; Mr. Blomenkamp refuses to have the potentially damaged trees removed.

As part of his initial challenge, Mr. Blomenkamp requested revocation of the project permits. CP 1618 at Part V (8/19/15 Planning Division Report & Recommendation to the Hearing Examiner). The Hearing Examiner noted that Mr. Blomenkamp's challenge to the validity of the ADB approval was a prohibited collateral attack on the ADB decision. CP 1630:15-25. Addressing the tree damage, however, the Hearing Examiner added conditions to Kautz Route's permit requiring Kautz Route to pay for removal and replacement of three trees the City's arborist identified as potentially dangerous, monitor a tree that was potentially dangerous, and pay for repair of another tree if required. CP 1633. The decision required Mr. Blomenkamp to submit estimates for this work by qualified contractors within two months. CP 1633. There is no dispute that Mr. Blomenkamp has never submitted any estimates for tree removal and replacement.

Mr. Blomenkamp filed a request for reconsideration, which resulted in an additional requirement for Kautz Route to pay for the replacement of three specified trees with new ten-foot high trees. CP 187-88 (HE Decision on Reconsideration). Mr. Blomenkamp was again ordered to submit timely estimates for payment. *Id*. Mr. Blomenkamp again did not submit estimates,

but turned to the Superior Court.

Mr. Blomenkamp filed a LUPA Petition in Snohomish County Superior Court, which resulted only in a remand to the Hearing Examiner with instructions for the Hearing Examiner to address the caliper of the replacement trees. CP 1655. The Hearing Examiner complied, modifying the order so that all replacement trees would be at least three inches in caliper. CP 1657-58 (HE Decision on Judicial Remand); *see also* CP 1663 (Court of Appeals' factual recitation). Mr. Blomenkamp again failed to submit estimates for payment.

Mr. Blomenkamp next appealed to the Court of Appeals Division One, No. 75737-7-1-I. This was unsuccessful. The Court of Appeals, in an unpublished July 2017 decision authored by Judge Verellen (CP 1660-73), found that Mr. Blomenkamp's LUPA appeal was an impermissible collateral attack, stating, "[W]hether the clearing was permitted under the December 29, 2014 permit or the February 5, 2014 ADB approval, the failure to exhaust administrative remedies and the doctrine of finality preclude Mr. Blomenkamp from raising the substantive tree protection standards in his LUPA appeal." CP 1668. The Court of Appeals concluded that the lack of a timely appeal of the ADB approval or the December 29, 2014 permit required denial of the appeal for failure to exhaust administrative remedies. CP 1665-68. Mr. Blomenkamp's other complaints

were rejected as unpersuasive. CP 1661.

2. Procedural history after the unsuccessful first appeal, leading to the current appeal.

When the Certificates of Occupancy issued on the duplexes on April 6, 2017, Mr. Blomenkamp filed a second LUPA Petition and a Complaint for Damages (CP 1960-83). The parties to this litigation are identical to those of the previous proceedings. *Id.* Mr. Blomenkamp again sought to raise his prior complaints arising from the severing of the tree roots. *Id*. He stated, in addition to a new LUPA claim, common law and statutory claims arising from the same facts. *Id*. He requested the remedy of abandonment of the occupied duplexes. *Id*.

The Superior Court dismissed the new LUPA Petition for lack of standing based on the type of decision attacked: a Certificate of Occupancy. CP 1995-97. Reversal of the Certificates of Occupancy would not afford Mr. Blomenkamp relief. VRP 14:36:45 – 14:41:39. The Certificates of Occupancy do not concern his trees. *Id*.

The Superior Court also dismissed Mr. Blomenkamp's damage claims against Kautz Route under CR 12(b)(6) and CR 56 for lack of evidence of damages, trespass, injury (including lack of evidence of adverse impact on the trees), and emotional distress, and lack of duty. CP 2006-07; CP 732-34; CP 1984-91.

The Court of Appeals upheld dismissal for both the LUPA and the damage claims.[3] The Court held: "In short, Blomenkamp cannot, under the guise of a LUPA failure-to-enforce challenge, use a certificate of occupancy issued at the end of a project to collaterally attack a final land use decision made near the beginning of the project." *Id*. at 7-8. And the Court found no evidence to support Mr. Blomenkamp's tort and damage claims. *Id*. at 8-12.

IV. ARGUMENT

The Petition for Review does not satisfy any of the criteria for review under RAP 13.4 and this Court should not accept review. Review will be accepted by this Court only if one of the following criteria are met:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Blomenkamp appears to argue that the dismissal of his LUPA appeal is in conflict with another Court of Appeals decision and that it presents an issue of substantial public interest. Neither is true.

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[3] Petition for Review, Appendix.

A. Neither *Chumbley* nor any other case is in conflict with the Court of Appeals' decision.

Mr. Blomenkamp's interpretation of *Chumbley v. Snohomish Count*y, 197 Wn. App. 346, 386 P.3d 306 (2016) is flawed. As Mr. Blomenkamp admits,[4] in *Chumbley* the court held that a LUPA appeal deadline ran from the county's decision that a land disturbing activity permit was not required; the deadline did not run from the issuance of occupancy permits. *Id*. at 364-65. Mr. Blomenkamp's argument that he can challenge the earlier building permits via the occupancy permits is not supported by the *Chumbley* case. Moreover, the unusual facts of *Chumbley* are not present here, where the entire scope of the project was disclosed and considered when City issued the building permit. There is no meaningful comparison to the facts of this case to the facts of *Chumbley*.

Mr. Blomenkamp did not articulate why the other cases he cited conflicted with the Court of Appeals' decision here. He points to his Motion for Reconsideration,[5] but a review of this motion also fails to identify a true conflicting opinion.

Instead, Mr. Blomenkamp argues that the Certificates of Occupancy

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[4] Petition for Review, p. 13.

[5] Appellant did not put his Motion for Reconsideration before the Court; it is not included in the Clerk's Papers.

are final decisions regarding code enforcement related to the 2014 permits. Mr. Blomenkamp fails to address that he lacked standing to launch a LUPA petition on the basis of Certificates of Occupancy where all of his claims and grievances relate to the 2014 permits and not the occupancy certificates. All of his claimed harms stem not from a loss of privacy/trees, which he did not lose, but rather from the existence of the new development. CP 1742-43. A certificate of occupancy, a purely administrative function to ensure building safety, CP 1527-30, does not authorize the development of a property. The previously-issued building permits, and any necessary prior land use approvals, did that. By the same token, denial of these Certificates of Occupancy cannot address Mr. Blomenkamp's desire to remove the fully-occupied duplexes or alter the landscaping.

Mr. Blomenkamp's LUPA challenge to the Certificates of Occupancy was correctly dismissed for being a fairly obvious and impermissible collateral attack on the permits issued years ago. Mr. Blomenkamp does not articulate a credible basis for claiming that this matter conflicts with other Court of Appeals cases. The cases he cites do not conflict with the Court of Appeals decision on this issue. His Petition for Review fails to meet the criteria for review.

B. Mr. Blomenkamp has no supporting evidence for his various damage claims and dismissal of such claims is not in conflict with any Washington cases.

At the time the tree roots on Kautz Route's property were severed, there was speculation that the trees could be damaged and removal was recommended. Mr. Blomenkamp would not cooperate and did not participate in the procedure to have the trees removed and replaced. The trees remain and have stood tall and firm for over four years now. Time has shown that Mr. Blomenkamp's trees were not damaged. CP 2006-07; CP 732-34; CP 1984-91. All of his damage claims, including his trespass claims, require a showing of harm or duty to be viable, which they are not. His damage claims against Kautz Route were unsupported by any evidence and were properly dismissed.

C. Mr. Blomenkamp failed to identify an issue of substantial public interest.

Mr. Blomenkamp argues that the public has substantial interest in the preservation of trees to combat climate change. While true, that fact does not help him here. First of all, his trees were preserved. Secondly, his identification of a conflict between increasingly dense development and tree removal is a legislative issue addressed in most municipal codes and comprehensive plans.

Mr. Blomenkamp failed to support his Petition for Review with any conflict of law or issue of substantial interest to the public. He has not met

any of the criteria for review and his petition should be denied.

V. REQUEST FOR FEES AND COSTS

Pursuant to RAP 18.1, Kautz Route requests its fees and costs on appeal. Attorneys' fees can be awarded based on an agreement, a statute, or some recognized ground in equity. *Hamm v. State Farm Mut. Auto Ins. Co*., 151 Wn.2d 303, 325, 88 P.3d 395 (2004) (citing *Dayton v. Farmers Ins. Grp*., 124 Wn.2d 277, 280, 876 P.2d 896 (1994)).

Under RCW 4.84.370, Kautz Route is entitled to its fees and costs. The statute provides that reasonable attorneys' fees and costs "shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny 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." RCW 4.84.370(1). The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if the prevailing party on appeal is the prevailing party in all prior judicial proceedings. RCW 4.84.370(1)(b). Kautz Route has been the prevailing party in all prior judicial proceedings. CP 1995-97; CP 732-43; CP 1984-91 (Superior Court orders); Petition for Review Appendix (Unpublished Court of Appeals

decision filed July 22, 2019).

VI. CONCLUSION

Mr. Blomenkamp failed to meet any of the criteria of RAP 13.4, and review should be denied. Respondent Kautz Route has endured four years of litigation on untimely and unsupported claims and respectfully requests this Court to grant its request for fees and costs pursuant to RCW 4.84.370(1)(b).

Dated: October 28, 2019.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Virginia Nicholson
Colin Folawn, WSBA #34211
Bert W. Markovich, WSBA #13580
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Attorneys for Respondent Kautz Route LLC

CERTIFICATE 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 the 28th day of October, 2019, I arranged for service of the foregoing RESPONDENT KAUTZ ROUTE LLC to the parties to this action as follows:

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