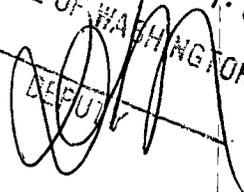


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DIVISION II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BA & C PROPERTY MANAGEMENT, LLC, Appellant,
v.
CITY OF LAKEWOOD, Respondent

BRIEF OF APPELLANT

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I. Introduction

Respondent City of Lakewood brought a nuisance abatement action alleging, among other things, that the storage building on Appellant's property was dangerous. After administrative hearing, the hearings examiner, Respondent's Building Official, issued an order on July 10, 2014 requiring that Appellant obtain the appropriate permit and either demolish or repair the building in question. Respondent City of Lakewood had also filed infractions and a criminal matter against Appellant and its owner, William Chung with regard to other properties. Prior to the expiration of the period for seeking appeal of the administrative decision issued in this matter, the parties reached an agreement resolving all of the matters.

Representing Respondent in those settlement discussions was the Building Official who, in his capacity as hearings examiner, issued the administrative order at issue. As part of that settlement, Respondent acknowledged that Appellant's chosen means of complying with the administrative order was to repair the building and that Appellant would need more time than provided in the administrative order to complete the building permit application for repair of the building. Appellant needed more time due to the fact that the architect and engineer necessary for the project were suffering work backlog. The building permit application required the participation of both. The agreement between Appellant and Respondent was to provide additional time to submit the building permit

application.

Based upon the agreement with Respondent and the representations Respondent made therein, Appellant did not appeal the administrative decision. However, when Appellant submitted a building permit application in early December, 2014, Respondent refused to accept the application.

Appellant does not seek review of the administrative order as Respondent suggests, but seeks to prevent Respondent from demolishing the subject building and to mandate that Respondent accept Appellant's building permit application consistent with parties' post-order agreement. After inducing Appellant to forego its appeal

II. Assignments of Error

Assignments of Error

1. The trial court erred in granting Respondent's motion to dismiss on September 25, 2015.

Issues Pertaining to Assignments of Error

1. Whether the court had subject matter jurisdiction over Appellant's petition for a writ alleging that Respondent City of Lakewood illegal refused to accept Appellant's building permit application after Respondent agreed to extend the time for submitting the application set forth in the underlying administrative order.

a. Whether the parties were permitted to reach agreement subsequent to issuance of the administrative order extending the time period set forth in the order for Appellant's submission of a building permit application for repair of the subject building.

b. Whether the fact that Appellant failed to appeal the underlying administrative order divests the court of subject matter jurisdiction over

Appellant's petition for a writ to mandate that Respondent City of Lakewood accept Appellant's building permit application submitted in compliance with the parties' agreement to extend the period set forth in the administrative for doing so.

c. Whether the fact that Appellant failed to appeal the underlying administrative order divests the court of subject matter jurisdiction over Appellant's petition for a writ to prohibit Respondent City of Lakewood from demolishing Appellant's building after Appellant complied with the parties' agreement reached subsequent to issuance of the order.

2. Whether the Respondent can enforce the time limits set forth in the administrative order where it induced Appellant to waive its appeal of the order by representing to Appellant that Respondent agreed to extend the time period for submitting a building permit application for repair of the subject building.

III. STATEMENT OF THE CASE¹

In early 2014, Respondent filed an administrative action to abate what it considered a nuisance on property Appellant owned within the respondent city's jurisdiction. At the time of the administrative action, Respondent had also instituted a criminal action alleging problems with a property owned by William Chung (the owner of Appellant) and other properties owned by William Chung and another company he owned. On June 16, 2014, after hearing was held on the administrative abatement action, the Hearings Officer—Respondent's Building Official—issued an order. After issuance of the order, on July 10, 2014, the parties reached a global settlement that included all of the actions or threatened actions against properties owned by William Chung or companies he owned, including the criminal matter and the administrative abatement procedure

¹ The "Statement of Facts" are those set forth in the Petition for Writ, Designation of Clerks Papers Filed 12-22-2015, Public 7.

which involved the property at issue here.

Consistent with the settlement, Appellant continued with cleanup of the subject property as required by the settlement, and the architect and engineer Appellant had retained finished with plans for remodeling structures on the property that would bring them up to code. Before the plans were completed, however, on August 5, 2014, Appellant received a letter from Respondent indicating that Respondent was not going to comply with the settlement agreement. In response, Appellant contacted Respondent and found out that the Building Official who had commenced the abatement process originally, Mark Nelson, and who issued the June 12, 2014 order had been replaced.

Shortly thereafter, however, Appellant met with the Respondent's new Building Official, Leonard Yarberry, who reassured Appellant and urged it to continue with the clean up and building design consistent with the settlement agreement. Then, Respondent changed position again. By letter of October 22, 2014, Mr. Yarberry informed Appellant that Respondent denied that the abatement claim had been settled and that it considered the prior Building Official's order controlling. Accordingly, Respondent was going to proceed with demolition of the structures on Appellant's Property.

Respondent took no further action, and Appellant completed the engineering and architectural plans for the structures' remodel. In early December, 2014, Appellant presented a completed Building Permit

Application to Respondent. Respondent refused to accept or take possession of the Building Permit Application. Appellant's Building Permit Application for the subject property was accordingly neither processed nor denied.

IV. ARGUMENT

The writ procedure is part of our common law and its purpose is to restrain the exercise of unauthorized judicial or quasi-judicial power. *Cty. of Spokane v. Local No. 1553, Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO*, 76 Wash. App. 765, 768 (1995). There are three types: certiorari, prohibition and mandamus. Although the common law writ procedures still exist, they have been effectively supplanted by the statutory procedures set forth under RCW chapter 7.16. The crux of a statutory writ is that a governmental entity exceeded its jurisdiction or acted illegally and there is no other avenue of review or adequate remedy at law. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 (2010).

A. A Writ Of Prohibition² Should Properly Issue to Prevent Respondent City of Lakewood From Demolishing Appellant's Storage Structure n Violation of the Parties Agreement to Permit Appellant to Repair he Structure.

A writ of prohibition is defined by statute as follows: "It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. The court has stated that:

² Appellant mis-titled its petition for a writ, identifying it as one of certiorari. However, the relief it seeks under the writ procedure is of prohibition and mandamus and the petition should accordingly

[u]nder the statutory writ, the actions of “any tribunal, corporation, board or person, whether they are acting in a judicial, legislative, executive, or administrative capacity, may be arrested, if acting in excess of their power.” *Winsor*, at 543, 64 P. 780. Two conditions must be met to grant the writ: (1) the party to whom the writ is directed must be acting without or in excess of its jurisdiction; and (2) there must be an absence of a plain, speedy, and adequate remedy in the ordinary course of legal procedure. *In re Jones*, 39 Wash.2d 956, 958, 239 P.2d 856 (1952). The writ may be issued where it appears the person to whom it is directed is about to act in excess of his or her jurisdiction. *State ex rel. Gillespie v. Kuykendall*, 117 Wash. 415, 419, 201 P. 778 (1921); *Harris v. Brooker*, 8 Wash. 138, 139, 35 P. 599 (1894).

Cty. of Spokane, supra. Here, Respondent induced Appellant to forego appeal of the administrative order by agreeing to extend the time period for submitting a building permit for repair of the structure, which Appellant did. Demolition of the structure by Respondent violates the representations and agreement it made and is illegal, and Respondent has not adequate remedy at law.

- B. A Writ Of Mandamus Should Properly Issue to Mandate that Respondent City of Lakewood to Accept and Process Appellant’s Building Permit Application for Repair of the Structure to Give Effect to the Parties Agreement That Induced Appellant to Forego Its Appeal of the Administrative Order.

The court in *Walker v. Munro*, 124 Wash. 2d 402 (1994) outlined the purpose and requirements of writs of mandamus:

Writs [of mandamus] are not directed at a general course of conduct. In *State ex rel. Taylor v. Lawler*, 2 Wash.2d 488, 490, 98 P.2d 658 (1940), we said:

The jurisdiction given to this court by the state constitution in Art. IV, § 4, to issue writs of mandamus to state officers,

be considered a petition for writs of mandamus and prohibition.

does not authorize it to assume general control or direction of official acts.

Instead, the remedy of mandamus contemplates the necessity of indicating the precise thing to be done. *Clark Cy. Sheriff v. Department of Social & Health Servs.*, 95 Wash.2d 445, 450, 626 P.2d 6 (1981) (citing *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 P. 1001 (1905)). In *State ex rel. *408 Pacific Am. Fisheries v. Darwin*, 81 Wash. 1, 12, 142 P. 441 (1914) (citing *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 67-69, 80 P. 1001 (1905)), we also stated:

Mandamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties....

Walker v. Munro, 124 Wash. 2d 402, 407-08 (1994).

A writ of mandamus is appropriate here. The very specific relief prayed for by Appellant is for the court to mandate that Respondent City of Lakewood accept and process the building permit application Appellant attempted to submit in December of 2014.

C. The Facial Allegations in Appellant's Petition Properly Invoked the Court's Jurisdiction and Dismissal of the Petition Under CR 12(b)(1) Was Error..

A motion for dismissal under CR 12(b)(1) is an assertion that the court does not have the power to adjudicate the claim. *State v. Lane*, 112 Wash.2d 464, 468 (1989). Respondent, in its motion to dismiss, asserted that Appellant's allegations on their face were insufficient to establish the court's jurisdiction. But, as the court has stated:

. A plaintiff confronting a facial challenge enjoys many of the procedural protections afforded under CR 12(b)(6). *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990). Thus, a trial court must assume the factual allegations in the complaint are true, construing them liberally in favor of the plaintiff, and will not look

beyond the face of the complaint to determine jurisdiction. 2 Moore, *supra*, ¶ 12.30[4], at 12–40

Wright v. Colville Tribal Enter. Corp., 159 Wash. 2d 108, 118–19 (2006).

As discussed above, based upon the allegations in Appellant's petition for writs of mandamus and prohibition, the court did have jurisdiction over Appellant's petition. Accordingly, dismissal under CR 12(b)(1) was improper.

V. CONCLUSION

The lower court erred when it dismissed Appellant's petition for a writ mandating that Respondent City of Lakewood accept and process Appellant's building permit application for repair of its storage structure and prohibiting Respondent from demolishing the structure. The lower court's ruling should be reversed, and this matter should be remanded to the lower court for resolution.

Respectfully submitted,



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