

No. 49467-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

PACIFIC COUNTY

Appellant,

vs.

**DANIEL A. DRISCOLL
DBA OYSTERVILLE SEA FARMS,**

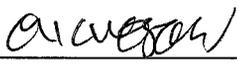
Respondent.

Appeal from the Superior Court of Washington for Pacific County

BRIEF OF APPELLANT

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April 6, 2017

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Introduction

This Court granted discretionary review of a Pacific County Superior Court RALJ¹ decision concerning land use infractions. The parties are the Pacific County Department of Community Development (county or DCD) and Daniel A. Driscoll doing business as Oysterville Sea Farms (OSF).

Assignments of Error

1. The superior court erred when it engaged in a de novo review of the facts and reversed the district court's finding that the infractions were committed, contrary to the superior court's role to review the legal sufficiency of the facts in a RALJ appeal.

In particular, the superior court erred in its findings #s 4, 8, 9, 10, 11, 13, 22, 23, 24, and 25.

2. The district court erred when it determined the county was collaterally estopped from enforcing land use regulations.

3. The district court erred when it allowed Mr. Driscoll to raise previously resolved land use issues in an infraction hearing.

¹ Rules for Appeal of Decisions of Courts of Limited Jurisdiction

Issues Pertaining to Assignments of Error

1. Is the proper role of the RALJ court to engage in a de novo review of the facts or to review the record for legal sufficiency of facts and conclusions? Assignment of Error #1.

2. Is a municipality collaterally estopped from enforcing its zoning codes by the actions or inactions of employees who were applying its health and building codes? Assignment of Error #2.

3. Under what circumstances may a respondent use a land use defense in an infraction hearing? Assignment of Error #3.

Statement of the Case

Daniel A. Driscoll owns and operates Oysterville Sea Farms (OSF), a business that has been in his family long before there was a zoning code or a Shoreline Master Program in Pacific County. The business began as an oyster farm and a wholesale processing and packing plant. Later Mr. Driscoll began selling raw oysters and then cooked oysters at retail. Such sale is contrary to current zoning and SMP ordinances, but the parties agree that this is a permitted

grandfathered non-conforming use. To make the business more economically viable, Mr. Driscoll has tried to change his use.²

On June 13, 2014, DCD Planning Director Tim Crose inspected OSF and cited it for violations of Pacific County's Shoreline Master Program (SMP) and county zoning Ordinance 162. The Pacific County South District Court (district court) set a hearing for this infraction on August 20, 2014. At the end of the county's opening statement, the district court asked the county about pre-existing nonconforming uses. RP1 p.6 To address this issue completely, the court continued the hearing.

On September 25, 2014, the county amended the notice of infraction³ to allege that in Count 1a. Mr. Driscoll caused or allowed a prohibited use in an Aquaculture District in violation of Pacific County Ordinance 162 § 8(H)⁴ by his commercial activities, or in the alternative 1b. That he caused or allowed a prohibited use in a restricted residential district in violation of Ordinance 162 § 8(H) with that commercial activity. The county alleged in Count 2a that Mr. Driscoll caused or allowed a violation of the SMP § 7(B)(1)⁵ by a

² The parties' disagreement as to whether this is an unlawful expansion or a lawful intensification drives this case.

³ District Court Exhibit #7, 10/06/14; also Supplemental Clerk's Papers p. 327

⁴ Supplemental Clerk's Papers p. 347

⁵ Supplemental Clerk's Papers p. 355

prohibited commercial use in a conservancy environment, or in the alternative 2b did cause or allow a violation of the SMP § 7(D)(2)⁶ by a prohibited commercial use in an urban environment without a permit. The notice of infraction did not further detail the specific factual allegations that were the basis of the violations, nor did Mr. Driscoll seek a bill of particulars or any further refinement of the allegations.

The district court held the continued infraction hearing on October 17, 2014. At this hearing, the county asserted that OSF's addition of a retail store selling non-seafood items including wine, beer, cookies, t-shirts, pasta, cranberries, and hot foods such as shrimp, crab cocktail, clam chowder, and oyster dishes in a restaurant setting both indoor and on a newly constructed deck in an outdoor dining area constituted a violation of the zoning ordinance and the SMP.⁷ Mr. Driscoll raised the defense against the infractions that his nonconforming uses were grandfathered. RP2 p.9. The county replied that the court did not have jurisdiction over the determination of grandfathering. The county's position was summarized by the district court, "[I]f the county says 'X' is not within

⁶ Supplemental Clerk's Papers p. 356

⁷ District Court Exhibit #12, pages 6-7, findings of fact 29-33, 35, 36

the grand- - the package of grandfathered rights you have, you have to appeal that under the Land Use Petition Act.” RP2 p. 11.

The district court held that:

I think that under the circumstances of this case that the Respondent is allowed to raise the issue contemplated by the LUPA definition.

In other words, I think because the use is what the county is pursuing, then that is – that is a violation which the quote, ‘local jurisdiction,’ is required by law to enforce in the courts of limited jurisdiction. Because this wasn’t an original decision. This was in the midst of an enforcement action. And I think at that stage, once that decision was made, Mr. Driscoll could not have brought a petition under LUPA. (RP2 p. 34)

...
[I]f the County gets involved interpreting regulations, applicable to a specific piece of property regarding use, that’s a land-use – that has to be appealed in a land use petition.

The only reason it doesn’t apply here is that interpretation by the County occurred during the enforcement process. Other – if there is no enforcement process, then it has to be a land use petition appeal. (RP2 p 37)

The district court did not reduce this to writing.

Based on the October 17, 2014, hearing, the district court issued a preliminary “decision on Non-Conforming Use Issues” on February 24, 2015. In this the court held⁸ that:

Regardless of the applicable zoning and PCSMP land use designations, however, OSF believes that its activities are authorized as a non-conforming use. Thus, after hearing two days of testimony, I am currently presented with limited questions regarding the scope of Mr. Driscoll’s allowable non-conforming

⁸ District Court Exhibit #12, p. 2

use and the extent that his current activities exceed the scope of the allowable non-conforming use.

The court's conclusions of law, summarized, are⁹:

56. OSF's retail and wholesale sales of seafood items generally found within a seafood sales store are authorized non-conforming uses.

57. Assuming that this seafood sale does not conform to the land use regulations, the use that the county's regulations seek to prohibit in this area pertains to establishments generally, rather than the selling of particular products.

58. Thus, DCD cannot limit sales of certain items, but the overall character of the seafood business that must be maintained in order to continue as a nonconforming use. DCD cannot issue infractions against every new item as an unlawful extension of the allowable non-conforming use, but only if the character of the store changes so much that it is no longer a seafood business.

59. Consequently, OSF's retail sales of non-seafood items generally found within a seafood store and related products is also merely an intensification of the seafood store that is an authorized nonconforming use.

⁹ District Court Exhibit #12, p. 10 – 11

60. OSF's food preparation is a permitted non-conforming use to the extent that it involves selling oysters on the half-shell for immediate consumption in an informal manner unlike a restaurant.

61. There has been no evidence presented concerning the scope of what else a generic seafood market sells so the sale of food other than oysters on the half shell is an unlawful nonconforming use.

62. OSF's on-site food preparation constitutes an unlawful expansion of the allowable non-conforming use to the extent that it provides food for formal consumption on the premises and offering outside seating.

63. Finally, OSF's sale of alcohol for consumption on the premises is an unlawful expansion of the allowable non-conforming uses.

The court's order¹⁰ holds:

64. As to Counts I and II as applied to the issue of inventory in OSF's retail store, the defendant did not commit the infraction.

65. As to Counts I and II as applied to the sale of oysters on the half shell for immediate consumption in an informal manner, the defendant did not commit the infraction.

¹⁰ District Court Exhibit #12, p. 11 – 12

The district court further ruled that it was reserving on the issue as to the operation of the restaurant and the scope of allowable seafood market sales pending further testimony and argument.

On March 10, 2015, the district court ruled on Mr. Driscoll's motions¹¹ that:

1. Oysters on the half shell may be served cooked or uncooked;
2. It was denying Mr. Driscoll's motion to compel the county to issue him a Level 2 food establishment license;
3. It was denying his request to allow on-site preparation of additional seafood at that time;
4. It was denying reconsideration that seafood was prepared and consumed on site in 1971; and
5. The court was unprepared to rule on expansion of his store without further evidence.

The district court held its final infraction hearing on these and other issues on June 15, 2015. Based on that hearing, the district court issued its final decision on September 17, 2015.¹² It concluded that the county was estopped to deny the defendant a "small deli"

¹¹ District Court Exhibit #15

¹² District Court Exhibit #21; Clerk's Index p. 7 and Supplemental Clerk's Papers p. 84.

and from operating an outdoor seating area limited to the back deck where patrons can consume products purchased on site, including cereal, fruit and fish. The district court concluded that Mr. Driscoll committed the infraction alleged in Count 1 by selling “wine and spirits,” and that he committed the infraction alleged in Count 2 by operating a food establishment with indoor seating without a valid permit and manufacturing cereal on the premises. The district court imposed a \$300 fine.¹³

On October 14, 2015, the district court denied Mr. Driscoll’s motion for partial reconsideration.¹⁴

The county appealed the district court’s decision in Pacific County Superior Court (superior court) on November 12, 2015.¹⁵ Mr. Driscoll cross-appealed on November 19, 2015,¹⁶ and filed an affidavit of prejudice against the sole county superior court judge the next day.¹⁷

Mr. Driscoll filed a motion to dismiss the county’s appeal on December 11, 2015. The superior court granted this motion in an order filed June 29, 2015, holding that Pacific County Ordinance 165

¹³ District Court Exhibit #21 p. 7 - 8; Clerk’s Index 13; Clerk’s Supplemental Papers p. 91.

¹⁴ District Court Exhibit #23; Also Clerk’s Supplemental Papers p. 83.

¹⁵ District Court Exhibit #24; Also Clerk’s Supplemental Papers p. 19 and 62.

¹⁶ District Court Exhibit #25; Also Clerk’s Supplemental Papers p. 22.

¹⁷ Clerk’s Supplemental Papers p. 51.

§ (4)(A) prohibited the county from appealing a district court determination that an infraction was not committed.¹⁸ This forestalled the county's argument that a district court should not be making land use decisions in an infraction hearing. That day, the superior court heard oral arguments on Mr. Driscoll's cross-appeal. The superior court reserved ruling and asked several questions that the parties were to brief.

The superior court ruled on July 29, 2016,¹⁹ reversing the district court in its finding that infractions I and II were committed.

The county's motion for discretionary review followed.

Argument

Standard of Review

RALJ 9.1 governs the discretionary appellate review of a superior court's decision reviewing a district court's decision. *State v. Ford*, 110 Wash.2d 827, 829, 755 P.2d 806 (1988). "Pursuant to RALJ 9.1(a) an appellate court shall review the decisions of the district court to determine whether that court has committed any errors of law." *State v. Brokman*, 84 Wn.App. 848, 850, 930 P.2d 354

¹⁸ Clerk's Supplemental Papers p. 334

¹⁹ Clerk's Index p. 1; also p. 15.

(1997). Application of a statute to a specific set of facts is an issue of law and the standard of review is therefore de novo. *State v. Jackson*, 91 Wn.App. 488, 491, 957 P.2d 1270 (1998), review denied, 137 Wn.2d 1038 (1999).

According to *Brokman*, above, this appellate court does not tarry with the superior court's decision, but instead reviews the district court's decision. However, to the extent it matters, the county assigns error to the superior court's decision.

1. The superior court erred when it reversed the district court's finding that the infractions were committed contrary to the superior court's role in a RALJ review.

RALJ 9.1 governs appellate review by a superior court of a decision of a district court. *State v. Ford*, 110 Wash.2d at 829–830, 755 P.2d 806 (1988). RALJ 9.1(a) states that the superior court reviews the lower court ruling to determine if there are any errors of law. In the course of its review, the superior court:

shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction." RALJ 9.1(b).

The superior court does not consider the evidence de novo. *State v. Basson*, 105 Wash.2d 314, 317, 714 P.2d 1188 (1986).

The superior court issued its ruling in 25 numbered paragraphs. Analysis of the superior court's opinion is hampered because it: 1) makes no citation to the district court's decisions except in the two points that the county conceded in oral argument, #s 1 and 2;²⁰ 2) makes no citation to facts except as to #5, that the defendant admitted that he had indoor seating in his establishment; and 3) has no logical structure. The superior court failed to analyze the decision of the district court as to whether its factual determinations met the legal standard. Instead it substituted its own review of the facts in its ruling. This is a violation of RALJ 9.1(a) and (b) and is sufficient to overturn the opinion.

The district court held in its September 17, 2015, decision that:

[T]he Defendant has committed the infraction as alleged in Count One as it pertains to the sale of wine and spirits. The court also finds the Defendant committed the infraction as alleged in Count Two by operating a food establishment with indoor seating without a valid permit and manufacturing cereal on the premises."²¹

²⁰ As to #4, the County did not concede that the district court's decision that the nonconforming use was in error, but that because the violation was cited in the alternative, the RALJ court only needed to look to the Urban Zone to find the violation committed.

²¹ District Court Exhibit #21, p. 8

Count One alleged a violation of County Ordinance 162 § 8(H), the zoning code with alternatives means appropriate to each of the two zones that OSF occupied, aquaculture and restricted residential. Count Two alleged a violation of the Pacific County Shoreline Master Program with alternate means appropriate to each of the two environments that OSF occupied, conservancy and urban.

The superior court addressed the SMP alone in paragraphs 7, 8, 9, 10, 11, 12, and 18. It addressed the zoning code alone in paragraphs 14, 15, 16, 17, 19, 20, and 21. It addressed both simultaneously in paragraphs 13, 22, 23, 24, and 25. The following discussion will take those three groups in that order, after briefly addressing irrelevant paragraphs 12, 15, 19, and 20.

The RALJ court failed to correctly align charges, factual allegations, and appropriate code in several places:

| Charge | Appropriate Code |
|------------------------|-----------------------|
| Selling wine | Ordinance 162, zoning |
| Operating a restaurant | SMP |

Count 1 was for an unlawful commercial activity, selling wine, in violation of the zoning code. Count 2 was for unlawfully operating a restaurant in violation of the SMP.

Paragraph 12 states that “There is no prohibition in the SMP for the sale of beer and wine in commercial activities.” The SMP has no bearing on the allegation of selling wine. Mr. Driscoll was not charged with violating the SMP by selling wine but for having a restaurant. The district court found him to have violated the SMP by operating a food establishment with indoor seating without a valid permit. The RALJ court misapplied the SMP to the allegation of commercial activity, selling beer, when the commercial activity is prohibited by the zoning code. Whether the SMP allows the sale of beer is irrelevant, as is this paragraph of the ruling.

Paragraph 15 states “Ordinance Number 162, page 67(D)(4) specifically allows for ‘retail and wholesale seafood sales’ in an aquaculture sub district as an accessory use.” Ordinance 162 has no bearing on the allegation of seafood sales. Mr. Driscoll was not tried for violating the zoning code by selling food. The district court found him to have violated the zoning code by selling wine. Paragraph 15 is irrelevant.

Paragraph 19 states that “The County violation dated June 18, 2014, found the defendant in violation of Section 8 of Pacific County Ordinance Number 162, Aquaculture District.” The county amended the notice of violation in October 2014. Mr. Driscoll’s hearing

concerned the amended notice of infraction, not the June citation. The 2014 citation is irrelevant and thus so is this paragraph.

Paragraph 20 states that “Retail and wholesale seafood sales are accessory uses under § 8(D)(4) in an aquaculture subdistrict.” Again, an aquaculture subdistrict is a zone enforced by Ordinance 162. Mr. Driscoll’s seafood sales were in violation of the SMP, not the zoning ordinance. Paragraph 20 is irrelevant.

Perhaps the district court meant to make these findings relevant by holding in paragraph 13 that “The Court must look at all zoning regulations in an effort to give effect to the interest and purpose of the regulations.” The superior court cites no legal source for this statement. One does not look to the SMP to determine whether the zoning code was violated, nor vice versa.

SMP

Paragraph 7 quotes the SMP as to the urban environment:

a. Prioritizing the preservation or [expansion] of existing high-intensity commercial or industrial waterfront centers over the creation of new high intensity or commercial sites.

Paragraphs 8 through 11 and then 18 follow the logical sequence that: 8) OSF is an existing high intensity commercial center; 9) use of it in the urban environment as a high intensity commercial center is consistent with the SMP; 10) the SMP

prioritizes the expansion of existing high intensity commercial centers in urban environments; 11) Mr. Driscoll's use of OSF for high intensity commercial activities is a preferred option of the SMP; and 18) The SMP regulates OSF as nonconforming uses at the time of its adoption in 1976. Without stating the conclusion, the inference is that the superior court meant to say that the transition from the sales of seafood to the ability to run a restaurant is a prioritized expansion of its non-conforming use. First, #10 is incomplete and thus wrong. The SMP prioritizes expansion of existing of existing high-intensity centers "over the creation of new high intensity industrial or commercial sites." Second, one cannot tell whether the superior court is using the words "expansion" and "intensification" in the same manner as they have developed into terms of art in the legal discussion of non-conforming uses. If so, then an expanded use is clearly disfavored while an intensification is allowed.

Zoning

The superior court begins its discussion of the zoning code by quoting Ordinance 162 § 8(A), the intent for the aquaculture district. It does not cite the parallel intent section, 12(A), for the other zone in which Mr. Driscoll was found to have violated the zoning code, restricted residential. Nowhere does the superior court discuss the

restricted residential zone's intent "to promote and protect the single-family character of selected developed or developing neighborhoods."

Again, the superior court cites the zoning code's discussion of water dependent accessory uses in the aquaculture zone in Paragraph 16 but fails to recognize or cite anything about restricted residential uses.

In paragraph 17, the superior court notes that the sale of beer and wine is nowhere specifically prohibited in Ordinance 162. It does not logically follow that the county cannot forbid the sale of beer and wine in any particular zone without such a specific prohibition.

In paragraph 21, the superior court addresses prohibited uses in the aquaculture district, but not the restricted residential district. In any event, this paragraph does not figure into the rest of the court's reasoning.

SMP and Zoning

The court ties these findings together in holding that:

13. One must look at all the zoning regulations in an effort to give effect to the interest and purpose of the regulations. . . .

22. Based on the above it is clearly the intent of Ordinance 162 and the SMP to encourage the continued commercial use of existing properties such as the historic Oysterville Cannery, including the intensification of uses so long as consistent with other environmental and health organizations and not detrimental to the aquatic environments.

23. Use of the Oysterville Sea Farms Cannery for a seafood market, deli, and/or the sale of beer and wine with or without indoor seating does not violate the spirit, intent, or specific prohibitions of Pacific County Zoning regulations under either the SMP or Ordinance Number 162. The intensification of commercial uses at the Oysterville Sea Farm Cannery is encouraged and there is no evidence, since all activities occur on the existing cannery structure, that harm will befall the environment by such intensification. The impact on the environment from operation of a deli or seafood market is nil whether one, or five, or fifty people patronize the business since the only use made of the aquatic environment is to view it from the protected perch upon the cannery.

24. The Pacific County Zoning regulations implicitly recognize the importance of pre-existing commercial uses of historic properties and that continued maintenance and existence of these historic properties and uses depends upon commercial viability, which includes adapting, or intensifying usage to meet changing times.

25. In short, the decision of the District Court limiting commercial uses of the Oysterville Cannery in such a detailed manner is inconsistent with the intent and language of Ordinance Number 162 and the SMP.²²

The parties agree that OSF has grandfathered nonconforming uses. The parties disagree as to the scope of which uses are in fact grandfathered and whether they are permitted intensifications or prohibited expansions. The superior court failed to discuss or analyze whether the district court facts were legally sufficient to uphold the conclusions of the district court. Instead, it engaged in a de novo review of the facts, and holds that the spirit and intent of

²² The superior court's analysis is hobbled by its misunderstanding of which charging document was used in the trial, so it neglects to discuss the ban on commercial activity including the sale of alcohol in the restricted residential district.

Ordinance 162 and the SMP encourage the intensification of OSF's nonconforming uses. Following the superior court's logic, Mr. Driscoll's next step could be to place a Red Lobster in historic Oysterville.²³ The superior court's analysis is itself legally insufficient.

This Court should hold that the RALJ court exceeded its authority and overturn its decisions.

2. The district court erred when it determined the county was collaterally estopped from enforcing land use regulations.

The district court concluded that the county was estopped to prevent Mr. Driscoll from operating:

a 'small deli' which sells seafood as its primary product with incidental non-seafood products also available for sale. It also seems clear that the Defendant can operate an outdoor seating area limited to the back deck where patrons may consume the product purchased on site including cereal, fruit, and fish because Pacific County is estopped to deny him that ability. (While there is no evidence of the exact cost of the reliance by Defendant it seems substantial.)²⁴

The court cited the following evidence in support of this conclusion:²⁵

²³ And despite his family's long history in Oysterville, nothing prevents Mr. Driscoll from selling the property with its bundled land use rights.

²⁴ District Court Exhibit #21, p. 7 – 8.

²⁵ District Court Exhibit #21, p. 4 – 7

- A January 2, 1997 communication from Tim Crose when he was Senior Environmental Health Specialist.
- An April 23, 2007, communication from Megan McNelly, Environmental Health Specialist.
- A May 27, 2009, food establishment inspection report.
- June 3, 2009, emails between Ms. McNelly environmental health specialist and Monte Givens, Pacific County building inspector/plans examiner.
- A June 18, 2009, communication from Ms. McNelly.
- A June 14, 2011, communication to Mr. Driscoll telling him that he was not allowed to sell non-seafood related items and outdoor seating related to those items.

From these pieces of evidence, the district court concluded that

Ms. McNelly was in constant contact with the planning department regarding the plans of the Defendant. Clearly she took it upon herself in May of 2009 to check with the building and planning department regarding the picnic tables on the deck. It was not until June that objection was made regarding their existence. It is problematic that in June of 2009 Monte Givens was informed of Mr. Driscoll's intention to put in a "small deli in his retail space." In his response he clearly indicates that the frying of foods, changing the structure to a restaurant with indoor seating, or expanding the structure would trigger a building permit." However when Ms. McNelly contacted Mr. Driscoll on June 18, 2009 the limitation regarding the "small deli" was not mentioned. It needs to be noted that in 2007 it was very clear that Mr. Driscoll was headed toward establishing a commercial kitchen and it seemed at least from the position of the Environmental

Health Department of Pacific County that this was possible. There is of course no indication in the 2007 letter that Ms. McNelly was going to take it upon herself to check with the planning department regarding Mr. Driscoll's plans. This did not occur until 2009. Perhaps more importantly there is no evidence to indicate whether a commercial kitchen would be needed for a "small deli". Finally there is no evidence as to whether or not the Building Department (Givens, Stevens, or Desimone) knew of the restaurant plans and remained silent as the Defendant spent more and more on his developments. Silence can in some circumstances support estoppel but those circumstances have not been proved by the Defendant.²⁶ [emphasis in original]

The central problem of this analysis, and perhaps the reason we are in court in the first place, is that the district court and Mr. Driscoll failed to appreciate that the health department, the building department, and the planning department are separate departments.²⁷ Each is tasked with knowing and applying totally different sets of laws, rules, ordinances, and codes. Just because a health inspector approves a restaurant does not mean that the building is up to code nor that the place is zoned to be a restaurant. Getting a liquor license, having the building up to code, and getting a kitchen certified from the health department does not imply that one need not comply with the zoning and SMP ordinances. Also, the district court assumes incorrectly that each department routinely discusses its work with other departments, let alone is compelled to.

²⁶ District Court Exhibit #21, p 7

²⁷ And compartments

What is assumed in a county of 20,000 would be unthinkable in a county of 2.12 million.

Even if the above were not true and the regulatory agency of the county were monolithic, the county is not estopped to enforce its code by actions of its employees. The application of equitable estoppel against state or local governments is disfavored. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993). Consequently, where a party asserts equitable estoppel against the government, it must meet two additional requirements: (1) equitable estoppel must be necessary to prevent a manifest injustice, and (2) the exercise of governmental functions must not be impaired as a result. *Kramarevcky*, 122 Wash.2d at 743. Governmental functions would be impaired here by a finding of equitable estoppel.

[A] municipality is not precluded from enforcing zoning regulations if its officers have issued building permits allowing construction contrary to such regulations, have given general approval to violations of the regulations, or have remained inactive in the face of such violations. [seven citations omitted]; *V. F. Zahodiakin Eng'r Corp. v. Zoning Bd. of Adjustment of City of Summit*, 8 N.J. 386, 86 A.2d 127 (1952). The rule is best stated in the *Zahodiakin* case as follows at page 132:

The want of fundamental power cannot be indirectly supplied by the application of the doctrine of estoppel *In pais*. The elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot

thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.

City of Mercer Island v. Steinmann, 9 Wn.App. 479, 483, 513 P.2d 80 (1973)

Cited with approval by *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994)²⁸

This Court should follow clearly established precedent and hold that collateral estoppel does not apply in this circumstance.

3. The district court erred by allowing Mr. Driscoll to raise a land use issue in an infraction hearing rather than a LUPA petition.

There are two Washington State appellate cases that touch upon this issue, but neither confront it directly.

In *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), Tacoma was attempting to compel Mr. Post to bring his numerous buildings into conformance with the city's building code. Tacoma's enforcement ordinance requires the city to notify the property owner by letter of the violations and the required mitigation. The owner may seek administrative review of the initial notice, but if

²⁸ "[A] municipality is not precluded from enforcing zoning regulations if its officers have failed to properly enforce zoning regulations. That court explained that the elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance; the public has an interest in zoning that cannot be destroyed."

he or she does not respond in 30 days or if the violations continue, the owner is subject to civil penalties. The first mandatory fine was \$125 per property and the next three were \$250 each. The owner may seek administrative review of the first fine, but there was no provision for review of the subsequent fines. Should the owner still not respond, negotiate, or comply after four such notices and fines, the city building and land use office has discretion to assess non-mandatory fines for each calendar day of violation until the violation is corrected. The city code provided no procedure for administrative review of any fine but the very first.

Id. at 304 – 305.

Tacoma cited Mr. Post for numerous violations. He failed to comply on 17 properties. With one exception that was dismissed, Mr. Post failed to meet the 30-day deadlines to appeal the citations. Five years after the first citation, Mr. Post claimed to have paid over \$140,000 to Tacoma, with some fines still unpaid and referred to a collection agency. *Id.* at 305 – 307.

Mr. Post then asked the superior court to declare the Tacoma code, the procedure, and the fines unconstitutional and to enjoin further enforcement against him. Tacoma counterclaimed for \$411,111 in unpaid penalties. The superior court granted summary

judgment to Tacoma holding: that Mr. Post failed to exhaust his administrative remedies under LUPA; that the penalties did not exceed the city's authority; and that the fines were not unconstitutionally excessive, did not constitute double jeopardy, did not violate due process rights, and were not a violation of his § 1983 civil rights. *Id.* at 307.

The facts of *Post v. City of Tacoma* are different from those presented to this court. The thrust of Mr. Post's claims are that Tacoma's procedures are unconstitutional because they do not afford him due process. Tacoma responded that, though subsequent notices of continuing violations and their fines cannot be appealed, Mr. Post could have filed a LUPA petition and thus there are sufficient procedural safeguards. Pacific County is not asserting that Mr. Driscoll should have appealed the infraction notice and fine via LUPA. The county does maintain that Mr. Driscoll's defense of grandfathering should have been presented as a LUPA petition when county planning first decided and told Mr. Driscoll that it was denying him the ability to expand his nonconforming use to include a restaurant and the sale of alcohol. That was when the land use decision was made.

The court in *Post v. City of Tacoma* began its inquiry with whether LUPA applied to Tacoma's notices of violations and assessments of penalties. They held that it did not, citing the definition of "land use decision" in RCW 36.70C.020(2):

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

The court analyzed Tacoma's regulatory scheme and determined that it was a "local jurisdiction . . . required by law to enforce the ordinances in a court of limited jurisdiction."

Tacoma's MBSC provides for a hearing to appeal only the first notice of violation and first civil penalty. However, Tacoma provides no process for hearing and determining subsequent infractions. Where the city has no such process, it cannot be said that it has "its own system," in the sense intended by the legislature in RCW 7.80.010(5). Such interpretation would allow Tacoma to impose unlimited punishment on civil defendants, a result that the legislature did not authorize. Absent its own complete system, Tacoma is required by chapter 7.80 RCW to follow the legislature's default system and enforce its infractions in courts of limited jurisdiction. LUPA does not apply when a local jurisdiction is required by law to enforce the ordinance at issue in a court of limited jurisdiction. Former RCW 36.70C.020(1)(c).
Id. at 312

Thus, a LUPA petition could not originate in the court of limited jurisdiction. Tacoma's argument failed. But this is not what Pacific County argues.

Mr. Driscoll should have filed a LUPA petition when he was given any of the final opinions that he could not have a restaurant or all the additional non-conforming uses that he claims are grandfathered. The 2012 letter²⁹ is such a final opinion. Instead, Mr. Driscoll ignored the ruling of the county about his nonconforming uses and, despite efforts by the county to work with him, went ahead

²⁹ Supplemental Clerk's Papers, p. 295.

with the non-conforming uses. Pacific County cited him. The district court came to a decision. The way to appeal a district court decision is not via LUPA but via RALJ because land use decisions can not and should not be made by a district court in an infraction proceeding. This is a plain reading of the LUPA act and the RALJ rules.³⁰ It makes sense of the legislature's desire to keep judicial authority for land use decisions solely in the superior court and district court decisions appealable solely under RALJ. For a district court to allow a defense of grandfathering, making a land use decision, is similar to a district court's allowing a defendant accused of a DWLS 1 to collaterally attack the finding of the Department of Licensing that the defendant was a habitual traffic offender.

[T]he charges against Montgomery here should not have been dismissed. Montgomery failed to avail himself of the opportunity to appeal the habitual traffic offender status following the DOL determination. Under the ruling of *Upward*,³¹ Montgomery may not collaterally attack prior convictions in the subsequent criminal proceeding for driving while a habitual traffic offender, and the prosecution need not prove the validity of the underlying convictions in the subsequent proceeding.

City of Bellevue v. Montgomery, 49 Wn.App. 479, 481, 743 P.2d 1257 (1987)

³⁰ Though this sentence construction is redundant, i.e.: 'Land Use Petition Act' Act, to remove the redundancy is nonidiomatic.

³¹ *Upward v. Department of Licensing*, 38 Wn.App. 747, 689 P.2d 415 (1984)

Another appellate court reviewed the interaction between municipal code, enforcement and legal process of land use issues with dissimilar facts and arrived at a conclusion that Mr. Driscoll would embrace in *Johnson v. City of Seattle*, 184 Wn.App. 184, 335 P.3d 1027 (2014). Seattle cited Tyko Johnson for having too many vehicles on his Seattle lot. At the hearing he attempted to raise the defense that his use was grandfathered. The Seattle code prevented the examiner from considering a grandfathered use defense.

As to the nonconforming use inquiry, however, Johnson could show only that he established his use with the Department.³² Johnson was not provided a stay for an opportunity to apply to the Department. He was not told that his citation would be vacated if he subsequently made the proper factual showing to the Department. The examiner affirmed Johnson's first citation.

Johnson was cited twice more with the same result. He then applied to the Department to establish his legal nonconforming use for the record. After 112 days, his application was approved. By virtue of Johnson's pending LUPA appeal, his citations had not yet become final. But, the City did not rescind his citations even though Johnson demonstrated that he did not violate the ordinance for which he was cited.

...
Once cited, Johnson had no opportunity to present his defense and was provided no procedural safeguards. Johnson, like Post, could not present his defense to the hearing examiner. . . . He was not given a stay to apply to the Department. And, the availability of a LUPA appeal provided Johnson no relief.

Addressing the third *Mathews*³³ factor, the City alleges no administrative burden that would result from providing additional safeguards to ensure that landowners avoid penalties for their legal property uses. Processing the application would be the

³² Department of Planning and Development

³³ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)

same. Staying the citation hearing pending application review would likely lessen the burden from hearings, potentially avoiding the hearings altogether. The City could also allow the hearing examiner to take the facts and make the establishment determination. Even this does not suggest any added burden. *Id* at 21 - 22.

Mr. Driscoll did not request a stay from the district court judge to establish his nonconforming use with the county. He already knew what the decision was and could have understood that he was long past the deadline for filing a LUPA petition.³⁴ Had Mr. Driscoll asked for a stay, the county likely would have joined in the motion, knowing the status as well.

Neither Mr. Driscoll nor Mr. Johnson were told that their citations would be vacated if they made the proper factual showing to the respective county and city offices. In fact, it would have done Mr. Johnson no good because even with the Department's approval the city did not rescind his citations. Not only is this just wrong, it would be a violation of RPC 3.8 if the proceeding were criminal rather than civil. It would have done Mr. Driscoll no good because the county already found that his nonconforming use was an expansion, not an intensification, and he did not appeal that determination.

³⁴ RCW 36.70C.040(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

The holdings in both *Post v. City of Tacoma* and *Johnson v. City of Seattle* hinge on the lack of procedural due process available to the respondents. In both cases, the respondents had no real right of review of the citations and no other forum in which to address the non-conforming uses other than the violation hearing. In the case at hand, Mr. Driscoll was afforded sufficient procedural due process as to the original land use decision by the county that his expansion of the non-conforming use was unlawful. He could have filed a LUPA petition. Land use decisions reside solely with the superior court. Also, Mr. Driscoll had sufficient procedural due process concerning his infraction hearing. That hearing had all the protections of a garden variety RALJ appeal. There is no unconstitutional process here that shocks the conscience.

District courts should not be the forum in which land use decisions are made. The legislature stated firmly that the superior court has sole jurisdiction and created a workable, speedy means to resolve disagreements.

This court should rule that this district court was not the proper forum for resolution of the scope of permitted grandfathered uses.

Conclusion

Pacific County asks this Court to hold that:

1. The RALJ court exceeded the proper scope of its authority by making a de novo review of the facts;
2. Collateral estoppel does not apply in this circumstance and that Pacific County is entitled to enforce its own code; and
3. Superior Court, not district court, is the proper forum for this determination of permitted grandfathered uses.

This Court should remand the case to the district court for entry of findings consistent with this opinion.

RESPECTFULLY submitted this 6th day of April, 2017.



Eric Weston, #21357
Pacific County Chief Deputy Prosecutor
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington that on the date signed below, I caused the foregoing document to be sent via electronic transmission to be delivered to the Court for filing, and a true copy sent for delivery via United States Postal Service first-class mail upon the attorney for the respondent:

Ben D. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

SIGNED this 6th day of April, 2017, in South Bend, Washington.

Brandi Huber

PACIFIC COUNTY PROSECUTOR
April 06, 2017 - 3:51 PM
Transmittal Letter

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Court of Appeals Case Number: 49467-1

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