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No. 50144-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DUNGENESS HEIGHTS HOMEOWNERS
a nonprofit corporation,
Appellant,

v.

RADIO PACIFIC, INC., SHIRLEY J. TJEMSLAND,
and CLALLAM COUNTY,
Respondents.

SUPPLEMENTAL BRIEF OF APPELLANT

Gerald B. Steel WSBA # 31084
Gerald B. Steel, PE
Attorneys for Appellant

7303 Young Rd. NW
Olympia, WA 98502
(360) 867-1166
(360) 867-1166 FAX
geraldsteel@yahoo.com

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I. INTRODUCTION

Respondents Shirley Tjemsland and Radio Pacific, Inc. (collectively "RPI") seek a building permit ("Building Permit") for a radio/cell tower and accessories proposed in the high-end Dungeness Heights rural residential neighborhood near Sequim Washington. The zoning code allows a maximum tower height of 100-feet in the subject Rural Neighborhood Conservation ("NC") zone to protect "scenic resources, property rights, and rural characteristics of Clallam County" pursuant to CCC 33.49.100(2)(a).[1] RPI wants a 150-foot tower. Respondent Clallam County through its Hearing Examiner ("Examiner") approved Conditional Use and Variance Permits (collectively "Zoning Permits"). Appellant Dungeness Heights Homeowners ("DHH") opposes the Tower Permits.

DHH timely-challenged the Zoning Permits to superior court but that court entered a February 24, 2017 Decision affirming the Examiner. (CPB56-62[2]) On March 27, 2017, DHH timely-filed a Notice of Appeal to this Court regarding the Zoning Permits in the instant case. (CPB54-62; CP5-24[3]) At RPI's request, the building official issued building permit BPT2016-00770 for the radio/cell tower and accessories. DHH timely-filed an administrative appeal to the County Board of Appeals ("Board").

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[1] "CCC" means Clallam County Code. Most cited CCC sections are provided in Appendix B to the Brief of Appellant. CCC 33.49.100(2)(a) is the first specific goal of the Wireless Communications Facilities Chapter 33.49 CCC:

> Manage wireless telecommunications facilities siting consistent with the Clallam County Comprehensive Plan while protecting the scenic resources, property rights, and rural characteristics of Clallam County.

[2] CPB56-62 refers to Clerk's Papers at 56 to 62 in the Building Permit challenge. This is a partial copy (without the Memorandum Opinion) of the superior court decision on the Zoning Permits.

[3] CP5-24 refers to the Clerk's Papers at 5-24 in the Zoning Permit challenge. This is a full copy of the Zoning Permit Notice of Appeal.

(CPB36-37; 81:20-21) DHH requested that the Board modify the Building Official approval of BPT2016-00770 to reduce the tower height by 4 feet. (CPB36) DHH also told the Board that DHH was exhausting administrative remedies to be able to challenge the validity of the Building Permit because the Zoning Permits are not valid. (CPB37) The Board land use decision modifies the tower height as DHH requested (CPB78-83) and notes that reversal of the Zoning Permits means "the cell tower may not be constructed (CPB79:11-14). DHH timely-challenged the Board land use decision to superior court on the basis that the Building Permit will be invalid if the Zoning Permits are not valid. (CPB70-83, and particularly 75; *See* CPB24).

The superior court got agreement from the parties that the fate of the Building Permit would follow the fate of the Zoning Permits:

> THE COURT: does everyone agree with the general concept that if the Court of Appeals reverses the [Zoning Permits] case that's currently on appeal that the [Building] permit should also be, I guess, reversed, for lack of a better word, and that the converse is also true . . .
> MR. QUINN [for RPI]: Your Honor, as my Co-respondent [Mr. Alvarez] said earlier, if the CUP and variance are declared invalid, then the building permit would be void ab initio.
> MR. ALVAREZ [for the County]: So I think you're agreeing with your Honor.
> MR. QUINN: Yes.

(RPB41:7-20[4])

DHH argued for a stay of Building Permit proceedings in superior court for judicial efficiency until appellate court review of the Zoning Permits is complete. (CPB17:11-14) Despite the agreement between the superior court and the parties, the parties were unable to agree to a stipulation to that

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[4] RPB41:7-20 refers to the Verbatim Report of Proceedings of the trial court June 2, 2017, hearing filed in the Court of Appeals, Div. II, on October 13, 2017, at page 41, lines 7 to 20.

effect and the superior court entered an order dismissing the Building Permit Land Use Petition and awarding statutory attorney fees to Respondents. (CPB7-12) DHH timely-filed and served a Notice of Appeal to this Court challenging the Building Permit on July 13, 2017, in Case No. 50880-0-II. On August 31, 2017, Commissioner Schmidt consolidated the cases under Case No. 50144-9-II. On October 23, 2017, Commissioner Schmidt directed that the briefs regarding the Building Permit challenge be labeled "Supplemental."

If this Court finds the Conditional Use Permit invalid, it should find the Building Permit void ab initio and should give DHH its requested relief with a remand to the superior court to implement this Court's Order that all construction done in reliance on Building Permit BPT2016-00770 shall be removed from the parcel before any other Clallam County Department of Community Development permits can be considered, approved, or finalized.

II. ASSIGNMENTS OF ERROR

A. Errors Of The Board's Decision At CPB78-83

No. 1. Error under (b)[5] and (d) in approving BPT2016-00770 unconditionally regarding the Zoning Permits that were before the Court of Appeals when the Board found that the Zoning Permits could "be reversed, meaning the cell tower may not be constructed and installed at the Tjemsland parcel." (CPB79:3-16.)

[5] Reference to (b), and (d) are references to RCW 36.70C.130(1)(b), and -(d) respectively, unless the context indicates otherwise.

No. 2. Error under (b) and (d) in finding at CPB79 that the challenge to the Zoning Permits at the Court of Appeals was entirely distinct from the appeal before the Board. (*Id.*)

No. 3. Error under (b) and (d) at CPB78 in stating that the Board Order was "Dismissing the Appeal of Appellant" when the appeal was actually granted regarding the only issue addressed.

No. 4. Error under (b) and (d) in failing to find BPT2016-00770 invalid in consideration of the fourth allegation ("Issue 4") at CPB37.

No. 5. Error under (b) and (d) at CPB81 in finding that the cell tower plan did not "need to be amended or revised."

No. 6. Error under (b) at CPB81:14-15 in stating the IBC is the only building code applicable to the RPI proposal when the Board correctly recognizes at CPB81:20-21 that portions of the County Code in Title 21 CCC are also applicable.

No. 7. Error under (b) and (d) at CPB83:1-3 in that the Board Order did not resolve all of the issues raised in the February 24, 2017 appeal document as that document raised "Issue 4" addressed in Error No. 4. above.

No. 8. Error under (b) and (d) at CPB82:7-12 in concluding that BPT2016-00770 was lawfully issued in accordance with IBC Sec. 105.3.1.

B. <u>Errors Of The Superior Court's Decisions At CPB7-12</u>

No. 1. Error at CPB9:14-23 in dismissing the Building Permit land use petition.

No. 2. Error at CPB9:23-24 and CPB10-12 in entering Judgment for Respondents and in awarding costs as statutory attorney's fees to Respondents.

No. 3. Error at CPB8:18-21 in concluding that DHH wrongly bases its petition on "hypothetical facts."

No. 4. Error at CPB9:4-7 in finding that the land use petition was not "legitimate."

No. 5. Conclusion at CPB9:14-23 that the superior court does not have "subject matter jurisdiction" over a LUPA appeal.

No. 6. Conclusion at CPB9:14-23 that the land use petition failed to "state a claim upon which relief can be granted.

No. 7. Error in not staying proceedings until appellate review on the Zoning Permits was final to avoid having to dismiss the case.

III. MAJOR ISSUE BEFORE THE COURT

No. 1. Should Building Permit BPT2016-00770 be found invalid (void ab initio) when the Conditional Use Permit is found not valid as approved? (Board Error Nos. 1, 2, 4, 7, and 8; Superior Court Error Nos. 1-7)

IV. STATEMENT OF THE CASE

DHH incorporates by reference the "Statement of the Case" in the Brief of Appellant at 8-10 and the "Reply to RPI Counter-Statement of the Case" in the Reply Brief of Appellant at 1-7. Relying on the Zoning Permits, RPI applied for and the building official issued building permit BPT2016-00770 for the radio/cell tower and accessories. Accessories included an associated equipment shelter and equipment including a radio Broadcast

antenna, fence, gate, meter bank, transformer, equipment pads, ice bridge, AC Units, and cabinets.

A. Proceedings Before The County Board Of Appeals

DHH timely-filed an administrative appeal of BPT2016-00770 to the County Board of Appeals ("Board"). (CPB36-37; 81:20-21) DHH requested that the Board modify the Building Official approval of BPT2016-00770 to reduce the tower height by 4 feet. (CPB36) DHH also told the Board that DHH was exhausting administrative remedies to be able to challenge the validity of the Building Permit because DHH asserted that the Zoning Permits are not valid. (CPB37) The Board issued its "Order Modifying BPT2016-00770 and Resolving the Appeal" ("Building Permit") on March 22, 2017. This final land use decision lowered the tower height by 4 feet as DHH requested. (CPB82:7-24) It also makes a finding that reversal of the Hearing Examiner on the Zoning Permits means "the cell tower may not be constructed and installed at the Tjemsland parcel." (CPB79:11-14)

B. Proceedings Before The Superior Court

1. The Parties Agree Regarding The Outcome

Having prevailed before the Board in lowering the height of the tower by 4 feet, DHH timely-filed a Building Permit Land Use Petition in superior court challenging the validity of the Building Permit because DHH asserted that the Zoning Permits will be found not valid. (CPB70-83, and CPB75 in particular; *See* CPB24.) DHH filed a Record and Scheduling Motion. (CPB110-12) The Respondent's filed four motions to dismiss. DHH filed its Opposition to Four Motions to Dismiss. (CPB13-69) The Motions were heard at a June 2, 2017 Initial Hearing under the Land Use Petition Act

(Chapter 36.70C RCW - "LUPA"). The Verbatim Report of Proceedings ("RPB") for the June 2, 2017 Hearing was filed with this Court on October 13, 2017.

At the Initial Hearing, the superior court got agreement from the parties that the fate of the Building Permit would follow the fate of the Zoning Permits:

> THE COURT: does everyone agree with the general concept that if the Court of Appeals reverses the [Zoning Permits] case that's currently on appeal that the [Building] permit should also be, I guess, reversed, for lack of a better word, and that the converse is also true . . .
> MR. QUINN [for RPI]: Your Honor, as my Co-respondent [Mr. Alvarez] said earlier, if the CUP and variance are declared invalid, then the building permit would be void ab initio.
> MR. ALVAREZ [for the County]: So I think you're agreeing with your Honor.
> MR. QUINN: Yes.

(RPB41:7-20)

2. Request For Stay Of Building Permit Proceedings

At the June 2, 2017 Initial Hearing, DHH argued for a stay of proceedings:

> DHH proposes that this Court issue a record and scheduling . . . order that will resolve the legality of the challenged building permit in the shortest time possible. This shortest time possible provides good cause to stay the proceedings in the building permit case, this instant case, until the appellate review of the zoning permits is final.

(RPB7:8-14) The DHH Record and Scheduling Motion states:

> Building Permit BPT2016-00770 which is being challenged in the instant case can remain valid only if the approval of the said Variance and the said Conditional Use Permit remains valid in final appellate court review. This Building Permit Approval will not be consistent with the Clallam County zoning code if either the said Variance or the said Conditional Use Permit approvals are reversed in final appellate court review. The only remaining legal issue in the instant challenge to Building Permit BPT2016-00770 is that this permit should be found invalid if either the said Variance or the said Conditional Use Permit are found invalid. For judicial efficiency, this Court should stay further proceedings Before this Court on the said Building Permit challenge until appellate court review of the said Variance and said Conditional Use Permit is complete.

(CPB111) DHH proposed that any party could request a motion hearing (perhaps a continuation of the Initial Hearing or a Hearing on the Merits) immediately after appellate review was final on the Zoning Permits with the agreement that the Court intends to affirm the Building Permit if the Zoning Permits are affirmed and intends to reverse the Building Permit if the Conditional Use Permit ("CUP") is reversed.

> If the said Variance and Conditional Use Permit are both affirmed in final appellate court review, Petitioner concedes that the challenged Building Permit Approval should be found valid. However, as Petitioner expects, if the Variance and/or Conditional Use Permit are not affirmed in final appellate court review, then the Building Permit Approval should be found invalid and should be reversed by this Court. The affirmation or reversal of the Building Permit Approval should be expedited to occur as soon as possible after the completion of appellate court review on the said Variance and Conditional Use Permit Approvals.

(CPB111-12)

3. Respondents Request Dismissal

The Respondents argued for dismissal of the Building Permit Land Use Petition. (CPB92-103) DHH argued that Respondent arguments were without merit. (CPB13-69)

Despite the agreement between the superior court and the parties, the parties were unable to agree to a stipulation to stay the superior court Building Permit proceedings until completion of final appellate review of the Zoning Permits, and the superior court dismissed the Building Permit land use petition (CPB7-9), and awarded statutory attorney fees and costs to Respondents (CPB9:23-24; CPB10-12).

C. Proceedings In The Court Of Appeals

DHH timely-filed and served a Notice of Appeal to this Court regarding the Building Permit on July 13, 2017, in Case No. 50880-0-II. On August 31, 2017, Commissioner Schmidt consolidated the cases under Case No. 50144-9-II. On October 23, 2017, Commissioner Schmidt directed that the briefs regarding the Building Permit challenge be labeled "Supplemental."

D. RPI Has Done Significant Construction At Its Own Risk

RPI, at its own risk, and in reliance on its challenged Building Permit, has done significant construction after the superior court issued its Order on June 23, 2017. In the Board record, DHH states:

> DHH believes that the appellate courts will invalidate the CUP and variance. When this occurs, DHH will ask the court to invalidate BPT2016-00770 and order that the tower be removed if any part of it has been constructed in reliance on this building permit.

(CPB37) RPI was further put on notice at the June 2, 2017 LUPA Initial Hearing:

> MR. STEEL: DHH has informed Respondents that any expenditures or development that they do in reliance on the challenged building permit is done at their own risk. If Radio Pacific does build the tower and later, if the zoning and building permits are found invalid, DHH will request this Court to require the 150-foot tower to be removed.

(RPB8:14-19) At the LUPA Initial Hearing, Mr. Alvarez, counsel for Clallam County states:

> MR. ALVAREZ: Dismissing this LUPA petition leaves everybody with some risk. I think this is important to point out. RPI, Inc. runs the risk of spending money to install the tower, only to later be forced to dismantle it, all or part of it if the Court of Appeals finds the CUP and other variance should not have been granted. I would presume that if the (indiscernible) for the Court of Appeals was favorable to DHH, then DHH would have some basis to obtain the remedy of removing the wireless tower . . .
> And the main thing about this is that under LUPA, the Applicant, once they had the building permit in their hands, is entitled to act on it at their own risk. And in that sense Mr. Steel's letters . . .warning the Applicant not to do anything are valid and they point out the risks.
> . . .
> And the Applicant has the risk that I've described, which is that somehow later it has to be torn down.

(RPB28; 39-40; 46)

E. <u>Relief Requested If Building Permit Void Ab Initio</u>

If this Court finds the Conditional Use Permit invalid, it should find the Building Permit void ab initio and should give DHH its requested relief which is a remand to the superior court to implement this Court's Order that all construction done in reliance on Building Permit BPT2016-00770 shall be removed from the parcel before any other Clallam County Department of Community Development permits can be considered, approved, or finalized.

V. ARGUMENT

A. Standard Of Review

DHH incorporates by reference into this Supplemental Brief of Appellant the "Standard of Review" section in the Brief of Appellant and the "Standard of Review Reply" section in the Reply Brief of Appellant. In addition, DHH cites to the following regarding the standard of review on a motion to dismiss for failure to state a claim upon which relief can be granted:

> A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that we review de novo. A trial court should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts justifying recovery exist. Under this rule, a plaintiff's allegations are presumed to be true, and a court may consider hypothetical facts not part of the formal record. A trial court should grant CR 12(b)(6) motions sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

(*West v. Stahley*, 155 Wn.App. 691, 696, 229 P.3d 943 (2010) (punctuation and citations omitted)) (CPB27)

Whether a superior court has subject matter jurisdiction "is generally a question whether the superior court has authority to decide this type of case." (*Outsource Services Management, LLC v. Nooksack Business Corporation*, 172 Wn.App. 799, 808-09, 292 P.3d 147 (2013))

> subject matter jurisdiction is a particular type of jurisdiction, and it critically turns on the type of controversy. If the type of controversy is within the court's subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

(*Id.* at 809 (punctuation omitted)) (CPB22)

A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. (*Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984))

B. <u>This Court Should Void The Building Permit When It Finds The Conditional Use Permit Is Not Valid As Approved (Board Error Nos. 1-2, 4-5, And 7; Major Issue No. 1)</u>

1. The Conditional Use Permit ("Zoning Permit") Is Shown To Be Invalid In The Brief And Reply Brief Of Appellant

In the Brief of Appellant and Reply Brief of Appellant, DHH presents argument as to why this Court should find the Zoning Permits (conditional use and height variance permits) not valid as approved for the proposed 150-foot RPI radio/cell tower and accessories.

As discussed in the Brief of Appellant at 13, a conditional use permit can be granted only if "The proposed action is consistent with" the zoning code Title 33 CCC - Zoning. The zoning code limits the height of radio/cell towers to 100-feet at the proposed location unless there is a valid height variance. (Brief of Appellant at 22-23)

In the Brief of Appellant at 23-50, DHH challenges that the height variance for the proposed 150-foot radio/cell tower is not valid. Without a valid height variance, the proposed 150-foot radio/cell tower is not consistent with the zoning code height limit of 100-feet.

In the Brief of Appellant at 13-23, DHH challenges that the proposed 150-foot radio/cell tower is not consistent with the zoning code for several reasons including because the height variance is not valid, and therefore that the conditional use permit is not valid.

2. Without A Valid Conditional Use Permit, The Building Permit Is Void Ab Initio Because It Does Not Comply With The Zoning Code

Chapter 19.27 RCW is the State Building Code. It requires all local jurisdictions to use the International Building Code ("IBC"). (RCW 19.27.031 and -(1)(a)) Chapter 21.01 CCC is the Clallam County Building and Construction Code and is applicable to the Board Decision along with the IBC. As **Board Error No. 6** notes CPB81:14-15 misinterprets the law under Standard (b) when it states the IBC is the only applicable building code because Chapter 21.01 CCC is also an applicable building code.

CCC 21.01.015(2) provides that the County use the IBC. RCW 19.27.090 reserves zoning requirements to local jurisdictions. RCW 19.27.095(1) requires a complete building permit application to be considered under the zoning ordinances in effect at the time of application. Section 105.3.1 of the IBC requires the Building Official to reject applications that "do not conform to the requirements of pertinent laws" which would include zoning laws. As **Board Error No. 8** notes CPB82:7-12 misinterprets the law under (b) when it states that the Building Officials initial approval of BPT2016-00770 was lawful with respect to Section 105.3.1 of the IBC. If it was lawful, the Board Modification would not have been necessary.

CCC 21.01.130(1) states, "Construction permits approved pursuant to this chapter shall comply with all other Clallam County codes, ordinances, and regulations."

Therefore, in order for a Building Permit to be valid it must comply with the zoning ordinances in Title 33 CCC - Zoning. The proposed 150-

foot radio/cell tower is in a Preference 3 area. (Brief of Appellant at 8) CCC 33.49.620[6] in the zoning code, requires a valid conditional use permit for proposals in a Preference 3 area. Therefore, if the proposed 150-foot tower does not have a valid conditional use permit, the proposal does not comply with zoning, and the building permit is invalid. An invalid building permit is void ab initio when timely challenged. (*Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 483, 513 P.2d 36, (1973) ("where a building permit is found to be invalid it is void and confers no rights.")) Therefore if this Court finds the Conditional Use Permit is not valid as approved, it should find the Building Permit invalid and void ab initio.

3. Board Errors

The Board Decision errs under Standards (b) and/or (d) because it approves BPT2016-00770 when the Conditional Use Permit is invalid. (**Board Error Nos. 1 and 4**) This issue was raised at the Hearing as Issue 4 at CPB37 but was unresolved except as noted at CPB79:11-14. (**Board Error No. 7**) The Board Decision errs under (b) and/or (d) because the validity of the Building Permit is directly linked to the validity of the Conditional Use Permit. (**Board Error No. 2**) The Board Decision errs under (b) and/or (d) because the body of the Decision shows the Board actually Granted the DHH Appeal but the phrasing at CPB78 makes it appear that the Appeal was Dismissed without being granted. (**Board Error No. 3**) This error is relevant because the body of the Board Decision shows that DHH prevailed on the only issue resolved by the Board Decision.

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[6] CCC 33.49.620 is in Appendix B to the Brief of Appellant.

The Board Decision errs under (b) and/or (d) in finding at CPB81 that the building plan "need not be amended." (**Board Error No. 5**) It is the Building Plan that shows the tower height is 150-feet above finished grade and shows finished grade at 147.15-feet above sea level. (CPB80:15-16; 80:7-9) With the modification made by the Board Decision, the tower height will only be allowed to be 146.37-feet above the 147.15-foot grade. (CPB81:7-9) The modified heights are different from the heights expressed on the plans and the plans should have been amended to cure this inconsistency. **Board Error Nos. 6 and 8** are addressed *supra* at 13.

This Court should find the Building Permit void ab initio when this Court finds the Conditional Use Permit not valid as approved.

C. DHH Seeks Clarification As to Whether Dismissal Of A Land Use Petition Or A Stay Of Proceedings Are Preferred When A Land Use Petition Will Be Resolved By A Issue Of Law Being Decided By A Higher Court

Before the superior court in the instant case, everyone knew that the 150-foot Tower Building Permit Land Use Petition would be resolved by an Appellate Court ruling in a case already before the Court of Appeals on the 150-foot Tower Zoning Permits Land Use Petition. It was recognized by the court and the parties that the fate of the Building Permit challenge would be determined by the fate of the Zoning Permits challenge. (*Supra* at 7)

DHH argued that for judicial efficiency and to shorten time to a final decision on the Building Permit, the superior court should stay the Building Permit Land Use Petition proceedings until the Appellate Review of Zoning Permits was final with an agreement that if the Zoning Permits were found valid, the Building Permit would also be valid and that the converse is also

true. (*Supra* at 7-8) The Respondents argued for dismissal knowing that the Building Permit case would be taken to the Court of Appeals and consolidated with the Zoning Permits case. (CPB25:10-22; *supra* at 8)

The superior court sought guidance from the Appellate Courts. He said he couldn't "believe this was unusual" and that "it would seem to me that this issue must just come up again and again." (RPB42:18 to 43:13) DHH responded that cases with the words "LUPA" and "stay" were researched and the two most relevant cases were reported. (RPB43:3-5; CPB26:13-26) No case provided useful guidance and so DHH requests that this Court provide some guidance based on this case.

1. Did The Superior Court Err When The Building Permit Land Use Petition Was Dismissed?

The superior court order dismissing the Building Permit Land Use Petition is at CPB7-9. The Petition was dismissed on two grounds: failure to state a claim upon which relief can be granted (CR 12(b)(6)) and lack of subject matter jurisdiction (CR 12(b)(1)). A failure to state a claim upon which relief can be granted is reviewed de novo. (*Supra* at 11) A trial court may dismiss on this ground "only if it appears beyond a reasonable doubt that no facts justifying recovery exist" (*Id.*) Motions under CR 12(b)(6) should be granted only in the unusual case in which allegations on the face have some insuperable bar to relief. (*Id.*)

As the trial court describes in his order at CPB8-9, the validity of the building permit will be determined by whether a Higher Court finds the related zoning permits valid or invalid. This determination awaits a decision on a conclusion of law by an Appellate Court. No dispute regarding facts was

identified. There is no insuperable bar to relief in that the zoning permits cannot be said to necessarily be valid.

DHH does not consider a conclusion of law that has not yet been made to be a fact. But if this Court considered the validity or invalidity of the zoning permits to be two possible facts to be sorted out in the future, then these would be hypothetical facts that certainly bear a relationship to the claim that the building permit is invalid. Under this standard, a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts. (*Supra* at 11) DHH urges this Court to find that under the de novo standard of review that the Building Permit Land Use Petition cannot be dismissed for failure to state a claim upon which relief can be granted. This would support the DHH request for a stay of proceedings until final appellate review answers the outstanding conclusion of law.

This Court reviews the question of subject matter jurisdiction de novo. (*Shaw Family LLC v. Advocates For Responsible Development*, 157 Wn.App. 364, 372, 236 P.3d 975 (2010)) Whether a superior court has subject matter jurisdiction "is generally a question whether the superior court has authority to decide this type of case." (*Outsource Services Management, LLC v. Nooksack Business Corporation*, 172 Wn.App. 799, 808-09, 292 P.3d 147 (2013))

> subject matter jurisdiction is a particular type of jurisdiction, and it critically turns on the type of controversy. If the type of controversy is within the court's subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

(*Id.* at 809 (punctuation omitted)) RCW 36.70C.030(1) provides that, "[LUPA] replaces the writ of certiorari for appeal of land use decisions and

shall be the exclusive means of judicial review of land use decisions" with exceptions not herein relevant. Here, the superior court has authority from the Legislature to decide this type of case and so Building Permit Land Use Petitions are the type of controversy within the superior court's subject matter jurisdiction.

In fact, this trial court addressed its subject matter jurisdiction regarding the zoning land use petition for the same 150-foot RPI tower and stated, "The motion to dismiss pursuant to CR 12(b)(1) should be denied, since the court has subject matter jurisdiction, at least in the sense that is has appellate jurisdiction over LUPA cases." (CPB40:27 to 41:3). This Court should find the requirements for collateral estoppel are met.

> The requirements for application of collateral estoppel are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) applying the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Malland v. Dep't of Ret. Sys.*, 103 Wash.2d 484, 489, 694 P.2d 16 (1985).

(*Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn.App. 417, 423, 62 P.3d 912 (2003)) The identical issue is subject matter jurisdiction in a LUPA case challenging the 150-foot RPI tower. The Memorandum Opinion in Clallam County Superior Court Case No. 16-2-00226-1 provided a final judgment on the merits on this issue. (CPB38-42 and particularly CPB40:27 to 41:3) All Respondents in the instant case were Respondents in Case No. 16-2-00226-1 and all brought the subject matter jurisdiction question. Respondents have not suggested there is injustice in precluding them from having a second bite of the apple on the subject matter jurisdiction issue and there is no injustice.

DHH urges this Court to find that under the de novo standard of review that the Building Permit Land Use Petition cannot be dismissed for lack of subject matter jurisdiction. This would support the DHH request for a stay of proceedings until final appellate review answers the outstanding conclusion of law.

DHH is requesting guidance from this Court on the dismissal of its Building Permit Land Use Petition but DHH is not requesting relief that the Building Permit Land Use Petition be returned to the superior court for a stay of proceedings. At this point it is judicially efficient for this Court to decide both the Zoning Permits Land Use Petition and the Building Permit Land Use Petition and provide appropriate relief.

D. <u>DHH Relief Requested</u>

When the superior court decided the instant case, there had been no construction in reliance on the challenged Building Permit. DHH and the County made it clear to RPI that RPI would be acting in bad faith and at its own risk if it began construction on the 9-acre parcel in reliance on the challenged Building Permit. (*Supra* at 9-10) In the DHH Opposition presented at the June 2, 2017 Initial Hearing, DHH further states:

> Any development in reliance on the Variance, CUP or Building Permits is at the developer's risk:
>
> > Development which occurs after the commencement of litigation is at the developer's risk.... Developers, and especially their lenders, generally are unwilling to assume this risk and hence refrain from development until litigation is concluded
>
> (*Kelly v. County of Chelan*, 167 Wn.2d 867, 871, 224 P.3d 769 (2010)) DHH has given notice to the Respondents that any construction or expenses incurred in reliance on their tower permits are not done in good faith and will be at their own risk and that if the variance or CUP are found invalid, DHH will seek removal of all related construction.

(CPB27:2-11)

Courts require removal of construction done in bad faith after litigation has begun as equitable relief. (*Heath v. Uraga*, 106 Wn.App. 506, 524, 24 P.3d 413, (2001) ("[The Respondent] thereby assumed the risk that his house would ultimately be found to be noncompliant and subject to correction or demolition"); *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn.App. 517, 521, 280 P.3d 1133, (2012) ("The judgment ordering the Bunneys to modify their home to comply with the height limitation is affirmed.”))

In the instant case, construction in reliance on Building Permit BPT2016-00770 began after the superior court issued its Order on June 23, 2017. The Building Permit Land Use Petition requests primarily that Building Permit BPT2016-00770 be found invalid when the Appellate Court finds the Conditional Use Permit invalid. (CPB70 and 76) However DHH did request "such other relief as this Court finds just and equitable." (CPB76:17-18)

This Court should find the Building Permit void ab initio when this Court finds the Conditional Use Permit not valid as approved. (*Supra* at 13-14) Because of the bad faith of RPI and because of the many warnings given

to RPI that any construction in reliance on BPT2016-00770 will be at their own risk and that DHH will request removal of such construction if the Building Permit is found invalid, DHH requests the following equitable relief:

1. Equitable Relief Requested

If this Court finds the Conditional Use Permit invalid, it should find the Building Permit void ab initio and should give DHH its requested relief which is a remand to the superior court to implement this Court's Order that all construction done in reliance on Building Permit BPT2016-00770 shall be removed from the parcel before any other Clallam County Department of Community Development permits can be considered, approved, or finalized.

2. Justification for Equitable Relief

DHH requests that construction done in reliance on Building Permit BPT2016-00770 shall be removed from the parcel before any other Clallam County Department of Community Development permits can be considered, approved, or finalized. The reason for this request is that the construction was done in bad faith and at RPI's own risk. But the requirement that this construction be removed before other permits are processed is necessary to ensure that applicants do not use incurred expenses as a means of exerting improper pressure upon the County to grant another application. This is necessary equitable relief.

E. <u>Superior Court Errors</u>

The superior court ("court") Decision at CPB9:14-23 errs under (b) and/or (d) because it wrongly dismisses the Building Permit Land Use Petition. (*Supra* at 16-19 - **court error No. 1**) The court Decision at

CPB9:23-24 and CPB10-12 errs under (b) and/or (d) in awarding costs to Respondents because the Land Use Petition was wrongly dismissed. (**court error No. 2**) The court Decision at CPB8:18-21 errs under (b) and/or (d) because the Petition was based on a "to be determined" conclusion of law and not on hypothetical facts, but if it were based on relevant hypothetical facts, that is allowable. (*Supra* at 11 - **court error No. 3**) The court Decision at CPB9:4-7 errs under (b) and/or (d) because the petition is "legitimate" and meets all statutory procedural requirements. (CPB13-33 - **court error No. 4**)

The court Decision at CPB9:14-23 errs under (b) and/or (d) because the court had subject matter jurisdiction. (*Supra* at 16-19 - **court error No. 5**) The court Decision at CPB9:14-23 errs under (b) and/or (d) because the petition did not fail "to state a claim upon which relief can be granted." (*Supra* at 16-19 - **court error No. 6**) The court Decision errs under (b) and/or (d) in not staying proceedings until appellate review on the Zoning Permits was final in order to avoid dismissing the case. (*Supra* at 16-19 - **court error No. 7**)

VI. REQUEST FOR COSTS

If DHH prevails and the Building Permit is found invalid, DHH requests costs including statutory attorney fees under RCW 4.84.010 because of the incredible amount of work required by DHH to protect its neighborhood values. DHH has also challenged the Judgment Summary and Cost Bill attached to the Notice of Appeal and requests that this Judgment Summary be vacated and DHH be awarded its costs in pursuing the superior court appeal.

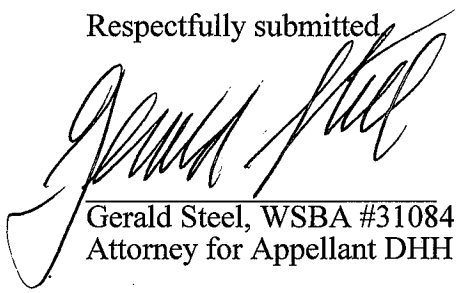
(*See Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn.App. 872, 891, 155 P.3d 952 (2007))

VII. CONCLUSION

The Examiner's approval of the tower height variance and CUP should be found invalid as DHH requests in the Brief of Appellant. If the CUP is found invalid, this Court should find the Building Permit invalid and void ab initio. Because RPI proceeded with construction in reliance on the Building Permit in bad faith and at its own risk after litigation on the Building Permit had begun, and because DHH gave repeated warnings to RPI after litigation had begun but before construction began that DHH "will seek removal of all related construction" if the Building Permit is found invalid, this Court should grant DHH the equitable relief requested which is a remand to the superior court to implement this Court's Order that all construction done in reliance on Building Permit BPT2016-00770 shall be removed from the 9-acre parcel before any other Clallam County Department of Community Development permits can be considered, approved, or finalized. DHH requests statutory attorney fees and costs and such other relief as this Court finds just and equitable.

Dated this 14th day of November, 2017.

Respectfully submitted,



Gerald Steel, WSBA #31084
Attorney for Appellant DHH

DECLARATION OF SERVICE

I, Gerald Steel, under penalty of perjury under the laws of the State of Washington declare as follows:

I am the attorney for Appellate.

On November 14, 2017, I caused:

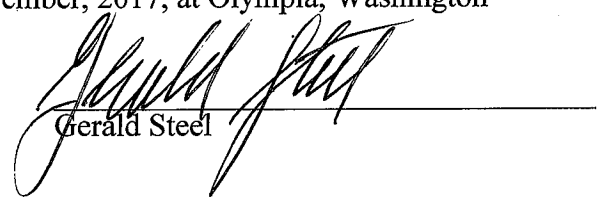
DHH Supplement Brief of Appellant (including DOS)

to be served by filing this document with COA2 at https://ac.court.wa.gov/ and per agreement with the parties by requesting copies be emailed to:

Eric Quinn
Of-Counsel to Joseph F. Quinn, P.S.
20 Forest Glen Lane SW
Lakewood, WA 98498-5306
ericquinn@firehouselawyer2.com
eric.quinn235@gmail.com

David Alvarez
Chief Civil Dep. Pros. Attorney
223 E 4th St. Ste 11
Port Angeles WA 98362-3000
dalvarez@co.clallam.wa.us

Dated this 14h day of November, 2017, at Olympia, Washington



Gerald Steel

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- james.c.mitchell@juno.com
- mjaldrich@olypen.com
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Address:
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