

Appeal No. 50513-4-II
Superior Court No. 17-2-07291-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BRIAN BYRD and NICOLE BYRD,

Appellants,

v.

PIERCE COUNTY,

Respondent.

APPELLANTS' BRIEF

Martin Burns
Burns Law, PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
(253) 507-5586
Attorney for Appellants

September 29, 2017

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ERRORS.....	1
1. Did the trial court err in granting Defendant/Respondent Pierce County's ("County") motion to dismiss pursuant to CR 12(b)(6) for Byrd' failure to state a claim upon which relief can be granted?	1
2. Did the trial court err in granting the County's motion to dismiss pursuant to CR 12(b)(6) for Byrd's failure to exhaust administrative remedies?	1
3. Did the trial court err in granting a motion to dismiss based upon defenses when alleged facts and hypothetical facts support well established causes of action including equitable estoppel and injunctive relief?.....	1
A. Issues related to the Assignment of Errors.....	1
1. Issues pertaining to Error No. 1: Did Byrd state a claim upon which relief may be granted by the Superior Court? In doing so, was it improper for the trial court to grant a motion for failure to state a claim when the complaint sets forth causes of action that are well recognized in Washington State. Additionally, is it inappropriate to essentially make a dispositive ruling on a defense under CR 12(b) (6) when both alleged and hypothetical facts support the well-established causes of action.....	1
2. Issues pertaining to Error No. 2: Did Byrd fail to exhaust administrative remedies before filing suit in the Superior Court when the administrative tribunal has no jurisdiction over equitable and declaratory relief alleged in the complaint?.....	2

3. Issues pertaining to Error No. 3: Did Byrd properly assert a cause of action allowing a court to estop the County from denying the minor driveway deviation given all of the prior reassurances, prior recommendation of approval and the issuance of permits and the expenditures of substantial sums in reliance of the County’s actions?	2
II. STATEMENT OF THE CASE	2
a. Brief Overview	2
b. Procedural Facts	3
c. Facts	3
III. ARGUMENT	7
a. The trial court erred in granting dismissal under CR 12(b)(6) as the complaint sets forth facts that support the granting of relief under well established causes of action and well established remedies.	7
b. Byrd has not failed to exhaust administrative remedies because LUPA hearing examiners lack jurisdiction over claims in equity.	9
c. Byrd has appropriately set forth facts that support the court estopping the County from denying the driveway deviation when Byrd complied with all mitigation requirements and the County had recommended approval..	18
IV. CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

<i>Washington Cases:</i>	<u>Page</u>
<u>Chaussee v. Snohomish Cty. Council</u> , 38 Wash. App. 630, 638, 689 P.2d 1084, 1091 (1984).....	10
<u>Cost Mgmt. Servs., Inc. v. City of Lakewood</u> , 178 Wn.2d 635, 310 P.3d 804 (2013).....	18
<u>DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.</u> , 179 Wash. App. 205, 223, 317 P.3d 543, 551 (2014).....	10
<u>Durland v. San Juan Cty.</u> , 182 Wn.2d 55, 67, 340 P.3d 191, 198 (2014).....	16
<u>Grandmaster Sheng-Yen Lu v. King County</u> , 110 Wn.App. 92, 38 P.3d 1040 (2002).....	16
<u>Halvorson v. Dahl</u> , 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978)	4
<u>Hoffer v. State</u> , 110 Wn.2d 415, 755 P.2d 781 (1988).....	8
<u>Kramarevcky v. DSHS</u> , 122 Wash.2d 738, 743, 863 P.2d 535 (1993)	19
<u>K Paradise, Inc. v. Pierce County</u> , 124 Wash. App. 759, 767, 102 P.3d 173, 177 (2004)	8
<u>Parmelee v. Clarke</u> , 148 Wn. App. 748, 758, 201 P.3d 1022, 1027–28 (2008) citing <u>Regents v. City of Seattle</u> , 108 Wash.2d 545, 551 (1987).....	9,19
<u>Phillips v. King County</u> , 87 Wn.App. 468, 479-80 (1997).....	15
<u>Trinity Universal Ins. Co. v. Willrich</u> , 13 Wn.2d 263, 124 P.2d 950 (1942).....	15
<u>Young v. Stampfler</u> , 27 Wash. 350, 67 P. 721 (1902).....	20

Washington Statutes:

Remington Revised Statute Section 785.....	7
RCW 7.28.010	7

Foreign Authority:

Other Authority:

CR 12(b)(6).....	passim
PCC 1.22.080.....	9
PCC 1.22.090(B).....	9

COMES NOW the Appellants, BRIAN BYRD and NICOLE BYRD, (collectively “Byrd”) by and through their attorney Martin Burns of Burns Law, PLLC, and submits their Appellate Brief to the Court of Appeals as follows:

I. ASSIGNMENT OF ERRORS

Error No. 1: Did the trial court err in granting Defendant/Respondent Pierce County’s (“County”) motion to dismiss pursuant to CR 12(b)(6) for Byrd’ failure to state a claim upon which relief can be granted?

Error No. 2: Did the trial court err in granting the County’s motion to dismiss pursuant to CR 12(b)(6) for Byrd’s failure to exhaust administrative remedies?

Error No. 3: Did the trial court err in granting a motion to dismiss based upon defenses when alleged facts and hypothetical facts support well established causes of action including equitable estoppel and injunctive relief?

a. Issues related to the Assignment of Errors

1. Issues pertaining to Error No. 1: Did Byrd state a claim upon which relief may be granted by the Superior Court? In doing so, was it improper for the trial court to grant a motion for failure to state a claim when the complaint sets forth causes of action that are well recognized in Washington State? Additionally, is it inappropriate to essentially make a dispositive ruling on a defense under CR 12(b)(6) when both alleged and hypothetical facts support the well-established causes of action?

2. Issues pertaining to Error No. 2: Did Byrd fail to exhaust administrative remedies before filing suit in the Superior Court when the administrative tribunal has no jurisdiction over equitable, declaratory and injunctive relief alleged in the complaint?

3. Issues pertaining to Error No. 3: Did Byrd properly assert a cause of action allowing a court to estop the County from denying the minor driveway deviation given all of the prior reassurances, prior recommendation of approval and the issuance of permits and the expenditures of substantial sums in reliance of the County's actions?

II. STATEMENT OF THE CASE

a. Brief Overview

This appeal is brought by the plaintiffs, Brian and Nicole Byrd, a husband and wife who, after frequent communication with Pierce County as to their commercial plans to develop a recycling center and after receiving all necessary approvals and permits to demolish any residence on the property, purchased the commercially zoned property that is at issue in this case. After five years of effort and expense, working with County and satisfying all of County's requests and requirements, receiving every indication that the recycling center would be approved, Byrd's plans were cast aside when the State of Washington challenged the development plan seemingly not realizing it had transferred all its interest in the area in question to the County years ago. Immediately thereafter, the County reversed its position and denied Byrd the right to improve their property. Specifically, it is the proposed improvement of a driveway needed to serve

the intended recycling center that the County suddenly denied asserting an old restriction in a deed that the County had not asserted throughout the permitting and approval process and which does not restrict Byrd as the County is asserting. After five years and great expense in complying with all of the County's requirements for development, and with every indication from County that approval was forthcoming, Byrd was inequitably denied a permit by County's sudden reversal of the proposed driveway improvement that is critical to the operation of the proposed recycling center.

b. Procedural Facts

This case was commenced by the plaintiffs Brian Byrd and Nicole Byrd, husband and wife, against the Defendant Pierce County ("County") on April 24, 2017. CP 1. The County filed a motion to dismiss Byrd's case on May 15, 2017. CP 89-115. Byrd filed their response in opposition to County's motion to dismiss on May 24, 2017. CP 119-131 The Superior Court granted County's motion to dismiss on May 26, 2017, ruling that Byrd had failed to state a claim upon which relief could be granted and that Byrd had failed to exhaust administrative remedies. CP 144-145. Byrd now appeals the Superior Court's order.

c. Facts

The recitation of facts essentially is the allegations in the Complaint given that the case was dismissed under CR 12(b)(6). The Complaint is found at CP 1-84. The references and citations below are to the sections of the Complaint as that seems more appropriate given that

APPELLANTS' BRIEF - 3

the Court is looking at the sufficiency of the Complaint in reviewing a CR 12(b)(6) motion. Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978).

In or around 1967, Disman and Beverly Peecher (the “Peechers”) owned 10615 Canyon Road E., in Puyallup, WA, parcel no. 7980000182 (“Subject Property”) which now happens to be within approximately 65 feet of the off-ramp of Highway 512 at Canyon Road in Puyallup, Washington. Complaint ¶ 3.1. In or around November of 1967, the Peechers deeded a portion of their property to the State of Washington (“WSDOT”) to allow relinquishment of their rights to access the new Highway 512 from the Subject Property. Complaint ¶ 3.2. The Peechers reserved driveway access on and off Canyon Road, in the form of a 14’ residential driveway exclusion included in the deed to WSDOT. Complaint ¶ 3.3. In or around August of 1979 at the completion of the highway on and off ramps, WSDOT quit claimed all right, title and interest in the property to the County. Complaint ¶ 3.4.

In or around April of 2012, the Peechers entered into contract negotiations with Brian Byrd in contemplation of selling the Subject Property. Complaint ¶ 3.5. The property was listed as commercial. Complaint ¶ 3.5. Mr. Byrd planned to construct a recycling center on the Subject Property. Complaint ¶ 3.5.

The Peechers went to Pierce County Planning and Land Services (a division of “County”) and obtained a demolition permit to remove a residence from the Subject Property in contemplation of selling it as APPELLANTS’ BRIEF - 4

commercial land, its best and highest use. Complaint ¶ 3.6. The Peechers continued negotiations with Byrd to sell the commercial lot, and subsequently sold it to Byrd on or about September 18, 2012 subject to the removal of the residence. Complaint ¶ 3.7. Byrd eventually had the existing residential house demolished in conjunction with plans to use the property as a recycling center. Complaint ¶ 3.6.

As part of Byrds' due diligence, Byrd had pre-submission conferences with County officials who raised no issues as to access for a commercial development other than they would likely be restricted to a right turn into and out of the property. Complaint ¶ 3.8.

On or around September 18, 2012, Byrd received a statutory warranty deed to the Subject Property, subject to "[r]elinquishment of right of access to state highway and of light, view and air under terms of deed to the State of Washington..." Complaint ¶ 3.9.

On or around April 18, 2013, Byrd went back to the County to assess what was necessary to completely renovate the detached garage to turn it into office space. Complaint ¶ 3.10. After permits were issued, extensive renovations commenced. Complaint ¶ 3.10.

On or around February 11, 2014, Byrd approached the County again to request a formal plan check of the plans drawn for the new recycling center. Complaint ¶ 3.11. Byrd was given a list of what had to be submitted before the plan check meeting could commence. Complaint ¶ 3.11. The "Customer Information Meeting" was held on August 28, 2014, during which Byrd's plans were approved. Complaint ¶ 3.12.

Byrd returned to the County on March 19, 2015, with a final submission and received approval to clear the land for construction of the recycling center. Complaint ¶ 3.13.

On or around October 22, 2015, during the County review, the County for the first time asserted that the Site Review Plans would require widening the current driveway to accommodate the commercial use of the property. Complaint ¶ 3.14. This would require an engineering deviation. Complaint ¶ 3.14. Byrd worked diligently with their professionals to find a solution and request a deviation, which was submitted on December 8, 2015. Complaint ¶ 3.15. All other plans were approved, and construction was scheduled to begin. Complaint ¶ 3.15.

On January 7, 2016, the County noted that any concerns with the request had been mitigated, and recommended that said Deviation Request be APPROVED. Complaint ¶ 3.16. Byrd moved forward with the agreed upon mitigation plans. Complaint ¶ 3.16.

On or around February 8, 2017, WSDOT (which possesses no right or interest in the Subject Property), stated that it will not “allow” the existing residential access to be changed to “any” other use. Complaint ¶ 3.17. Thereafter, the County reversed its position and denied Byrd’s Deviation Request, rendering the commercial property inaccessible by commercial vehicles. Complaint ¶ 3.19.

In anticipation of County’s acceptance, Byrd has procured and submitted at least 12 application packets, site plans, and mitigated deviation requests to build this recycling center. Complaint ¶ 3.20.

Additionally, Byrd has incurred renovation costs of the office space and substantial engineering-related costs. Complaint ¶ 3.20. Not once did the County attempt to enforce the outdated covenant until WSDOT, without any standing, tried to forbid the deviation. Complaint ¶ 3.20.

III. ARGUMENT

- a. The trial court erred in granting dismissal under CR 12(b)(6) as the complaint sets forth facts that support the granting of relief under well-established causes of action and well established remedies.

This Court needs to first consider that this case was dismissed under CR 12(b)(6). Such rule relates to a failure to state a claim. The Complaint asserted “Causes of Action: Quiet Title/Declaratory Relief”. CP 5. The Prayer for Relief requested an order estopping the County from denying the minor right of way deviation and a permanent injunction as to enforcement of the covenant on title related to the assertion that it was for residential access only. CP 5-6. The point of reiterating the actual causes of action and relief prayed for is to demonstrate these are claims upon which the courts in this State have granted relief thousands of times before. It is also worth stating that no hearing examiner has ever granted such relief insofar as the undersigned could find. Quieting title is a statutory cause of action under RCW 7.28.010, which, looking at the history of the statute, dates back to 1854 under the Remington Revised Statute Section 785. As discussed herein, the relief requested is very common place. Whether or not Byrd will ultimately prevail is not the

issue at the time of a CR 12(b)(6) motion – the issue is whether or not a claim has been stated.

Under CR 12(b)(6), a complaint can be dismissed if it fails to state a claim upon which relief can be granted. Because a trial court's dismissal under this rule is a holding on a question of law, appellate review is de novo. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir.1984).

Courts should dismiss a claim under CR 12(b)(6) only if " 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.' " *Orwick v. Seattle*, 103 Wash.2d 249, 254, 692 P.2d 793 (1984) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978)). Under this rule, a plaintiff's allegations are presumed to be true. *Lawson v. State*, 107 Wash.2d 444, 448, 730 P.2d 1308 (1986); *Bowman v. John Doe Two*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985). Moreover, a court may consider hypothetical facts not part of the formal record. *Halvorson v. Dahl*, 89 Wash.2d 673, 675, 574 P.2d 1190 (1978). Therefore, a complaint survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery. *Lawson*, 107 Wash.2d at 448, 730 P.2d 1308; *Bowman*, 104 Wash.2d at 183, 704 P.2d 140.

As a practical matter, a complaint is likely to be dismissed under CR 12(b)(6) "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." 5 C. Wright & A. Miller, *Federal Practice* § 1357, at 604 (1969). For the foregoing reasons, CR 12(b)(6) motions should be granted " 'sparingly and with care.' " *Orwick*, 103 Wash.2d at 254, 692 P.2d 793 (quoting 27 Federal Procedure Pleadings and Motions § 62:465 (1984)).

Hoffer v. State, 110 Wn.2d 415, 755 P.2d 781 (1988) (emphasis added).

So, in reviewing such motion and order thereon, all of the allegations are taken as true. *Paradise, Inc. v. Pierce County*, 124 Wash. App. 759, 767,

102 P.3d 173, 177 (2004). Under this rule, a court may consider hypothetical facts not part of the formal record and such motions to dismiss should only be granted “sparingly and with care.” *Id.*

Byrd has properly pleaded a cause of action for equitable estoppel:

The elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Parmelee v. Clarke, 148 Wn. App. 748, 758, 201 P.3d 1022, 1027–28 (2008) citing Regents v. City of Seattle, 108 Wash.2d 545, 551 (1987). Clearly an action asserting equitable estoppel is a viable cause of action in the State of Washington. The trial court went well beyond the standards of a CR 12(b)(6) motion when it got into the merits and the defenses asserted by the County in a manner far more akin to a summary judgment. However, in doing so, the trial court denied Byrd the opportunity to more fully develop his facts in discovery and submit affidavits in opposition.

b. Byrd has not failed to exhaust administrative remedies because LUPA hearing examiners lack jurisdiction over claims in equity.

1. Deed Provision is Not a Land Use Matter

The County cites to PCC 1.22.090(B) for the premise that any “Land Use Matters” shall be appealed to the County within 14 days, and then seek LUPA appeal from there. However, a “Land Use Matter” is one concerning Pierce County Code. *See* PCC 1.22.080. Appeals, denials, violations, classifications, regulations, modifications, exemptions, etc. all

relate to the PCC. In this case, we have a provision in a past deed that the County is choosing to interpret and recognize by denying Byrd's commercial grade access to a parcel that is already zoned, planned, and permitted for commercial use. It is for this reason that Byrd requested equitable relief from the Superior Court. In researching this matter on Westlaw, over a hundred cases came up of Superior Court judges interpreting deeds. No case was found with a hearing examiner interpreting a deed. The obvious reason is that RCW 2.08.010 vests the Superior Court with original jurisdiction over real property issues. Interpretation of a deed is a Superior Court matter. Below, the County cited to Harrison v. County of Stevens, 115 Wash. App. 126, 61 P.3d 1201 (2003) for the proposition that a hearing examiner may interpret a deed. Nowhere in the case is such legal proposition stated. Such case related to if the holder of mineral rights had to sign on a short plat application. However, the rights each party held were not in dispute. Such case did not interpret a deed, it simply acknowledged existing law that a mineral right holder is not an owner of the surface. In its holding, the Court of Appeals reversed the trial court finding the hearing examiner misinterpreted the law – not the deed. Id. at 134.

2. Hearing examiners have no jurisdiction over equitable issues.

“The interpretation by the hearing examiner that he was without jurisdiction to consider the issue of equitable estoppel is supported by the relevant statutory and code provisions.” Chaussee v. Snohomish Cty. Council, 38 Wash. App. 630, 638, 689 P.2d 1084, 1091 (1984). So

essentially what we have is a situation where the County is arguing that Byrd must go to the hearing examiner to be told that the hearing examiner has no jurisdiction to hear the matter.

Byrd should not be made to go before a forum that lacks jurisdiction to rule on their case. Washington courts generally apply the maxim that “the law does not require the performance of an idle or useless act.” *See DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wash. App. 205, 223, 317 P.3d 543, 551 (2014). We are dealing with the scope of a deed provision which is not a hearing examiner issue. We are dealing with the application of equitable estoppel which is not a hearing examiner issue.

There is a threshold question in this case and in this entire controversy as to exactly what rights each party has. The County, in listening to improper assertions from WSDOT, are now denying commercial access to a commercial property based upon a deed provision that the County had not asserted in the several years during which the County took Byrd’s money, approved his permits, allowed demolition of buildings, and required mitigation measures. Byrd complied with all County requirements and spent significant time and money. The County made all sorts of assertions and engaged in all sorts of conduct that is directly counter to then saying “never mind, that was prohibited 50 years ago.” The situation was exacerbated by the County’s own conduct of approving and indicating approval for the commercial project on site

representations which Byrd relied upon in purchasing and engineering the Property.

This Court needs to consider that after meeting with the County and divulging their commercial plans, and after receiving all necessary approvals and permits to demolish any residence on the property, Byrd purchased the commercially zoned Property subject to the following:

Relinquishment of right and access to state highway and light, view and air under terms of deed to the State of Washington recorded under Auditor's No. 2214607.

CP 31-32.

As Byrd had no intention of accessing the state highway directly from the parcel, and had met with the County multiple times to discuss the plans for a recycling center, the nearly indecipherable deed from WSDOT was a presumed a non-issue. CP 10-11. A more clear copy later found CP 103-104. The plan, as divulged and initially agreed by the County, was to access commercially from Canyon Road. A deviation was initially approved until this whole deed restriction issue popped up.

The County quotes the 1967 deed from the Peechers to WSDOT and alleges an exclusion. The language states, "that the State shall construct on its right of way a Type A off and on Approach, not to exceed 14 feet in width, for the sole purpose of serving a single family residence..." Defendant's Motion to Dismiss, p. 2. Assuming this was part of WSDOT's negotiation with the Peechers, the standard driveway width would have been all that WSDOT was bound to construct. Nothing says that a commercial access on Canyon could

not be constructed should the use change – which it did when the County rezoned the property as commercial. The deed vaguely describes the use to be “for that purpose only” right after providing “... the grantors, their heirs, successors and assigns reserve a right of reasonable access, for that purpose only...” CP 103-104. As such, any attempt to tie the purpose to a single-family house as opposed to tying the purpose to a reasonable access is not proper – particularly after the County. Such language, reasonably interpreted, relates to what WSDOT was to construct. Such language does not restrict a different person or entity from constructing a wider driveway for a different purpose – particularly a purpose to which the County zoned the property.

This Court needs to read the claimed restriction closely. It is not the restriction claimed by the County re-zoned the property commercial. The language, “for the sole purpose of serving a single family residence,” is merely an explanation of why the driveway that the State was required to construct was not 18, 20, or 24 feet in width. While the then-existing driveway standards have not been examined – given that we have not even got into discovery - the notion of not having a wider driveway makes sense in context as current code PCC 17.B has differing requirements as to accessing singular versus multiple homes. There was only one house on the subject property back when the deed was drafted so it made sense to have a one house access. Now there is no house on the property as it was demolished pursuant to County-issued permits as part of the bigger plan to commercially develop the property. Nowhere does the language on the deed explicitly state that the use of the property or the width of the driveway could never change.

Nowhere on the deed does it state the entire parcel must be single residential use only. It was an agreement binding WSDOT to construct a new driveway approach for the single family residence that was occupying the parcel at the time that the right of way was deeded to WSDOT. As a matter of fact, the parcel has since been zoned commercial and the residence demolished.

The County argued below that the condemnation process led to the requirement that WSDOT construct a driveway approach gave WSDOT "*all access to the property, except those of residential access.*" CP 91 (emphasis original). That was an unsupported and arguable assertion. But if that were the case, why did the County rezone the property to commercial use essentially land-locking it? Why did the County allow demolition of the residential structure in anticipation of building a commercial recycling center? Why did the County Engineer give conditional approval of the "right-in/right-out" driveway deviation with an expressed commercial use? Simply put, the County now reads more restrictions into the deed than exist. The County now reads more into the restriction than it did previously and it reads more into the restriction than it asserted when it allowed Byrd to proceed in a manner inconsistent with the County's latest interpretation.

At this stage of the proceedings, the Court of Appeals should find that a plausible cause of action exists and remand for further proceedings. This case could not have been brought to the hearing examiner. Assuming everything Byrd asserts to be true, the County is misinformed as to the rights it holds and the County should be estopped from changing its prior position related thereto. That is a threshold issue which must be determined by the APPELLANTS' BRIEF - 14

Superior Court. To the extent the County has some ability to restrict Byrd's access, it should be equitably estopped. Estoppel is not a hearing examiner issue... it is a Superior Court matter.

The Pierce County Hearing Examiner's Office is an administrative court of limited jurisdiction. It acts as an oversight to counteract the County's wrongful decisions, so as to not overwhelm the courts of law. Phillips v. King County, 87 Wn.App. 468, 479-480 (1997). We are dealing with interpretation of deed provisions and equity. That is in the province of the Superior Court.

Byrd does not disagree generally that exhaustion of administrative remedies may be required to proceed with a Land Use action, but this is a deed/equity action. Two parties -- Peechers and WSDOT -- engaged in a real estate transaction and set forth the terms in a deed. In this case, Byrd is not so much seeking appellate review of Pierce County's denial of the deviation request as Byrd is asking the court to estop Pierce County from attempting to implement an overly burdensome reading of the contract/covenant language that does not exist on Byrd's deed. "[T]hat when the parties to the contract have so agreed, they are both bound thereby, and the courts will not attempt to rewrite the contract for them nor interpolate conditions which cannot be reasonably implied..." Trinity Universal Ins. Co. v. Willrich, 13 Wn.2d 263, 124 P.2d 950 (1942). Again, the rights of these litigants when juxtaposed with the deed provisions have to be determined as a threshold matter because an improper interpretation poisons the remaining analysis. Additionally, the changing and incorrect reading of the deed has led to a situation where equitable estoppel could be applied. That being the case, this matter should

not be dismissed for failure to exhaust administrative remedies because no administrative remedy is available based on the causes of action/relief requested set forth.

In its Motion to Dismiss below, the County cites Grandmaster Sheng-Yen Lu for the pretense that even for declaratory relief, there is an adequate remedy via the Hearing Examiner and LUPA. However, that case addresses the issuance of grading permits. In the case of permits, and zoning regulations, we agree that the Hearing Examiner and LUPA offer adequate remedies.

The Neighbors also argue that LUPA would not provide an adequate alternative remedy if the County issued a grading permit without making a final decision on the CUP. This argument is wholly unpersuasive....The statutes require the County to determine whether the proposed use conforms with the zoning code when it reviews grading permit applications.”

Grandmaster Sheng-Yen Lu v. King County, 110 Wn.App. 92, 38 P.3d 1040 (2002). Such is not the situation here. Byrd had assurances and recommendations for approval. It was only when WSDOT inappropriately nosed in at the last minute that the County retreated, incorrectly interpreted the deed, and caused great damage to Byrd who relied on earlier approvals and assurances by the County in purchasing the property and preparing for its development.

The County also cited Durland for the proposition that there are no “equitable exceptions to the exhaustion requirement in LUPA.” See Defendant’s Motion to Dismiss at 11, citing Durland v. San Juan Cty., 182

Wn.2d 55, 67, 340 P.3d 191, 198 (2014). Durland, unlike this case, was brought pursuant to the LUPA statute without exhausting his administrative remedies, which we agree is a pre-condition to bringing a LUPA action. Durland argued for an exception to the exhaustion requirement based on equitable grounds such as lack of notice. In contrast, Byrd seeks a remedy in equity which falls outside the LUPA hearing examiner's jurisdiction. Let us not confuse procedural requirements of different types of cases with jurisdiction:

We have cautioned, in a different context, that 'by intertwining procedural requirements with jurisdictional principles, ... separate issues ... have been blurred. As a result, unfortunately, procedural elements have sometimes been transformed into jurisdictional requirements.' *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003).

Superior courts in this state 'have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.' Wash. Const. art. IV, § 6. Superior courts also have 'such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.' *Id.*

Exhaustion, on the other hand, is a doctrine of judicial administration; courts applying exhaustion consider whether an adequate administrative remedy exists that the claimant should try first because of the courts' 'belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges. *Citizens for Mount Vernon*, 133 Wn.2d at 866 (citing *S. Hollywood Hills Citizens Ass'n*, 101 Wn.2d at 73).

This court has long applied 'the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.' *Wright v.*

Woodard, 83 Wn.2d 378, 381, 518 P.2d 718 (1974) (citing *State ex rel. Ass'n of Wash. Indus. v. Johnson*, 56 Wn.2d 407, 353 P.2d 881 (1960)). To determine if the rule applies, we examine whether the party seeking relief 'has an administrative remedy' and whether any 'attempt has been made to pursue that remedy.' *Id.* at 382. If the party seeking relief has an administrative remedy, and did not pursue it before turning to the courts, then it is error for a trial court to entertain the action. *Id.*

The primary question in exhaustion cases, however, is whether the relief sought can be obtained through an available administrative remedy; if so, the party seeking relief must first seek relief through the administrative process.

Ultimately, CMS's claim was an action in equity for money had and received; and, under both the Washington Constitution and state statute, the superior court properly maintained original jurisdiction to hear the equity claim.

(bold added) Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wn.2d 635, 310 P.3d 804 (2013). The relief Byrd seeks here is not available through the hearing examiner process. Therefore, Byrd has standing and the Superior Court has the right to properly interpret the deed and to estop the County's inequitable reversal of position.

- c. Byrd has appropriately set forth facts that support the court estopping the County from denying the driveway deviation when Byrd complied with all mitigation requirements and the County had recommended approval.

As previously set forth above

The elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the

first party to contradict or repudiate the prior act, statement or admission.

Parmelee v. Clarke, 148 Wn. App. at 758. Getting beyond the fact that the Complaint set forth well recognized causes of action upon which countless judges have granted relief, when the trial court got to the merits of equitable estoppel, it erred. As to the first element of equitable estoppel, The County committed a continuous series of statements and acts over the course of five years, requiring and approving plans as well as issuing permits for Byrd's expressly-described recycling center. Complaint ¶¶ 3.6, 3.8-3.16. CP 2-3. These acts of approval were entirely inconsistent with the "eleventh hour" claim by the County that Byrd lacked the right to improve the existing driveway into a commercial grade driveway that must serve as the only access for the commercial recycling center that the County had already approved.

As to the second and third elements of equitable estoppel, Byrd acted in reliance upon the County's many acts and statements over the course of five years, all of which indicated approval for Byrd's recycling center. To their injury, in reliance on the County's representations Byrd at their own expense procured and submitted at least 12 application packets, site plans, and mitigated deviation requests to build their recycling center. Complaint ¶ 3.20. CP 4-5. Additionally, Byrd has incurred renovation costs of the office space and substantial engineering-related costs. Complaint ¶ 3.20. CP 4-5.

Byrd's claim for equitable estoppel is properly pleaded. While not favored, equitable estoppel may be asserted against the government. Kramarevcky v. DSHS, 122 Wash.2d 738, 743, 863 P.2d 535 (1993). On the

facts alleged in the Complaint, there is a clear case for equitable estoppel. Therefore, this Court must reverse the trial court's order granting the County's motion to dismiss for failure to state a claim upon which relief can be granted. Equitable estoppel has long been recognized as a proper claim/relief under Washington law. The Supreme Court of Washington set forth the basic tenants of equitable estoppel over 115 years ago:

Equitable estoppels are based on the ground of promoting the equity and justice of the individual case by preventing the party from asserting his rights under a general technical rule of law when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppel depends, as a general rule, are proved by oral evidence. But this evidence should be precise and clear and unequivocal. The circumstances out of which the question may arise are of infinite variety, and, as in other cases of fraud and dishonesty, the court must look to the circumstances of each particular case. Herm. Estop. §§ 742, 743, 760, 762.

The first paragraph of the last section cited fits the case under consideration, and is as follows: **'The exclusive warrant for an equitable estoppel is that it is necessary to sustain the cause of right and justice. Where the acts and representations of a party must have influenced the other to do acts which he would not otherwise have done, and where a denial or repudiation must operate to the injury of such other party, the estoppel is created.'** There was no time fixed in which Kleber should execute the certificate he was authorized to make. For the purposes of this case it is immaterial whether he ever executed it, as we must regard that as done which the parties agreed to do. There is no controversy as to the facts found by the court. For the purposes of this appeal they are admitted, and, as we have said, they constitute an equitable estoppel; and, having come to this conclusion, it is unnecessary to pass upon the other questions suggested in the briefs.

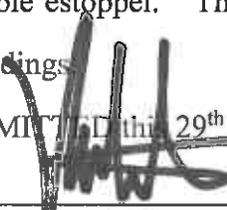
(bold added) Young v. Stampfler, 27 Wash. 350, 67 P. 721 (1902).

Byrd relied on the County's approval. In anticipation of County's acceptance, Byrds procured and submitted at least 12 application packets, site plans, and mitigated deviation requests to build this recycling center. Additionally, they incurred renovation costs of the office space and substantial engineering related costs over Five years. Not once did the County attempt to enforce the outdated covenant until WSDOT, without any standing, raised a concern as to the deviation. The County should be estopped from doing so now.

IV. CONCLUSION

The Superior Court erred in dismissing Byrd's claim for quiet title and declaratory relief. The Superior Court erred in not estopping the County from reversing its prior positions after causing Byrd to expend large amounts of money in reliance thereon. The trial court should be reversed for holding that Byrd is required to exhaust their remedies in a forum which has no jurisdiction to decide the issues related to deed interpretation and equitable estoppel. Byrd's claims are properly pleaded and established by the facts alleged in the Complaint. Byrd has not failed to exhaust their administrative remedies because no administrative forum exists with jurisdiction to address their cause of action for equitable estoppel. The matter should be reversed and remanded for further proceedings.

RESPECTFULLY SUBMITTED this 29th day of September, 2017.s



MARTIN BURNS, WSBA No. 23412
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on September 29, 2017, at Tacoma, Washington, I caused true and correct copies of the document to which this certification is affixed to be served upon all parties and/or their counsel of record at their last known addresses in the manner indicated below:

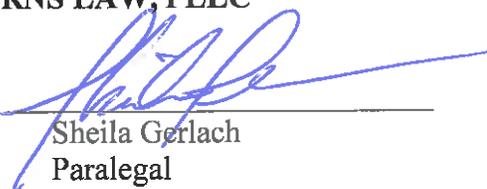
Michelle Luna-Green
Pierce County Prosecutor/Civil
955 Tacoma Ave. S., Ste. 301
Tacoma, WA 98402-2160
Email mluna@co.pierce.wa.us
Fax: (253) 798-6713

- | | |
|-------------------------------------|------------------------------|
| <input type="checkbox"/> | by legal messenger |
| <input type="checkbox"/> | by postage prepaid USPS |
| <input checked="" type="checkbox"/> | first-class mail |
| <input checked="" type="checkbox"/> | by Electronic Mail/E-Service |

DATED this 29th day of September, 2017, at Tacoma, Washington.

BURNS LAW, PLLC

By _____


Sheila Gerlach
Paralegal

M:\30000\30252 Byrd (Misc)\Appeal\PIDgs\Appellate Brief\Appellant's Brief v2.doc

BURNS LAW, PLLC

September 29, 2017 - 4:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50513-4
Appellate Court Case Title: Brian Byrd, Appellant v. Pierce County, Respondent
Superior Court Case Number: 17-2-07291-1

The following documents have been uploaded:

- 7-505134_Briefs_20170929162936D2228909_2043.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf

A copy of the uploaded files will be sent to:

- mluna@co.pierce.wa.us
- pcpatvecf@co.pierce.wa.us

Comments:

Sender Name: Sheila Gerlach - Email: sheila@mburnslaw.com

Filing on Behalf of: Martin Burns - Email: martin@mburnslaw.com (Alternate Email:)

Address:
524 Tacoma Ave S
Tacoma, WA, 98402
Phone: (253) 507-5586

Note: The Filing Id is 20170929162936D2228909