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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' REPLY BRIEF

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TABLE OF CONTENTS

Page

I. ARGUMENT 1

A. There are no adequate administrative remedies for Byrd to exhaust. 1

1. Hearing examiner lacks jurisdiction to interpret deeds 1
2. Hearing examiner lacks jurisdiction over equitable estoppel 3
3. One of the issues in this case is deed interpretation, not zoning enforcement 9

B. Byrd's causes of action and prayers for relief are sufficiently pleaded. 10

1. Quiet title is sufficiently pleaded 10
2. Equitable estoppel has been adequately briefed for purposes of this appeal 12
3. Grounds for relief in equity are sufficiently pleaded 13

C. Elements of equitable estoppel can later be proven 14

1. A trier of fact could find reasonable reliance 14
2. Manifest injustice may be proven 16
3. Government function will not be impaired by estoppel 17
4. Representations of law versus fact are in dispute and not dispositive 18

II. CONCLUSION **19**

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Washington Cases: Page

Harrison v. County of Stevens, 115 Wn. App. 126, 61 P.3d 1201 (2003) 1

Butler v. Craft Eng Const. Co., 67 Wn. App. 684, 687, 843 P.2d 1071, 1074 (1992) 2

WSDOT v. City of Seattle, 192 Wn. App. 824, 368 P.3d 251 (2016) 2

Chausee v. Snohomish, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984) 3-4

City of Bonney Lake v. Kanany, 185 Wn. App. 309, 319, fn. 4, 340 P.3d 965 (2014) 4

Race Track, LLC v. King County, 183 Wn. App. 1014 WL 4347602 (2014) 4

Smoke v. City of Seattle, 132 Wn.2d 214, 224, 937 P.2d 186 (1997) 4

City to Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 31,785 P.2d 447 (1990) 4

Rettkowski v. Department of Ecology, 122 Wn.2d 219, 234, 858 P.2d 232 (1983) 4-5

Tacoma-Pierce County Multiple Listing Service, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980) 5

Schreber v. Riemcke, 11 Wn. App. 873, 875, 526 P.21 904 (1974) 5

Kramarevcky v. Dep't of Soc. & Health Servs. 122 Wn.2d 738, 863 P.2d 535 (1993) 5-6,13,16,17

Dykstra v. County of Skagit, 97 Wn. App. 670, 985 P.2d 424 (1999) 5-6

Overhulse Neighborhood Ass'n v. Thurston Cty., 94 Wn. App. 593, 600–01, 972 P.2d 470, 474 (1999)..... 7

Durland v. San Juan Cty., 182 Wn.2d 55, 340 P.3d 191 (2014)..... 7

Lauer v. Pierce Cty., 173 Wn.2d 242, 256-57, 267 P.3d 988 (2011) 7

Lauer v. Pierce Cty., 157 Wn. App. 693, 238 P.3d 539, 544 (2010) rev'd, 173 Wn.2d 242, 267 P.3d 988 (2011) 7

Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009) 7

Durland v. San Juan Cty., 182 Wn.2d 55, 60, 340 P.3d 191, 194 (2014) 8

Prekeges v. King Cty., 98 Wn. App. 275, 283, 990 P.2d 405, 410 (1999) 8

World Wide Video of Washington, Inc. v. City of Spokane, 125 Wn. App. 289, 305, 103 P.3d 1265, 1273–74 (2005) 8

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 983, 216 P.3d 374, 379 (2009) 11

Butler v. Craft Eng Const. Co., 67 Wn. App. 684, 700, 843 P.2d 1071, 1081 (1992) 11

Fix v. Fix, 176 Wn. App. 1030 (2013) 11

Skagit Cty. v. Skagit Hill Recycling, Inc., 162 Wn. App. 308, 253 P.3d 1135 (2011) 12
Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002) 13

City of Seattle v. St. John, 166 Wn.2d 941, 949, 215 P.3d 194 (2009) 14

Concerned Land Owners of Union Hill v. King Cty., 64 Wn. App. 768, 778, 827 P.2d 1017, 1023)(1992) 14

Shelcon Const. Grp., LLC v. Haymond, 187 Wn. App. 878, 904, 351 P.3d 895, 909 (2015) 14-15

Colonial Imports, Inc. v. Carlton Nw., Inc., 121 Wn.2d 726, 737, 853 P.2d 913, 919 (1993) 15

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216, 219–220 (1994) 15

Marashi v. Lannen, 55 Wn. App. 820, 824, 780 P.2d 1341 (1989) .. 15

Davidheiser v. Pierce Cty., 92 Wn. App. 146, 153, 960 P.2d 998, 1002 (1998) 18

Rowe v. James, 71 Wash. 267, 274–75, 128 P. 539, 542 (1912)..... 18

Washington Statutes:

RCW 36.70C..... 2, 7
RCW 3.66.030 3
RCW 2.08.010 ..... 3, 11
RCW 36.70C.110(4)..... 7
RCW 36.70C.120(5))..... 7

Foreign Authority:

Other Authority:

CR 8(e)(2) 10
CR 8(f) 10
CR 8(a) 10
CR 12(b)(6) ..... passim

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

I. ARGUMENT

A. There are no adequate administrative remedies for Byrd to exhaust

1. Hearing examiner lacks jurisdiction to interpret deeds

The County continues to rely on Harrison v. County of Stevens, 115 Wn. App. 126, 61 P.3d 1201 (2003), to argue that a LUPA hearing examiner has jurisdiction to interpret deed provisions. Respondent's Brief, pp. 18-20. Nowhere in Harrison does the appellate court address the jurisdiction of a hearing examiner to interpret deed provisions. In a review of all cases citing to Harrison in a WestLaw KeyCite review, no further supports such proposition. Fourteen (14) years after Harrison, there appear to be no reported cases that so much as imply that a LUPA hearing examiner has jurisdiction to interpret deed provisions. A thorough search for cases involving hearing examiners interpreting deed language turns up cases demonstrating hearing examiners disclaiming any such jurisdiction:

> The hearing examiner determined that she did not have jurisdiction to determine the other issues raised by the objecting neighbors, i.e., whether only Parcel A of the proposed short plat would have a legal right to use the private road at issue here and whether Craft Eng's plan to use the road to provide access for Parcels B and C of the proposed short plat would be a breach of the objecting neighbors' ownership interest in the road as tenants in

> common or of their rights as grantees under existing easement documents.

Butler v. Craft Eng Const. Co., 67 Wn. App. 684, 687, 843 P.2d 1071, 1074 (1992). The Butler court noted that the parties did not appeal the findings and conclusions of the hearing examiner, but instead "filed suit in Superior Court, seeking declaratory and injunctive relief," the same remedies and the same forum that Byrd has used in this case. Id. at 687. The hearing examiner's determination of lack of jurisdiction to determine ownership interests was never challenged, addressed, or overturned. Although Butler was decided prior to LUPA, LUPA does not confer any jurisdiction to interpret deed provisions or claims in equity. RCW 36.70C.

The County also raises WSDOT v. City of Seattle, 192 Wn. App. 824, 368 P.3d 251 (2016) to apparently argue by analogy that because the City of Seattle "had to analyze RCW 47" it is proper for a hearing examiner to interpret language in a deed. Respondent's Brief pp. 17-18. There are several flaws in this argument. First, no one is contending here that a municipal body or hearing examiner lacks jurisdiction to analyze statutes—Appellants are addressing the lack of jurisdiction of a hearing examiner to analyze deed provisions. Second, while temporary easements were involved in the facts of WSDOT v. City of Seattle, there is no analysis therein of easement language, either by the courts or by a municipality. Third, the case makes no mention whatsoever of the involvement of a hearing examiner. This strained, attempted argument by analogy underscores the lack of legal authority establishing jurisdiction of

a hearing examiner to interpret deeds. As a brief aside, the fact that the Respondent is making a strained argument to allow a hearing examiner to interpret deeds stands in stark contrast with statutory provisions that vest such authority with the superior court (RCW 2.08.010) and divest the district courts (RCW 3.66.030). If a district court judge cannot interpret deeds, it is very indicative that an unelected hearing examiner cannot do so.

2. Hearing examiner lacks jurisdiction over equitable estoppel

Chausee v. Snohomish has a clear holding regarding a hearing examiner's lack of jurisdiction to rule on equitable estoppel: "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." 38 Wn. App. 630, 638, 689 P.2d 1084, 1091 (1984). Still, as discussed below, other courts have pointed this out as established law. First, Chausee explained that "[i]t should also be noted that the hearing examiner is not required to be an attorney and would lack the legal expertise to handle such questions." Id. The County points out that Chausee was decided prior to enactment of LUPA. Respondent's Brief p. 22, fn. 6. While true, LUPA does not imbue hearing examiners with jurisdiction over claims in equity. "The general legal principles [such as equity] which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations. The scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them."

Chaussee v. Snohomish Cty. Council, 38 Wn. App. 630, 639, 689 P.2d 1084, 1092 (1984) citing Messer v. Board of Adjustment, 19 Wn. App. 780, 787, 578 P.2d 50 (1978). The County points to nothing within LUPA that confers jurisdiction in equity to hearing examiners. This division of the Court of Appeals essentially took the inability of hearing examiners to hear equitable or constitutional issues as a given in City of Bonney Lake v. Kanany, 185 Wn. App. 309, 319, fn. 4, 340 P.3d 965 (2014) when it rejected an argument to the effect of the "hearing examiner system throughout the state being unconstitutional because hearing examiners are not authorized to decide equitable or constitutional questions." While the court disagreed with the unconstitutional argument, it had no problem with the asserted lack of hearing examiner authorization. Division 1 of the Court of Appeals similarly stated this well-established point that "the hearing examiner did not have the authority to decide claims based on either equitable estoppel or laches." Race Track, LLC v. King County, 183 Wn. App. 1014, 2014 WL 4347602 (2014)(unpublished decision cited per GR 14.1). Clearly, hearing examiners have no authority to make equitable decisions. The Respondent wants a party to exhaust remedies with a tribunal that has no authority to grant the requested remedy. The Washington Supreme Court has noted it will not require exhaustion "where there was doubt as to whether the agency was empowered to grant effective relief." Smoke v. City of Seattle, 132 Wn.2d 214, 224, 937 P.2d 186 (1997); City to Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 31, 785 P.2d 447 (1990); Rettkowski v. Department of Ecology, 122

Wn.2d 219, 234, 858 P.2d 232 (1983); Tacoma-Pierce County Multiple Listing Service, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980); Schreber v. Riemcke, 11 Wn. App. 873, 875, 526 P.21 904 (1974).

Appellant is seeking equitable relief. The hearing examiner cannot grant such relief. There is no requirement to perform a useless act.

The cases that the County cites in attempting to establish hearing examiner jurisdiction in equity do not provide such. The County relies on Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 863 P.2d 535 (1993) and Dykstra v. County of Skagit, 97 Wn. App. 670, 985 P.2d 424 (1999) for its argument that a LUPA hearing examiner has jurisdiction to hear claims in equity. Respondent's Brief pp. 21-22. In Kramarevcky, administrative law judges (ALJ) ruled that the Department of Social and Health Services (DSHS) was equitably estopped from recovering overpayments made to petitioners. The ALJ concluded each element of the defense of equitable estoppel had been met, and DSHS was estopped from recouping the overpaid amounts. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 741–42, 863 P.2d 535, 537–38 (1993)

"[Petitioners] sought a declaratory ruling that administrative law judges (ALJ) have the authority to consider equitable estoppel as a defense to the Department's recoupment claims." Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 740, 863 P.2d 535, 537 (1993).

> The Superior Court issued a memorandum opinion – ruling in favor of the plaintiffs and rejecting each of the Department's arguments. *DSHS did not appeal this ruling.* The Superior Court entered an order directing DSHS to

> inform all class members of their right to request a hearing and to assert the defense of equitable estoppel.

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 740, 863 P.2d 535, 537 (1993) (emphasis added). Because DSHS did not appeal the Superior Court's ruling, the issue of whether an ALJ has authority to consider equitable estoppel was never addressed by the higher courts. Thus, Kramarevcky offers no more support for the County's position that a hearing examiner may rule on claims in equity than does the order below which is the subject of this appeal.

The opinion in Dykstra makes no mention of estoppel or equity except in the final paragraph where the court states:

> Dykstras cannot claim any vested right because they did not apply for development permits until several months after Skagit County had aligned its enforcement practices to comply with its code. [Citation omitted]. *To the extent Dykstras' argument is in the nature of an estoppel claim, it fails for the same reason.*

Dykstra v. County. of Skagit, 97 Wn. App. 670, 679, 985 P.2d 424, 429 (1999), as corrected (Nov. 9, 1999) (emphasis added). There is no further discussion of equity or estoppel, much less any review of a hearing examiner's jurisdiction over claims in equity. The court merely disposed of a potential alternative legal argument that was not clearly raised otherwise. Thus, Dykstra offers no support of the County's argument for hearing examiner jurisdiction over claims in equity.

Nowhere in the LUPA statutes is hearing examiner jurisdiction over matters in equity stated, mentioned, or implied. RCW 36.70C. The

only mentions of equity in the chapter are found in RCW 36.70C.110(4) regarding a *court's* duty to assess costs of preparing the record for judicial review, and RCW 36.70C.120(5) regarding a *court's* duties to allow discovery to the extent necessary for equitable review of the issues and fashioning an equitable discovery order. Clearly the use of "equitable" in such context is more in line with a court setting forth a fair, pragmatic process, not a grant of authority to a hearing examiner to fashion equitable remedies. The few cases among hundreds listed within the Notes of Decisions across the entire LUPA chapter that even mention equity or estoppel deal with issues not before this Court on appeal: improper service of a LUPA petition, estoppel to raise claims in a subsequent LUPA petition, equitable exceptions to the exhaustion requirement, equitable tolling of appeal deadlines, and collateral estoppel to raise defenses to a LUPA petition. Overhulse Neighborhood Ass'n v. Thurston Cty., 94 Wn. App. 593, 600–01, 972 P.2d 470, 474 (1999), disapproved of by Durland v. San Juan Cty., 182 Wn.2d 55, 340 P.3d 191 (2014); Lauer v. Pierce Cty., 173 Wn.2d 242, 256-57, 267 P.3d 988 (2011) (party not estopped from raising claims in their LUPA petition) overruling Lauer v. Pierce Cty., 157 Wn. App. 693, 238 P.3d 539, 544 (2010), rev'd, 173 Wn.2d 242, 267 P.3d 988 (2011) (discussing equitable tolling of LUPA appeal deadline); Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009), as amended (Dec. 8, 2009) (equitable tolling of appeal deadlines); Durland v. San Juan Cty., 182 Wn. 2d 55, 60, 340 P.3d 191, 194 (2014) (no equitable exceptions to exhaustion requirement); Prekeges

v. King Cty., 98 Wn. App. 275, 283, 990 P.2d 405, 410 (1999) (assuming failure to exhaust administrative remedies could be cured through equity, equity cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff); World Wide Video of Washington, Inc. v. City of Spokane, 125 Wn. App. 289, 305, 103 P.3d 1265, 1273–74 (2005).

The only case from the above list in which a hearing examiner even touched upon an equitable consideration was Lauer. There, the Washington Supreme Court quoted a hearing examiner finding which indicated that a party, the Garrisons, in applying for a building permit had submitted information they knew to be false, specifically that a "trail" was mislabeled as an "existing drive" and the documents omitted the existence of a stream on their property. Lauer at 250. Although the hearing examiner stated that the Garrisons could not assert justifiable reliance on a County inspector's approval of the footing location because "numerous exhibits and substantial testimony show that a trail and not a 'drive' existed," the Court did not address this question of reliance nor whether the hearing examiner had jurisdiction to rule on claims of equity, if this statement even raised such. The Court did address a different equitable argument, finding the other involved private parties were not equitably estopped from raising claims asserted in their own LUPA petition by virtue of the fact that they had not intervened in the Garrisons' LUPA petition. Lauer at 256-57. The Court observed, "[i]t is not clear what statement that [involved private parties] allegedly made that the Garrisons

relied on. Rather the Garrisons seek to bind [said parties] to the County's statement, that the variance request would be considered under 2004 law." Lauer at 257.

The Court's acknowledgement of the Garrisons' argument of justifiable reliance before the hearing examiner appears to have been included to provide support for the Court's determination that the Garrisons had made knowing misrepresentations and omissions of material facts: "Under these unique facts, where *the Garrisons have submitted knowing misrepresentations*..." Lauer at 263 (emphasis added). "A permit application that is not allowed under the regulations in place at the time it is submitted and is issued under a *knowing misrepresentation or omission of material fact* confers no rights upon the applicant." Id. The Supreme Court did not acknowledge or address whether the hearing examiner had jurisdiction to consider equitable issues. This somewhat lengthy review of authorities demonstrates that there is no appellate court authority for the County's assertion that hearing examiners have jurisdiction over claims in equity. In fact, case law is to the contrary. Our courts have always been the sole forum for determining issues of equity, LUPA did not change that.

3. One of the issues in this case is deed interpretation, not zoning enforcement

The County cites several cases for the premise that enforcement of zoning ordinances cannot be equitably estopped based on the actions of government officials. Respondent's Brief p. 24. Byrd does not dispute

this. The critical difference here is that Byrd seeks a deviation which the County denied "due to title notification that the subject parcel is only allowed a residential driveway approach not to exceed 14 feet wide." CP 81. The County is enforcing what Byrd contends is an erroneous interpretation of a deed provision. The underlying question here is "on what grounds did the County deny the deviation?" Byrd asserts that it was on the grounds of interpretation of rights conferred by deed, as evidenced by the County letter dated March 23, 2017. CP 81. The County may argue that the deviation was denied for the legitimate government concerns that the relevant ordinances address. That is an issue of fact that is not to be decided on a 12(b)(6) motion.

B. Byrd's causes of action and prayers for relief are sufficiently pleaded

1. Quiet title is sufficiently pleaded

"A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." CR 8(e)(2). "All pleadings shall be construed as to do substantial justice." CR 8(f). Washington's system of notice pleading requires only "a short and plain statement of the claim" and a demand for relief in order to file a lawsuit. CR 8(a). Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims." Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 983, 216 P.3d 374, 379 (2009).

> Although Craft Eng made no formal motion to amend its pleadings, in their complaint Butler and Lee sought alternatively to extinguish Craft Eng's title or to limit its ability to convey title to any person but the purchaser of Parcel A. Craft Eng first sought to quiet title in its motion for summary judgment, well in advance of the trial. The issue raised in the trial brief could hardly have come as a surprise to Butler and Lee.

Butler v. Craft Eng Const. Co., 67 Wn. App. 684, 700, 843 P.2d 1071, 1081 (1992).

> Given the name of the complaint ("Complaint to Establish Constructive Trust and Quiet Title"), the allegation that the property belonged to Joy, and the relief sought (constructive trust and quiet title), the reasonable conclusion is that Joy sought to quiet title through a constructive trust theory.

Fix v. Fix, 176 Wn. App. 1030 (2013). Here, the County cannot claim to be surprised by Byrd's assertion of a quiet title cause of action. As it notes, the phrase "quiet title" appears as a cause of action in the Complaint. CP 5; Respondent's Brief p. 14. It would be substantially unjust to deny Byrd their quiet title claim, as well as the original jurisdiction of the Superior Court which the County concedes is proper in a quiet title action. RCW 2.08.010; Respondent's Brief p. 15, fn. 5. The County asserts that to bring a quiet title action, Byrd would have to "claim an interest in the land, Parcel 'A' as recorded in Warranty Deed 2214607, and seek to quiet any interest claimed by Pierce County or the State of Washington to this strip of land." Respondent's Brief p. 15. Contrary to the County's claim that "the Complaint is devoid of any such assertion," Respondent's Brief p. 15, the Complaint describes the conveyance from

the Peechers to the State of Washington including the reservation of rights of access on Parcel "A" and includes as Exhibit 2 the partially indecipherable copy of the deed which was then the only one available to Byrd. CP 2, 10-15. The facts and contentions in this case clearly raise the central question of what interests each party has in the subject property and can such rights be presently enforced. It necessarily follows that a court must determine the rights and interests of the title-holders, Byrd and the County, by interpreting the language of the deeds in order to quiet title regarding the dispute over rights of access and from there issue the appropriate orders.

2. Equitable estoppel has been adequately briefed for purposes of this appeal

The County argues that this Court should not consider Byrd's equitable estoppel claim, citing Skagit Cty. v. Skagit Hill Recycling, Inc., 162 Wn. App. 308, 253 P.3d 1135 (2011). Respondent's Brief p. 21. This argument is inapposite. Skagit addressed an appeal from *summary judgment* where all alleged material issues of fact are addressed after being developed based on the evidence presented after discovery has concluded. Skagit at 311. This Court is considering a 12(b)(6) motion, not a motion for summary judgment. RAP 10.3(a)(6) does not call for an appellate briefing of every element of every cause of action in the context of a motion to dismiss. As more fully discussed above in reply to the County's attack on Byrd's pleading of quiet title, Washington's system of notice pleading requires only "a short and plain statement of the claim"

and a demand for relief in order to file a lawsuit. CR 8(a). Byrd satisfied these requirements in the Complaint which is before this Court. There is no need to brief an appellate court as to the elements of each cause of action where the issue is whether the plaintiff stated a claim upon which relief may be granted under Washington's forgiving standard of notice pleading.

3. Grounds for relief in equity are sufficiently pleaded

The County's argument so-described as "Appellants failed to plead a claim of equitable estoppel against the government" actually reads as an argument on the evidence, which is appropriate in the context of summary judgment, but not a 12(b)(6) motion. Respondent's Brief p. 22. First, in looking at the Appellant's opening brief, the elements of equitable estoppel are set forth on p. 9 and the brief discussed one of the seminal cases allowing equitable estoppel against governmental entities on p. 19 wherein Kramarevcky v. Dep't of Soc. & Health Servs. 122 Wn.2d 238, 743, 863 P.2d 535 (1993) (which is a pinpoint citation to where equitable estopple against the government) is discussed. Second, the County quotes several cases which state the burden of proof as to equitable estoppel, *not* the burden of pleading: "the party asserting estoppel must *prove* each of the elements…" Peterson v. Groves, 111 Wn.App. 306, 310, 44 P.3d 894 (2002) (emphasis added).("[P]arties must *demonstrate* [additional elements of equitable estoppel against government]…" City of Seattle v. St. John, 166 Wn.2d 941, 949, 215 P.3d 194 (2009) (emphasis added). "The party asserting [equitable estoppel] must *demonstrate* that its

reliance was reasonable." (Concerned Land Owners of Union Hill v. King Cty., 64 Wn. App. 768, 778, 827 P.2d 1017, 1023)(1992)(emphasis added). See Respondent's Brief pp. 22-23. None of these cases addressed a 12(b)(6) motion. Peterson was an appeal from summary judgment. Peterson at 310. St. John was a criminal appeal from a ruling on admissibility of evidence. St. John at 944. Concerned Land Owners of Union Hill was an appeal from the final ruling of the trial court. Concerned Land Owners of Union Hill at 770. All of these cases are appeals from evidentiary hearings, whereas what is before this Court is an appeal from a 12(b)(6) motion. The emphasized words "prove" and "demonstrate" in the above quotes indicate that these are burdens of proof, not pleading, and are thus completely irrelevant in the context of a 12(b)(6) motion. To avoid repetition *ad nauseam*, the undersigned refers this Court to the statements and authority above, already twice-repeated, regarding Washington's notice pleading standard. Equitable relief is sufficiently pleaded and prayed for in the Complaint.

C. Elements of equitable estoppel can later be proven

1. A trier of fact could find reasonable reliance

Estoppel is a question for the trier of fact unless only one inference can be drawn from the evidence. Shelcon Const. Grp., LLC v. Haymond, 187 Wn. App. 878, 904, 351 P.3d 895, 909 (2015) citing Colonial Imports, Inc. v. Carlton Nw., Inc., 121 Wn.2d 726, 737, 853 P.2d 913, 919 (1993).

> Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that

> would justify recovery. "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." CR 12(b)(6) motions should be granted "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."

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216, 219–220 (1994) (footnotes omitted). While the County declares that Byrd cannot establish reasonable reliance on any of the County's actions during five years of planning and permitting, it offers no authority and scant factual analysis for this assertion. Respondent's Brief at 24. The Complaint outlines frequent communications and numerous document submissions with a variety of County officials stretching over the course of five years. CP 2-4. This factual recital does not detail each and every representation by the County. Such evidence will be developed through discovery and testimony of the parties. At this initial stage of pleading, the evidence is not sufficiently developed to allow ruling that no reasonable fact finder could find reasonable reliance.

The County cites Marashi v. Lannen for the premise that "[r]eliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them." 55 Wn. App. 820, 824, 780 P.2d 1341 (1989). It then states that Byrd had knowledge of, or a means to discover, the "facts" that encumbered their land as recorded on their deed. Respondent's Brief p. 25. With this, the County attempts to brush past the central issue that brings this case before the courts with

jurisdiction to interpret deed provisions: what exactly are the extent and effect of the restrictions in the deeds on the subject property? That question is why we are here and why the courts, not a hearing examiner, must decide this case.

Moreover, given the facts that are pleaded setting forth a pattern by the County of granting permits and approvals, and given that hypothetical (and likely) further facts may be developed that shows that the County's entire argument is a pretext to try to avoid all the damage it has caused to Appellant, a reasonable finder of fact could find all elements of equitable estoppel against the County. A judge could reasonably determine that the County should not be able to belatedly assert a restriction not raised for years. There is a course to recovery and a remedy in this case.

2. Manifest injustice may be proven

The County also declares without authority and the lightest factual brush that no manifest injustice shall result if it is not equitably estopped from denying Byrd's deviation request. Whether there will be a manifest injustice is a factual inquiry. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 749, 863 P.2d 535, 541 (1993). Several of the factors on which the Supreme Court and the Court of Appeals based a finding of manifest injustice in Kramarevcky also apply to Byrd. See Kramarevcky at 748-49. Providing timely and accurate information to the government: over the course of five years Byrd obtained, developed, and submitted at least 12 application packets, site plans, and mitigated deviation requests at great cost in time and money. CP 4-5. The actions

which the government should be estopped from abrogating, overpayments in Kramarevcky, representations of approval here, resulted solely from government action. See Complaint. Prior to the WSDOT's eleventh hour erroneous intervention, there was no reason Byrd would have been alerted to claimed ineligibility for the requested deviation when, in fact, they are not ineligible. While a preliminary showing of manifest injustice is made on these alleged facts, such factual analysis cannot be fully performed at this initial stage of pleading when discovery has not commenced. Byrd should be allowed their day in court to introduce their evidence of manifest injustice. They are not required to do so in their initial pleading.

3. Government function will not be impaired by estoppel

Whether a government function is impaired by application of equitable estoppel is a factual inquiry. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 749, 863 P.2d 535, 541 (1993). In Kramarevcky, the Court of Appeals determined that estoppel would not impair government function, observing that the potential for estoppel may encourage the government to exercise more rigorous oversight of its actions. Id. at 749. Similarly, estopping the County from taking a position contrary to five years of representations requiring great expenditures by Byrd would encourage the County to perform more complete reviews in its approval process to avoid pulling the rug out from under applicants who have reasonably relied on its representations for years. How is governmental function impaired by allowing a driveway that the County had recommended allowing? Further, this case is an

isolated matter. Estopping the County from denying access it had recommended for approval here does not bind the County to granting other deviations to other applicants at other sites. Thus, government function is not impaired by application of estoppel here. Regardless, the question is a factual inquiry that warrants discovery and presentation of evidence and is thus inappropriate for a 12(b)(6) motion.

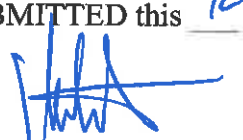
4. Representations of law versus fact are in dispute and not dispositive

Providing no factual analysis or explanation, the County asserts that its five years of representations to Byrd were all exclusively representations of law, not fact. Respondent's Brief p. 25. Even if this were true, it is insufficient to extinguish the claim on this ground. The rule is stated that "*[g]enerally,* equitable estoppel does not apply to representations of law." Davidheiser v. Pierce Cty., 92 Wn. App. 146, 153, 960 P.2d 998, 1002 (1998) (emphasis added). Indeed, the Washington Supreme Court has applied estoppel to representations of law. Rowe v. James, 71 Wash. 267, 274–75, 128 P. 539, 542 (1912). The qualification of *general* inapplicability necessarily allows that there are exceptions. This especially holds true here where representations occurred over the course of five years and involved both factual and legal analyses of the site and proposed developments. CP 3-5. Presenting the full extent of these representations will require testimony and discovery which are not yet in play at this initial pleading stage of the case.

II. CONCLUSION

This Court must decide if it will pronounce a rule that imposes a superfluous and wasteful requirement to bring a case before a hearing examiner when the examiner patently lacks jurisdiction to determine the central issues of the case. Byrd respectfully request that this Court reverse the order granting the County's 12(b)(6) motion to dismiss and remand to the Superior Court for further proceedings.

RESPECTFULLY SUBMITTED this 12 day of January, 2018.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 12, 2018, 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	☐ by legal messenger ☐ by postage prepaid USPS first-class mail ☒ by Electronic Mail/E-Service

DATED this 12th day of January, 2018, at Tacoma, Washington.

BURNS LAW, PLLC

By _____
Sheila Gerlach
Paralegal

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BURNS LAW, PLLC

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