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NO. 50513-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BRIAN BYRD and NICOLE BYRD, Appellants

v.

PIERCE COUNTY, Respondent

RESPONDENT'S BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly grant the motion to dismiss where Appellants sought to have the superior court direct the Pierce County Engineer to grant the deviation request to their property and thus reverse a land use decision which falls under LUPA?

2. Have Appellants failed to preserve on appeal the issue of equitable estoppel where it is not properly briefed on appeal? Even if properly briefed on appeal, have Appellants failed to meet their burden of proving equitable estoppel against the government?

II. STATEMENT OF THE CASE

A. PROCEDURE

On April 24, 2017, Appellants Brian Byrd and Nicole Byrd filed a cause of action in Pierce County Superior Court No. 17-2-07291-1, titled "Complaint for Equitable Estoppel and Request for Permanent Injunction." CP 1.

The Complaint sought relief from the Pierce County Engineer's decision to deny a deviation request for a driveway issued on March 23, 2017. CP 4, CP 81.

On May 26, 2017, the matter came before the Honorable Judge Jack Nevin, on Pierce County's Motion to Dismiss pursuant to 12(b)(6) for failure to state a claim. CP 89. Pierce County requested dismissal arguing that the Complaint sought to set aside the Engineer's decision (thus the request for injunctive relief) and that this argument fell under LUPA, RCW 36.70C *et seq*. and was untimely. Alternatively Pierce County

requested dismissal arguing that Appellants failed to plead a case of equitable estoppel. Judge Nevin granted this 12(b)(6) motion. CP 144.

This appeal timely follows. CP 146.

B. FACTS

1. Limited Access Highways

This case involves a purchase of access rights for purposes of serving a "limited access highway," in lieu of condemnation over 40 years ago.

RCW Title 47.52 outlines the procedure and the State's interest in regulating limited highway access highways and the property abutting the highways. Specifically, RCW 47.52.080 provides:

> No existing public highway, road, or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.133, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing condition at the time of the notice provided in RCW 47.52.133 as for the taking or damaging of property for public use.

RCW 47.52.080. As outlined below, the State – through WSDOT – purchased access rights to the property in question.

2. **Highway 512, Quit Claim Deed, and Limits to Access of Property**

Disman and Beverly Peecher (the Peechers) owned 10615 Canyon Road E., Puyallup, WA, (Parcel No. 7980000182) (property). CP 2. The property is located immediately adjacent to the off-ramp to Highway 512 at Canyon Road. *Id.*

Around 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 property. CP 2, CP 10, and CP 103.[1] Included in this document was a 14-foot residential driveway exclusion in the deed to WSDOT:

> Also, the grantors herein convey and warrant to the State of Washington all rights of ingress and egress (including all existing, future or potential easements of access ... to, from and between said Secondary State Highway 5-G (SR) Portland Avenue to McEachron Road, and the remainder of Said PARCEL "A". **EXCEPT 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, on the easterly side** ....

CP 2, CP 103, *emphasis added*. The front of the warranty deed is stamped, "limited access."

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[1] For the Court's convenience, Respondent attached cleaner copies of some of Appellants' exhibits:
Byrd Complaint Ex. 2 (CP 10) – Warranty Deed – App. A (CP 103); and
Byrd Complaint Ex. 3 (CP 15) – Deed of Trust and it's Ex. A (CP 21) – App. B (CP 106); App. C (CP 109) and Ex A (CP 111). Ex A (CP 111) is a close up of App. C (CP 109).

This, in effect, was the end result of the condemnation process WSDOT did with the Peechers. Rather than grabbing up their whole property, the state purchased a portion and then reserved it as limited access highway, thus making it subject to RCW 47.50.080 and thereby forever restricting the access to the property as long as SR 512 remains. CP 2 and CP 103.[2] Thus the State purchased the rights to such property, reserved egress and ingress as outlined in the agreement, and later conveyed this interest, with the corresponding restrictions, to Pierce County. CP 106. Stated another way, the State acquired from the Peechers *all access to the property*, except those of residential access. CP 103.

Around 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. Within the quit claim the same express limitation on the approach:

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[2] For a general history of the purpose, procedure, and safety consideration of limited access highways see *State v. Calkins*, 50 Wn. 2d 716, 722, 314 P.2d 449, 452–53 (1957):

> Thus, after defining an existing highway RCW 47.52.011, the legislature has provided in general terms for the taking of certain property rights, including access, air, view, and light, in the manner authorized by law, for the construction of limited-access facilities (RCW 47.52.050). Then, in specific terms the legislature has stated that compensation shall be paid for the taking of an abutting owner's right of access to an existing highway (RCW (Sup.1955) 47.52.080). But no provision is made relative to 'taking' the above-mentioned rights in connection with a new limited-access highway. The maxim, expression unius est exclusion alterius, seems to be applicable.

> The grantee herein, its successors or assigns, shall have no right of ingress and egress to, from and between said SR 512 and the lands herein conveyed and will maintain the control of ingress and egress to, from and between the lands of access symbol appearing on said Exhibit "A";

Complaint (CP 2) and App. C. "Exhibit A" (CP 109) – state:

> "ACCESS NOTES": Type A approach is an off and on approach in legal manner not to exceed 14 feet in width, for sole purpose of serving a single family residence. It may be served by abutting owner for specific use at a point satisfactory to the state at or between designated highway stations.

CP 109 and CP 111 (a close up of CP 109). On the legend, Peechers' property is named as one of the properties with limited access and shows up as a Type A restriction. *Id.*

3. <u>Byrds' Purchase of Property</u>

On September 18, 2012, Appellants Brian and Nichole Byrd (the Byrds) purchased the Peechers' property, including a single family residence (SFR). CP 3, CP 26, CP 31. Prior to the purchase, the Peechers applied for a demolition permit from Pierce County to remove the residence from the property in anticipation of selling it to the Byrds. CP 2, CP 23. The purchase was subject to the removal of the residence. CP 3, CP 26. The warranty deed issued on September 18, 2012, and attached as Ex. A contained the language "Relinquishment of right of access to state highway and of light, view and air under terms of deed to the State of

Washington recorded under **Auditor's No. 2214607**." CP 3, CP 32. **Auditors No. 2214607**, is the original warranty deed, attached as Ex. 2 to the Complaint, and outlines the 14-foot limitation to approach of the property. CP 10, CP 103.

4. <u>Byrds' Attempt to Develop Property</u>

Ignoring the express limitations on their recorded deed, the Byrds pushed forward with plans to develop the SFR as commercial property. CP 3-4. In the course of development, Appellants were made aware that in order to serve a commercial purpose, they must seek an *engineering deviation* to widen the driveway. CP 4, CP 65. No discussions were brought forward at this time regarding the legal aspects of development, instead the focus was on the engineering requirements. CP 3-4. On January 7, 2016, an internal memorandum was issued by Pierce County Planning and Land Services (PALS) "*recommending*" approval of the deviation request subject to Public Works review and approval. CP 4, CP 73.

Sometime during the review of the plans, it was called to the County's attention that there was a restriction from WSDOT regarding access. CP 4, CP 76. Appellants never communicated this restriction noted on their own warranty deed to Pierce County in any earlier

conversations, and in fact, Appellants claim to have also been unaware of such a restriction. CP 3-4.

On February 8, 2017, WSDOT made clear to Pierce County that the State was going to stand by the express terms of the original deed from the Peechers and the quit claim deed, and that "WSDOT will not support allowing the driveway's usage to be changed from its current residential use only," and "[t]herefore WSDOT will not allow the existing limited access Type A Residential Use only driveway to be changed to any other use." CP 76. WSDOT explained that typically their limited access standards dictate that <u>no driveways</u> may be located within the first 300 feet past the ramp terminal, but "for whatever reason WSDOT allowed a residential use only driveway to remain." *Id., emphasis added*. The standstill was the result of concern of preserving the capacity and safety of the highway by restricting the use of driveways. *Id.*

Based on the communication with WSDOT and the position WSDOT took, Pierce County noted internally on April 28, 2016, that the access restrictions "must be maintained, per our turn back agreement issued by WSDOT in 1978," and that the current owners should be aware of those limitations given that it was recorded on the Statutory Warrant Deed issued along with the sale of the property. CP 78.

5. Final County Determination of Deviation Request

On March 23, 2017, Brian Stacy, acting as County Engineer, issued a final determination on the deviation request:

> Pierce County has denied the request to reduce the intersection spacing from a minor driveway approach to serve the proposed commercial use to the westbound SR-512 off-ramp to Canyon Road East due to title notification that the subject parcel is only allowed a residential driveway approach not to exceed 14 feet wide.
>
> This restriction can be found in the Statutory Warranty Deed under Auditor's Recording No. 2012209250068, which references Auditor's Recording No. 2214607.
>
> Specifically, Pierce County denies the deviation to the Manual on Design Guidelines and Specification for Road and Bridge Construction in Pierce County, Chapter 5-2.2, which requires a minimum of 125 feet of spacing from a minor driveway approach to an intersection.

CP 78.

III. LAW AND ARGUMENT

Standard of Review Under 12(b)(6)

An appellate court reviews a trial court dismissal pursuant to CR 12(b)(6) de novo. *Future Select Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc*., 180 Wn. 2d 954, 963, 331 P.3d 29, 34 (2014), *citations omitted*. Dismissal under CR 12(b)(6) is proper where "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Tenore v. AT & T Wireless Servs.*, 136 Wn. 2d 322, 329–30, 962 P.2d 104, 107 (1998). A

court regards the plaintiff's allegations in the complaint as true, and considers hypothetical facts outside the record. *Id.* "A court may consider documents physically attached to the pleading when ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp*., 144 Wn.App. 709, 726, 189 P.3d 168 (2008). Here, Appellants attached all critical documents pertaining to the denial of the deviance to the Complaint. CP 1-84. Thus, Appellants' allegation that "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 summary judgment" is not well taken. *See* Opening Brief at 9. Instead, the superior court had everything in front of it at the time the pleadings were filed that the hearing examiner would have in front of it, including the deeds in question, the deviation request, and the denial of such request. CP 1-84.

A. THE TRIAL COURT DID NOT ERROR IN GRANTING THE MOTION TO DISMISS WHERE APPELLANTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES UNDER LUPA AND WHERE THEY SEEK REVERSAL OF THE COUNTY'S DENIAL OF A DEVIATION REQUEST UNDER ITS DESIGN GUIDELINES ON ROADS

Appellants filed an original action in superior court and bypassed the first stage of LUPA as provided for in PCC 1.22.090(B). CP 1.

PCC 1.22.090(B) outlines strict time limits to appeal any land use decision:

B. Time Limits

1. Land Use Matters

a. A notice of appeal, together with the appropriate appeal fee, shall be filed at the planning and land services department within 14 days of the date of an administrative official's decision ….

PCC 1.22.090(B), App. A.

After seeking review under PCC 1.22.090(B), a party must seek review under LUPA. However, under LUPA, "[a] petition for judicial review of a land use decision is barred unless timely filed within 21 days of issuance of the decision." *Chelan Cty. v. Nykreim*, 146 Wn. 2d 904, 932–33, 52 P.3d 1, 14–15 (2002). RCW 36.70C.030(1) states that "[t]his chapter replaces the writ of certiorari for appeal of land use decisions and shall be the *exclusive means* of judicial review of land use decisions, except that this chapter does not apply to .... [enumerated exceptions not relevant to this case]." (Emphasis added.) *Chelan Cty. v. Nykreim*, 146 Wn. 2d 904, 930, 52 P.3d 1, 13 (2002).

LUPA petitioners must first exhaust administrative remedies to have standing to maintain a LUPA action in superior court. RCW 36.70C.060(2)(d).

> The [exhaustion] doctrine is founded on the principle that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will

> not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely.

Phillips v. King County, 87 Wn.App. 468, 479–80, 943 P.2d 306 (1997), aff'd, 136 Wn.2d 946, 968 P.2d 871 (1998); *see also Harrington v. Spokane County*, 128 Wn.App. 202, 209–10, 114 P.3d 1233 (2005). This requirement applies even with regard to constitutional issues. *Harrington v. Spokane County*, 128 Wn.App. at 210.

Here, there is no dispute that the letter dated March 23, 2017, is a final land use decision by a County officer. RCW 36.70C.020.[3] Per PCC 1.22.090, any person aggrieved by a final decision of an administrative

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

> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;
> (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020.

official may appeal the decision to the PC Hearing Examiner within 14 days of the decision. Appellants did not file any administrative appeal under the PCC and did not file any LUPA appeal under RCW 36.70C and therefore are time barred from doing so. Having failed to comply with LUPA requirements to exhaust administrative remedies, the superior court lacked jurisdiction to review the land use decision. *See Knight v. City of Yelm*, 173 Wn. 2d 325,336, 267 P.3d 973 (2011) (noting that LUPA's standing and administrative exhaustion requirements are jurisdictional).

Appellants argue that "[i]n this case, we have a provision in a past deed that the **County is choosing to interpret** and recognize by denying Byrds' commercial grade access to a parcel that is already zoned, planned, and permitted for commercial use." (Opening Brief of Appellant at 10). And "Byrd is asking the court to **estop Pierce County from attempting to implement an overly burdensome reading of the contract/covernent language."** (Opening Brief of Appellant at 15). These issue statements underscore that what the Byrds are attempting to do is override a land use decision in an injunctive relief action. This flies contrary to the entire purpose of LUPA. The County Engineer, and the final decision maker below, very clearly outlined that his decision was based on County guidelines, and not on language in the deed, although language in the deed guided him:

> ***Specifically***, Pierce County denies the deviation to the Manual on Design Guidelines and Specification for Road and Bridge Construction in Pierce County, Chapter 5-2.2, which requires a minimum of 125 feet of spacing from a minor driveway approach to an intersection.

(CP 81, *emphasis added*); Appendix B, Pierce County Ordinance No. 2010-70s, § 8, App. F; PCC 17B.10.060(A).

A party is not entitled to a declaratory judgment if there is an adequate alternative remedy available. *Grandmaster Sheng–Yen Lu v. King County*, 110 Wn.App. 92, 98–99, 38 P.3d 1040 (2002), *citing Stafne v. Snohomish Cty*., 156 Wn. App. 667, 688, 234 P.3d 225, 235 (2010), *aff'd*, 174 Wn. 2d 24, 271 P.3d 868 (2012). Where LUPA is the exclusive means of judicial review a party may not seek a declaratory judgment because there is an adequate alternative remedy. *Id*. Although declaratory relief is available if a court determines that other available remedies are unsatisfactory, this exceptional relief is rare. *Sheng–Yen Lu*, 110 Wn.App. at 106. Loss of an adequate remedy due to a party's failure to diligently pursue it does not allow the party to bring an action for declaratory relief. *Evergreen Wn. Healthcare Frontier LLC v. Dep't of Social & Health Servs*., 171 Wn.App. 431, 452–53, 287 P.3d 40 (2012), *review denied*, 176 Wn.2d 1028 (2013).

Appellants had an adequate remedy at law and chose not to pursue that remedy; they cannot convert a LUPA action into a superior court declaratory action.

Under LUPA, the reviewing court may grant relief under six circumstances, including where "the land use decision is an erroneous interpretation of law after allowing for such deference as is due the construction of the law by a local jurisdiction with expertise." *See* RCW 36.70C.130(1)(a)-(f). Here, Appellants could have sought relief under LUPA arguing that the County Engineer improperly interpreted the facts (deed) in relation to the law (the County Guidelines and Specification for the Road and Bridge Construction). They chose not to do so.

The Complaint only mentioned in passing the phrase "'quiet title'" (CP 5, Complaint at 5, ¶IV "'Causes of Action: Quiet title/declaratory relief,'") but did not plead a case of "'quiet title'" under RCW 7.28.010.[4] RCW 7.28.010 permits a "'[**a]ny person having a valid subsisting interest in real property**, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, . . .

[4] Interestingly, even Appellants' assignment of error states, "'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?'" (Assignment of Error No. 3). Although the failure to assign error under RAP 10.3(g), may not result in the waiver of the error on appeal, waiver may be found where the issues is not properly agued and developed in the brief. *See SentinelC3, Inc. v. Hunt*, 181 Wn. 2d 127, 138, 331 P.3d 40, 45 (2014). Again, Appellants' theory of "'quiet title'" is sparsely developed on appeal and thus respondents are prejudiced.

and may have judgment in such action quieting or removing a cloud from plaintiff's title.'" *Emphasis added*. Here, if Appellants wanted to bring a quiet title[5] action, they 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. However, the Complaint is completely devoid of any such assertion. Instead of requesting that the superior court "'quiet the title,'" the Complaint is titled, "'Complaint for equitable estoppel and request for permanent injunctive relief,'" (CP 1) and states in the cause of action that:

> The County has now changed its approval [of access deviation]. Appellants have been damaged by the County's denial. Such conduct by the County satisfies the doctrine of equitable estoppel as a party cannot act in a manner allowing another to rely on such action only to then contradict or repudiate such action to the detriment of the relying party.

(CP 5).

The prayer for relief also does not ask the court to quiet the title, but instead states:

> For an order estopping the County from denying Appellants' minor right of way deviation. [and] For a permanent injunction against the enforcement of a covenant on title restricting residential access only to the Subject commercial Property.

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[5] Respondent does not dispute that a properly brought quiet title action which seeks to quiet the title under theories such as adverse possession, equitable easement, etc. may be brought outside a land use action as an original action in superior court. However, that was not the relief sought here. *See* CP 1-8.

(CP 6, ¶5.1 and 5.2). The Appellants do not claim Pierce County has an interest in its property that is improper or vice versa, nor could it given the express language in Warranty Deed 2214607. Instead, it asked the superior court to order Pierce County to approve its driveway approach deviation - an approval which is a land use decision.

For example, the rationale for refusing to examine a land use decision within a declaratory action was well summarized by the court in *Richards v. City of Pullman:*

> Pullman issued a notice to the Richardses that their addition violated an ordinance regulating improvement and development of property. This notice constituted a land use decision. RCW 36.70C.020(1)(c). Their administrative appeal was rejected as untimely. When they filed for declaratory relief under chapter 7.24 RCW, the period for filing a timely petition for review under LUPA had run. RCW 36.70C.040(3) (the LUPA petition is timely if filed and served on the parties within 21 days of the issuance of the land use decision); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408, 120 P.3d 56 (2005) (LUPA's statute of limitations begins to run when the land use decision is issued). Consequently, review of the notice of violation and order to correct or cease activity was unavailable under LUPA.
> . . .
> Because LUPA provides an adequate and exclusive means for review of most land use decisions, and because Pullman is not required by law to enforce its zoning code in a court of limited jurisdiction, declaratory relief was not appropriate in this case. *Id*. This commonsense reading of the language in RCW 36.70C.020(1)(c) and PCC 17.10.090 comports with the purpose of LUPA to promote administrative finality in land use decisions. *James v. Kitsap County*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005).

Richards v. City of Pullman, 134 Wn. App. 876, 881, 142 P.3d 1121, 1123 (2006) *disapproved of on other grounds by Durland v. San Juan Cty*., 182 Wn. 2d 55, 340 P.3d 191 (2014).

Also as illustrated in *WSDOT v. City of Seattle*, 192 Wn.App. 82, 368 P.3d 251(2016), WSDOT sought superior court review under LUPA after the city required grading permits for construction on temporary easements for a highway floating bridge project. Interestingly, one of the issues the case turned on was temporary easements WSDOT obtained as a necessary right-of-way to build SR 520 (a limited access facilities pursuant to RCW 47.52.010 and RCW 47.12.010 – the same highways at issue here) and most of the property had been acquired by the State. 192 streated by WSDOT as a state right –of-way and delineated as such on WSDOT's right-of-way plans. *Id*. When the city required WSDOT to obtain permits for grading on the State "'right-of-way,'" WSDOT followed the appeal process under LUPA challenging such permits. *Id.* In order to analyze the permits, the court had to look to the language in the code as well as the documents creating temporary easements and statutory language under RCW 47.01.260 and RCW 47.12.010. The -"'fee simple,'" or had a temporary easement, state law established that "'WSDOT is the only agency authorized to site, design, construct, and acquire land for construction of state highways under Title 47 RCW.'" 192 Wn.App. at

840. Thus, the Appellate Court affirmed the trial court's ruling that the City of Seattle erroneously required a permit for the grading of the right of way under the city code. *Id.*

Here, the County denied the deviation request under the county Manual on Design Guidelines and Specification for Road and Bridge Construction in Pierce County, Chapter 5-2.2. CP 81. In refusing to grant a deviation, the County factually examined the deed, much like the City had to analyze RCW 47. It is not uncommon in making land use decisions that a hearing examiner or County Engineer may have to look to facts, deeds, or other bodies of law to guide its decision. This does not take the matter outside the appeal process of LUPA.

The facts in *Harrison v. County of Stevens*, further highlights that a hearing examiner does in fact interpret deeds, make land use decisions based on those deeds, and that such a determination may be appealed under LUPA. *Harrison v. Cty. of Stevens*, 115 Wn. App. 126, 128–30, 61 P.3d 1202, 1204 (2003). The case in *Harrison* followed the traditional LUPA procedure: (1) a land use decision by county council *approving* a short plat, (2) an appeal of that decision to a hearing examiner who *affirmed* the short plat approval, (3) an appeal to superior court who *reversed* the hearing examiner, and (4) an appeal to the Court of Appeals who *reversed* the superior court and reinstated the plat. *Id.* at 129-130.

At issue in *Harrison* was the interpretation of a **deed** which granted property title in fee to one party but reserved mineral rights to another party. In interpreting the deed, the superior court reversed the hearing examiner's decision that the mineral rights were severed from the title to the surface and therefore the mineral right owner's signature was required for application of a short plat. 115 Wn.App. 126, 129, 134. The appellate court reversed the superior court and affirmed the hearing examiner's decision, finding that the superior court misinterpreted the law or erroneously applied the law to the proved facts. *Id. citing*, RCW 36.70C.130(a)(b). After carefully analyzing the language contained in the deed, and case law analyzing mineral rights versus surface rights the court held:

> Mr. Harrison's **deed,** on its face, grants nothing more than ownership of all dolomite, limestone, silica, and marble rock in the 80 acres of the parcel, as well as the right to enter the property to remove those minerals.

115 Wn.App. at 134, *emphasis added*. The hearing examiner's decision was then reinstated and the landowner's short plat application was approved. *Id.; See* former RCW 58.17.020(6) (short plat is a division of land into four or fewer lots).

Contrary to Appellants' argument, the *Harrison* decision was not based on an analysis of general surface versus mineral rights law, but absolutely turned on the lower court's treatment of the language contained in the deed as it related to the county ordinance. (See Opening Brief of Appellants at 10, *citing Harrison*, 115 Wn.App. at 134). Instead, the court stated, "'[c]ritical to our analysis is an understanding of the respective interests held by Mr. Harrison and the Crains in the land.'" The court then went on to look at language in the deed. 115 Wn.App. at 132 & 134. The trial court also found that the "'language in the quitclaim deed to Mr. Harrison was unique and created a special form of mineral rights.'" *Id*. at 129.

The Appellants had every opportunity under LUPA to appeal the County Engineer's decision to deny the deviation. The fact that the County Engineer looked at language in the statutory warrant deed does not take this action outside the exhaustion requirements of RCW 36.70C.020. The Engineer's decision was a land use decision to "'deny a deviation,'" and as such, Appellants needed to continue to challenge such a determination under LUPA.

B. Appellants Have Failed to Adequately Brief Equitable Estoppel Against the Government and Therefore This Court May Not Consider on Appeal; Even if This Court Could Consider Such an Argument on Appeal (1) a Hearing Examiner May Consider Arguments in Equity, and (2) Even if Equitable Estoppel Is Properly Before This Court Appellants Failed to Plead Grounds for Relief in Equity

On appeal, Appellants completely fail to brief the elements of equitable estoppel when asserting such a remedy against the government. *See* (Opening Brief of Appellants at 18-21). As such, this Court should refuse to consider the claim on appeal. *See Skagit Cty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 320–21, 253 P.3d 1135, 1141 (2011)(holding that pursuant to RAP 10.3(a)(6), because appellant did not fully develop its argument of equitable estoppel against a government, the court declined to reach the issue).

Equitable estoppel may be brought within a LUPA action or other administrative law setting. *See Dykstra v. Cty. of Skagit*, 97 Wn. App. 670, 679, 985 P.2d 424, 429 (1999), as corrected (Nov. 9, 1999)(in what appears to be a LUPA appeal from superior court, court rejects an equitable estoppel claim where there were no vested rights for the development permits); *See Also Kramarevcky v. Dep't of Soc. & Health*

Servs., 122 Wn. 2d 738, 741, 863 P.2d 535 (1993)(ordering an ALJ judge to consider equitable estoppel in a hearing on benefits).[6]

However, even if properly briefed, Appellants' estoppel argument fails. As outlined below, Appellants failed to plead a claim of equitable estoppel against the government.

Equitable estoppel is based on the view that "'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'" *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (*quoting Kramarevcky v. Dep't of Social & Health Svcs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (internal quotations omitted)). "'Equitable estoppel is not favored, and the party asserting estoppel must prove each of the elements by clear, cogent, and convincing evidence.'" *Peterson v. Groves*, 111 Wn.App. 306, 310, 44 P.3d 894 (2002).

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[6] Appellants cite to *Chaussee v. Snohomish Cty. Council*, 38 Wn. App. 630, 634, 689 P.2d 1084, 1089 (1984), for the proposing that a hearing examiner has no jurisdiction to consider matters of equitable estoppel. While this court did conclude this, it was issued in a 1984 decision, pre-passing of the LUPA statute under RCW 36.70C.130. Since then, courts have applied principles of equitable estoppel to LUPA actions. *See Supra*, *Dykstra v. Cty. Of Skagit*, at 679.

Equitable estoppel requires: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on the faith of such admission, statement, or act; and (3) injury to the other party if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act. *Liebergesell v. Evans*, 93 Wn.2d 881, 888–89, 613 P.2d 1170 (1980). "'Assertions of equitable estoppel against the government are not favored, and parties must demonstrate that equitable estoppel is necessary to prevent a manifest injustice and that the exercise of governmental functions will not be impaired as a result of the estoppel.'" *City of Seattle v. St. John*, 166 Wn.2d 941, 949, 215 P.3d 194 (2009).

The party asserting the doctrine 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). "[W]here the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied." *Id.* Courts have held that " [r]eliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them." *Marashi v. Lannen*, 55 Wn.App. 820, 824, 780 P.2d 1341 (1989).

The promulgation of zoning ordinances is a governmental function and generally estoppel does not apply to government enforcement of zoning ordinances, even when its officers have issued building permits, allowed construction contrary to regulations, have given general approval to regulation violations, or have remained inactive in the face of such violations. *City of Mercer Island v. Steinmann*, 9 Wn.App. 479, 483, 513 P.2d 80 (1973); *See also Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 165–66, 43 P.3d 1250, 1256–57 (2002)("'Any failure by the City to enforce its zoning code or any representations the City made that the uses were legal do not constitute approval by the Board of Adjustment.'"). And "'[a] plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.'" *Id.* Further, a "'misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment.'" *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 781, 11 P.3d 322, 326 (2000).

First and foremost, Appellants cannot establish *reasonable reliance* on preliminary approval of permits where no final determination was made. Appellants acted at their peril in marching forward with demolition and other developments prior to final approval by the County. Second, there is no *manifest injustice* because the property may still be

used for residential or other purposes. Further, to rule in favor of Appellants would *impair the exercise of a government function* – controlling traffic off an intersection and highway. *See* CP 89-90 (describing limited access highways); CP 76 (email from WSDOT explaining danger of allowing any access and that "limited access was created to preserve the capacity and safety of the highway by either prohibit access altogether, or by restricting the use of any existing driveways). And moreover, the law is well settled that generally estoppel cannot apply to enforcement of government ordinances. Finally, any preliminary representations made by the County was *one of law* and not fact, and Appellants were in the same position as the county to have *knowledge of the facts* or a means to *discover* the facts that encumbered their land as recorded on their deed.

IV. CONCLUSION

The Appellants find themselves in the wrong court at the wrong time. Strict compliance with LUPA's procedural requirements is required and failing to do so divests the superior court of jurisdiction. Having slept on their rights and remedies available at law, nothing can resurrect their claims. Alternatively, there is no theory of law in equity, or otherwise, that allows a court to rewrite the language in the covenants or override State law regarding limited access highways. See RCW 47.52.080 (stating

that permits outside limited highway access must be by deed only). This court should affirm the trial court's dismissal under 12(b)(6) for failure to exhaust administrative remedies and failure to plead a case of equitable estoppel.

DATED this 29th day of November, 2017.

MARK LINDQUIST
Prosecuting Attorney

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CERTIFICATE OF SERVICE

On November 29, 2017, I hereby certify that I electronically filed the foregoing Respondent's Brief with attached Appendix with the Clerk of the Court and I caused a true and accurate copy of the uploaded file to be transferred via the Washington State Secure Access eFiling Portal system to:

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s/ DEBRA BOND

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APPENDIX

App. A: PCC 1.22.090(B).....App 1-3

App. B: Pierce County Ordinance No. 2010-70s,
§ 8, App. F; PCC 17B.10.060(A).....App 4-15

1.22.090 Appeals of Administrative Decisions to the Examiner. Revised 1/17 Amended Ord. 2017-12s

A. **Right to Appeal.** Any person aggrieved, or any officer, department, board, agency, district or bureau of the County or State affected by any final decision of an administrative official, as set forth in PCC 1.22.080 B., may file a notice of appeal.

B. **Time Limits.**

1. **Land Use Matters.**

a. A notice of appeal, together with the appropriate appeal fee, shall be filed at the Planning and Land Services Department within 14 days of the date of an Administrative Official's decision. In the case of an appeal of a Determination of Nonsignificance requiring a comment period which is issued concurrently with a final decision, the appeal period shall be extended to 21 days.

b. The Administrative Official shall prepare a written report regarding the administrative decision.

c. Staff reports shall be filed with the Examiner, mailed to the applicant and appellant and made available to the public at least 10 working days prior to the public hearing scheduled to review the administrative appeal. Copies shall be provided to the public upon request at the cost of reproduction.

d. The public hearing, if applicable, shall be scheduled no later than 70 days from the date a notice of appeal is filed.

e. Any supplemental briefs or materials supporting an appeal and/or responding to a staff report shall be filed with the Examiner and the Administrative Official at least five working days prior to the public hearing, unless a different schedule is set by the Examiner. Any costs incurred as a result of noncompliance with this subsection may be charged to the applicant at the discretion of the Examiner.

f. If the Examiner has been requested to render a decision on an appeal in writing without conducting a public hearing, as set forth in PCC 1.22.090 F.2., then the written briefs shall be submitted to the Examiner within 30 days of the Department's receipt of a filed notice of appeal.

2. **Non Land Use Matters.** Refer to the applicable code.

C. **Content of Notice of Appeal.** A Notice of Appeal on an administrative decision shall, at a minimum, contain the following information:

1. Name, mailing address, and electronic mail address of the appellant and his/her agent or representative, if any;
2. A copy of any decision, license, order or environmental determination which is being appealed;
3. A concise statement of the factual and legal basis for the appeal citing specifically the alleged errors in the administrative official's decision; and
4. The specific relief sought.

D. **Consolidation.**

1. If more than one person files an appeal of an administrative decision on a proposal, the Examiner shall consolidate such appeals for review at one public hearing. However, the appeal of a Determination of Significance, as set forth in

Title 18D PCC, Development Regulations – Environmental, may occur separately and prior to the public hearing on the underlying permit as determined by the Hearing Examiner.

2. Appeals of the adequacy of an FEIS or SEIS or threshold determination of a DNS/MDNS, as set forth in Title 18D PCC, Development Regulations – Environmental, shall be consolidated with the public hearing on the merits of the proposal. If no public hearing process exists for a proposal, review of the FEIS, SEIS or DNS/MDNS shall be heard as determined by the Hearing Examiner.

E. **Notice Provisions.** Notice for an appeal of an administrative decision to be reviewed at a public hearing shall be in conformance with PCC 1.22.110, Public Hearing.

F. **Review Procedure.**

1. The Hearing Examiner shall conduct a public hearing to review appeals including:
   a. The Administrative Official's findings, conclusions, and determination;
   b. All evidence admitted into the record; and
   c. Taking sworn testimony.
2. The Hearing Examiner may render a decision on an appeal, in writing, without holding a public hearing when the parties agree that no issues of fact are to be decided. When issues of law are to be determined and opposing parties agree, they may request the Hearing Examiner to render a decision based upon written briefs. The Hearing Examiner shall render a written decision within 10 working days of receipt of the briefs.

G. **Burden of Proof.**

1. A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.
2. **Appeal of an enforcement action.**
   a. When an appeal is submitted by the recipient of a final enforcement decision or order on a land use matter, the initial burden shall be on the County to prove, by a preponderance of evidence, that the use, activity, or development is not in conformance with the regulations contained in Pierce County Code or the terms of a permit, approval, or final written order.
   b. Failure by a party to submit a timely appeal following the issuance of a final administrative determination, permit, approval, or final written order precludes later challenges to the decision(s) during subsequent enforcement actions and appeals therefrom.
   c. When the appellant alleges that an exemption applies, the burden shall be upon the appellant to prove, by a preponderance of evidence, that the current use, activity, or development is exempt from the regulations contained in the Pierce County Code. A claim or allegation of nonconforming use or development rights by an appellant must be verified by Pierce County Planning and Land Services through an application for confirmation of nonconforming use or development rights.
   d. The Examiner's review shall not be limited to the evidence submitted by the appellant to the Department before a formal appeal was filed, or to the evidence obtained by the Department during the course of the investigation

or informal review. The Examiner may consider all relevant testimony and exhibits that are timely submitted when determining whether the parties have met their respective burdens of proof.

H. **Scope of Authority.** The Examiner may reverse or affirm, wholly or in part, or may modify the Administrative Official's order, requirement, decision or determination. If the Hearing Examiner reverses the Administrative Official's decision, the entire action shall be remanded to the Administrative Official for an action consistent with the Hearing Examiner's decision.

I. **Dismissal of Appeal.**

1. The Hearing Examiner has the authority to summarily dismiss an appeal of an Administrative Official's decision without a hearing when such appeal is determined by the Examiner to be without merit on its face, frivolous, or brought merely to secure a delay.
2. The Hearing Examiner may also dismiss an appeal of an Administrative Official's decision pursuant to a settlement agreement between the parties, or at the request of the appellant.

(Ord. 2016-56s § 1, 2016; Ord. 2014-52s2 § 1 (part), 2014; Ord. 2009-69s § 1 (part), 2009; Ord. 96-19S § 4 (part), 1996)

Sponsored by: Councilmember Terry Lee
Requested by: County Executive/Planning and Land Services Dept.

ORDINANCE NO. 2010-70s

An Ordinance of the Pierce County Council Consolidating and Reducing the Complexity of the Pierce County Development Regulations by Amending Various Portions of the Pierce County Code; Amending Section 1.22.080, "Examiner – Powers and Duties"; Repealing Chapters 2.58, 2.59, 2.62, 2.63, 2.64, 2.65, 2.67, 2.75, 2.77, 2.83, 2.85 and 2.94 and Consolidating the Land Use Advisory Commissions into Chapter 2.45, "Land Use Advisory Commissions"; Amending Sections 12.08.010, "Classification of County Roads," 12.08.030, "Plan Available at the Development Center," and 12.24.040, "Minimum Width Set"; Amending Section 17A.10.130, "Penalties and Enforcement"; Amending Chapters 17B.10, "General Provisions" and 17B.20, "Access and Driveway"; Repealing Chapter 17B.30, "Roads and Bridges"; Repealing and Replacing the "Manual on Design Guidelines and Specifications for Road and Bridge Construction in Pierce County"; Amending Section 17C.20.050, "Premises Identification"; Amending Title 18, "Development Regulations – General Provisions"; Amending Title 18A, "Development Regulations – Zoning"; Amending Section 18B.10.070, "Violations, Penalties, and Compliance"; Amending Sections 18D.10.090, 18E.10.110, and 18I.10.100, "Compliance," to Correct the Name of the Chapter Reference Therein; Amending Section 18H.20.040, "Class I Forest Practices"; Amending Title 18J, "Development Regulations – Design Standards and Guidelines"; Adopting Findings of Fact; and Setting an Effective Date.

Whereas, the Pierce County Council initiated a review of measures that could be taken to stimulate economic growth through Pierce County Resolution No. R2008-77s; and

Whereas, in response to Resolution No. R2008-77s, the Pierce County Office of Economic Development produced the Pierce County Economic Stimulus Report which was accepted by the Council through Resolution No. R2008-146; and

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DISTRIBUTION:

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Cort O'Connor, Dep. Pros. Atty. ✓
Brian Stacy, PW & U ✓
Rory Grindley, PW & U ✓
Ramiro Chavez, PW & U ✓
Joe Phillips, Econ. Dev. ✓
Sean Gaffney, PALS ✓
Deirdre Wilson, PALS ✓
Aaron Petersen, PALS ✓
Carol Johnson, PALS ✓
Mitch Brells, PALS ✓
Vicki Diamond, PALS ✓
Diana Ranes, PALS ✓
Paula Manning, PALS ✓
Toni Fairbanks, PALS ✓
Keri Rooney, Executive Office ✓
Al Rose, Executive Office ✓

12/27/10 CJ
Date/initials

Whereas, the Pierce County Economic Stimulus Report identifies a number of measures that could be taken to stimulate the local economy; and

Whereas, among other things, the Economic Stimulus Report recommends that the Pierce County Development Regulations undergo a rigorous review to remove inconsistencies and improve the application and predictability of the regulations; and

Whereas, the Pierce County Development Regulations are codified primarily within the Title 18 series of the Pierce County Code; and

Whereas, the Pierce County Development Regulations have become progressively more complex since their original adoption in 1995 due to increasing environmental requirements at the state and federal level; adoption of community plans; and adoption of new regulations in response to emergent issues and Comprehensive Plan amendments; and

Whereas, the page volume of these regulations has grown from approximately 370 pages in the year 1999 to approximately 1,500 pages in the year 2009; and

Whereas, numerous areas of overlap and duplication exist with the Pierce County Development Regulations; and

Whereas, Pierce County's last major effort to reform and improve the usability of the development regulations occurred more than a decade ago in 1997 with the adoption of Ordinance No. 97-84; and

Whereas, the Pierce County Council appropriated $100,000 in the 2009 Pierce County Budget, and $100,000 in the 2010 Pierce County Budget for the implementation of the Pierce County Economic Stimulus Report, including consolidation of the Pierce County Development Regulations; and

Whereas, Code simplification and consolidation may result in a more easily administered development code and greater efficiencies in operation of the Planning and Land Services Department; and

Whereas, the Pierce County Council adopted Resolution No. 2009-56 that directed Planning and Land Services to initiate a process to consolidate and reduce the complexity of the Pierce County development regulations and provide recommendations for Code consolidation and simplification to the Pierce County Planning Commission and the Pierce County Council; and

Whereas, on June 1, 2010, the first phase of the Code consolidation project became effective; and

Whereas, in order to consolidate related design standards, those that apply within the right-of-way should be moved from Title 18J, "Development Regulations –

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Design Standards and Guidelines" to Title 17B, "Construction and Infrastructure Regulations – Road and Bridge Design and Construction Standards"; and

Whereas, Code enforcement for certain development regulations administered by Planning and Land Services is now being pursued by staff in the Public Works and Utilities Department; and

Whereas, in order for the Planning and Land Services and Public Works and Utilities Departments to provide efficient and fair Code enforcement, the compliance language for such throughout the Development Regulations and Construction and Infrastructure Regulations must be consistent; and

Whereas, there are 12 Land Use Advisory Commission (LUAC) Chapters in Title 2, Administration, all with similar roles and responsibilities for the LUAC that could be consolidated into one Chapter to simplify administration; and

Whereas, portions of Title 12 need to be clarified to avoid conflicts with Title 17B and Title 18 and further the goals of Resolution No. R2006-146s for the prevervation of right-of-way; **Now Therefore,**

BE IT RESOLVED by the Council of Pierce County:

Section 1. Section 1.22.080 of the Pierce County Code, "Examiner – Powers and Duties," is hereby amended as shown in Exhibit A, which is attached hereto and incorporated herein by reference.

Section 2. Chapter 2.45 of the Pierce County Code, "Land Use Advisory Commissions," is hereby amended as shown in Exhibit B, which is attached hereto and incorporated herein by reference.

Section 3. Pierce County Code Chapters 2.58, "Gig Harbor Peninsula Advisory Commission," 2.59, "Graham Advisory Commission," 2.62, "Parkland-Spanaway-Midland Land Use Advisory Commissions," 2.63, "Mid-County Land Use Advisory Commission," 2.64, "Frederickson Advisory Commission," 2.65, "Upper Nisqually Advisory Commission," 2.67, "Southwest Pierce County Advisory Commission," 2.75, "South Hill Advisory Commission," 2.77, "Foothills Plateau Advisory Commission," 2.83, "Alderton-McMillin Advisory Commission," 2.85, "Key Peninsula Advisory Commission," 2.94, "Greater Greenwater Gateway Advisory Commission" are hereby repealed.

Section 4. Sections 12.08.010, "Classification of County Roads," 12.08.030, "Plan Available at the Development Center," and 12.24.040, "Minimum Width Set" of the Pierce County Code are hereby amended as shown in Exhibit C, which is attached hereto and incorporated herein by reference.

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Section 5. Section 17A.10.130 of the Pierce County Code, "Penalties and Enforcement," is hereby amended as shown in Exhibit D, which is attached hereto and incorporated herein by reference.

Section 6. Chapters 17B.10, "General Provisions" and 17B.20, "Access and Driveways" of the Pierce County Code are hereby amended as shown in Exhibit E, which is attached hereto and incorporated herein by reference.

Section 7. Chapter 17B.30 of the Pierce County Code, "Roads and Bridges," is hereby repealed.

Section 8. The "Manual on Design Guidelines and Specifications for Road and Bridge Construction in Pierce County" as adopted by PCC 17B.10.060 is hereby repealed and replaced as set forth in Exhibit F, which is attached hereto and incorporated herein by reference.

Section 9. Section 17C.20.150 of the Pierce County Code, "Premises Identification," is hereby amended as shown in Exhibit G, which is attached hereto and incorporated herein by reference.

Section 10. Title 18 of the Pierce County Code, "Development Regulations – General Provisions," is hereby amended as shown in Exhibit H, which is attached hereto and incorporated herein by reference.

Section 11. Title 18A of the Pierce County Code, "Pierce County Development Regulations – Zoning" is hereby amended as shown in Exhibit I, which is attached hereto and incorporated herein by reference.

Section 12. Section 18B.10.070 of the Pierce County Code, "Violations, Penalties, and Compliance," is hereby amended as shown in Exhibit J, which is attached hereto and incorporated herein by reference.

Section 13. Sections 18D.10.090, 18E.10.110, and 18I.10.100 of the Pierce County Code, "Compliance," are hereby amended as shown in Exhibit K, which is attached hereto and incorporated herein by reference.

Section 14. Sections 18H.10.055, "Compliance with Other Codes," and 18H.20.040, "Class I Forest Practices," of the Pierce County Code are hereby amended as shown in Exhibit L, which is attached hereto and incorporated herein by reference.

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Exhibit F to Ordinance No. 2010-70s

Pierce County
Public Works and Utilities

Manual on Design Guidelines and Specifications for Road and Bridge Construction in Pierce County

Prepared by
Office of the County Engineer

As Recommended by Pierce County Planning Commission
August 18, 2010

Acknowledgments

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Pat McCarthy

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Craig Deaver, C.E.S. NW Inc
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Paul Green, Azure Green Consultants
Rich Larson, Larson & Associates
William Lynn, Gordon, Thomas, Honeywell
Corey Maki, WestSound Engineering
Mark Palmer, KPFF Consulting Engineers
Tiffany Speir, Master Builders Assn
Jeff Sutton, Apex Engineering
Douglas Tooley, Resident
Kurt Wilson, Soundbuilt

5-2.2 Minor Driveway Approach

Minor Driveway Approaches shall be constructed in accordance with the specific geometric requirements provided by the County Engineer. Grading and restoration of the access beyond the end of the driveway approach shall be done to provide a smooth, passable, and safe transition to the existing facility.

Minor Driveway Approaches shall be located a minimum of 125 feet from an intersection. Along an arterial roadway they may also be located directly across from a local road minor or cul-de-sac intersection. Physical site conditions and spacing of existing driveway approaches may cause the County Engineer to require another location. The 125 feet is measured from the intersecting road right-of-way line to the nearest edge of the access. Access to a corner lot with a frontage less than 155 feet in width will be established on a case-by-case basis by the County Engineer, and the driveway approach shall be placed at such a location to maximize safety.

Minor Driveway Approaches on a local road feeder or an arterial roadway shall be located a minimum of 20 feet from the side property line, as measured from the property line to the nearest edge of the access.

5-2.3 Major Driveway Approach

Major Driveway Approaches shall be constructed in accordance with the specific geometric requirements provided by the County Engineer. Grading and restoration of the access beyond the end of the driveway approach shall be done to provide a smooth, passable, and safe transition to the existing facility.

Major Driveway Approaches shall be located a minimum of 125 feet from an intersection. Along an arterial roadway they may also be located directly across from a local road feeder, minor, or cul-de-sac intersection. Physical site conditions and spacing of existing driveway approaches may cause the County Engineer to require another location. The 125 feet is measured from the intersecting road right-of-way line to the nearest edge of the access. Access to a corner lot with a frontage less than 155 feet in width will be established on a case-by-case basis by the County Engineer, and the driveway approach shall be placed at such a location to maximize safety.

The number, location, and size of Major Driveway Approaches shall be determined by the volume and type of traffic generated by the development, other driveway approaches in the vicinity of the proposed approach, the amount of lot frontage along the road, and channelization/traffic control on the road along the lot frontage. When multiple Major Driveway Approaches to one parcel or development are permitted, they shall not be less than 125 feet apart, measured from centerline to centerline. A minimum of two driveway approaches (combination of minor and/or major) will be required for developments that will generate 3000 ADT or more unless other mitigating measures are approved by the County Engineer.

Major driveway approaches on a local road feeder or an arterial roadway shall be located a minimum of 30 feet from the side property line, as measured from the property line to the nearest edge of the access.

1.22.090 Appeals of Administrative Decisions to the Examiner. Revised 1/17 Amended Ord. 2017-12s

A. **Right to Appeal.** Any person aggrieved, or any officer, department, board, agency, district or bureau of the County or State affected by any final decision of an administrative official, as set forth in PCC 1.22.080 B., may file a notice of appeal.

B. **Time Limits.**

1. **Land Use Matters.**

a. A notice of appeal, together with the appropriate appeal fee, shall be filed at the Planning and Land Services Department within 14 days of the date of an Administrative Official's decision. In the case of an appeal of a Determination of Nonsignificance requiring a comment period which is issued concurrently with a final decision, the appeal period shall be extended to 21 days.

b. The Administrative Official shall prepare a written report regarding the administrative decision.

c. Staff reports shall be filed with the Examiner, mailed to the applicant and appellant and made available to the public at least 10 working days prior to the public hearing scheduled to review the administrative appeal. Copies shall be provided to the public upon request at the cost of reproduction.

d. The public hearing, if applicable, shall be scheduled no later than 70 days from the date a notice of appeal is filed.

e. Any supplemental briefs or materials supporting an appeal and/or responding to a staff report shall be filed with the Examiner and the Administrative Official at least five working days prior to the public hearing, unless a different schedule is set by the Examiner. Any costs incurred as a result of noncompliance with this subsection may be charged to the applicant at the discretion of the Examiner.

f. If the Examiner has been requested to render a decision on an appeal in writing without conducting a public hearing, as set forth in PCC 1.22.090 F.2., then the written briefs shall be submitted to the Examiner within 30 days of the Department's receipt of a filed notice of appeal.

2. **Non Land Use Matters.** Refer to the applicable code.

C. **Content of Notice of Appeal.** A Notice of Appeal on an administrative decision shall, at a minimum, contain the following information:

1. Name, mailing address, and electronic mail address of the appellant and his/her agent or representative, if any;
2. A copy of any decision, license, order or environmental determination which is being appealed;
3. A concise statement of the factual and legal basis for the appeal citing specifically the alleged errors in the administrative official's decision; and
4. The specific relief sought.

D. **Consolidation.**

1. If more than one person files an appeal of an administrative decision on a proposal, the Examiner shall consolidate such appeals for review at one public hearing. However, the appeal of a Determination of Significance, as set forth in Title 18D PCC, Development Regulations – Environmental, may occur separately and prior to the public hearing on the underlying permit as determined by the Hearing Examiner.
2. Appeals of the adequacy of an FEIS or SEIS or threshold determination of a DNS/ MDNS, as set forth in Title 18D PCC, Development Regulations – Environmental, shall be consolidated with the public hearing on the merits of the proposal. If no public hearing process exists for a proposal, review of the FEIS, SEIS or DNS/MDNS shall be heard as determined by the Hearing Examiner.

E. **Notice Provisions.** Notice for an appeal of an administrative decision to be reviewed at a public hearing shall be in conformance with PCC 1.22.110, Public Hearing.

F. **Review Procedure.**
1. The Hearing Examiner shall conduct a public hearing to review appeals including:
   a. The Administrative Official's findings, conclusions, and determination;
   b. All evidence admitted into the record; and
   c. Taking sworn testimony.
2. The Hearing Examiner may render a decision on an appeal, in writing, without holding a public hearing when the parties agree that no issues of fact are to be decided. When issues of law are to be determined and opposing parties agree, they may request the Hearing Examiner to render a decision based upon written briefs. The Hearing Examiner shall render a written decision within 10 working days of receipt of the briefs.

G. **Burden of Proof.**
1. A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.
2. **Appeal of an enforcement action.**
   a. When an appeal is submitted by the recipient of a final enforcement decision or order on a land use matter, the initial burden shall be on the County to prove, by a preponderance of evidence, that the use, activity, or development is not in conformance with the regulations contained in Pierce County Code or the terms of a permit, approval, or final written order.
   b. Failure by a party to submit a timely appeal following the issuance of a final administrative determination, permit, approval, or final written order precludes later challenges to the decision(s) during subsequent enforcement actions and appeals therefrom.
   c. When the appellant alleges that an exemption applies, the burden shall be upon the appellant to prove, by a preponderance of evidence, that the current use, activity, or development is exempt from the regulations contained in the Pierce County Code. A claim or allegation of nonconforming use or development

rights by an appellant must be verified by Pierce County Planning and Land Services through an application for confirmation of nonconforming use or development rights.

d. The Examiner's review shall not be limited to the evidence submitted by the appellant to the Department before a formal appeal was filed, or to the evidence obtained by the Department during the course of the investigation or informal review. The Examiner may consider all relevant testimony and exhibits that are timely submitted when determining whether the parties have met their respective burdens of proof.

H. **Scope of Authority.** The Examiner may reverse or affirm, wholly or in part, or may modify the Administrative Official's order, requirement, decision or determination. If the Hearing Examiner reverses the Administrative Official's decision, the entire action shall be remanded to the Administrative Official for an action consistent with the Hearing Examiner's decision.

I. **Dismissal of Appeal.**

1. The Hearing Examiner has the authority to summarily dismiss an appeal of an Administrative Official's decision without a hearing when such appeal is determined by the Examiner to be without merit on its face, frivolous, or brought merely to secure a delay.
2. The Hearing Examiner may also dismiss an appeal of an Administrative Official's decision pursuant to a settlement agreement between the parties, or at the request of the appellant.

(Ord. 2016-56s § 1, 2016; Ord. 2014-52s2 § 1 (part), 2014; Ord. 2009-69s § 1 (part), 2009; Ord. 96-19S § 4 (part), 1996)

17B.10.060 Standards Adopted. Revised 12/15

A. The latest adopted edition of the "Manual on Design Guidelines and Specifications for Road and Bridge Construction in Pierce County," as published by the Pierce County Engineer, is adopted for use on all road, shared access facility, gate, bridge, and other new construction of public and private roads, including the widening or expansion of existing roadways, in unincorporated Pierce County, and as far as is practicable and feasible to reconstruction, resurfacing, restoration, and rehabilitation of existing public or private roads in unincorporated Pierce County.

B. The latest adopted edition of the "Manual on Accommodating Utilities in Pierce County Right-of-Way," as published by the Pierce County Engineer, is the policy for accommodation of utilities for road and bridge construction of public and private roads in unincorporated Pierce County.

C. Projects that propose the construction of roads, shared accesses, or alleys must comply with the Pierce County Stormwater Management and Site Development Manual – PCSWMM (Title 17A PCC). The PCSWMM shall be utilized for the design of all roads, alleys, or shared accesses within the project. The PCSWMM contains certain low impact development standards that supersede certain standards, criteria, and requirements contained in PCC 17B.10.060 A. and 17B.10.060 B. above. Standards, criteria, and

requirements within PCC 17B.10.060 A. and 17B.10.060 B. not specifically superseded by the PCSWMM are still applicable.

(Ord. 2015-48s § 2 (part), 2015; Ord. 2010-70s § 6 (part), 2010; Ord. 2004-56s § 3 (part), 2004; Ord 2004-71 § 3, 2004; Ord. 2000-57s § 3, 2001; Ord. 99-24S § 6 (part), 1999)

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

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Appellate Court Case Title:	Brian Byrd, Appellant v. Pierce County, Respondent
Superior Court Case Number:	17-2-07291-1

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The appendix was combined with the brief per the Court's request.

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