

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 AUG 31 3:10

BY RONALD R. CARPENTER

NO. 81855-0

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

CLERK  
*lph*

---

JEFF KELLY, in his individual capacity, and  
DAVID DORSEY and NANCY DORSEY,  
a marital community,

Respondents,

v.

COUNTY OF CHELAN, a municipal Corporation  
Acting through its hearing examiner;  
and ROBERT CULP, P.E., MUNSON ENGINEERS, INC; and  
ANTON ROECKL, Dba WICO,

Appellants.

---

**FUTUREWISE'S *AMICUS CURIAE* BRIEF  
IN SUPPORT OF RESPONDENTS**

---

Keith P. Scully  
WSBA No. 28677  
GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 1015  
Seattle, WA 98101  
(206) 621-8868  
Attorneys for *Amicus Curiae* Futurewise

**ORIGINAL**

TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| <b>I. INTRODUCTION</b> .....   | 1           |
| <b>II. INTERESTS OF AMICUS CURIAE</b> .....  | 1           |
| <b>III. ARGUMENT</b> .....   | 2           |
| <b>A. The Court of Appeals’ holding that a conditional use permit is not automatically stayed upon filing of a LUPA appeal should be affirmed.</b> .....   | 2           |
| <b>1. The plain language of RCW 36.70C.100 indicates that a stay is not automatic. Allowing discretion in granting stays means that courts can tailor a stay to fit local circumstances and the facts of the case.</b> ..... | 2           |
| <b>2. Automatic stays further dilute subsequent public policy decisions.</b> .....   | 7           |
| <b>3. Automatic stays are not consistent with Washington law which allows development to proceed during the appeal process.</b> .....  | 9           |
| <b>IV. CONCLUSION</b> .....  | 10          |

TABLE OF AUTHORITIES

Page

**Cases**

*Bach v. Sarich*,  
74 Wn.2d 575, 445 P.2d 648 (1968)..... 9

*Erickson & Assocs. v. McLerran*,  
123 Wn.2d 868, 872 P.2d 1090 (1994)..... 7

*Kelly v. Chelan County*,  
No. 25378-3-III, Slip Op..... 3, 5

*Rhod-A-Zalea & 35th, Inc. v. Snohomish County*,  
136 Wn.2d 1, 959 P.2d 1024 (1998)..... 7

*Steele v. Queen City Broadcasting Co.*,  
54 Wn.2d 402, 341 P.2d 499 (1959)..... 9

**Statutes**

RCW 36.70C.100..... passim

RCW 36.70C.100(1)..... 10

## I. INTRODUCTION

Futurewise urges this court to affirm the decision of the Court of Appeals in this matter. Futurewise was asked by this Court to submit an *amicus* brief and has reviewed the Court of Appeals decision and briefing of the parties. The decision below should be affirmed because the Legislature intended for trial courts to have discretion in deciding which conditions of a permit are stayed pending the results of an appeal, and which must be met to prevent the permit from expiring. A holding to the contrary would unnecessarily lengthen the permit review process and waste judicial and party resources.

## II. INTERESTS OF AMICUS CURIAE

Futurewise,<sup>1</sup> a nonprofit corporation, is a statewide organization interested in the efficient management of growth in the State of Washington and the effective implementation of the Washington Growth Management Act (“GMA”). Futurewise closely follows the implementation of the GMA, and regularly litigates land use policy issues in a variety of fora. Futurewise’s interests in these administrative appeals and cases are affected by vesting and permit expiration on a regular basis. Futurewise was asked by this Court to submit an *amicus* brief.

---

<sup>1</sup> Formerly known as 1000 Friends of Washington.

### III. ARGUMENT

**A. The Court of Appeals' holding that a conditional use permit is not automatically stayed upon filing of a LUPA appeal should be affirmed.**

**1. The plain language of RCW 36.70C.100 indicates that a stay is not automatic. Allowing discretion in granting stays means that courts can tailor a stay to fit local circumstances and the facts of the case.**

RCW 36.70C.100 governs stays of local government action during a Land Use Petition Act (LUPA) petition and provides:

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

(a) The party requesting the stay is likely to prevail on the merits;

(b) Without the stay the party requesting it will suffer irreparable harm;

(c) The grant of a stay will not substantially harm other parties to the proceedings; and

(d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

Thus, an applicant for a land use permit can ask for and receive a stay of conditions imposed upon the granting of the permit if the permit is appealed under the Land Use Petition Act. *Kelly v. Chelan County*, No. 25378-3-III, Slip Op. at 11; RCW 36.70C.100. In this case, the applicant's permit was conditioned upon the applicant obtaining all other agency approvals and completing all infrastructure installation within two years, or the permit would expire by its own terms. *Kelly v. Chelan*, Slip Op. at 7.

After the permit was granted, neighbors filed a LUPA petition with Chelan County Superior Court and ultimately prevailed. The applicant did not move for a stay of the permit or any of its conditions during the course of the Superior Court LUPA appeal, nor did they complete the conditions of the permit. After the Superior Court reversed the granting of the permit, the applicant appealed to Division III of the Court of Appeals, and the Court of Appeals ruled that the permit had expired pursuant to the explicit terms of the permit, finding that the time spent litigating the

LUPA action did not toll the two-year time period for meeting the requirements which was established by the permit.

The developer argues on review that the time was tolled through application of a common law stay, and the parties have ably briefed the applicable law. The plain language of RCW 36.70C.100 and the policy underlying the Legislature's decision to leave stays of permit conditions to the discretion of trial courts requires that the Court of Appeals be affirmed.

As the Court of Appeals held, and Respondents rightly argue, the plain language of RCW 36.70C.100 allows for, but does not automatically provide, a stay of the conditions of a permit imposed by a local government when an appeal has been filed.

The Legislature has left the decision to issue a land use permit to the discretion of local governments, and has specifically provided that a Superior Court may stay the local government's actions "upon such terms and conditions ... as are necessary to prevent harm to other parties." This policy choice on the part of the Legislature seems wise, given that the conditions on a permit, which are dictated by local circumstances, can vary tremendously. Some conditions may involve additional study and government permits, such as the requirement in this case to obtain

“federal, state and local agency approvals” within two years. *Kelly v. Chelan County*, Slip Op. at 7. Other conditions, such as the requirement to complete “[a]ll infrastructure installation” in this matter, may involve the construction of access roads, tree planting, wetland creation or other environmental mitigation, or even the purchase of development rights through a transfer of development rights system. *Kelly v. Chelan County*, Slip Op. at 7.

Where the conditions require additional environmental or other feasibility studies or securing other permits, it often makes little sense to stay those conditions during the pendency of an appeal. Doing so automatically would in many situations cause a significant waste of judicial and party resources. Multiple permits are often required to complete a project and a failure to obtain any one of them often means the project cannot continue. For example, a project next to a water body might require a short or long plat, an environmental impact study, other land use permits, a Shoreline Substantial Development Permit, building permits, and numerous other studies and approvals. Often, the permits are not all applied for or received at the same time. Instead, a project proponent will often obtain land use permits first before seeking building

and other permits. If the land use permit is granted but a later permit is denied, then the project cannot go forward.

Appeals of various project permits can take years and cost substantial sums, including attorney's fees, for all sides. An automatic stay would require a project to go through the appeal process and the expense and delay that process entails only to leave open the possibility that a later permit will be denied, which wastes the resources of both parties and the courts.

By contrast, staying a permit condition which requires infrastructure construction will generally make sense. Building access roads for a townhouse development that may never be built makes little sense for either the developer, which has made the investment in the roads and other infrastructure, or the community, which may end up with "roads to nowhere," should the infrastructure be built and the permit subsequently reversed.

This Court should follow the plain language of RCW 36.70C.100 and allow the parties to evaluate and courts the discretion to decide in what circumstances it is appropriate to seek a stay for a permit or particular condition of a permit pending resolution of an appeal.

**2. Automatic stays further dilute subsequent public policy decisions.**

Washington's liberal vesting rules allow developments to proceed long after they are out of step with subsequent changes to planning and development policies. Unlike most states, Washington allows a project to "vest" to regulations current at the time a complete application is filed with the issuing jurisdiction. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 16, 959 P.2d 1024 (1998). Once a project is vested, the development may proceed under the regulations in effect at the time the application is complete, as long as permits are not denied and do not expire.

Large development projects take years to complete. A project that vests to regulations that are changed thereafter may be built years or even decades after the application is complete. As this court has acknowledged, vesting provides certainty to property owners at the expense of the public interest in compliance with new laws. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 868, 874, 872 P.2d 1090 (1994). An automatic stay of a permit's conditions once a LUPA appeal is filed extends the vesting process even further. It would mean that the conditions precedent to actual construction set forth in a permit will not be started until after

permit litigation is complete. Some of these conditions can be time-consuming to complete. Mandating that a project proponent wait to obtain other permits and complete environmental and other studies means that a project will be built at an even later time than if the conditions were completed during the course of litigation. This increases conflicts with later, compliant developments. In the instant case, the applicant proposes a large residential development on the shore of Lake Chelan. Although the applicant's project vested to the 1994 rules, developments of this nature were prohibited at least as of 2000. Real estate sales and development projects in the area have proceeded under the new regulations prohibiting dense residential developments; roads have been built and maintained for traffic levels far below those contemplated in the applicant's proposal; lake water quality has been maintained without the runoff from the large-scale impervious surfaces planned by the applicant. Had the conditions of the permit been timely completed, the impact of an 80 unit development and an 88 boat slip marina mushrooming on the shore of an otherwise rural area could have been accounted for under the regulations in effect. Now, neighboring property owners – whose lives and property values have been planned by almost ten years of knowledge that townhouses cannot be built there – will have to deal with the

development springing up unexpectedly. Likewise, Chelan County will have to adapt its roads, water quality protections, and other health and safety issues to accommodate a development at least ten years out of step with current regulations.

Requiring an applicant to complete those conditions to a permit while an appeal is pending where the applicant cannot make a compelling case to a Superior Court that those conditions should be stayed minimizes the impacts of vesting related to public policy which have been repeatedly recognized by this Court. See, e.g., *Erickson & Assocs. v. McLerran*, 123 Wn.2d 868.

**3. Automatic stays are not consistent with Washington law which allows development to proceed during the appeal process.**

Washington has long allowed developments to be constructed during the land use appeal process at the developer's risk. *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 404, 341 P.2d 499, 500-01 (1959); *Bach v. Sarich*, 74 Wn.2d 575, 580-82, 445 P.2d 648, 652-53 (1968). Both appellants and respondents have the option of requesting a stay or restraining order at their discretion. *Steele*, 54 Wn.2d at 404, 341 P.2d at 500-01.

LUPA is consistent with this longstanding line of Washington cases in that it does not prohibit construction during an appeal. Further LUPA, in RCW 36.70C.100(1), provides that “[a] petitioner or other party may request the court to stay or suspend an action by the local jurisdiction ...” This too is consistent with Washington case law. However, an automatic stay of the permit conditions and the permit is not. The better approach, adopted by the Legislature, is to allow the appellants or respondents to seek the stay authorized RCW 36.70C.100. This is both consistent with the plain language of LUPA and Washington’s common law, and allows the parties and courts the discretion to decide the most effective means of managing a development project while appeals are pending.

#### IV. CONCLUSION

For the reasons argued herein, Futurewise respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated this 31<sup>st</sup> day of August, 2009.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

Keith Scully  
WSBA No. 28677  
Attorneys for Futurewise