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FILED

AUG 19 2008

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

81855-0

FILED

AUG 27 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

CASE NO. 253783

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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

v.

COUNTY OF CHELAN, a municipal corporation acting through its  
hearing examiner; and ROBERT CULP, P.E. MANSON  
ENGINEERS, INC.; and ANTON ROECKL, d/b/a WICO,

---

ANSWER TO PETITION FOR REVIEW

---

Lawler Burroughs & Baker, P.C.  
Brian E. Lawler WSBA #8149  
Attorney for Jeff Kelly, and  
David and Nancy Dorsey  
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Seattle, WA 98154  
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## **I. IDENTITY OF RESPONDENTS**

Respondent Jeff Kelly and Respondents David and Nancy Dorsey, a marital community, submit this answer to Petitioners' Robert Culp, P.C. Manson Engineers, Inc. and Anton Roeckl, d/b/a WICO Petition For Review pursuant to RAP 13.4(d).

## **II. COURT OF APPEALS DECISION**

The decision of the Court of Appeals, Division III, is the Published Opinion filed June 19, 2008 ("Opinion"), a copy of which is attached to the Petition for Review.

## **III. RESTATEMENT OF THE CASE**

In August of 2005, the Chelan County Hearing Examiner granted a conditional use permit ("CUP"), a shorelines substantial development permit ("SDP"), and a shorelines conditional use permit ("S-CUP") to WICO. The lengthy and convoluted permit processing history is set forth in the first six pages of the Opinion. Subsequently the S-CUP was not approved by the Washington State Department of Ecology. Respondents Kelly and Dorsey appealed the CUP which was invalidated by the Chelan County Superior Court (Honorable John Bridge) on June 22, 2006. CP 38. WICO appealed the Superior Court decision, to the Court of Appeals, Division III.

In granting the CUP for what was then considered by Chelan County to be a vested, but non-conforming project, the

County placed time restrictions on the CUP. Importantly, the CUP set forth in bold text a maximum two-year period to meet the conditions of approval, install required infrastructure, and obtain other federal, state, and local agency approvals. Opinion at page 7; CP at 188.

During the pendency of the appeal, Respondents observed that WICO never exercised its rights under either RCW 36.70C.100 or RAP 8.1(b)(2) to stay either the running of the time periods in the CUP or the decision of the Superior Court. Nathan Pate, Senior Planner for Chelan County, confirmed that since the issuance of the CUP in 2005, WICO had taken little, if any, action to meet the 76 conditions of approval; had not submitted any of the further studies required by CUP Conditions 12 and 13; to the County's knowledge, had not obtained required approvals from other state and federal agencies; and had not installed required infrastructure. Declaration of Nathan Pate. Attachment 1. Respondents Kelly and Dorsey moved for dismissal, on grounds of mootness; i.e., even if the Court of Appeals had upheld the CUP, it would have expired on its own terms.

WICO does not deny that it never sought a stay of either (1) the timeframes in the CUP, or (2) the Superior Court decision. WICO does not deny that it essentially did "nothing" to advance the project to perfect or protect its rights under the CUP during the pendency of the Superior Court review or the appeal to the Court

of Appeals, Division III. WICO argues, instead, that it had no duty, or obligation to do anything to preserve or protect its rights under the CUP.

#### IV. ARGUMENT WHY REVIEWED SHOULD NOT BE ACCEPTED

##### **A. The Court of Appeals' Opinion Is Entirely Consistent With The Stay Provisions of the Land Use Petition Act (LUPA)**

A party to a LUPA appeal has a right to seek a stay of an action pending review. RCW 36.70C.100. A party must affirmatively seek such relief under RCW 36.70C.100(1). A court may grant a stay if four statutory criteria are met. RCW 36.70C.100(2)(a-d). The court has flexibility in granting the terms and conditions of the stay. RCW 36.70C.100(3). Absent a stay, WICO had the right to proceed with its project. See, for example, *Pinecrest Homeowners v. Cloninger & Associates*, 151 Wn.2d 279, 87 P.3d 1176 (2004). If Kelly and Dorsey had been aggrieved by WICO's implementation of the CUP, they could have petitioned for a stay to prevent WICO from proceeding. If WICO was concerned about the running of the time periods in the CUP, it could have petitioned for a stay.

A statute should be presumed to be meaningful. Each provision of a statute should be read together with other provisions to determine legislative intent. *State v. Chapman*, 140 Wn.2d 436,

998 P.2d 282 (2000). *Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn.2d 12, 994 p.2d 838 (2000). The legislature does not engage in unnecessary or meaningless acts. The court presumes some significant purpose or objective in every legislative enactment. *Johanson v. DSHS*, 91 Wash. App. 737, 959 P.2d 1166 rev. denied 197 Wn.2d 1001, 978 p.2d 1099 (1998). WICO's position negates the intent and purpose of RCW 36.70C.100. WICO's suggestion that somehow the time frames in the CUP were automatically stayed or frozen is inconsistent with the language in RCW 36.70C.100(1) that a party "may request the court to stay or suspend" the decision. WICO's position is inconsistent with the language of RCW 36.70C.100(2) that a stay is discretionary and based on meeting four conditions.

**B. The Case Does Not Involve An Issue of Substantial Public Interest.**

WICO contends the substantial public interest requirement is satisfied here because the case is one of first impression, for which there is not "controlling case law from the State of Washington." Petition For Review, Page 5. The controlling law is the statute itself, RCW 36.70C.100, which confers the optional remedy, during appeal, of a stay. The lack of any extensive case law on RCW 36.70C.100 may simply mean that the statute is sufficiently clear.

WICO attempts to create an issue by referring to cases involving superseadeas bonds, *Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001) and *King v. King*, 2 Wn. App 386, 468 P.2d 464 (1970), neither of which are land use cases. WICO provides no case law that conflicts with RCW 36.70C.100.

The sole reported Washington decision that explicitly reference RCW 36.70C.100 is entirely consistent with the statute, and the Opinion. *Pinecrest Homeowners v. Cloninger & Associates*, confirms that a party may request a stay under LUPA, but is not required to do so to perfect their appeal rights. In *Pinecrest*, the rights of the parties were not frozen or suspended during the appeal because no stay was sought. *Homeowners v. Cloninger & Associates*, 151 Wn.2d 279, 87 P.3d 1176 (2004).

In another pre-LUPA land use permit appeal case, *Snohomish County v. State*, 69 Wn.2d 655, 850 P.2d 546 (1993), the court reiterated the general principle that a case is moot if effective relief cannot be granted. In that case, during the pendency of an appeal of timber harvesting permits, which were not stayed, the timber had been harvested and the permits had expired. No stay had been sought. The court stated the general rule of mootness, but further indicated it may review a moot case if a sufficient public interest is involved, under a three-part test. WICO is not arguing here that

notwithstanding the mootness, the court should determine the underlying legal question, based on the three-part test.

In the recent decision, *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), the court reiterated that LUPA provides for a stay of a permit. The Asches' challenged a building permit and sought injunctive relief based on claims of public nuisance and private nuisance. The County contended that the Asches' claims should be dismissed since LUPA was intended to be the exclusive means to challenge a land use action. In response, the Asches' contended that LUPA provided no effective remedy such as injunctive relief. The court disagreed:

The Court responds that LUPA allows a stay of action pending review and that a reversal still provides the same relief as an injunction via a nuisance claim. The County's position is correct.

*Asche v. Bloomquist* at 793.

WICO cites no Washington case law to the contrary on land use or development permits, so we are left with the unanswered question: What exactly is the issue of substantial public interest, where a developer fails to exercise a statutory right to seek a stay of the time frames in a permit, fails to seek a stay of the decision of the Superior Court, and otherwise does nothing to advance the cause of its non-conforming land use project? We need to keep in mind that WICO was dilatory in the permit processing over 15 years. The Superior Court found that all of the alleged delays were self-

caused and not the fault of the County. CP 38 at Finding No. 11. This sort of dilatory conduct continued on appeal. How is this a matter of substantial public interest?

What is the substantial public interest in, as the Opinion notes, a land use permit that is not permissible under current standards and started almost 20 years ago? Opinion, page 9.

### **C. The Out of State Cases Are Not Controlling.**

WICO argues that the Court of Appeals relied on the “wrong” out of state cases. That is incorrect. The Court of Appeals relied on the language of RCW 36.70C.100 and RAP 8.1. Opinion page 11.

WICO argues the similarity and relevance of *Tantimonaco v. Zoning Bd of Review*, 102 R.I. 594, 232 A.2d 385 (1967), without elaborating whether Rhode Island law has a statutory right for a stay in a land use permit case, as in Washington’s LUPA. By comparison, in *Gold v. Kamin*, 170 Ill. App 3d 312, 120 Ill. Dec 595, 524 N.E.2d 625 (1988), the courts had a statutory right to issue a stay of a land use decision, if requested by either party. *Gold*, 170 Ill. App 3d 314-315.

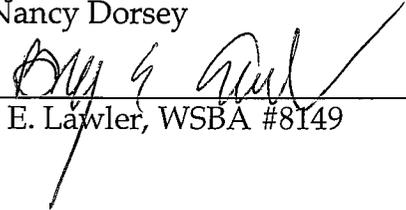
WICO suggests that *Tantimonaco* and *Belfer v. Building Comm’r*, 363 Mass., 439, 294 N.E.2d 857 (1973) are wise decisions reflecting “common prudence.” Petition for Review, p. 10. WICO contends, then, that Court of Appeals Opinion “is a trap for the

unwary, clearly emphasizing form over substance, and is a departure from the common law within the State of Washington." Not exercising a clearly stated statutory right to a stay is not a trap for the unwary. Failing to exercise a right under RAP 8.1 is not a trap for the unwary.

## V. CONCLUSION

The Petition For Review should be denied. It is time for the almost 20 year-old WICO project to come to an end. Nothing prevented WICO from proceeding with its project by satisfying the conditions of approval during the appellate process. Nothing prevented WICO from seeking a stay of the CUP and the obligations thereunder during the appeal process. The Opinion is consistent with the intent and purposes of LUPA. The Opinion is consistent with Washington case law.

LAWLER BURROUGHS & BAKER, P.C.  
Attorneys for Jeff Kelly, David Dorsey  
and Nancy Dorsey

By:   
\_\_\_\_\_  
Brian E. Lawler, WSBA #8149

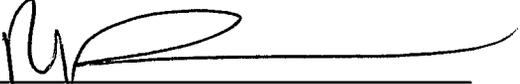
## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court of Appeals, Division III, the foregoing Answer to Petition for Review, and served, via Federal Express overnight delivery, a copy of the same on the following:

Chelan County Prosecuting Attorney's Office  
Deputy Prosecuting Attorney  
Susan Hinkle  
401 Washington St. Level 5  
Wenatchee, WA 98807-2596

Chancey C. Crowell  
Attorney at Law  
925 Fifth Street, Suite B  
Wenatchee, WA 98807-2866

Signed at Seattle, Washington this 18<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
Rochelle L. Parker

**FILED**

**SEP 26 2007**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

CASE NO. 253783

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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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. MANSON  
ENGINEERS, INC.; and ANTON ROECKL, d/b/a WICO,

Appellants

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**DECLARATION OF NATHAN PATE IN SUPPORT OF  
RESPONDENTS' MOTION TO DISMISS APPEAL AS MOOT**

---

Lawler Burroughs & Baker, P.C.  
Brian E. Lawler WSBA #8149  
Attorney for Jeff Kelly, and David  
and Nancy Dorsey  
1001 Fourth Avenue Suite 4400  
Seattle, WA 98154  
(206) 464-1000

**COPY**

I, Nathan Pate, under penalty of perjury of the laws of the State of Washington certify and declare that the following is true and correct:

1. I am the Senior Planner for Chelan County Department of Community Development, am over the age of eighteen years, have personal knowledge of the facts contained herein and am otherwise competent to testify.
2. I have reviewed the file for Missouri Harbor CUP 1955. The Hearing Examiner issued its decision on this permit on August 19, 2005 (the "Decision"). More than two years have elapsed since the permit's issuance.
3. The Decision approving this Conditional Use Permit contained 76 Conditions of Approval.
4. Condition 29 pertaining to CUP approval and continuance incorporated the language from former Chelan County Code 11.56.045, which requires that certain benchmarks be met in order to continue the permit approval. A true and correct copy of the relevant condition is attached hereto as Exhibit A.
5. Since the Decision, the applicant has made little, if any, progress toward the meeting the conditions of approval and

certainly has not "obtained ALL necessary approvals to proceed within 2 years of the Decision date" as required for continuation of the permit under Condition 29.

6. The Decision requires certain studies to be submitted at Conditions 12 and 13. The File of Record does not include such studies, or documentation that each have been reviewed and approved by the agency with authority.
7. To the Departments knowledge, necessary infrastructure has not been constructed, installed, certified , inspected, and/or approved by agencies with authority, nor has the applicant demonstrated installation of all the necessary infrastructure and/or obtainment of approvals.
8. The Decision requires several approvals from other state and federal agencies. I am not aware that all of the required approvals have been obtained. However, I believe that the Shorelines Substantial Conditional Use Permit for this project was denied by the state Department of Ecology, and I believe that the decision was not appealed by the applicant. A true and correct copy of DOE's decision is attached hereto as Exhibit B.

9. The County considers CUP 1955 to be no longer valid, both because of the Superior Court's reversal of the Decision and because of the applicant's failure to meet the permit conditions in a timely manner.

Dated this 24<sup>th</sup> day of September in Wenatchee, WA.

  
\_\_\_\_\_  
Nathan Pate, Senior Planner

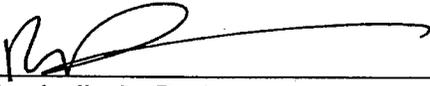


Motion to Dismiss Appeal as Moot and served, via U.S. Mail, first-class postage prepaid, a copy of the same on the following:

Chelan County Prosecuting Attorney's Office  
Deputy Prosecuting Attorney  
Susan Hinkle  
P.O. Box 2596  
Wenatchee, WA 98807-2596

Chancey C. Crowell  
Attorney at Law  
925 Fifth Street, Suite B  
PO Box 2866  
Wenatchee, WA 98807-2866

Signed at Seattle, Washington this 25<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
Rochelle L. Parker

23. A copy of this permit and attached conditions shall be kept on-site and provided to the contractor and all others working within the shoreline area at all times. The applicant, contractor, machinery operators and all others working within the shoreline area shall have read this permit and attached conditions and shall follow its conditions at all times.
24. The project shall proceed in compliance with the Shoreline Management Act (RCW 90.58), the Washington Administrative Code, the Chelan County Shoreline Master Program and the Chelan County Code.
25. Prior to commencement of this project, the applicant shall obtain all necessary permits from agencies with jurisdiction. This shall include, but is not limited to: the Washington State Department of Fish and Wildlife (Hydraulic Project Approval), the United States Army Corps of Engineers Regulatory Branch (Section 10 &/or 404) and the Washington State Department of Ecology (Section 401 Water Quality Certification). The applicant may also be required to obtain lease approvals through Washington State Department of Natural Resources for any improvements or activities proposed waterward of the 1079 elevation level of Lake Chelan.
26. Prior to commencement of this project, the applicant shall provide the Chelan County Planning Department copies of all plans, approvals and certifications issued or required by agencies with jurisdiction (Wash St Dept of Fish & Wildlife, Wash St Dept of Ecology, US Army Corp of Engineers, Wash St Dept of Natural Resources).
27. Building permits, issued by the Chelan County Department of Building, Fire Safety, and Planning must be obtained by the applicant in addition to the Shoreline permit and other agency permits prior to construction of the pier and installation of the lifts.
28. Construction shall proceed substantially as shown on the application materials date stamped January 12, 2005, and revised pier plans date stamped March 31, 2005 on file with the Chelan County Department of Building/Fire Safety & Planning. Minor changes in the proposal may be permitted as modified by conditions of this permit, or as may be required by another agency with jurisdiction, provided that the revised plans still comply with the bulk, dimensional and use standards of the Chelan County Shoreline Master Program. ~~It is the applicant's responsibility to submit any design changes to Chelan County and other applicable agencies for review prior to construction of the project.~~
29. CUP approval and continuation:
  - a. Any approval of an application for a conditional use shall automatically be for a period of one year from the date of approval.
  - b. At the expiration of it's first year of approval, and after an administrative review by the Planning Office and certification by staff that all conditions of approval have been, or are being met, any such approved conditional use may be continued for one additional year.
  - c. At the expiration of it's second year of approval, and after a public hearing before the Chelan County Hearing Examiner at which it is found that the conditional use continues to meet all applicable conditions, any such conditional use may be granted permanent approval by the Hearing Examiner. All infrastructure installation and federal, state and local agency approvals shall be obtained prior to the 2 year deadline. **Failure to obtain ALL necessary approvals to proceed within 2 years of the Decision date will result in nullification of this conditional use permit.**



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

15 West Yakima Avenue, Suite 200 • Yakima, Washington 98902-3452 • (509) 575-2490

October 19, 2005

Nathan Pate  
Chelan County Planning Department  
411 Washington Street  
Wenatchee WA 98801 2879

**FILE COPY**

Anton Roeckl Applicant  
WICO  
c/o P.O. Box 3796  
Wenatchee WA 98807

Dear Mr. Pate and Mr. Roeckl:

Re: Chelan County Permit #SDP 99-5 SCUP 99-5  
ROECKL, ANTON d/b/a WICO - Applicant  
Shoreline Substantial Development/Conditional Use Permit 2005-CN-00036-1 -  
DENIED

The Department of Ecology has reviewed the above referenced Conditional Use permit to construct a 78 unit condominium development, with 2 single family residential units, 80 slip dock, and an access road within shoreline jurisdiction on Lake Chelan.

We find that the proposal does not meet the intent of the master program nor the criteria set forth in WAC 173-27-160 for granting a Conditional Use permit because:

1. The project as proposed, specifically the community dock in scope, dimension, and orientation to the shoreline, does not contain elements that necessitate a Shoreline Conditional Use Permit.
2. The Shoreline Conditional Use Permit is an inappropriate permit issuance as it appears to function as a mechanism to grant relief from specific bulk, dimensional or performance standards of the community dock.
3. A Variance Permit is the mechanism through which an applicant can request relief from specific bulk, dimensional or performance standards.
4. The applicant has not applied for, nor made a case for the granting of a Variance as specified in WAC 173-27-170.
5. Ecology encourages the applicant to engage in dialogue with appropriate regional technical staff regarding the permitting process for your project.

EXHIBIT "B"

Nathan Pate  
Anton Roeckl/WICO  
October 19, 2005  
Page 2

The permit is hereby denied.

The Shoreline Management Act of 1971 provides that a request for review (appeal) before the Shorelines Hearings Board may be filed within twenty-one (21) days from the transmittal date of this denial. Guidelines for filing a request for review (appeal) are available from the Shorelines Hearings Board at (360) 459-6327.

If you have any questions on the above action, please contact Gary Graff at (509) 454-4260.

Sincerely,



Jeff Lewis, Section Supervisor  
Shorelands and Environmental  
Assistance Program

JL:GDG:jw 100513a

Anyone aggrieved by this decision has twenty-one (21) days from the "date of filing" as defined in WAC 461-08-305 and RCW 90.58.140(6) to file a petition for review with the Shorelines Hearings Board as provided for in RCW 90.58.180 and Chapter 461-08 WAC, the rules of practice and procedure of the Shorelines Hearings Board.

**THIS SECTION FOR DEPARTMENT OF ECOLOGY USE ONLY IN REGARD TO A CONDITIONAL USE OR VARIANCE PERMIT**

Date received by the Department \_\_\_\_\_

Approved \_\_\_\_\_

Denied X \_\_\_\_\_

This conditional use permit is approved/denied by the Department pursuant to Chapter 90.58 RCW.

Development shall be undertaken pursuant to the following additional terms and conditions:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10-19-05  
Date

Jeff Lewis  
Signature of Authorized Department Official