No. 90716-1

Court of Appeals No. 69414-6-I

SUPREME COURT OF
THE STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT, Appellant,

v.

CITY OF BLACK DIAMOND, et al., Respondents

ANSWER TO PETITION FOR REVIEW

Nancy Bainbridge Rogers, WSBA No. 26662
Randall P. Olsen, WSBA No. 38488
CAIRNCROSS & HEMPELMANN

524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Attorneys for BD Lawson Partners, LP and BD Village Partners, LP

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. There is no split among the Courts of Appeals as to the application of RCW 4.84.370(1). 2

B. The plain language of RCW 4.84.370(1) and public policy support the Court of Appeals' decision to award fees. 4

C. Yarrow Bay requests attorneys' fees for preparing and filing this Answer to TRD's Petition for Review. 6

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Durland v. San Juan County, Supreme Court No. 89293-8 ..... 1, 6

Northshore Investors, LLC v. City of Tacoma, 174 Wn. App. 678, 701, 301 P.3d 1049 (2013) 2

Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn. App. 593, 601, 972 P.2d 470 (1999) 3

Prekeges v. King County, 98 Wn. App. 275, 990 P.2d 405 (1999) 3

Richards v. City of Pullman, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006) 2

See Habitat Watch v. Skagit County, 155 Wn.2d 397, 413, 120 P.3d 56 (2005) 4

Witt v. Port of Olympia, 126 Wn. App. 752, 759-60, 109 P.3d 489 (2005) 3

Statutes

RCW 36.70C.010 5

RCW 4.84.370 ..... 2, 4, 5

RCW 4.84.370(1) ..... passim

RCW 4.84.370(2) 1, 2, 3

Rules

RAP 13.4(b) 1, 4, 5, 6

RAP 18.1(j) 6

I. INTRODUCTION

The Court should deny the Petition for Review filed by Toward Responsible Development, a Washington nonprofit corporation ("TRD"). Likewise, there is no basis for the Court to defer decision on TRD's Petition until the *Durland* case is decided. There is no split among the Courts of Appeals as to whether fees should be awarded to Respondent Yarrow Bay[1] in this case. Here, the Court of Appeals properly awarded Yarrow Bay its fees and costs pursuant to RCW 4.84.370(1). The cases cited by TRD from Divisions II and III all involve a government entity seeking fees under RCW 4.84.370(2), which requires a finding that the government's decision was upheld. Those cases do not apply here. The Court of Appeals properly awarded fees to Yarrow Bay as the prevailing party or substantially prevailing party under RCW 4.84.370(1).

Even if there was a split among the Courts of Appeals, the plain language of the statute, the policy behind the statute, and the equities required the Court of Appeals to award Yarrow Bay its attorneys' fees and costs. None of the considerations governing review under RAP 13.4(b) warrant accepting review. The Court should deny TRD's Petition for Review.

[1] Respondents BD Lawson Partners, LP and BD Village Partners, LP are consistently referenced as "Yarrow Bay."

II. ARGUMENT

A. There is no split among the Courts of Appeals as to the application of RCW 4.84.370(1).

RCW 4.84.370 contains two subsections. RCW 4.84.370(1) states in relevant part that "reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a...land use approval ....if...[t]he prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings." Separately, RCW 4.84.370(2) states in relevant part "the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal." Subsection (1) applies to Yarrow Bay.

TRD cites cases from the Court of Appeals for Divisions II and III where the Court denied an award of fees under RCW 4.84.370(2) because no decision was issued on the merits. Unlike this case—where fees were awarded to Yarrow Bay pursuant to RCW 4.84.370(1)—the cases cited by TRD each involved a government entity seeking fees against a private appellant pursuant to RCW 4.84.370(2). *See Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049 (2013) (denying fees because the matter was dismissed for lack of jurisdiction and therefore the city's decision was not "upheld" as required by RCW 4.84.370(2); *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006) (denying fees because the city of "Pullman's decision

was not 'upheld' at superior court because [the appeal]...was merely dismissed for lack of subject matter jurisdiction" and therefore there was no decision on the merits to support an award of fees under RCW 4.84.370(2)); *Witt v. Port of Olympia*, 126 Wn. App. 752, 759-60, 109 P.3d 489 (2005) (denying fees because the case was dismissed for improper service and therefore the Port's decision was not "upheld" under RCW 4.84.370(2)); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999) (denying fees because the case was dismissed for lack of jurisdiction and therefore Thurston County's decision was not "upheld" under RCW 4.84.370(2)).

Even if a conflict between the Courts of Appeals exists with regard to the application of RCW 4.84.370(2), that only impacts the City's request, not Yarrow Bay, and TRD does not even object to the amount of the City's fees, noting that the "City seeks a reasonable sum for an appeal of this nature." *See* Response of Appellant, Toward Responsible Development, to Attorney Fee Applications at pg. 3, Court of Appeals Case No. 69414-6-I.

This case is unlike the cases cited above. Rather, it is more similar to the facts in *Prekeges v. King County*, 98 Wn. App. 275, 990 P.2d 405 (1999). There, the Court of Appeals for Division I applied RCW 4.84.370(1) and awarded fees to a private respondent where the appeal was dismissed for failure to exhaust administrative remedies, and no decision on the merits was issued. In awarding fees, the Court applied the plain language of RCW 4.84.370(1) and expressly stated that "[t]he statute

does not require that the party must have prevailed on the merits." *Id.* at 285.

Here, the superior court dismissed TRD's case for failure to pay for the administrative record and only after the Court provided TRD three separate deadlines to comply. The holding from *Prekeges* applies and the Court of Appeals correctly awarded fees to Yarrow Bay in its decision below. There is no conflict between the Courts of Appeals, substantial public interest or other reason under RAP 13.4(b) for the Court to accept TRD's Petition for Review. Consequently, Court should deny TRD's Petition for Review.

B. The plain language of RCW 4.84.370(1) and public policy support the Court of Appeals' decision to award fees.

Under RCW 4.84.370, appellants are entitled to one free appeal without the risk of bearing the other party's attorneys' fees and costs. *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005). The purpose of RCW 4.84.370 is to discourage frivolous appeals and rebalance the burdens between landowners seeking development permits and opponents challenging such developments through appeals. Without RCW 4.84.370, opponents would be able to delay development projects for years without the risk of paying fees. They could do so through a series of appeals that cost the appellants relatively little, but cost the landowner a disproportionate amount of money related to owning idle, unproductive land and as a result of the need to defend the appellants' appeals of the landowner's approved permits. The delays caused by improperly filed

appeals (like those in several of the cases cited above) or delays caused by the failure to prosecute the appeal (like this case) are no less harmful to landowners than appeals that are decided on the merits. The presumption should be that the legislature was aware of that fact when it enacted RCW 4.84.370 without expressing any requirement that the prevailing party obtain a decision on the merits, and because under RCW 36.70C.010, an express purpose of the Land Use Petition Act is to establish "expedited" appeal procedures.

Here, TRD appealed Yarrow Bay's Development Agreement approvals and refused to prosecute its appeal. When the appeal was dismissed, TRD appealed the dismissal to the Court of Appeals, which also denied the appeal. TRD now files its Petition for Review before this Court. All of TRD's appeals require responses from Yarrow Bay, which are costly and time-consuming. All of TRD's appeals have delayed ultimate dismissal of this matter. Under the plain language of RCW 4.84.370(1), the Court of Appeals was required to award fees to Yarrow Bay—i.e., "the prevailing party or substantially prevailing"—and the Court did award such fees. None of the considerations governing review under RAP 13.4(b) warrant accepting review. Accordingly, the Court should deny TRD's Petition for Review.

C. Yarrow Bay requests attorneys' fees for preparing and filing this Answer to TRD's Petition for Review.

Pursuant to RAP 18.1(j), Yarrow Bay requests an award of attorneys' fees and expenses for preparing and filing this Answer.

III. CONCLUSION

The cases cited by TRD establish no split among the Courts of Appeals as to the application of RCW 4.84.370(1). The Court of Appeals properly awarded fees and costs to Yarrow Bay under RCW 4.84.370(1). The plain language of RCW 4.84.370(1) and public policy support the Court of Appeals' decision to award fees and costs to Yarrow Bay. None of the considerations governing review under RAP 13.4(b) warrant accepting review. Accordingly, the Court should deny TRD's Petition for Review and TRD's alternative request to impose additional delay by deferring decision on this Petition until the *Durland* case is decided.

DATED this 8th day of September, 2014.

CAIRNCROSS & HEMPELMANN, P.S.

Nancy Bainbridge Rogers, WSBA No. 26662
Randall P. Olsen, WSBA No. 38488
524 Second Ave., Ste. 500
Seattle, WA 98104
Tel: (206) 587-0700
Attorneys for BD Village Partners, LP and
BD Lawson Partners, LP

Certificate of Service

I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on September 8, 2014, I caused a copy of the document to which this is attached to be served on the following individual(s) via in the manner indicated below:

Attorneys for Toward Responsible Development, et al.:
David A. Bricklin
Bricklin & Newman, LLP
1001 Fourth Ave., Ste. 3303
Seattle, WA 98154
Email: bricklin@bnd-law.com
Via Messenger, U.S. Mail, postage prepaid, and Email

Attorneys for City of Black Diamond:
Carol Morris
Morris Law P.C.
3304 Rosedale Street NE, Ste. 200
Gig Harbor, WA 98335-1805
Email: carol@carolmorrislaw.com
Via Email

Other Necessary Party:
Attorneys for City of Maple Valley:
Jeffrey B. Taraday
Lighthouse Law Group
1100 Dexter Avenue N., Suite 100
Seattle, WA 98109
Email: jeff@lighthouselawgroup.com
Via Email

DATED this 8th day of September, 2014, at Seattle, Washington.

Kristi Beckham, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Kristi Beckham
Subject: RE: Toward Responsible Development v. City of Black Diamond, et al. - Court of Appeals No. 69414-6-I

Received 9-8-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kristi Beckham [mailto:KBeckham@Cairncross.com]
Sent: Monday, September 08, 2014 11:05 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: bricklin@bnd-law.com; carol@carolmorrislaw.com; jeff@lighthouselawgroup.com; eustis@aramburu-eustis.com; Nancy Rogers; Randall Olsen
Subject: Toward Responsible Development v. City of Black Diamond, et al. - Court of Appeals No. 69414-6-I

For filing in the above-referenced case, attached please find the following document:

1. Answer to Petition for Review.

Case Name: Toward Responsible Development v. City of Black Diamond, et al.
Case No.: WA Supreme Court: Unassigned; Court of Appeals No.: 69414-6-I
Person Filing: Randall P. Olsen (Attorney for Respondents, BD Lawson Partners, LP and BD Village Partners, LP)
(206) 254-4418
WSBA No. 38488
rolsen@cairncross.com

If you have any questions, please let me know.

Thank you.

CH& **Kristi Beckham**
Legal Assistant
Cairncross & Hempelmann
524 Second Ave. | Ste. 500 | Seattle, WA 98104-2323
KBeckham@Cairncross.com | d:206-254-4494 | f:206-587-2308