No. 93963-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL,
and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WESLEY HEINMILLER,
ALAN STAMEISEN, and SUNSET COVE LLC,

Respondents.

APPELLANTS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE REPLY ON PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners Michael Durland, Kathleen Fennell and Deer Harbor Boatworks (collectively "Petitioners") respectfully submit this Response in Opposition to Respondents'[1] Motion to Strike Reply on Petition for Review, in accordance with the Court of Appeals' letter dated February 2, 2017, allowing this responsive pleading.

II. RESPONSE ARGUMENT

The Heinmillers argue that Mr. Durland's reply in support of his Petition for Review to this Court is disallowed under RAP 13.4(d) and should be stricken. However, in their Response filings, Respondents made arguments that they know are contradicted by their previous positions concerning the original permitting of the subject barn, and which run counter to each and every position of the County Department of Community Development staff since at least 1987. Thus, this matter is not a run-of-the-mill dispute over competing facts.

Petitioner is not prohibited from addressing Respondents' claims under RAP 13.4. Durland affirmatively has the right to address any issues raised by Respondents in their response. RAP 13.4(d) does not require Respondents to file a cross-petition or affirmatively seek review; the rules

[1] The motion to strike was filed by Respondents Heinmiller and Stameisen ("Heinmillers"). Respondent San Juan County did not file a separate motion to strike.

merely require that an issue be raised in response to a petition for review. *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210 n.3, 87 P.3d 757 (2004).

The following issues were raised by the County and Heinmillers in their Responses and expressly may be addressed by Durland in his Reply, pursuant to RAP 13.4(d) and RAP 1.2(a) ("These rules will be liberally interpreted to promote justice"):

- The argument that the barn structure was illegal when built and the assertion that such an "unsupported conclusion" is advanced by Mr. Durland in this regard;

- The argument that there is "no evidence" a building permit was applied for or issued, despite substantial evidence that contradicts Respondents' assertions;

- The argument that whether a permit was issued is "irrelevant" because no permit was required (under the Examiner's decision, that runs contrary to all other decisions and admissions by the County and the Heinmillers, and which also contradicts the Examiner's own language in his ruling that acknowledged the role of the doctrine of finality of a permit was issued;

- The argument that the County has the right to provide exemptions from building or permitting requirements, absent any evidence the County did so, or intended to do so, with respect to setback requirements in place in 1981 when the barn was constructed; and

- The argument that the matter is "fact specific" such that review by the Supreme Court is not warranted, despite the positions advanced by both parties that: (a) undermine finality in permitting decisions and (b) "read into" a County Resolution

> provisions that do not exist in its plain language and that contradict statutory construction principles.

Each of these issues are addressed by Durland in his Reply filing, consistent with RAP 13.4(d). The reply sets out uncontroverted evidence that (1) a building permit issued in 1981 with a 10-foot setback and (2) San Juan County at the time required and enforced this setback for uninhabited barns. The official County position to the Hearing Examiner was to this very effect.

The Heinmillers conceded issuance of the permit and setback but then jumped on the Examiner's *sui generis* interpretation that a permit and setback were not required under the law. That is a misinterpretation, but more fundamentally, under the doctrine of finality the permit decision controls.

The Court should consider that the County's attorney has not offered any reasoning or support for her abrupt change in position concerning the permit for the Smith barn. She has not explained her reasoning for contradicting the entire staff of the Department of Community Development, either, or how she believes she can ignore the statements of Sam Gibboney, Director of the Department. She sat by and allowed the Hearing Examiner to ignore the official, consistent position of County staff, concerning issuance of a building permit and the

requirement of a 10-foot setback for the barn to reach his own determination. The Examiner refused to accept evidence offered by the Director of the Department of Community Development so that he could turn a blind eye to the facts. In so doing, the Examiner relied on (although officially "disavowed")[2] a rouge Staff Report that was subsequently withdrawn when the staffer reviewed new documentation of the issued permit and a payment receipt for the permit that his Department Head provided. This unauthorized speculation by the staffer was contrary to all other evidence and – again - contrary to the County's own position concerning the building permit, which had been established over 28 years. This is Alice-In-Wonderland.

The San Juan County Office of Prosecuting Attorney drafted a "compliance plan" to resolve the situation, which the Examiner held was unenforceable. That plan states: "Building Permit 3276 was issued in 1981 for the 30' by 50' structure .... The County approval required the structure to be placed at least 10 feet from the property line." (AR 00039).

As an officer of the Court and under the duties of the Prosecuting Attorney's office, the County's attorney had an obligation to address and

[2] One need only review the text of Conclusion of Law No. 2 of the Decision (p.8) to determine that the supplemental Staff Report clearly influenced the Examiner's decision. Failure to allow a proper rebuttal violates due process. *See Rabon v. City of Seattle (Rabon II)*, 107 Wn. App. 734, 743-44, 34 P.3d 821 (2001); *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 522-23, 29 P.3d 689 (2001).

attempt to correct the Examiner's error. *E.g.,* RPC 3.3, "Candor Toward the Tribunal":

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
>
> ....
>
> (4) offer evidence that the lawyer knows to be false.

RPC 3.3.

"A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal." *State v. Coppin,* 57 Wn. App. 866, 874 n. 4, 791 P.2d 228 (1990). *See also* RPC 8.4 (defining professional misconduct as, among other things, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

The County's inexplicable change in position concerning facts that have never been in dispute until now, appears to be in collusion with the Heinmillers. Only by accepting the Heinmillers' argument there was no building permit/no setback requirement can the County sustain its decision, because an illegal structure cannot be converted. In other words,

the building permit is an "inconvenient" fact from which the County has now distanced itself so that its permitting decisions with respect to the Heinmillers can be sustained. This raises independent questions concerning violation of RCW 42.23.070(1) ("No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others").

The County has become emboldened as this case has proceeded. At first, it merely "allowed" the Examiner to question[3] whether a building permit had issued for the barn in 1981, which he did in the challenged decision. At that time, the Deputy Prosecuting Attorney carefully omitted taking a "position" regarding the evidence that shows the County's Official Position is that a building permit was issued to Mr. Smith that required compliance with the 10-foot setback. Then, in the lower courts, the County meekly and incorrectly argued that it *had* to defend the Examiner's decision, apparently on the basis that it mattered not whether the decision was supported by law or facts.[4] Now, the County has, in its response to the Petition for Review, committed fraud on the court by

[3] It is important to note that the Examiner did not make a finding that no building permit had issued. His finding in this regard is equivocal. Conclusion of Law 11, Decision at pp.11-12.

[4] The Prosecuting Attorney's duty is to seek justice, not blindly defend the indefensible. *See Young v. United States ex rel. Vuitton et fils,* 481 U.S. 787, 803 (1987). By rejecting the vast documentation of the building permit and the Stamp which confirms Res. 58-77 did not delete setback requirements, the County Attorney is neglecting her duty to uphold justice.

arguing for the first time that "no permit was issued," even though the Deputy Prosecuting Attorney knows such a statement is patently false.

The Deputy Prosecuting Attorney also argues in her Response that "thus no setback was required for the barn structure when it was built in 1981," completely ignoring the County manufactured stamp appearing on two different building plans which is part of and clarifies Resolution 58-1977 stating "All structures shall be minimum 10 feet from adjacent property lines. S. J. CO. 58-77"

This is not Candor to the Tribunal under RPC 3.3, and should not be countenanced under that rule, or under RPC 8.4. Moreover, it constitutes a collateral attack on the requirements of the building permit issued to Mr. Smith. Washington law is clear that, even if a permit is issued improperly, when such permit is not appealed, it is binding on the permittee. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

Given the serious ethical issues in this case concerning a failure of candor to the tribunal and potential violation of RCW 42.23.070(1), as well as the threat to the well-established doctrine of finality, the Court should consider the Reply and grant the Petition for Review pursuant to

RAP 1.2(a). Mr. Durland is allowed to have the "final say" to address the patent falsehoods and arbitrary change of past permit decisions perpetuated by the Respondents herein.

III. CONCLUSION

For all the foregoing reasons, the Court should deny the Motion to Strike and grant the Petition for Review.

RESPECTFULLY SUBMITTED this 16th day of February, 2017.

By _____

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CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the foregoing pleading was timely filed on February 16, 2017 pursuant to RAP 18.6(c), as follows:

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov, email
Via Email Attachment

The original will be maintained in the files of the Dennis D. Reynolds Law Office. I further certify that I caused a true and correct copy of the foregoing pleading to be served this date, BY EMAIL*, to the parties listed below:

Randall K. Gaylord, WSBA #16080, Prosecuting Attorney Amy S. Vira, WSBA #34197, Deputy Prosecuting Attorney San Juan County Prosecutor's Office 350 Court Street / P.O. Box 760 Friday Harbor, WA 98250 amyv@sanjuanco.com; elizabethh@sanjuanco.com *Attorneys for Respondent San Juan County*	John H. Wiegenstein, WSBA #21201 Heller Wiegenstein PLLC 144 Railroad Avenue, #210 Edmonds, WA 98020-4121 Johnw@hellerwiegenstein.com; MonicaR@hellerwiegenstein.com; docket@hellerwiegenstein.com *Attorneys for Respondents Wesley Heinmiller, Alan Stameisen, and Sunset Cove LLC*

[*Per Parties' stipulation to electronic service by email; hard copies not served unless requested; documents too large for email (typically >10MB) may be served by Dropbox or similar to allow direct downloading]

DATED at Bainbridge Island, Washington, this 16th day of February, 2017.

Christy Reynolds

Christy A. Reynolds
Legal Assistant