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INTRODUCTION

The Respondents, Verizon Wireless and Seattle SMSA Limited Partnership, applied to the City of Bainbridge Island for a permit to construct a cell phone tower on property located directly below the hillside property owned by the Appellants. The new pole and antennas directly impact the views from their residences. The City issued a permit on September 14, 2007, without notice to Appellants or others. The Appellants first learned of the project 46 days later when a survey crew first came to the site. Their appeal of the City's decision 9 days later was dismissed as untimely by the City Hearing Examiner under the City ordinance requiring any appeal to be within 14 days of the issuance of a permit. The Appellants filed a LUPA Petition 8 days later but the Trial Court dismissed the Petition because Appellants had not met the City's 14 day deadline.

No one disputes the fact that Appellants had no notice or any opportunity to learn of the project and that they were prevented by such lack of knowledge from filing any appeal. However, neither the Hearing Examiner nor the Superior Court granted Appellants request for an equitable tolling of the limitation period or agreed that the Appellants' due process rights have been violated.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in refusing to equitably toll the 14 day deadline for appealing a land use decision under the City of Bainbridge Island ordinance, where the 14 days started when the permit was issued and Appellants had no notice or ability to know of the permit application or the permit issuance until 46 days after the permit was issued.

2. The Trial Court erred in refusing to equitably toll the 14 day deadline for appealing a land use decision under the City of Bainbridge Island ordinance, where the City and other Respondents failed to give the Appellants the required notice under SEPA and Appellants had no other notice of the permit application.

3. The Trial Court erred in failing to rule that, under the facts of this case, the lack of notice to the Appellants, coupled with an appeal deadline that expired before they had any means of knowing about the permit, deprived the Appellants of their rights under the due process clause of the Constitution of the United States and the State of Washington.

STATEMENT OF THE CASE

The facts do not appear to be in dispute. In any event, in an appeal from an order granting a CR 12(b)(6) motion, all allegations in the complaint are deemed true. **Mueller v. Miller** 82 Wn. App. 236, 917 P.2d 604 (1996).

This case arises out of the issuance of a permit for a wireless cell tower pole in front of the homes of the Appellants. The Nickum Appellants own property in the West Blakely area of Bainbridge Island, shown as Tax Parcel No. 033 on the Assessor's Map attached to the Appellants' Land Use Petition. CP 7 (§5.1) and 17. The Snedeker Appellants own property next door, shown as Tax Parcel No. 034. CP 7 (§5.2) and 17. The Respondents, Jeffry E. Powers and Debra Haase, own Tax Parcel No. 038. CP 7 (§5.3) and 17, which they leased to the Respondents, Verizon Wireless and Seattle SMSA Limited Partnership, for the purpose of installing a cell tower pole, with antennas, and a 20 foot by 12 foot equipment building. CP 5 (§4.1). This cell tower pole obstructs the Appellants' view of the water and, by rising above the horizon, significantly detracts from their scenic vistas and seriously impacts the natural beauty enjoyed from their homes. CP 8 (§5.6).

In December of 2006, the Respondent, Verizon Wireless, applied to the Respondent, City of Bainbridge Island, for a building permit on the Respondent Powers/Haase property to install a new 45 foot cell tower pole, with antennas, and an adjacent equipment building. CP 5 (§4.1). In that application it claimed its permit was categorically exempt from the State

Environmental Policy Act (SEPA), under RCW 43.21C.0384, because it was attaching the antennas to an "existing structure" as allowed under that provision. CP 5 (§4.2). The Respondent, City of Bainbridge Island, approved of that exemption even though the new cell tower antennas were to be attached to a new 45 foot pole, replacing an existing 30 foot pole. No notice of the application was given by the City to anyone, either by mail, posting of the property, or by newspaper publication. CP 5 (§4.3).

On September 14, 2007, the City of Bainbridge Island issued Respondent Verizon Wireless the requested building permit. Again, no notice of the permit was mailed, posted or published. CP 5 (§4.4).

On October 30, 2007 the Appellant, David M. Snedeker, noticed workman placing stakes in the ground on the property and the Appellants learned for the first time about the project and this permit. CP 5 (§4.5).

Nine (9) days later, after reviewing the City's permit file, requesting the City to revoke the permit, and getting no response, the Appellants filed an appeal to the City's Hearing Examiner. The Hearing Examiner dismissed the appeal on January 22, 2008 because it was not filed within 14 days of the permit issuance. Appellants then filed this Land Use Petition Act (LUPA) action eight days later on January 30, 2008. Following Respondent Verizon's CR 12 (b)(6) Motion, CP 18, the trial court dismissed the LUPA Petition, CP 42, rejecting the Appellants' request for equitable tolling of the 14 day deadline and their position that their due process rights were violated by the City's ordinance. CP 33-41.

Unless this Court reverses the Trial Court, the Appellants will have been denied the ability to require the City to comply with SEPA and its zoning code in this permit decision. The Appellants do not oppose a cell tower in their neighborhood but only to its placement in a location which seriously impacts their view. CP 10 (§6.2.3) and CP 8 (§5.6). Two nearby properties owners are willing to lease a portion of their property for this cell tower and Appellants have no objection to those sites, which are higher in elevation and would block no views. CP 10 (§6.2.4 to 6.2.6).

Under SEPA, the City is required to consider the impact of any project on people's views. The required Environmental Checklist, WAC 197-11-960, which each non-exempt project applicant must submit, asks in Question 10 b, "What views in the immediate vicinity would be altered or obstructed?" The Respondents would have been required to answer that the Appellants views would be obstructed and it seems very likely that the cell tower would have been required to be placed in a better location.

In addition to objections to the location of the cell tower, the Appellants claim that certain provisions of the City of Bainbridge Island Zoning Code were not followed, such as a height restriction, CP 10 (§6.3), power density and FCC compliance disclosure, CP 11 (§6.4), screening and camouflaging, CP 11 (§6.5), and property line setbacks, CP 12 (§6.6).

ARGUMENT

1. **The City of Bainbridge Island's 14 day time limit for appeal should be tolled, under the circumstances of this case, for the 46 days it took the Appellants to learn of the permit application.**

The City of Bainbridge Island ordinance at issue in this case, Bainbridge Island Municipal Code, BIMC 2.16.130 (B)(1), reads in pertinent part as follows:

“An appeal of an administrative decision shall be filed with the city clerk 14 days after the date of the decision . . .”

The Appellants are not seeking to establish any broad rule applicable to all zoning cases. They only seek to show that, under the circumstances of this case, equitable tolling is appropriate. Here, there was nothing to alert the Appellants that such a project was even contemplated. CP 9 (§6.1.1). The Respondents did not provide notice of this permit application to anyone. CP 9 (§6.1.3). The Appellants live next to the property and would have promptly reacted to any mailings received and would have noticed any postings on the property or publications in the newspaper. CP 9 (§6.1.5). When they learned of the project they promptly protested to the Respondents, including the City. CP 5 and 6 (§4.5 to § 4.8). When the City didn't respond to the demand to revoke the permit, they filed their appeal 9 days after learning of the project. CP 5 and 6 (§4.5 and 4.9).

Because the Appellants acted as promptly as possible and their lack of knowledge was not a result of their conduct, equitable tolling is appropriate.

a. **The principal of equitable tolling is well recognized under Washington law, as well as the law in other jurisdictions.**

Washington law recognizes the principal of equitable tolling in limited circumstances. For example, in **Seamans v. Walgren** 82 Wn.2d 771, 514 P.2d 166 (1973), a case was brought against an attorney who was also a member of the legislature. Because legislators are immune from civil process during a legislative session, service could not be effected before the statute of limitations ran out. The Court tolled the statute on equitable grounds, stating:

“Although generally exceptions to a statute of limitations will not be implied, nevertheless where there is an inability to bring a lawsuit this rule is not applied and exceptions are created.”82 Wash.2d at 775.

Numerous other Washington cases have applied this rule. In **Thompson v. Wilson** 142 Wash. App. 803, 175 P.3d 1149 (2008), a mother sought judicial review of a death certificate showing her daughter committed suicide. The mother claimed she had been murdered. This Division tolled the statute because the coroner had refused to meet with the mother, as required by law. **In re Bailey's Estate** 178 Wash. 173, 34 P.2d 448 (1934) involved assets of an estate that had escheated to the State. An heir later surfaced and got the legislature to return the money to the estate. The Court tolled the statute of limitations for the time it took the legislature to act because the heir had no recourse to the Courts during that time.

In **Barbo v. Nooksack Valley School District** 16 Wash. App. 371, 556 P.2d 245 (1977) the Court excused a teacher from a 10 day deadline to appeal a layoff notice because the appeal had to be filed with the Clerk of the District and the District had not appointed a Clerk. In **Millay v. Cam** 135 Wn.2d 193, 955 P.2d 791 (1998) the Court ruled the time period for redeeming property involved in a foreclosure can be equitably tolled “upon finding of fraud, oppression, or other equitable circumstances.” 135 Wn. 2d at 205. The circumstances in that case involved the inability to get an accurate sum of the amount needed to redeem.

Federal Courts take a similar approach when the circumstances are appropriate. As stated in **Salois v. Dime Sav. Bank of New York, FSB** 128 F.3d 20, 25 (C.A.1 (Mass.),1997):

“Although, under federal law, equitable tolling is applied to statutes of limitations ““to prevent unjust results or to maintain the integrity of a statute,”” *King v. California*, 784 F.2d 910, 915 (9th Cir.1986), courts have taken a narrow view of equitable exceptions to limitations periods, *see Earnhardt v. Puerto Rico*, 691 F.2d 69, 71 (1st Cir.1982). Indeed, equitable tolling of a federal statute of limitations is ““appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands.”” *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).”

The Eighth Circuit in **Riddle v. Kemna** 523 F.3d 850, (C.A.8 (Mo., 2008), tolled the statute for a prisoner who relied on established precedent for the applicable deadline, which was subsequently shortened in a new decision. In **Downs v. McNeil** 520 F.3d 1311 (C.A.11,Fla., 2008), the

statute was tolled for a diligent prisoner whose attorney ignored repeated demands to file the prisoner's case.

- b. **Equitable tolling is especially appropriate here where the Respondents intentionally decided not to give the Appellants the notice to which they were entitled under the State Environmental Policy Act.**

The present case involves more than the inability of the Appellants to file an appeal based upon their lack of knowledge. Here the Respondents failed to give the Appellants notice of the project to which they were entitled. As such, the Court has additional reason to toll the statute.

The permit application of the Respondent, Verizon Wireless, was subject to the State Environmental Policy Act. RCW 43.21C.010 et.seq. (SEPA). However, the Respondent took the position that this application was categorically exempt under SEPA, relying on RCW 43.21C.0384. CP 5 (§4.2). This statute exempts from SEPA certain wireless service facilities attached to existing structures, as follows:

“(a)(i) The facility to be sited is a microcell and is to be **attached to an existing structure** that is not a residence or school and does not contain a residence or a school; or (ii) the facility includes personal wireless service antennas, other than a microcell, and is to be attached to an existing structure (that may be an existing tower) that is not a residence or school and does not contain a residence or a school, and the existing structure to which it is to be attached is located in a commercial, industrial, manufacturing, forest, or agricultural zone; or (iii) the siting project involves constructing a personal wireless service tower less than sixty feet in height that is located in a commercial, industrial, manufacturing, forest, or agricultural zone” Emphasis Added.

The permit application in this case recites that a 30 foot high Puget Sound Energy pole will be replaced by a new 45 foot high pole to which the antennas are to be attached. CP 5 (§4.1). Obviously, the new 45 foot high pole is not an “existing structure” as required under this exemption. Nevertheless, the Respondent City of Bainbridge Island treated the application as categorically exempt.

Because the project was treated as “categorically exempt” no threshold determination of significance or non-significance was made, which would have triggered the notice provisions of BIMC 16.04.130 (A)(2), which requires the City to give notice “using all of the following means:

- A. Posting the property for site-specific proposals or mailing to property owners within 300 feet of the proposal if the project is site-specific, or both, as determined by the responsible official . . . , and
- b. Publishing notice in the city’s legal newspaper, and

* * * ”

In **Felida Neighborhood Association v. Clark County** 91 Wash. App. 155, 913 P. 2d 823 (1996), Division II of the Court of Appeals dealt with a case where the appellant failed to appeal within the required 30 day time frame. However, the county had never sent out notice of the County Commissioners’ decision approving the hearing examiner’s decision. The Court held that failure to give the statutorily required notice tolls the time for filing an appeal.

In **Leson v. Department of Ecology**, 59 Wash. App. 407, 799 P. 2d 268 (1990) the Department of Ecology fined Leson after an oil tanker he piloted ran aground in Port Angeles Harbor, which was affirmed by a decision of the Pollution Control Hearings Board. His attorney was given notice of the final Board decision but notice was not also sent to Leson, as required by statute. Leson didn't file an appeal to Superior Court within 30 days of the Board's decision but he argued that the statute was tolled until he received the notice from the Board. The Court of Appeals agreed, saying that the statute required notice of the Board's decision, and accompanying findings to be sent to the parties **and** their attorney and the appeal period didn't start to run until that notice was given.

These cases are directly applicable here and are consistent with other equitable tolling cases. They reflect a policy that a potential appellant who is entitled to notice so that an appeal decision can be made should not be penalized by the failure of others to provide such required notice.

Here the Respondents adopted the ludicrous position that the new 45 foot pole was an "existing structure" and SEPA notice procedures could be avoided. As a result of the Respondents' blatant violation of that SEPA statute, the Appellants were prevented from filing a timely appeal. Equity demands that Respondents not be rewarded for their illegal actions.

- c. **Equitable Tolling is essential in this case to avoid injustice because the Appellants received no notice and had no ability to learn of the permit application or permit issuance prior to the deadline for appeal.**

The essential feature of this case was the complete inability of the Appellants to exercise their rights within the City's 14 day appeal deadline. This is a rare circumstance and entitles the Appellants to the rare relief of equitable tolling, regardless of the culpability of the Respondents.

In Janczewski v. Smithsonian, 767 F.Supp. 1 (D.C. Circ. 1991) the District Court applied equitable tolling to extend a deadline where the absence of a security guard at a courthouse caused a case to be filed a few minutes past the deadline. In Koch v. Donaldson, 260 F. Supp. 2d 86 (D.C. 2003) the Court equitably tolled the statute for filing of a document with a government agency because the agency's fax machine didn't work during the final day for filing when the appellant sought to fax it the appeal document.

These cases stand for the simple proposition that the appeal rights of parties must not be taken away by circumstances beyond their control.

d. **The application of equitable tolling principals in this case is not contrary to the Ashe v. Bloomquist and Habitat Watch cases relied on by the Respondents.**

Respondents have cited Ashe v. Bloomquist 132 Wash. App. 784, 133 P.3d 475 (2006), where the Court affirmed a dismissal of a case for nuisance and mandamus brought by a neighbor some five months after a building permit was issued and several months after construction started. The neighbor complained that the height of the house exceeded the height permitted under local law. The Court of Appeals affirmed the trial court's dismissal of the case as untimely. However, in that case, the neighbor had

knowledge of the construction of the house next door for several months before any legal action was taken. Unlike the present case, no argument was made that the appeal deadline expired before the neighbor had knowledge of any permit or plans.

Respondents also rely on Habitat Watch v. Skagit County 155 Wash. 2d 397, 120 P. 3d 56 (2005). In that case a citizens group, made up of neighbors to a proposed golf course site, opposed the development of the property. The group participated in various public hearings, including those that resulted in the project being approved and one deadline extension being granted. No appeals were taken. Two additional extensions were granted, however, without notice to the group, even though notice was required. The Court rejected their appeal some years later after construction started.

Unlike the Appellants in this case, Habitat Watch was aware of the project and had unsuccessfully argued against it and its first extension. It had the knowledge and ability to track the project and any applications for extensions within the deadlines involved. It is not surprising that the courts held them to the deadline involved. In the present case, however, the Appellants had no such knowledge. They are not complaining about lack of notice of some later event in the project but lack of notice of the project itself. That is a fundamental and essential difference.

2. The lack of notice to the Appellants, coupled with an appeal deadline that expired before they had any means of knowing about the permit issued in this case, deprived the Appellants of

their rights under the due process clause of the Constitution of the United States and the State of Washington.

The due process rights of the Appellants are constitutionally protected. The 5TH Amendment to the United States Constitution guarantees that no persons shall be “deprived of life, liberty, or property, without due process of law . . .” The 14TH Amendment to the United States Constitution says that no state shall “deprive any person of life, liberty, or property, without due process of law.” Article 1, Section 3 of our Washington State Constitution also declares that “No person shall be deprived of life, liberty, or property, without due process of law.”

As stated in **Wedges/Ledges of CA v. City of Phoenix**, 24 F.3d 56 (9th Circ. 1994):

“A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from “existing rules or understandings that stem from an independent source such as state law.”” **Board of Regents v. Roth**, 408 U.S. at 577, 92 S.Ct. at 2709.

That “Due Process” requires notice is beyond debate or discussion. In **Tulsa Professional Collection Services, Inc. v. Pope** 485 U.S. 478, 108 S. Ct. 1340 (1988), the U.S. Supreme Court ruled that notice to creditors published in a newspaper by an estate during probate was not adequate notice under the due process clause to creditors known to or reasonably ascertainable by the executor of the estate. It invalidated an Oklahoma statute which provided for notice by publication alone.

Washington Courts have been very protective of our citizens' due process rights. In **Halsted v. Sallee** 31 Wash. App. 193, 639 P.2d 877 (1982), the court invalidated a decree terminating a parent's visitation rights to their child because of inadequate notice to that parent. In **Veradale Valley Citizens' Planning Committee v. Board of Com'rs of Spokane County** 22 Wash. App. 229, 588 P.2d 750 (1978) the Court affirmed the dismissal of a zoning appeal where the property owner was not named as a party. It said:

Procedural due process requires that an individual have notice and an opportunity to be heard before he can be deprived of an established property right. Article 1, Section 3, Washington State Constitution. . . It follows that a person who has acquired a valuable property right as a result of a favorable zoning administration decision must be given notice when judicial review of that decision is sought.

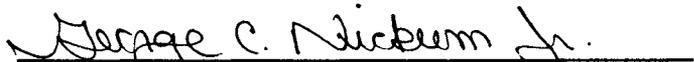
In the present case, the Appellants were clearly denied due process. "No notice" is obviously inadequate notice. The appeal deadline expired before they received any notice of the permit or the project. As such they were denied any ability to exercise their rights under SEPA or other City laws pertaining to this permit.

CONCLUSION

An appeal deadline should never expire before a person has knowledge of the need to appeal. The Trial Court allowed that to happen and this Court has the ability and the duty to reverse such injustice. Equitably tolling the statute under the unique facts of this case is an easy and proper solution under the laws of this state. Such result will allow the Appellants to assert their rights before the City Hearing Examiner and the Trial Court on this permit application, something guaranteed them under the United States and State of Washington Constitutions.

The Court is requested to reverse the Trial Court's dismissal of the Appellants' LUPA action and to hold that the Appellants have alleged facts sufficient to entitle them to a 46 day equitable tolling of the City's 14 day appeal deadline. These facts include the Appellants lack of notice of the project, the failure of the Respondents to give them the notice to which they are entitled under SEPA, and the due diligence of the Appellants in pursuing this matter. The Court should also rule that without such equitable tolling, the Appellants' due process rights have been violated.

Respectfully submitted this 29TH day of October 2008.


George C. Nickum, Jr. WSBA #5761
Attorney for Appellant

CERTIFICATE OF SERVICE

08 OCT 30 PM 1:23

STATE OF WASHINGTON

The undersigned certifies that on October 30, 2008 I deposited in the United States Mail, with postage prepaid, a copy of the **Appellants' Brief** dated October 29, 2008 in the above matter to the following attorneys and parties of record in this case:

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated this 30TH day of October 2008.



Margaret D. Nickum