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SUPREME COURT
STATE OF WASHINGTON

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No. 81855-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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,

Petitioners.

BRIEF OF AMICUS CURIAE
ASSOCIATION OF WASHINGTON BUSINESS

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TABLE OF CONTENTS

I. INTRODUCTION1

II. IDENTITY AND INTEREST OF AMICUS CURIAE2

III. ISSUE OF CONCERN TO AMICUS CURIAE2

IV. STATEMENT OF THE CASE3

V. ARGUMENT4

 A. A LAWSUIT THAT CHALLENGES A LAND USE PERMIT EFFECTIVELY PREVENTS THE PERMIT HOLDER FROM PROCEEDING WITH THE PROJECT UNTIL THE LITIGATION IS FINALLY RESOLVED.6

 B. THE COURT OF APPEALS INCORRECTLY INTERPRETED RCW 36.70C.100 AS REQUIRING A DEVELOPER TO SEEK A STAY OF HIS OR HER OWN PERMITS.....8

 C. THE COURT OF APPEALS' DECISION ADDS GREATER UNCERTAINTY AND COMPLEXITY TO AN ALREADY UNCERTAIN AND COMPLEX SYSTEM.....10

VI. CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Bach v. Sarich, 74 Wn.2d 575, 445 P.2d 648 (1968) 7-8

Eastlake Community Council v. Roanoke Associates, Inc.,
82 Wn.2d 475, 513 P.2d 36 (1973)..... 7-8

Kelly v. County of Chelan, 145 Wn. App. 166, 185 P.3d
1224 (2008)..... 9

West Main Assoc. v. City of Bellevue, 106 Wn.2d 47, 720
P.2d 782 (1986)..... 11

Statutes

RCW 36.70C.100..... 1, 8-9

RCW 36.70B.010..... 11

RCW ch. 90.58..... 11

RCW 90.58.180 12

RCW 90.58.140 12

Laws of 1995 ch. 347, § 1..... 10

Secondary Authority

Richard L. Settle, *Washington Land Use and
Environmental Law and Practice* (1983) 6-7

I. INTRODUCTION

The Association of Washington Business (“AWB”) submits this amicus brief, at the request of this Court, to address an issue of first impression: do time limits in a land use permit continue to run during litigation challenging the permit? Stated another way, must a permit holder seek a stay to toll the time limit in a permit that is the subject of a lawsuit until final disposition of the litigation?

The Court of Appeals misinterpreted RCW 36.70C.100 as creating an affirmative requirement for a project proponent to seek a stay of a permit challenged by third parties. This holding raises a number of practical and public policy concerns; and, by increasing the already formidable complexity and uncertainty of our state’s system of land use and environmental regulation, would damage the general welfare with no corresponding benefit to the public at large. The better rule is that the filing of a lawsuit challenging a land use permit tolls the permit’s time limits until final resolution of the litigation.

For the reasons developed below, the court should reverse the Court of Appeals and remand for consideration of the underlying substantive issue.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB is the state's largest general business membership organization and represents over 6,600 businesses from every industry sector and geographical region of the state. AWB members range from large to small and employ over 650,000 people in Washington. AWB is an umbrella organization which also represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in this and other courts as amicus curiae on issues of substantial interest to its statewide membership.

AWB's members include many businesses engaged in residential, commercial, or industrial real estate development. These members are applicants for state and local land use permits and must be able to rely on a stable and predictable body of law governing the issuance, validity, and appeal of such permits. In addition, all of AWB's members live in, use, or are, in one way or another, served by the buildings and projects that are governed by our land use regulatory system. Accordingly, the Court's determination of the issue presented in this case will affect a substantial interest of all of AWB's members.

III. ISSUE OF CONCERN TO AMICUS CURIAE

In Washington, almost every land use permit has an expiration date. The filing of a lawsuit challenging a permit will, in almost all cases,

prevent the permit holder from proceeding with the project until that litigation is favorably resolved, and that litigation will often, as here, last beyond the expiration date in the permit. Should the filing of such a lawsuit toll the time limit in the permit until a final disposition of the lawsuit?

IV. STATEMENT OF THE CASE

AWB has reviewed the briefs filed in the appellate court and the pleadings filed with this Court. The essential facts relevant to the issue presented for review can be simply stated:

A local government issued a land use permit to a developer. That permit contained a deadline requiring the developer to complete installation of all infrastructure required by the permit within two years. Neighbors opposed to the project filed suit challenging the permit, and the trial court upheld their challenge issuing an order terminating the permit. The developer appealed. While that appeal was pending, the two-year time limit in the permit expired. The neighbors moved to dismiss the appeal because the permit had expired, and the appellate court dismissed the appeal for that reason.

V. ARGUMENT

Although our state's vested rights doctrine may be at issue when this case is remanded, the sole issue before this Court is whether the challenged land use permit expired during litigation. The Court of Appeals' lengthy discussion of the tortuous history of this project, the rationale supporting the vested rights doctrine, and the reasons for strictly construing that doctrine are irrelevant to the issue now before this Court. The project may or may not be vested to regulations in effect at some point in the time it was undergoing land use and environmental review. Those regulations have subsequently been changed; and, apparently, would now prohibit a project such as this. On remand, the appellate court can determine whether the Chelan County Hearing Examiner, who determined that the project vested to the earlier regulations, or the Superior Court, which overturned that decision, was correct. But, the appellate court did not decide this case on vesting grounds. Rather, it decided the case on procedural grounds and its holding creates a troubling and harmful precedent.

The appellate court's holding would significantly increase the complexity and uncertainty of our already complex and uncertain land use regulatory system. This would damage not only the permit holder but all those who live in, use, or are served by the residential, industrial,

commercial, and public buildings and projects that are governed by that regulatory system. Among other things, the appellate court's holding would have the following consequences:

- It would encourage parties to file lawsuits challenging permits in the expectation that the project could be stopped simply because of the delay inherent in litigation.
- It would require all permit holders to seek judicial relief staying the time limits in every permit and governmental approval needed for a project to proceed whenever one of those permits or approvals was subject to judicial review.
- It would require every local jurisdiction and state and federal permitting agency to expend governmental resources responding to the permit holder's request to toll the time limits in the permits and approvals necessary for the project to proceed.
- It would require the expenditure of scarce judicial resources in considering and deciding requests for stays.
- It would expose permit holders to the prospect of inconsistent results in their attempts to obtain such judicial relief; and, in those cases where such relief was denied by a trial court, it would require extraordinary interlocutory review of the trial court's procedural decision in order to preserve the valuable property rights granted in

the permit while the litigation challenging the permit proceeded to final disposition.

Before this Court affirms a decision with the potential for such unfortunate consequences, it should identify the benefits that would result from the rule established by the appellate court. But, try though we might, AWB has not been able to identify any benefit to any party resulting from the rule established by the appellate court's holding other than to the particular opponents of this specific project.

A. A LAWSUIT THAT CHALLENGES A LAND USE PERMIT EFFECTIVELY PREVENTS THE PERMIT HOLDER FROM PROCEEDING WITH THE PROJECT UNTIL THE LITIGATION IS FINALLY RESOLVED.

In Washington, the mere filing of a lawsuit contesting a land use permit creates a de facto injunction for almost all development projects.

This has long been recognized both by academic commentators and by practitioners in this area of law. For example, Professor Settle points out:

In Washington, however, injunctive relief is seldom sought in land use litigation because of a stringent bond requirement and the constructive injunctive effect of litigation challenging development. The Washington Supreme Court has made it clear that development which occurs after the commencement of litigation is at the developer's risk. Such development will be given no equitable consideration and will be abated if it ultimately is held to have been improper. Since developers, and especially their lenders, generally are unwilling to assume this risk and hence refrain from development until litigation is concluded, injunctive relief is rarely necessary.

Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 8.7(a) at 252 (1983). Indeed, “[t]his constructive injunctive effect of litigation challenging private development makes the delay of litigation especially onerous for development proponents.” *Id.*, § 3.7 at 320.

The rule that a developer proceeds with a project under litigation at his or her own risk is longstanding in Washington. In *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 513 P.2d 36 (1973), this Court made clear that a developer will have no grounds in equity to rescue a project started under the cloud of litigation and later found to be legally deficient. The Court noted:

We cannot find that a litigant has any right to be a beneficiary of unlawful administrative conduct where the public's interest will suffer, by the mere assertion that extensive financial investment is in the balance. Defendant started the project with full awareness that there were multiple, serious legal obstacles and cannot now claim relief simply because money was expended in the face of an awareness it might not have a legal right to proceed.

Roanoke Associates, 82 Wn.2d at 485. See also *Bach v. Sarich*, 74 Wn.2d 575, 582-83, 445 P.2d 648 (1968) (noting developers proceeded at own risk in beginning construction while lawsuit challenging development was pending on the merits).

Thus, a permit holder, while legally entitled to proceed with a project after permit issuance, must, as a practical matter, wait until the litigation challenging the permit is completed before proceeding with the project authorized by the permit. But, litigation takes time and, especially when appellate review of a trial court decision is sought, a substantial amount of time. During that time, one or more of the many governmental permits and approvals required to proceed with a project, some of which may not have even been challenged, is almost certain to expire -- if this Court affirms the appellate court and holds that those time limits continue to run during litigation.

B. THE COURT OF APPEALS INCORRECTLY INTERPRETED RCW 36.70C.100 AS REQUIRING A DEVELOPER TO SEEK A STAY OF HIS OR HER OWN PERMITS.

As noted by Settle and given the reasoning of this Court in *Roanoke Associates* and *Bach*, litigation challenging a development effectively works as a “constructive injunction” because the risks to both the developer and his or her investors or lenders generally deter action on the permits. Nevertheless, when it enacted the Land Use Petition Act (LUPA), the statute under which this challenge arose, the Legislature authorized a statutory injunction process for LUPA petitions:

(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.

RCW 36.70C.100. The Court of Appeals erred when it found this process prescriptive *for the developer*. It stated: "Because this statute affords any party an opportunity to obtain a stay, the developer's argument -- that a stay is automatically afforded it -- is illogical." *Kelly v. County of Chelan*, 145 Wn. App. 166, 174-75, 185 P.3d 1224 (2008). The court then went so far as to suggest "[t]he developer's current challenge to the deadlines may then constitute a collateral attack of the permit[.]" because the permit deadlines constituted permit decisions of the hearing examiner which could only be challenged in a timely LUPA petition. *Id.* This is an improper interpretation of the statute.

At the threshold, an argument that permit timelines automatically toll during appeal of the permit is hardly an attack on the permit -- it is a

defense of the permit. But more fundamentally, RCW 36.70C.100 doesn't apply to this situation at all. It is a statute intended to allow project opponents to seek a stay of development to preserve the status quo and it enables them to achieve the result they seek if they prevail. The statute's plain language supports this. It applies to stay or suspend an "action" by the "local jurisdiction" or "another party" which action is "to implement the decision under review." It is a strained interpretation of this provision to suggest it is meant in any practical way to require a developer, having received a favorable land use decision now under challenge by a third party, to itself challenge the decision simply to toll the time lines contained within it.

C. THE COURT OF APPEALS' DECISION ADDS GREATER UNCERTAINTY AND COMPLEXITY TO AN ALREADY UNCERTAIN AND COMPLEX SYSTEM.

The process of obtaining land use and environmental project approval in Washington is uncertain and complex, a situation which harms the public interest. As our Legislature has found:

... the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing cost for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public.

Laws of 1995, ch. 347 § 1. These findings support the legislative intent underlying the local project review chapter of our state's land use statutes.

Going further, the Legislature has declared:

(1) As the number of environmental laws and development regulations has increased for land uses and development, so has the number of required local land use permits, each with its own separate approval process.

(2) The increasing number of local and state land use permits and separate environmental review processes required by agencies has generated continuing potential for conflict, overlap, and duplication between the various permit and review processes.

(3) This regulatory burden has significantly added to the cost and time needed to obtain local and state land use permits and has made it difficult for the public to know how and when to provide timely comments on land use proposals that require multiple permits and have separate environmental review processes.

RCW 36.70B.010. This Court has also noted the extent to which complexity and uncertainty in the permitting process imposes social costs as well, stating in an oft-quoted declaration that “[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.” *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

This case demonstrates some of the complexity in land use projects. The briefs on file identify two local government permits required for the project -- the conditional use permit that is the subject of the litigation and approval of a subdivision for the property. In addition, there

are two permits required for the work within the area subject to the Shoreline Management Act, RCW ch. 90.58 -- a substantial development permit (issued by a local government but appealable to the state Shoreline Hearings Board, RCW 90.58.180) and a shoreline conditional use permit, reviewed for approval by the Washington State Department of Ecology, RCW 90.58.140(10). Finally, other aspects of the project such as relocation and improvement of the road through the project site and the construction of permanent improvements in the navigable waters of the United States of America also would require both local permits and permits from federal agencies.

Under the appellate court's holding, a permit holder would need to obtain a stay tolling the time limits in all of these permits and approvals while this litigation was pending in order to protect the right to proceed with the project. Among other things that would mean that all permitting jurisdictions and agencies would have to be made parties to respond to such requests for judicial relief. In the case of federal agencies, a separate lawsuit in federal court would be necessary to obtain jurisdiction over such agencies in order to make such a request.

While it is probable that most of these requests would be granted, that would not always be the case. A trial court's denial of a request to toll a time limit would result either in an interlocutory procedural appeal or the

abandonment of a project not for any substantive reason but because of the onerous nature of the litigation required to protect a permit holder's right to proceed.

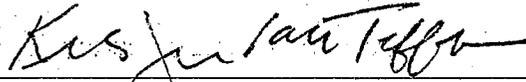
AWB submits there is simply no countervailing public policy reason or legal authority for further convoluting the permitting process, nor for facilitating the incredible waste of public and private resources such a result invites.

By contrast, a simple rule that time limits in land use permits toll during the pendency of litigation attacking them would save private and public resources from waste and focus judicial review on the merits of the dispute. Such a rule would express the generally accepted practice in land use litigation for as long as anyone can remember – the fact this issue has arisen as a matter of first impression nearly a century after the introduction of modern land use regulation is itself notable – that permit time lines toll during litigation. Such a rule is consistent, furthermore, with the stay provisions of LUPA available to project opponents, and furthers the stated legislative intent underlying local permit review by reducing, rather than multiplying, the cost and complexity of development.

VI. CONCLUSION

AWB urges reversal of the Court of Appeals decision and remand for determination of the underlying issues regarding this permit.

Respectfully submitted this 8th day of September, 2009.



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