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### Case Illustrates the Need for Speed When Challenging Land Use Decisions

Nov 24, 2008

By John Riper

A new case from the Washington appellate courts illustrates how owners and contractors may have only days to react to governmental actions such as red tags and violation notices, or be forever barred from challenging those determinations.

The case involved the remodel of an existing City of Bellevue building that encroached almost completely on the City's current setback requirements. During predevelopment the City advised that the developer could remodel the structure within its existing footprint without becoming subject to the setback restrictions, provided the remodel did not exceed 30 percent of the existing building's replacement value. So the developer applied for a building permit, requiring work estimated to cost 29.84 percent of replacement value.

During permit review the City requested an engineering statement that the existing foundation was capable of supporting the loads proposed for the remodel. The developer replied with its architect's statement that the foundation appeared to be sound, and the project plans appeared to comply with the applicable building code. The city issued a building permit.

Although the approved plans called for demolition of only selected walls, the contractor demo'd all the exterior walls. The owner then notified the City that the exposed foundation was not sound, and would need substantial repair. The City approved revised construction plans, including construction of a new foundation slab.

Meanwhile, the Bellevue City Council passed a moratorium on future development on downtown Bellevue properties, including this project. The City's land use manager then initiated review of the developer's permit, on the basis that it had apparently been obtained based on inaccurate information (such as the total costs of the work that would actually be required, and whether adequate engineering information had been furnished about the soundness of the existing foundation). The City posted a Stop Work order on the project, stating the development exceeded the permitted scope of work.

The red tag noticed said the "Correction Required" was to "Provide revisions to comply with current city of Bellevue construction and land use codes and ordinances," and in the space for the compliance deadline the red tag said, "Contact City." The developer promptly responded with a memo explaining why the red tag should not have issued. The parties spent several weeks exchanging correspondence about the propriety of the red tag, and then the City issued a letter explaining the basis for its decision. Twenty-one days after that letter, the developer filed a LUPA petition in Superior Court contesting the validity of the red tag.

The City responded that the developer's suit was too late. Washington's Land Use Petition Act ("LUPA") is the exclusive mechanism for contesting final decisions by local jurisdictions regarding land use. LUPA requires that a petition be filed within 21 days of a decision by the highest level of authority of the local jurisdiction. If a LUPA petition is not filed within that time, a later attempt to contest the decision will be barred.

Although the developer had initiated its LUPA petition within 21 days of the City's letter explaining the basis for the red tag, the City contended the petition would have been timely only if made within 21 days of the red tag itself. The court of appeals rejected the City's position, but only because the Bellevue City Code happened to require certain elements for a final decision that were missing from the red tag. The court of appeals signaled that if it were not for those self-imposed requirements, a notice such as a red tag could be enough to start the 21-day statute of limitations for a LUPA petition.

While the court of appeals sided with the developer on the timeliness of its LUPA petition, the developer nonetheless lost the case. The court found that on the merits the red tag had not been shown to be improper, in that sufficient evidence existed that the development exceeded the scope of the permit.

For other developers and contractors the case is a reminder of the importance of getting immediate legal advice when a local jurisdiction renders any adverse determination regarding land use. Although this particular case largely involved decisions of the developer, similar disputes could easily implicate the contractor as well, either where the contractor's work is called into question (as it partially was in this case, with demolition that exceeded what was called for in the plans), or under an indemnity clause if one exists in the prime contract providing for the contractor to indemnify the owner against claims arising out of the project.

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The case is named *Heller Building v. City of Bellevue*, and was ordered published on October 27, 2008. It does not yet have an official legal citation.

*John Riper is a founding partner of Stanislaw Ashbaugh, LLP, where he practices in the areas of construction law and business litigation. He currently serves on the AGC Legal Affairs Committee.*

Posted by: Sarah Teague



1200 Westlake Ave. N, Suite 301 | Seattle, WA 98109  
Phone: 206.284.0061 | Fax: 206.285.4546