



## I. JOINDER

Respondent City of Bainbridge Island ("City") joins in Verizon Wireless LLC and Seattle SMSA's ("Verizon") Motion on the Merits.

## II. RELIEF REQUESTED

The City requests that the Court grant Verizon's Motion on the Merits, and affirm the Superior Court's order dismissing the Nickum's LUPA petition.

## III. GROUNDS FOR RELIEF REQUESTED

### A. **The Superior Court Properly Dismissed the Nickums' LUPA Petition for Lack of Standing and Lack of Jurisdiction.**

This Court should grant the Motion on the Merits. The Superior Court properly determined that the Nickums lacked standing to bring a petition under LUPA, and the Court lacked jurisdiction over the Nickums' LUPA action. These conclusions are clearly controlled by settled law. RAP 18.14(e)(1).

First, the Land Use Petition Act, Chapter 36.70C RCW ("LUPA") is the exclusive remedy for obtaining judicial review of land use decisions made by local jurisdictions. *RCW 36.70C.030(1)*; *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005)("[T]he act quite clearly declares legislative intent that [LUPA] is to be 'the exclusive means of judicial review of land use decisions'").

LUPA applies to decisions to issue building permits. *Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002); *James v. Kitsap County*, 154 Wn.2d 574, 584, 116 P.3d 286 (2005).

To have standing under LUPA, the petitioner must have exhausted all administrative remedies. *RCW 36.70C.020(1)*(defining "land use decision" as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals"); *RCW 36.70C.060*; *Ward v. Bd. of Skagit County Comm.*, 86 Wn.App. 266, 270-2, 936 P.2d 42 (1997). To exhaust administrative remedies as required by LUPA, the administrative appeal must be filed in a timely manner. See *Prekeges v. King County*, 98 Wn.App. 275, 279, 281, 990 P.2d 405 (1999). Under the City code, building permit decisions are appealed to the Hearing Examiner. *BIMC 2.16.095H*; *BIMC 2.16.130*. The appeal to the Examiner must be filed "with the city clerk 14 days after the date of the decision ... ." *BIMC 2.16.130B.1*. The Nickums did not appeal the City's building permit decision to the Hearing Examiner within fourteen days of the decision, depriving the Examiner of jurisdiction to consider the appeal, and depriving the Nickums of standing to challenge the building permit decision under LUPA.

Second, in addition to the Nickums failing to exhaust their administrative remedies, the Superior Court lacked jurisdiction to consider the Nickums' LUPA petition, because the action was time-barred. Under LUPA, a petition "is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served." *RCW 36.70C.040(2)*; *Chelan County v. Nykreim*, 146 Wn.2d at 932. The petition must be filed and served within 21 days of the issuance of the decision. *RCW 36.70C.040(3)*. Failure to comply with the 21-day time limit deprives the court of jurisdiction to consider the appeal of the land use decision. *Lakeside Indus. v. Thurston County*, 119 Wn.App. 886, 900, 83 P.3d 433 (2004); *Overhulse Neighborhood Ass'n. v. Thurston County*, 94 Wn.App. 593, 597, 972 P.2d 470 (1999); *Skagit Surveyors & Eng'r. v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Once the time to appeal under LUPA has passed, the City's land use decision (and all determinations embodied in that permit decision) becomes final and binding on the parties, and cannot be challenged by any party in a collateral proceeding. *Chelan County v. Nykreim*, 146 Wn.2d at 932-3; *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 177, 181, 4 P.3d 123 (2000)(Approval of rezone became valid once opportunity to challenge it under LUPA had

passed, and plaintiff could not collaterally attack determinations made as part of the rezone decision in a challenge to a subsequent subdivision decision); *Samuel's Furniture v. Dept. of Ecology*, 147 Wn.2d 440, 444, 465, 54 P.3d 1194 (2002). The land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline, and may not be collaterally attacked in a later proceeding. *Habitat Watch*, 155 Wn.2d at 407, 410; *Wenatchee Sportsmen*, 141 Wn.2d at 177, 181; *James v. Kitsap County*, 154 Wn.2d at 586.

Here, the Nickums did not file their LUPA petition within twenty-one days of the date of the City's building permit decision. The Superior Court properly dismissed the Nickums' LUPA petition for lack of jurisdiction.

Third, under LUPA, the time limit for filing the appeal is jurisdictional. *Lakeside Indus.*, 119 Wn.App. at 900; *Overhulse Neighborhood Ass'n.*, 94 Wn.App. at 597; *Skagit Surveyors*, 135 Wn.2d at 555. Therefore, the doctrine of equitable tolling does not apply to this case. See *In re Hoisington*, 99 Wn.App. 423, 431, 993 P.2d 296 (2000)(equitable tolling does not apply to time limits that are jurisdictional). LUPA, and the case law requiring strict compliance with LUPA's time limit for filing a petition, controls.

Further, even if LUPA's appeal time limit was not jurisdictional, equitable tolling would not apply to this case. Equitable tolling applies to circumstances involving "bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff." *In re Hoisington*, 99 Wn.App. at 430; *State v. Littlefair*, 112 Wn.App. 749, 759, 51 P.3d 116 (2002). The Nickums do not even allege any bad faith, deception, or false assurances by Respondents.

Fourth, LUPA's strict time limit for challenging a land use decision applies even where the petitioner claims that lack of notice violated constitutional procedural due process requirements. *Asche v. Bloomquist*, 132 Wn.App. 784, 797-99, 133 P.3d 475 (2006); see *Habitat Watch v. Skagit County*, *supra*. Once the time to appeal under LUPA has passed, "even illegal" land use decisions are final and binding, and not subject to collateral attack. *Habitat Watch*, 155 Wn.2d at 407, 410; *Wenatchee Sportsmen*, 141 Wn.2d at 177, 181.

**B. The City Is Entitled to an Award of Attorneys' Fees on Appeal Under RCW 4.84.370.**

The City requests an award of its reasonable attorneys' fees incurred in this appeal, pursuant to RCW 4.84.370. RCW 4.84.370 provides:

- (1) ... reasonable attorneys' fees and costs shall be awarded

to the prevailing party or substantially prevailing party on appeal before the court of appeals ... of a decision by a county, city, or town to issue, condition, or deny a development permit involving a ... building permit, ... or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, 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.

Under RCW 4.84.370, a party to a land use decision matter, who prevails before the local administrative agency, the superior court, and the appellate court, is entitled to an award of reasonable attorneys' fees incurred at the court of appeals level. *Habitat Watch v. Skagit County*, 155 Wn.2d at 413-6. This includes the local agency whose land use decision is upheld on appeal. *RCW 4.84.370(2)*. And, the dismissal does not have to be "on the merits;" the dismissal of an appeal based on lack of jurisdiction supports an award of attorneys' fees under RCW 4.84.370, if the dismissal is upheld by the superior court and the appellate court. *Habitat Watch*, 155 Wn.2d at 413-6.

The City recognizes that the divisions of the appellate courts have been split on the issue of whether a party prevailing on a motion to dismiss for lack of jurisdiction is entitled to a fee award under RCW 4.84.370. Compare *Witt v. Port of Olympia*, 126 Wn.App. 752, 759-60, 109 Wn.2d 489 (Div. II 2005); *Quality Rock Products v. Thurston County*, 126 Wn.App. 250, 275, 108 P.3d 805 (Div. II 2005) with *Prekeges v. King County*, 98 Wn.App. at 285-6 (Div. I 1999); *San Juan Fidalgo v. Skagit County*, 87 Wn.App. 703, 943 P.2d 341 (Div. I 1997). However, in *Habitat Watch v. Skagit County*, the Washington Supreme Court awarded attorneys' fees under RCW 4.84.370 to a party that, among other claims, prevailed on a motion to dismiss challenges to two land use decisions, based on failure to file the LUPA petition within LUPA's twenty-one day time limit and for failure to exhaust administrative remedies. *Habitat Watch*, 155 Wn.2d at 404, 417. Cases holding that a party who prevails on a motion to dismiss for lack of jurisdiction is not entitled to fees under RCW 4.84.370 predate *Habitat Watch v. Skagit County*.

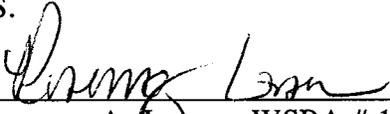
#### IV. CONCLUSION

For the reasons stated in Verizon's Motion on the Merits, Verizon's Motion should be granted; the Superior Court's order

dismissing Appellants' Land Use Petition should be affirmed. The City further requests an award of its reasonable attorneys' fees incurred in this appeal, pursuant to RCW 4.84.370.

DATED this 2 day of December, 2008.

INSLEE, BEST, DOEZIE & RYDER,  
P.S.

By   
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Rosemary A. Larson, WSBA # 18084  
Attorneys for City of Bainbridge Island

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**CERTIFICATE OF SERVICE**

I, Carol Cotto, hereby certify that on this 2nd day of December, 2008, I caused to be served a true and correct copy of CITY OF BAINBRIDGE ISLAND'S JOINDER IN VERIZON WIRELESS LLC AND SEATTLE SMSA'S MOTION ON THE MERITS on the individual(s) named below in the specific manner indicated:

George C. Nickum, Jr. 4095 Birkland Road NE Bainbridge Island, WA 98110	<input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax
Charles E. Maduell Davis Wright Tremaine LLP 1201 Third Avenue, Ste. 2200 Seattle, WA 98101-3045	<input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax
Michael C. Walter Keating Bucklin & McCormack 800 Fifth Avenue, Ste. 4141 Seattle, WA 98104-3175	<input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax
Gina S. Warren Perkins Coie 10885 NE Fourth St., Ste. 700 Bellevue, WA 98004-5579	<input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax
Jeffrey Powers and Debra Haase 4054 W. Blakely Avenue NE Bainbridge Island, WA 98110	<input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: December 2, 2008, at Bellevue, Washington.

  
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Carol Cotto