

I. JOINDER

The City of Bainbridge Island joins in the Brief of Respondents Seattle SMSA Limited Partnership, Verizon Wireless (VAW) LLC, Puget Sound Energy, Inc., and Jeffrey E. Powers and Deborah Haase ("Verizon's Brief"). The Superior Court's order dismissing Appellants' Land Use Petition should be affirmed.

II. REQUEST FOR ATTORNEYS' FEES ON APPEAL

As stated in the City's Joinder in Verizon Wireless LLC and Seattle SMSA's Motion on the Merits, the City requests an award of its reasonable attorneys' fees incurred in this appeal, pursuant to RCW 4.84.370 and RAP 18.1.

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 397, 413-6, 120 P.3d 56 (2005). 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. 275, 285-6, 990 P.2d 405 (Div. I

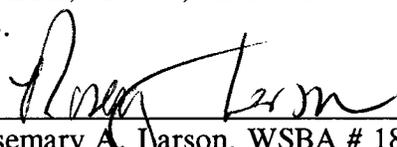
1999); *San Juan Fidalgo v. Skagit County*, 87 Wn.App. 703, 715, 943 P.2d 341 (Div. I 1997). However, in *Habitat Watch v. Skagit County*, the Washington Supreme Court awarded attorneys' fees under RCW 4.84.370 to a party that, among other claims, prevailed on a motion to dismiss challenges to two land 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*.

III. CONCLUSION

For the reasons stated in Verizon's Brief, the Superior Court's order dismissing Appellants' Land Use Petition should be affirmed. The City requests an award of its reasonable attorneys' fees incurred in this appeal, pursuant to RCW 4.84.370.

DATED this 21st day of January, 2009.

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

By 
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Attorneys for City of Bainbridge Island

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CERTIFICATE OF SERVICE

I, Carol Cotto, hereby certify that on this 21st day of January 2009, STATE OF WASHINGTON

DEPUTY

I caused to be served a true and correct copy of CITY OF BAINBRIDGE ISLAND'S JOINDER IN BRIEF OF RESPONDENTS SEATTLE SMSA LIMITED PARTNERSHIP, VERIZON WIRELESS (VAW) LLC, PUGET SOUND ENERGY, INC., and JEFFRY E. POWERS and DEBORAH HAASE on the individual(s) named below in the specific manner indicated:

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

DATED: January 21, 2009, at Bellevue, Washington.



Carol Cotto