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Court of Appeals
Division II
State of Washington

No. 50144-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DUNGENESS HEIGHTS HOMEOWNERS
a nonprofit corporation,
Appellant,

v.

RADIO PACIFIC, INC., SHIRLEY J. TJEMSLAND, CLALLAM COUNTY, and T-MOBILE WEST LLC,
Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Nothing in the Respondents' Briefs should convince this Court that the approval by Respondent Clallam County ("County") is valid for conditional use and height variance permits ("Permits") sought by Respondents Shirley Tjemsland and Radio Pacific, Inc. (collectively "RPI") for a radio and cell tower proposed in the high-end Dungeness Heights rural residential neighborhood near Sequim Washington. Appellant Dungeness Heights Homeowners ("DHH") provides this Reply regarding each of its challenges in the Brief of Appellant ("Op. Br.").

II. REPLY TO RPI COUNTER-STATEMENT OF THE CASE

A. Primary Concerns Of Staff Are Not Adequately Addressed

The Brief of Respondents RPI ("RPI Br.") at 2 lists Staff "primary concerns" from AR513[1] that led the County Staff to originally recommend denial of the Permits. But the RPI Br. at 2 fails to list the following three primary concerns of Staff that are also listed on AR531: (i) lack of analysis to demonstrate the 150-foot tower "is needed to provide adequate in-vehicle service for the area"; (ii) how the "special circumstances" variance criterion is met; and (iii) how the "special privilege" variance criterion is met.

Regarding (i) above, there still remains lack of analysis to show the 150-foot tower "is needed to provide adequate in-vehicle service." This violates the evaluation requirements in CCC 33.49.410 as described in the Op. Br. at 17-22 and results in non-compliance with the "in-vehicle services"

[1] This Reply uses the same abbreviations to cite to the record as were used in the Brief of Appellant. (*See* Notes 1-5 in the Brief of Appellant at 1-2 and 8)

variance requirement in CCC 33.49.530(1) as described in the Op. Br. at 41-44. Regarding (ii) above, the Op. Br. at 25-38 shows that the "special circumstances" variance requirement is not met because although there is evidence of physical property "special circumstances," the variance allowing a 50-foot increase in tower height does not remedy any "disparity in privileges" "commonly enjoyed by other properties in the same vicinity and zone" as required for a variance by RCW 36.70.020(14) and by the "special circumstances" variance criterion in CCC 33.30.030(1). Regarding (iii) above, the Op. Br. at 38-41 shows RPI is granted a "special privilege" such that the "special privilege" variance requirement in CCC 33.30.030(4) is not met.

B. <u>Other Primary Concerns Of DHH</u>

The Op. Br. at 44-49 demonstrates that the ("injurious to property") variance requirement in CCC 33.30.030(2) is also not met on this record. There are seven variance criteria that must all be met to grant the variance. DHH challenges that the four criteria identified above are not met: "in-vehicle services," "special circumstances," "special privilege," and "injurious to property." The Op. Br. at 23-25 shows that the variance is invalid if any one of the four challenged variance criteria is not met. The Brief of Respondent Clallam County ("Co. Br.") at 8 states that all parties agree that the four challenged variance requirements must be met "before a WCF ["Wireless Communications Facility"] variance may be granted." This is not contested in the RPI Br.

An unchallenged variance criteria in CCC 33.30.030(3) requires a variance to not "materially compromise" the "spirit" of the zoning code. This

is the only Clallam County variance criteria that invites "*Medina* balancing," the "weighing the costs and benefits of approval." (Op. Br. at 49-50) Because of the discretion this criterion gives to the Hearing Examiner, this "spirit of zoning" variance criterion is not challenged by DHH. The four challenged variance criteria do not allow "*Medina* balancing."

To grant a conditional use permit ("CUP") the Examiner must find compliance with CCC 33.27.040(1)(b) ("The proposed action is consistent with [Title 33 CCC - Zoning].") DHH only challenges the CUP based on non-compliance with this requirement. (Op. Br. at 13-23) This "zoning" requirement, by its plain language, is also not subject to "*Medina* balancing."

DHH brings three challenges for noncompliance under this CUP "zoning" requirement. First, the Examiner Decision violated zoning when it did not require strict compliance with the plain language of the "tower setback from property line" requirement in CCC 33.49.520(2). (Op. Br. at 13-17) Second, the Examiner Decision violated zoning when it did not do the evaluation required under CCC 33.49.410. (Op. Br. at 17-22) For example, the Examiner Decision did not evaluate higher priority options to see if those options provide adequate "in-vehicle services." (Op. Br. at 20) Third, DHH asserts that if the approval of the variance is reversed by this Court, then the 150-foot tower approval by the CUP is not consistent with the 100-foot tower height otherwise allowed by zoning. (Op. Br. at 22-23)

C. <u>Additional Reply To The RPI Counter-Statement</u>

The RPI Br. at 6 states that Becky Todd, zoning manager for T-Mobile, found alternative sites would not meet T-Mobile's gap in coverage. It is important to note that Ms. Todd only looked at sites with existing

support structures ("existing sites") and not to alternative locations for new support structures or new power pole extension sites. (RP28; AR1234-35 and AR1238)

Also T-Mobile's coverage gap interest is for "in-building coverage." (Op. Br. at 43) The record fails to do required analysis to evaluate in-vehicle coverage which is the only coverage required by the County.

> Level of Service. Wireless communication facilities subject to the provisions of this chapter shall provide a level of service throughout Clallam County described as "in-vehicle" service.

(CCC 33.49.510(6)) A WCF variance may only be granted when it is shown necessary to provide in-vehicle coverage. (CCC 33.49.530(1); Op. Br. at 41-42)

There are T-Mobile maps that map where adequate coverage is or would be provided for various coverage categories for some WCF options. (*See* AR1222, AR1228, and AR1230-32 - all in App. C to the Op. Br.) These documents, in said App. C, are described in detail in RPTC6:15 to RPTC10:15. But to analyze availability of "in-vehicle services" requires a list or map of "major and minor arterials and major collectors" in the service area. (CCC 33.49.300(16); Op. Br. at 41-42) There is no such list or map in the record.

The RPI Br. at 6 states that Mr. Gunnerson submitted wireless coverage analysis at AR907-08. But the coverage map at AR907 (copied from AR172 with cell antennas on tower at 135-feet and AR174 with cell antennas on tower at 90-feet) is not useful because it does not show the contributions to coverage from all of the on-air sites that are shown on AR1222 (in App. C to Op. Br.). AR908 is not useful for the same reason.

The RPI Br. at 6 refers to Mr. Gunnerson's analysis at AR913-17 that compares Fresnel zone (F_1) coverage for cell antenna heights at 134-feet on a 150-foot tower and at 76-feet on a 150-foot or 100-foot tower[2] on a red line shown on AR913 starting at the RPI site. On AR913, Sequim-Dungeness Way, is shown at the "middle of the red line." Sequim-Dungeness Way is one of the "primary roads for circulation" in the Sequim-Dungeness regional planning area[3] that should have in-vehicle services. (CCC 33.49.510(6); CCC 33.49.300(16)) Mr. Gunnerson's documents at AR914-17 show that for the "middle of red line" (in the middle of each graph) that the Fresnel zone (F_1), coverage is excellent for cell antennas at either 134-feet or 76-feet. The 150-foot tower is unnecessary to get in-vehicle services at this location on Sequim-Dungeness Way.

The RPI Br. at 5-6, Note 5, states Mr. Gunnerson demonstrated that a total of 9 power pole replacements would be required to serve 4 carriers citing to AR938. But Mr. Gunnerson states on AR938 in the grey typeface that this number of replacements is needed to get coverage at -75 dbm. T-Mobile at AR166A and Staff at AR521 (CP211) state that commercial in-building coverage occurs down to -88 dbm. Residential in-building coverage occurs down to -97 dbm. (AR166A; AR521 (CP211)) T-Mobile's objective was in-building residential coverage. (Op. Br. at 43: AR1232) In-vehicle coverage occurs down to -114 dbm. (AR166A; AR521 (CP211)) So Mr.

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[2] The 100-foot tower has already been approved for radio antennas on the subject site. (CP145, Para. 2)

[3] "[P]rimary roads for the circulation within the Sequim-Dungeness regional planning area, [include but are not limited to] Cays, Anderson, Old Olympic Highway, Woodcock, Sequim-Dungeness Way, Kitchen-Dick, and Lotzgesell or Hogback Roads." (CCC 31.03.475(4)(a))

Gunnerson's calculation of a need for 9 (or 10) power pole replacements is an unreliably high estimate of replacements needed because it is based on a coverage level (-75 dbm) far better than the T-Mobile objective of in-building service (-97 dbm) and far, far better than the County standard of "in-vehicle services" (-114 dbm). A height variance is allowed only if the carrier has an "inability" to provide -114 dbm service on principal roads. (*See* Op. Br. at 41-44)

The RPI Brief at 7 cites to Mr. Girling's testimony that more people would be covered with in-building residential service with the height variance and 150-foot tower. But this observation does not aid in showing that the four challenged variance criteria are satisfied.

The RPI Br. at 7 quotes counsel for T-Mobile as stating there is a "significant gap in T-Mobile's coverage in this area." T-Mobile is encouraged to remedy that gap. (CCC 31.02.720(4)) But to be granted a variance under CCC 33.49.530(1), RPI /T-Mobile were required to show that without the variance, there would be "an inability . . . to provide adequate 'in-vehicle services.'" This has not and cannot be demonstrated. (*See* Op. Br. at 41-44)

The RPI Br. at 8 cites to AR101 for the establishment of an exclusive easement that restricts development on the southerly 175-feet of Lot 3. The easement restricts development by the owner of Lot 3 only because the easement requires the owner to "preserve trees." (AR101-04) Development with "trees preserved" is allowed. (*Id.*) And while Ms. Tjemsland currently owns Lot 3 and Lot 4, in the future these lots are likely to be owned by

separate parties. The Examiner's Decision only addresses the challenged "tower setback from property line" requirement in one single sentence:

> The tower has a 175-foot easement which sufficiently meets the setback requirements for a 150-foot WCF tower.

(CP151)

RPI counsel quotes his own testimony at the Examiner's hearing stating that all 160 Dungeness Heights lots face north "toward the Strait of Juan de Fuca" and not toward the tower and claims Staff at AR519 makes a similar statement. (RPI Br. at 8) At AR519 Staff actually states "**most** of the homes are oriented towards the north towards the Strait of Juan de Fuca." (Emphasis supplied) Staff also states that approximately one third of the lots along the southern portion of the neighborhood are located on the 150-foot high ridge. (AR515, Para. 6) Houses at the top of the ridge have views both to the north and to the south. (CP52:4-17)

The RPI Br. at 8-9 speaks to the three separate appraisal reports RPI described near the end of the Examiner's hearing. (RP104:20 to RP106) DHH has challenged that this evidence, which is RPI's only evidence, does not qualify as substantial evidence that a 150-foot WCF tower will have no effect on property values for the close-by high end view homes located at the top of the same ridge. (Op. Br. at 44-49) DHH asserts that a fair-minded person would not be persuaded by the RPI appraisal reports that the property value of a high-end view home just a few hundred feet away would not be negatively affected by the presence in its view of a 150-foot cell tower WCF (like a 15-story building) with multiple carriers' antenna arrays. (Op. Br. at 44-49) (For an example *see* CP53:10 to CP54:12)

III. ARGUMENT

A. Standard Of Review Reply

DHH addressed standard of review in its Op. Br. at 10-13. The Co. Br. at 5 challenges "the argument of DHH that the Examiner's Conclusions of Law and Findings of Fact are surplusage." DHH did not make this argument. The only similar argument made by DHH was that, in the instant case, the superior court's "findings of fact and conclusions of law [are] surplusage." Op. Br. at 12. The Co. Br. at 5 agrees regarding superior "court's finding and decision."

The Op. Br. at 11 states, appellate courts review *de novo* questions of law under RCW 36.70C.130(1)(b). Appellate courts interpret local ordinances "in the same way that [they] interpret statutes." (Op. Br. at 13) Deference is given to the Examiner's interpretation of local ordinances unless the ordinance is unambiguous. (*Id.*) "If an enactment's meaning is plain on its face, then the court must give effect to that plain meaning." (*Shaw v. Clallam County*, 176 Wn.App. 925, 933, 309 P.3d 1216 (2013))

The Co. Br. at 7 makes the self-serving statement that all County ordinances "are ambiguous" so there must always be deference to "the staff planner and the Examiner." Of course, all County ordinances are not ambiguous. (*See e.g.* CCC 33.49.520(2)(a)) Any deference due is given to the Examiner and not to staff. (*G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn.App. 408, 415-17, 225 P.3d 448, (2010) (deference given to Examiner who overturned Staff MDNS) But no deference is due under RCW 36.70C.130(1)(b) when ordinances to be construed are unambiguous. (Op. Br. at 13)

B. <u>This Court Should Find The CUP Is Not Valid As Approved (Error Nos. 1-5 And 13(a), (b), And (c))</u>

In the Op. Br. at 13, DHH argued that the approval of the conditional use permit ("CUP") should be reversed because the proposed action is not consistent with the zoning code as required by CUP criterion CCC 33.27.040(1)(b).

1. The Proposed Action Does Not Meet The WCF Setback Requirements In The Zoning Code (Error Nos. 1, 4, And 5)

In the Op. Br. at 13-17, DHH argues that the unambiguous plain language of CCC 33.49.520(2) and -(2)(a) requires a setback "measured from the base of the WCF support tower to the property line of the parcel on which it is located" that "shall be equal to 110 percent of the height of the support tower." No Respondent disputes that the distance from the base of the WCF support tower to the property line of the parcel on which it is located is about 20-feet. (Co. Br. at 26 ("No Respondent disputes this 20' distance.")) Respondents also do not contest that 110 percent of the height of the 150-foot tower creates a setback requirement of 165-feet. (RPI Br. at 36 ("110 percent of 150 is 165."); Co. Br. at 26) Respondents do not contest that the parcel on which the tower is located is Tjemsland Lot 4. (Co. Br.; RPI Br.)

Respondents instead point to the 175-foot ("preserve tree") easement (AR101-04) on Lot 3 granted by Ms. Tjemsland to RPI. (Co. Br. at 26-29; RPI Br. at 36-37 and 11-13) They ask this Court to construe the County ordinance as the Examiner did:

> The tower has a 175-foot easement which sufficiently meets the setback requirements for a 150-foot WCF tower.

(CP151)

The RPI Br. at 37 and 13 and the Co. Br. at 29 argue that the 175-foot easement eviscerates the property line. But as stated in the Op. Br. at 17, the *property line of the parcel* (Lot 4) is not changed by an easement and neither RPI nor the County provides authority for their proposition. RPI and the County argue that all is OK because Ms. Tjemsland owns both Lot 3 and Lot 4. (RPI at 37 and 11; Co. Br. at 27-28) But it is likely that in the future the two lots will be sold to separate parties and there is certainly nothing to prevent that from happening. RPI argues that the setback issue was not raised for CUP 2015-0003 (CP145, Para. 2) approving a 100-foot tower in the same compound and therefore the setback issue is time-barred for the proposed 150-foot tower. (RPI Br. at 12, Note 7) Just because there is inadvertent noncompliance with an ordinance for an unchallenged CUP permit for one tower does not change the ordinance. The ordinance continues to apply to CUP permits for other towers.

The RPI Br. at 12 cites to *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956) for a pre-LUPA legal proposition applicable to an ambiguous ordinance. Because CCC 33.49.520(2) and -(2)(a) are not ambiguous, and because the instant case is governed by LUPA, *Morin* is not applicable. RPI and the County both opine on the purpose of a setback ordinance and then state that the Examiner's Decision is another way of meeting their separate interpretations of that purpose. (RPI Br. at 11-13 and 36-37; Co. Br. at 26-29). But neither the Hearing Examiner nor RPI can change the ordinance language for this CUP and their interpretations of the ordinance remain inconsistent with the plain language of the ordinance. Even

if the ordinance were found ambiguous, which should not happen, their interpretations of the ordinance cannot be justified by any reasonable interpretation of the language in the ordinance.

The law is clear that local ordinances are construed in the same manner that statutes are interpreted. (*Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008); *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014); *Community Treasures v. San Juan County*, 74738-0-I (2017)[4] (applies above principal to a LUPA case)

> Where the plain language of a statute is unambiguous, and legislative intent is therefore apparent, we will not construe the statute otherwise.

(*Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014) (punctuation and citations omitted)) RPI admits that the Examiner did not construe the setback requirement consistent with the plain language of the ordinance. (RPI Br. at 13) The ordinance is not ambiguous and the Examiner's interpretation and implementation is not consistent with the plain language. Therefore the Examiner's interpretation is an erroneous interpretation of the law under (b), not supported by substantial evidence under (c), and a clearly erroneous application of the law under (d) such that this Court should grant DHH relief.[5] This Court should find that CCC 33.27.040(1)(b) is not met regarding CCC 33.49.520(2) and -(2)(a).

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[4] This unpublished case decided in 2017 is nonbinding authority allowed per GR 14.1 for persuasive value.

[5] This Court may grant relief if DHH meets its burden to show that one of the standards in RCW 36.70C.130(1)(a) to (f) is met. DHH argues that standards (b), (c), and/or (d) are met and following the nomenclature established in the Op. Br. at 3, will refer to these standards simply by reference to (b), (c), and (d). (*Supra* at 1, Note 1)

2. The CUP Approval Is Inconsistent With The Zoning Code Because Of Failure Of The Decision To Apply CCC 33.49.410 (Error Nos. 2, 4, 5, And 13(a), (b), And (c))

The CUP approval is inconsistent with the zoning code because, as described in the Op. Br. at 17-22, this land use decision fails to mention or apply CCC 33.49.410 in evaluating the 150-foot tower proposal. Because a height variance was being requested and because the height variance could not be granted unless otherwise it would "result in an inability of the applicant to provide adequate "in-vehicle" services" (CCC 33.49.530(1)), it was essential for the Examiner Decision to evaluate the higher preference options in CCC 33.49.410 to determine if they provided such adequate "in-vehicle services."

The Co. Br. at 23-24 quotes CCC 33.49.410. Then the Co. Br. at 24 states:

> The Court is referred to Conclusion of Law #10 found at CP 150-152, where for example, the eight PREFERENCES are listed and where the Examiner wrote "[i]t is significant to note that the first priority set out by [Section 410] is minimizing the total number of towers."

But as the Examiner states in the second paragraph under Conclusion of Law #10 at CP150, "minimizing the total number of towers" is one of FIVE criteria in CCC 33.49.**400** [and is not in "Section **410**" as the County contends]. (Emphasis supplied) These five criteria are "for prioritizing preference areas and siting." (CCC 33.49.400(1)) CCC 33.49.400(2) prioritizes preference areas into Preference Areas 1-3 (3 being the lowest preference for new support towers) and defines which zoning districts are in each of these Preference Areas. The NC zone (where the proposal is located)

is not listed in CCC 33.49.400(2) under Preference Areas 1-2 and so is in Preference Area 3 ("all other zones"). (CP146, Para. 8)

CCC 33.49.410 lists eight "preference" categories "to be utilized in evaluating WCF proposals." Nowhere in Conclusion of Law #10 found at CP 150-152, (which discusses consistency with the zoning code) and nowhere else in the Examiner's Decision, does the Examiner use (or even mention) CCC 33.49.410 or the eight "preference" criteria that the zoning code in CCC 33.49.410 requires "to be utilized in evaluating WCF proposals." The Staff Report quotes CCC 33.49.410 at CP215 but there is no Staff analysis of the viability of alternative options in each of the "preference" categories in CCC 33.49.410.

Importantly, there is no Staff or Examiner (or Respondent) analysis of the ability of any proposal to provide adequate "in-vehicle services." In order to consider whether "in-vehicle services" are adequate, a necessary step is to identify the "major and minor arterials and major collectors within the Clallam County roads system" (CCC 33.49.300(16)) that are intended to or can be served by WCF options. (*See* Op. Br. at 42 for the definition of "In-vehicle" service which requires service on all "major and minor arterials and major collectors") The record before the Examiner contains no listing or map or discussion regarding these "major and minor arterials and major collectors" and this makes it impossible to conclude whether "in-vehicle services" are adequate or inadequate for different WCF options. This inadequacy occurs because of lack of compliance with CCC 33.49.410 and without this information the Examiner cannot validly show that the "in-vehicle services" variance criterion in CCC 33.49.530(1) is met.

The first five paragraphs in Conclusion of Law #10 on CP150-51 concern themselves with the five criteria in CCC 33.49.400 (and not with Section 410) including the "co-locating" comments cited by the Co. Br. at 24. The Co. Br. at 24 states, "The Hearing Examiner goes on to discuss CCC 33.49.410 at CP 152" but then the following quoted material in the Co. Br. at 24 either addresses requirements of CCC 33.49.510 or the "foregoing considerations" that were all based on CCC 33.49.400 and not on Section 410. There is no evidence in the record that the Examiner utilized CCC 33.49.410 "in evaluating WCF proposals" which is a substantial violation of the zoning code.

The Co. Br. at 25 after again falsely claiming that the Examiner considered CCC 33.49.410, argues that DHH "asks the Court to REWEIGH the evidence" in the record. But DHH does not ask this Court to reweigh the evidence but instead asks this Court to find that there is not substantial evidence in the record to show that the Examiner complied with CCC 33.49.410 both in evaluating the WCF proposal and in evaluating whether the options in CCC 33.49.410 could provide adequate "in-vehicle services."

The Co. Br. at 25-26 argues that CCC 33.49.410 doesn't mandate that a low preference option cannot be approved if a high preference option is available. DHH agrees. But CCC 33.49.410 does mandate that its eight "preference" categories must "be utilized in evaluating WCF proposals" and there is no evidence that the Examiner's Decision complied with this requirement. Also there is no evidence that "in-vehicle" service coverage was evaluated for the proposal or for any of the alternative options in CCC 33.49.410. "In-vehicle" service coverage cannot validly be evaluated because

there is no list or map of "major and minor arterials and major collectors" in the record. (*Supra* at 13)

The RPI Br. addresses this issue at 14-17 and 38. RPI first argues that the Examiner's Findings are based on substantial evidence. (RPI Br. at 14) But there is no finding or conclusion in the Decision, or information in the record, to show that the WCF proposal was evaluated under CCC 33.49.410 as required by the zoning code. An evaluation under CCC 33.49.400 does not substitute for the required evaluation under CCC 33.49.410.

The RPI Br. at 16 cites to the record where Mr. Gunnerson found that four wireless providers would together need 9 or 10 power pole replacements to achieve the "same coverage," citing to AR938. (*See* CP147, Para. 19) This is discussed *supra* at 5-6, and **this Court should reach a definite and firm conviction under RCW 36.70C.130(1)(d) that a mistake has been committed in using that analysis based on -75 dbm to evaluate the number of power pole replacements needed to meet either T-Mobile's -97 dbm objective or the County's in-vehicle -114 dbm objective.**

The RPI Brief at 16 cites to evidence at AR923 that the "Potholes Ridge is the greatest single inhibiting factor for locating wireless facilities at any other single Preference Area." This may favor locating power pole replacements on the ridge. But a major issue that cannot be addressed, because the Examiner's Decision did not do the evaluation required by CCC 33.49.410, is whether T-Mobile or other carriers have the ability to provide in-vehicle services without a tower height variance on the subject property.

If they have that ability, then they must achieve any in-building objective without a variance because of the "in vehicle services" variance requirement in CCC 33.49.530(1). (*See* Op. Br. at 41-44) This needs to be addressed either with analysis under CCC 33.49.410 or analysis under CCC 33.49.530(1).

In response to the DHH claim in the Op. Br. at 21 that there was "no substantial evidence of application of CCC 33.49.410", the RPI Br. at 16-17 cites to the Examiner's introductory statement at AR1536 (CP150) that "CCC 33.49 provides guidance for siting and developing wireless WCF's in Clallam County." But the Examiner follows this statement with a detailed analysis of application of CCC 33.49.400 and fails to address at all, compliance with CCC 33.49.410.

Besides Respondent issues already addressed, the RPI Br. at 38 argues that DHH provides no authority "that the Examiner must evaluate CCC 33.49.410 'line by line,' or face reversal under RCW 36.70C.130(1)(b)." The authority is the CUP requirement for consistency with the zoning code in CCC 33.27.040(1)(b) and the zoning code language in CCC 33.49.410(preamble) that the "priority list [in CCC 33.49.410] is to be utilized in evaluating WCF proposals."

By showing that the Examiner did not utilize CCC 33.49.410 to evaluate the proposal with respect to its alternatives and by not analyzing the options for "in-vehicle services" DHH has met its burden under (b), (c), and (d). This Court should find that CCC 33.27.040(1)(b) is not met regarding CCC 33.49.410 and should find that the CUP approval is invalid.

3. The CUP Approval Is Inconsistent With The Zoning Code Because The Tower Height Variance Is Not Valid (Error Nos. 3-5)

In the Op. Br. at 22-23, DHH argues that IF the tower height variance is found invalid, then the CUP approval must also be found invalid. No Respondent contests this statement.

C. <u>This Court Should Find The Tower Height Variance Is Not Valid As Approved (Error Nos. 5-12 And 13(d), (e), And (f))</u>

In the Op. Br. at 23, DHH states:

> This Court should find the tower height variance for increasing the allowed tower height from 100-feet to 150-feet is not valid as approved because of lack of compliance with local ordinance variance requirements. A variance permit may be lawfully granted only within the guidelines set forth in the zoning ordinance. (*Orion Corp. v. State*, 103 Wn.2d 441, 458-59, 693 P.2d 1369 (1985); *Ling v. Whatcom County Bd. of Adjustment*, 21 Wn.App. 497, 499, 585 P.2d 815 (1978))

DHH replies below to the response in the Co. Br. and RPI Br. for each four variance criteria that the Op. Br. argues have not been met.

1. Seven Local Ordinance Criteria Must Be Met Or The Tower Height Variance Is Not Valid As Approved (Error Nos. 5-12 And 13(d), (e), And (f))

DHH argues that if any one variance criteria is not met, then the variance should be found invalid. The Respondents do not contest this argument. (*Supra* at 2)

2. This Court Should Find That The Tower Height Variance Requirement In CCC 33.30.030(1) Is Not Met (Error Nos. 5, 6, 7, 11, 12, And 13(d))

The Op. Br. at 25-38 argues that the "special circumstances" variance requirement in CCC 33.30.030(1) is not met. The DHH argument relies, in part, on the fact that Clallam County plans under the Planning Enabling Act

(Chapter 36.70 RCW) which gives the County a statewide definition of "variance" that must be harmonized with the similar local "special circumstances" variance criteria in CCC33.30.030(1). In the Op. Br. at 25, DHH argues that relief should be granted under (b), (c), and (d).

The "special circumstances" variance requirement in CCC 33.30.030(1) that DHH claims is not met is:

> That because of special circumstances applicable to subject property including size, shape, topography and location, the strict application of this regulation would deprive subject property owner of rights and privileges enjoyed by other property owners in the vicinity and within the same zone as set forth in the official zoning map;

a. <u>Relief Under CCC 33.30.030(1) Is Limited To Adjustment Of A Regulation That With Strict Application Deprives The Subject Property Owner Of Rights Or Privileges Enjoyed By Neighboring Property Owners In The Same Zone (Error Nos. 5, 6, 7, 11, 12, And 13(d))</u>

In the Op. Br. at 26-38, DHH argues that CCC 33.30.030(1) limits adjustment of a regulation by a variance to a regulation that deprives the subject property owner of a right or privilege enjoyed by neighboring property owners in the same zone. DHH argues that the Examiner Decision misinterprets or misapplies this variance requirement when it adjusts the tower height regulation because this regulation does not deprive the subject property owner of rights or privileges enjoyed by neighboring property owners in the same zone. (Op. Br. at 26)

The Co. Br. at 10-13 and the RPI Br. at 20-27 and 41-42 respond to the DHH argument that CCC 33.30.030(1) is not validly applied when it allows the adjustment of the tower height regulation. The Co. Br. at 10-11 seeks support for this variance criterion from *City of Medina v. T-Mobile*

USA, Inc. ("*City of Medina*"), 123 Wn.App. 19, 95 P.3d 377 (2004). *City of Medina* is inapplicable because the Medina City Code ("MCC") had explicit language governing only variances that authorizes what the RPI Br. at 48, Note 19, refers to as "*Medina* balancing" so that "the spirit of the ordinances will be observed." (Op. Br. at 49-50) *City of Medina* at 25 states:

> Under the MMC, a hearing examiner is authorized to make variance decisions "in harmony with the general purpose and intent of said zoning ordinances and such variances may vary any rules ... of the zoning ordinances relating to the use of land and/or structures so that the spirit of the ordinances will be observed."

Clallam County Code requires that CCC 33.30.030(1) be met as written without "*Medina* balancing" with other ordinances.

The Co. Br. at 11, misrepresents the DHH argument regarding residences on surrounding 1/4-acre lots because DHH did not assert that a residence is the only right or privilege that Ms. Tjemsland has on the subject property. The Co. Br. at 13 states, "the neighbors as well at the Applicant always had the "right" or "privilege" to install a 100' WCF." DHH agrees. The Op. Br. at 36, states,

> Other neighboring properties in the same zone have a right to have a WCF tower that is 100-feet tall by CUP. The RPI tower is at the top of the ridge so no one in the neighborhood can have a tower with higher absolute elevation. So there is no privilege associated with WCF towers that neighboring property owners have that the subject property does not have.

The Co. Br. at 12 argues that the Examiner found there were "special circumstances" at CP 154. DHH agrees. But these "special circumstances," that must relate to property physical features and location pursuant to CCC 33.30.030(1), have not prevented RPI from having a 100-foot tall WCF tower that is a right or privilege of neighboring properties in the same zone. In fact,

RPI was recently approved for a 100-foot WCF tower at the top of the ridge on the subject property. (CP145, Para. 2) The Examiner found that "T-Mobile will be co-locating with the recently approved Radio Pacific WCF tower." (CP147, Para. 19) So it is likely that T-Mobile will choose to co-locate on the 100-foot tower if the tower height variance is found invalid. Even though there are "special circumstances applicable to subject property including size, shape, topography and location," these "special circumstances" do not require an adjustment to the 100-foot tower height limit regulation to allow RPI to have the benefit of a 100-foot tall WCF tower that is a right or privilege of neighboring properties in the same zone.

The Co. Br. at 12-13 argues that the requested variance is an "area variance." DHH agrees. But it is not an area variance that can be granted under the terms of the "special circumstances" variance criterion in CCC 33.30.030(1).

The RPI Br. at 41 argues that if CCC 33.30.030(1) operated as DHH contends:

> then every individual landowner in NC zones would be required to make use of their property in the exact same manner, despite the unique nature of their property.

This is not a DHH contention. RPI has been recently approved for a 100-foot tall WCF tower even though there has never been another WCF tower approved in the NC zone. (CP280-81)

The RPI Br. at 41-42 argues that the Examiner in his site visit saw the "rights and privileges" in the surrounding neighborhood and so his Findings are entitled to "considerable judicial deference." But the only Finding made by the Examiner on this issue is:

> [CCC 33.30.030(1)] requires only that the homeowner be deprived of rights and privileges enjoyed by other homeowners in the vicinity. In this case, other homeowners are able to develop their entire property, while the subject property owner is [sic] cannot due to the shape, topography, and location of the property.

Even if being "able to develop their entire property" were a valid statement of a neighbor's privilege (and it is not), the "strict application" of the tower height regulation does not itself "deprive the subject property owner of rights and privileges" of being able to develop the entire subject property.[6] Because all of the easements granted by Ms. Tjemsland to Radio Pacific, Inc. were granted on July 24, 2015 (AR 101-04), they were established to meet approval requirements for the RPI 100-foot WCF that was approved on August 26, 2015 (CP145, Para. 2). No additional property is being developed by adjusting the tower height ordinance. DHH addresses this issue in the Op. Br. at 31:

> In the instant case, the relief to the subject property owner allows replacement of an already permitted 100-foot WCF tower with a 150-foot WCF tower and the extra 50-feet of tower height is unrelated [to] the alleged neighbors' privilege "to develop their entire property."

The RPI Br. at 22 argues it would not be feasible even to build a home on Tjemsland Lot 4. This a privilege enjoyed by neighboring properties. The Op. Br. at 33 states, "Even under the worst case analysis in AR970 the subject property has room for full development and use of at least 1/4-acre." And the Op. Br. at 36 establishes that the development allowed on the subject

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[6] The Op. Br. at 32 states all parcels in the neighborhood including the subject parcel have the same rights to full use of their parcels subject to restrictions for critical areas, easements, and setbacks. The prime restriction from full development on the subject property is because more than half of the subject property is in a landslide hazard critical area and its buffer. (Op. Br. at 32)

property can accommodate any use that is actually being enjoyed in the neighborhood. The Decision at CP154 states, in reference to the subject property, "the applicant has been able to build a single-family residence on a portion of the land." The RPI Br. at 22-23 quotes this statement. The Staff Report at AR538 (CP283), Para. 1, states that the Department of Community Development ("DCD"):

> would contend that the applicant has the ability to place a residence on the unimproved 9.3 acre parcel and the approval of a 100' mono-snag (CUP 2015-03) provides the landowner with a reasonable use of parcel.

The applicant at AR952 states that Ms. Tjemsland "does not have the resources . . . to construct another residential dwelling unit" on the subject property. This "personal" reason does not justify a variance under CCC 33.30.030(1). (Op. Br. at 34; *see* RPI Br. at 28)

The RPI Br. at 23 argues that because of the special circumstances, "strict application" of the tower height regulation deprives Ms. Tjemsland of rights and privileges enjoyed by neighboring property owners. This cannot be, and has not been, demonstrated. RPI then argues that the rights and privileges given to Ms. Tjemsland do not have to actually be the "same rights and privileges of surrounding landowners." (RPI Br. at 23). **DHH requests that this Court find that CCC 33.30.030(1) does require the rights and privileges given to the applicant be of the same nature as the rights and privileges of surrounding landowners.**

CCC 33.30.030(1) requires identification of a right or privilege of neighbors, a showing that, because of special circumstances related to physical aspects of the property, an ordinance is depriving the applicant of

that right or privilege, and then allowing an adjustment to that ordinance. The tower height ordinance is not depriving the applicant from getting any neighbors' right or privilege and so under CCC 33.30.030(1) that ordinance may not be adjusted.

The RPI Br. at 23-24 makes the argument that "denying the variance would deny Ms. Tjemsland the ability to develop her property." If this were true, it might support an argument that Ms. Tjemsland deserves a reasonable use exception from critical areas regulations under CCC 27.12.740. But it is not likely true so a reasonable use exception would likely be denied. (*Supra* at 21-22)

The RPI Br. at 24-25 argues that there is evidence to support the "declared premise" of the Examiner's Decision regarding CCC 33.30.030(1) at AR1540, Para. 3 (which is also at CP154, Para. 16). But as argued in the Op. Br. at 25-38, the Examiner has misinterpreted and misapplied CCC 33.30.030(1) such that the Examiner's "declared premise" is not valid.

The RPI Br. at 25-27 seeks to rely on *City of Medina* to support the Examiner's Decision on this variance criteria. But as discussed in the Op. Br. at 48-49 and in this Reply (*supra* at 2-3 and 18-19), *City of Medina* granted the variance using "*Medin*a balancing" which is not allowed for finding compliance with CCC 33.30.030(1).

In the Op. Br. at 27-28, DHH argues that if this Court finds that CCC 33.30.030(1) is unambiguous, as DHH contends, then,

> The only reading of CCC 33.30.030(1) that does not produce an absurd result is that the relief allowed must only be adjustments to regulations, that when strictly applied, "would deprive subject property owner of rights and privileges enjoyed by other property owners in the vicinity and within the same zone as set forth in the official zoning map." (Quote from CCC 33.30.030(1))

The RPI Br. at 27 argues that DHH asserted that reliance on the evidence to find "special circumstances" would lead to "absurd" results. That is not a DHH assertion. DHH admits that Tjemsland Lot 4 has special circumstances related to the property, but DHH asserts that the relief can only be an adjustment to a regulation that itself deprives the subject property owner of rights and privileges enjoyed by neighbors. DHH asserts that any other interpretation of the relief allowed would be absurd. (Op. Br. at 28-29) The tower height regulation does not deprive the applicant of rights and privileges that belong to neighboring property owners and so adjusting that regulation is a violation of CCC 33.30.030(1). This Court should find that DHH has met its burden under (b), (c), and (d) and the variance permit should be found invalid.

i. Determining If An Ordinance Is Unambiguous Or Ambiguous

In the Op. Br. at 26-27, DHH analyzes the laws that apply in construing whether CCC 33.30.030(1) is unambiguous or ambiguous. No Respondent objects to that analysis.

ii. CCC 33.30.030(1) Is Unambiguous

In the Op. Br. at 27-29, DHH concludes that CCC 33.30.030(1) is unambiguous regarding the nature of the relief that is consistent with this criterion. The Co. Br. at 7 argues that all County ordinances are ambiguous. (*Supra* at 8) This does require a further response. The RPI Br. does not

appear to address this issue but does address the hypothetical presented in the Op. Br. at 28. In that hypothetical, neighbors had "full use" of 1/4 acre lots and the rear half of the subject property was unbuildable with critical areas and buffer. (Op. Br. at 28) A variance was sought for an oversized sign and DHH argued that it would be absurd to construe CCC 33.30.030(1) to allow such a sign variance as relief because it was unrelated to any right or privilege of the neighbors. (Op. Br. at 28) The RPI Br. at 28-29 seeks to distinguish the hypothetical because a "sign advertises the use" and the overheight WCF is a use. This is a difference without substance. In both cases the variance requested "is unrelated to the claimed 'full use' privilege on neighboring properties and unrelated to the special circumstances." (quoting Op. Br. at 28) In both cases the variance should not be able to adjust the unrelated ordinance.

iii. Even If CCC 33.30.030(1) Were Found To Be Ambiguous, This Court Should Reach The Same Result Regarding The Nature Of Relief Allowed

In the Op. Br. at 29-30, DHH argues that even if CCC 33.30.030(1) were ambiguous, this Court should reach the same result regarding the nature of relief allowed by a variance under this criterion. Because a state law applicable to Clallam County defines a "variance" regarding the effect of "special circumstances," CCC 33.30.030(1) must be harmonized with that statute. (Op. Br. at 29-30) The state law is more explicit than CCC 33.30.030(1) and states that any relief must remedy the "disparity in privileges." (Op. Br. at 29-30) The RPI Br. at 21 argues that there was no reason for the Examiner to interpret this state statute because "DHH has set

forth no evidence demonstrating that CCC 33.30.030(1)" could be in conflict with this statute. The Op. Br. at 29-30 does explain the conflict:

> CCC 33.30.030(1) would be in conflict with [the state statute] RCW 36.70.020(14) if the ordinance was interpreted to allow an adjustment to a regulation if the adjustment did not remedy the inequality in those privileges that are "commonly enjoyed by other properties in the same vicinity and zone.

The state statute forbids a variance from providing an adjustment to a regulation unless the property is deprived of neighbors' privileges and the "adjustment remedies [this] disparity in privileges." (Op. Br. at 29-30) If CCC 33.30.030(1) were interpreted to permit an adjustment unrelated to curing a disparity in a privilege, it would be in conflict with RCW 36.70.020(14) because it would permit that which is prohibited by state law.

> a local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. In other words, when two provisions are contradictory they cannot coexist. No conflict will be found, however, if the provisions can be harmonized.

(*Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (punctuation and citations omitted)) Under a related theory, this Court relies on related statutes to discern the plain meaning of an unambiguous ordinance or to interpret an ambiguous ordinance. (Op. Br. at 27 citing to *Tingey*)

b. The Requirements of CCC 33.30.030(1) Are Not Met Because The Relief Granted Was Not Limited To Adjustment Of A Regulation That With Strict Application Deprives The Subject Property Owner Of Rights Or Privileges Enjoyed By Neighboring Property Owners In The Same Zone (Error Nos. 5, 6, 7, 11, 12, And 13(d))

The Op. Br. at 30-31 argues that the requirements of CCC 33.30.030(1) are not met because the relief was unrelated to neighboring privileges. The responses in the Co. Br. and RPI Br. and the DHH reply related to this issue are provided *supra* at 17-25.

c. The Alleged Right or Privilege Of Neighbors "To Develop Their Entire Property" Is Not A Valid Right or Privilege For This Variance Analysis (Error Nos. 5, 6, 7, 11, 12, And 13(d))

The Op. Br. at 32-35 addresses this issue and there does not appear to be a direct response in the Co. Br. or RPI Br. except as indicated below.

i. All Residential Properties In The Same Zone Have The Same Rights To Full Use Of Their Parcel Subject To Restrictions For Critical Areas, Easements, and Setbacks

The Op. Br. at 32 addresses this issue and there does not appear to be a direct response in the Co. Br. or RPI Br.

ii. The Examiner's Decision Misinterprets *St. Clair v. Skagit County*, 43 Wn.App. 122, 715 P.2d 165 (1986)

The Op. Br. at 32-33 argues that the Examiner's Decision misinterprets *St. Clair v. Skagit County* (*"St. Clair"*), 43 Wn.App. 122, 126, 715 P.2d 165 (1986) when it found that "full use" of neighboring 1/4 acre parcels creates a privilege to have a similar intensity of development all over

a 9-acre parcel. The RPI Br. at 27-28 and 47-48 responds to the Op. Br. at 32-33.

RPI first argues that because the Examiner was aware that 97% of Lot 4 was unbuildable that this led to the Examiner's "'declared premise' that the remainder of the property is 'unsuitable for the permitted uses.'" (RPI Br. at 27) This is an incorrect statement by RPI. The 97% unbuildable came from RPI counsel's Exhibit D at AR970. That exhibit shows 3% (11,773 sq ft - more than 1/4 acre) as buildable area. Counsel's Exhibit E at AR971 states this "buildable area is generally equivalent to other lots on the North side of Brigadoon Blvd." Ms. Tjemsland has not applied for a subdivision for her 9+ acre lot so it is unknown how many lots she would be allowed by subdivision. But importantly, AR970 shows 12% of Lot 4 (blue - 1.2 acres) for buffers and easements for the recently approved 100-foot WCF tower. This 12% is utilized to accommodate a CUP-permitted WCF tower use and so it is not "unsuitable for the permitted uses" as stated by the RPI Br. at 27.

Next the RPI Br. at 27-28 states that "strict application of the [tower] height requirements would deprive Ms. Tjemsland of the 'full use' of her land under *St. Clair*." But this is a misreading of *St. Clair*. *St. Clair* at 126 allows "full use" just to the extent neighboring properties can be used. (Op. Br. at 33) As the Op. Br. at 33 states, the commonly enjoyed extent of development on neighboring large and small lots alike is about 1/4 acre. Lot 4 already has more than 1/4-acre for additional permitted development plus more than 1-acre devoted to an existing permitted WCF, and it has a larger woodlot than any neighboring property. (*See* AR211). So RPI and the Examiner Decision err when they rely on *St. Clair* for a privilege to "develop

their entire property" on a 9+ acre lot. The RPI Br. at 47-48 adds nothing more to this issue.

iii. *St. Clair v. Skagit County*, 43 Wn.App. 122, 715 P.2d 165 (1986) Agrees With The Dissent In *Sherwood v. Grant Cy.*, 40 Wn.App. 496, 699 P.2d 243 (1985) That A Variance May Not Be Justified By Non-Conforming Uses

The Op. Br. at 34-35 states that *St. Clair* at 128 agrees with the dissent in *Sherwood v. Grant Cy.*, 40 Wn.App. 496, 504, 699 P.2d 243 (1985) that a variance shall not be justified by non-conforming uses. The Op. Br. at 35 requests that this Court follow *St. Clair* and the dissent in *Sherwood* and find that privileges on non-conforming lots may not be the basis for granting a variance. As to CCC 33.30.030(1), the Op. Br. argues that the Examiner Decision misinterprets or misapplies the law when it relies on "full use" of nonconforming 1/4-acre lots to conclude that "full use" should be allowed on a conforming 9-acre lot. The RPI Br. and Co. Br. do not respond to this argument but do address non-conforming lots under the "special privilege" variance criterion CCC 33.30.030(4).

d. The Right Associated With Having A 150-Foot WCF Tower In The NC Zone Does Not Reflect A Right That Any Neighboring Property Has (Error Nos. 5, 6, 7, 11, 12, And 13(d))

The Op. Br. at 35-38 argues that there is no privilege that neighboring property owners have with respect to WCF towers that RPI does not already enjoy and so the requirement of CCC 33.30.030(1) that "the strict application of this [tower height] regulation would deprive subject property owner of rights and privileges enjoyed by other property owners" is not satisfied and

therefore CCC 33.30.030(1) does not allow a variance to the tower height regulation. The Op. Br. at 37-38 documents the strong neighborhood opposition to overheight cell towers and concern that if this variance were allowed, the County would not be able to deny such variances in the future thus ending the favored benefit to the NC zone that limits WCF tower height to 100-feet.

The Co. Br. and RPI Br. do not address this issue except that the RPI Br. at 17 and 39 argues that general community opposition "alone" cannot support a reversal of a land use decision.

3. This Court Should Find That The Tower Height Variance Requirement In CCC 33.30.030(4) Is Not Met (Error Nos. 5, 8, 11, And 12))

The Op. Br. at 38-41 argues that the "special privilege" variance requirement in CCC 33.30.030(4) is not met. That requirement is:

> That approval of the variance will not constitute a grant of special privilege.

As the Op. Br. at 39 describes, the issue before this Court is whether the privilege is being granted to RPI "to the exclusion of others." The Examiner Decision at CP155, Para. 19 relies on the existence of 7 support towers in Preference Areas 2 and 3 from 140 to 175 feet tall. These towers were established before 2001 when the WCF code (Chapter 33.49 CCC) was adopted and when height limits were set for support towers. (CP155; AR1140) None of these support towers have heights consistent with the height limits adopted in 2001. (*Id.*) Two of these tower are in the NC zone with heights of 150 and 152 feet. (*Id.*)

The Examiner believed these uses were non-conforming uses and believed that it was not a special privilege to grant a variance that created another similar non-conforming use:

> If the purpose of the code was to prevent all non-conforming WCF uses in Preference Areas 3, then it would not have included a procedure for obtaining a variance.

(CP155) The Op. Br. at 34-35 and 37-41 requests that this Court follow *St. Clair* and rule that privileges on non-conforming lots may not be the basis for granting a variance under a "special privilege" variance criteria. If this Court agrees, it should find that the Examiner has misinterpreted and misapplied the law when he found that CCC 33.30.030(4) was satisfied. (Op. Br. at 40-41)

The Co. Br. at 17-20 argues that the "seven WCF do not hold the status of non-conforming, but instead they are "exempt." DHH replies that these seven should be found to be preexisting non-conforming exempt WCF.

CCC 33.49.200(1) states, "All telecommunications facilities which are not exempt pursuant to this section shall conform to the standards specified in this chapter." Therefore "exempt" that do not conform to standards/requirements in Chapter 33.49 CCC are non-conforming uses or structures. Under CCC 33.03.010(73),

> "Non-conforming use or structure" means a lawful structure or use existing at the time this title or any amendment thereto becomes effective, which does not conform to the requirements of the zone in which it is located.

CCC 33.49.200(2) and -(2)(a) grandfather pre-existing[7] exempt non-conforming WCFs, subject to certain additional general standards in CCC 33.49.510.

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[7] Pre-existing is legally established before Ch. 33.49 CCC went into effect in 2001.

> Exemptions. The following are exempt from the provisions of this chapter and shall be allowed in all zones:
> (a) Wireless communication facilities which were legally established prior to the effective date of this chapter shall not be subject to the requirements of this chapter except:
> (i) Such facilities shall provide reasonable opportunities for co-location of other carriers pursuant to CCC 33.49.510(1);
> (ii) Such facilities shall comply with provisions requiring RF emissions reporting pursuant to CCC 33.49.510(5), Health, Safety and Welfare Hazards;

(CCC 33.49.200(2))

These pre-existing exempt non-conforming WCFs are "**allow**ed in all zones" pursuant to CCC 33.49.200(2) but that does not change the fact that they are non-conforming uses or structures. Clallam County **allow**s non-conformities to continue and be maintained:

> It is the intent of this chapter [33.43 CCC] to permit nonconformities to continue and be maintained.

(CCC 33.43.010)

"**Allow**" is not defined in Ch. 33.03 or 33.49 CCC but the dictionary definition of "allow" is "permit." (Webster's New Universal Unabridged Dictionary (2003)) Therefore Clallam County Code "allows" nonconformities in all zones. But, as described in the Op. Br. at 40, non-conforming uses have restrictions on continued use. As found in *St. Clair* at 126-27, it would be a special privilege to allow a conforming use by variance based on non-conforming uses because that conforming use would not have the same restrictions on continued use that the non-conforming uses have. Allowing such a new conforming WCF would be granting a special privilege under *St. Clair* in violation of the "special privilege" variance requirement in CCC 33.30.030(4).

The Co. Br. at 18 argues that a variance "make[s] lawful what would otherwise be non-conforming and thus unlawful." It is true that a variance makes lawful what otherwise would be unlawful (and therefore not permitted). But it would not be non-conforming if unlawful because it would not be permitted. (*See* CCC 33.03.010(73)) The Co. Br. at 18 continues and states that a variance "does not grant 'conforming' status." But the County is wrong again because "Structures or uses having the benefit of a variance conform with the ordinance . . . by virtue of the variance." (Op. Br. at 41 citing to MBA Law Rev.)

The Co. Br. at 19 states that "it is not the granting of a 'special privilege' to have . . . any proposal obtain the status of 'lawful' through granting of a variance." That is correct if the variance does not require reliance on non-conforming uses in order to show it is not granting a "special privilege." Under *St. Clair*, a variance is not valid if it requires reliance on non-conforming uses to meet the "special privilege" variance requirement. Because the Examiner relied solely on non-conforming uses to satisfy CCC 33.30.030(4), the RPI variance should be found invalid under (b), (c), and (d).

In note 10 in the Co. Br. at 19, the County argues that any neighbor and the Applicant have a right to apply for a 150-foot WCF in the NC zone through a CUP and a Variance. They can apply. But under the facts of this case, all such variances should be denied.

The RPI Br. at 29-30 and 42-44 responds to DHH arguments regarding the "special privilege" variance requirement. The RPI Br. at 29 and 43 argues that this Court should adopt an interpretation of a "special privilege" offered by the 9th Cir in *Desert Outdoor Advertising Inc. v. City*

of Oakland, 506 F.3d 798, 807 (9th Cir. 2007). The 9th Cir. did not quote the full language of the Oakland "special privilege" ordinance for sign facilities that is was interpreting. RPI does not provide that language. The current Oakland "special privilege" ordinance for variances for sign facilities states:

> That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the zoning regulations.

(OPC 17.148.050(C)(3)) This ordinance is not similar to the Clallam County "special privilege" ordinance and there is no valid reason for using an interpretation of the Oakland sign facility variance ordinance to try to interpret the Clallam County area variance ordinance which has different language. The Examiner properly used Black's Law Dictionary to define "special privilege" and that definition was not challenged.

The RPI Br. at 29 and 43 argues that with the taller WCF, more people will get cell coverage. This is not relevant to the issue of "special privilege" because those people will be paying for the service while RPI will be getting paid.[8] The RPI Br. at 30 argues that this proposal would not be the only WCF granted in a rural zone that required a variance. It is however the only WCF tower in the NC zone that sought a variance and the only WCF tower in the County that sought a height variance. (AR1140-80)

The RPI Br. at 43 claims DHH has not cited authority or evidence that granting the variance would contravene zoning objectives. The authority is

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[8] DHH notes that the RPI Br. at 18, in Note 10 states that the Staff found that the WCF was an "essential public facility." The Examiner did not reach this conclusion. (CP138-59) "Essential Public Facilities" are limited to "public capital facilities." CCC 31.02.285(8) The RPI tower is a privately funded facility and therefore not a "public capital facility."

is in the Board of County Commissioners' careful crafting of the WCF code that creates Preference Area 3 (CCC 33.49.400 and -.410) to give the highest level of protection to "visual and aesthetic resources of Clallam County" (citing from CCC 33.49.100(1)) by putting the strongest rural WCF tower height limitations in the County in this Area. (CCC 33.49.520(1)(b)(ii)) There is dominating evidence that the affected residents are strongly opposed to anyone cracking through this greatly-appreciated WCF tower height limitation. (Op. Br. at 37-38).

The RPI Br. at 43-44 again cites to "*Medina*" and DHH points out again that "*Medina balancing*" is not allowed on the four challenged variance criteria. (*Supra* at 2-3, 18-19, and 23)

This Court should find that the "special privilege" variance requirement in CCC 33.30.030(4) is not met and provide DHH relief under RCW 36.70C.130(1)(b), (c), and/or (d).

4. This Court Should Find That The Tower Height Variance Requirement In CCC 33.49.530(1) Is Not Met (Error Nos. 5, 9, 11, And 12))

The Op. Br. at 41-44 argues that the "in-vehicle services" variance requirement in CCC 33.49.530(1) is not met. That requirement is:

> Strict adherence to the provisions of this chapter will result in an inability of the applicant to provide adequate "in-vehicle" services within Clallam County.

In the Op. Br. at 41, DHH requests that this Court construe this requirement. In the Op. Br. at 42, DHH argues that this requirement should be construed to not allow a tower height variance for in-building services, if

applicants/carriers can provide adequate "in-vehicle" services without the variance. CCC 33.49.300(16) defines "in-vehicle" service:

> "In-vehicle" service shall refer to the level of service which provides for the transmission of telecommunications signals to and from vehicles. This level of service shall extend to all urban areas, *major and minor arterials and major collectors* within the Clallam County roads system.

(emphasis supplied)

Responses to DHH arguments are provided in the Co. Br. at 20-22 and in the RPI Br. at 30-31 and 44-45. The Co. Br. at 21-22 argues that the way DHH construes CCC 33.49.530(1) is wrong because there may be a desire for a WCF variance even if there are adequate "in-vehicle services." The proposition that an applicant might desire a WCF variance that is not available does not mean that DHH misconstrues the "in-vehicle services" variance requirement.

CCC 33.49.530(1) should be found unambiguous because there is not another reasonable interpretation of the ordinance except that which DHH offers: no tower height variance is allowed if carriers can provide adequate in-vehicle services without a variance. The Examiner did not offer a different interpretation. Instead the Examiner Decision only found the variance was necessary to provide adequate in-vehicle services. (CP155-56) This finding is consistent with the DHH reading of the ordinance: a variance is only allowed if it is necessary because without the variance the applicant/carrier would have an inability to provide adequate in-vehicle services. The Co. Br. does not offer a different interpretation of the ordinance. (*See* Co. Br. at 20-22)

The Co. Br. at 21 states "outdoor" service is a superior service when the record only shows it as a lower level of service. (AR166A)

The Co. Br. at 21-22 questions whether DHH can meet the requirements in RCW 36.70C.130(1). The Examiner has concluded that the proposed WCF tower provides "adequate in-vehicle services" (CP156) and that power pole replacements "provide the **same coverage** as this one WCF tower" (CP147 emphasis supplied). Therefore quoting from CCC 33.49.530(1), "strict adherence to the provisions of this chapter" will *not* "result in an inability of the applicant to provide adequate 'in-vehicle' services" because T-Mobile can use power pole replacements to provide such adequate services. Therefore, under (b) or (d), the Examiner's Decision misinterprets or misapplies the law at CP155-56, Para. 20, when it finds CCC 33.49.530(1) is satisfied.

The Examiner's Decision is also not supported by substantial evidence under (c) because no one can actually calculate whether in-vehicle service is adequate or inadequate without having a map or list of the *"major and minor arterials and major collectors"* where "in-vehicle services" are mandated by CCC 33.49.300(16). There is no such map or list in the record. (*Supra* at 4 and 13)

The RPI Br. at 31 argues "T-Mobile submitted volumes of evidence." But none of that evidence include identification of where the *"major and minor arterials and major collectors"* are located which is needed to determine if in-vehicle services are adequate.

The RPI Br. at 44 argues that for the Examiner to reach a different conclusion would have been a violation of the FTA. But because CCC 33.49.410 puts power pole replacements 3rd in the County's priority list and puts new towers in Preference Area 3 as 8th and last on the County's priority list and because power pole replacements can provide the "same coverage" as the proposed WCF tower, the power pole replacements are the "least intrusive means for closing a significant gap" and there is no FTA violation.

5. This Court Should Find That The Tower Height Variance Requirement In CCC 33.30.030(2) Is Not Met (Error Nos. 5, 10, 11, 12, And 13(e) and (f))

The Op. Br. at 44-49 argues that the "injurious to property" variance requirement in CCC 33.30.030(2) is not met. That requirement is:

> *That the granting of the variances will not be materially detrimental to the public health or injurious to property or improvements thereon;*

There are high end view homes just a few hundred feet from the proposed 150-foot cell tower including the home of William Aurich, at 770 Brigadoon Blvd, marked with a C on AR211 whose magnificent view of the Olympic Mountains will be negatively impacted by the proposed WCF. (AR211; AR 203; AR260; CP52:4-17; CP53:23 to CP54:12)

The Examiner relied on the applicant's appraisal information to conclude WCF's [sic] did not have a negative effect on property values in the Sequim-Dungeness area. (CP 151, first para.) DHH challenges under (c) that this appraisal evidence, which is RPI's only evidence, is not substantial evidence that a 150-foot WCF tower will have no adverse effect on property values for the high-end view homes located at the top of the same ridge only

a few hundred feet away from the proposed tower. (Op. Br. at 44-49) DHH asserts that when viewed in light of the whole record before the Court, as required by (c), a fair-minded person would not be persuaded by the RPI appraisal reports that the property value of such a high-end view home would not be negatively affected by the presence in its view, a few hundred feet away, of a 150-foot cell tower WCF (like a 15-story building) with multiple carriers' antenna arrays. (Op. Br. at 44-49)

In reliance on the RPI appraisal reports, the Examiner Decision finds the "injurious to property" variance requirement in CCC 33.30.030(2) is met. (CP154-55)

DHH asserts that the second and third appraisal reports for Tjemsland Parcels 3 and 4 (AR1463-83) do not provide any information because the report on Parcel 3 (with a house) occurred before the WCF tower was proposed, and the report on Parcel 4 (without a house) provided no information on house values. (Op. Br. at 45-46) Only the appraisal on 1772 Melody Lane (AR1456-63) provided information and it showed a 1.5% negative property value impact for a low-end house without a view in Port Angeles, outside of the Sequim-Dungeness Planning area. (Op. Br. 45-47; CCC 31.03 and 31.04) The rest of the "whole record" showing that there is a negative property value impact is summarized in the Op. Br. at 46-49.

Responses are in the Co. Br. at 13-16 and in the RPI Br. at 31-34 and 46. The Co. Br. at 16 recognizes that DHH "only succeeds under [(d)] if it also succeeds under" (c) but no reply to the Co. Br. at 13-16 is needed because the County does not present any argument regarding (c). The RPI Br. at 46 also does not address (c). The RPI Br. at 32-34 talks about

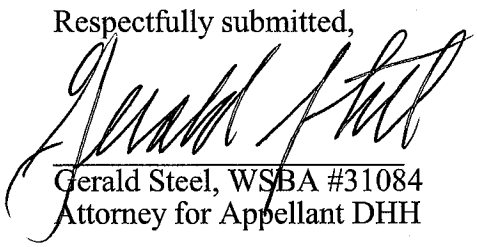
"weighing the credibility of the evidence" but that is not what DHH requests. DHH requests that this Court find that an appraisal for a single distant low-end no-view house outside the "Sequim-Dungeness Area" that shows a small negative impact on house value is not substantial evidence sufficient for a fair-minded person to conclude that there would be no negative impact on a high-end view house with the proposed WCF a few hundred feet away and in the house's view corridor. The RPI Br. at 33 relies on "*Medina* balancing" which is not relevant. (*Supra* at 2-3, 18-19, 23, and 35)

IV. CONCLUSION

The Examiner's approval of the tower height variance and CUP should be found invalid. The tower height variance should be invalidated because DHH has met it burden to show that at least one of the standards in (b), (c), and (d) have been met regarding at least one of the following variance requirements: CCC 33.30.030(1), -(2), -(4), and CCC 33.49.530(1). The CUP should be invalidated under at least one of the same standards for non-compliance with CCC 33.27.040(1)(b) regarding at least one of the following zoning requirements: CCC 33.49.520(2) and -(2)(a), CCC 33.49.410, and CCC 33.49.520(1)(b)(ii) (this last requirement if the variance is found invalid). DHH requests statutory attorney fees and costs and such other relief as this Court finds just and equitable.

Dated this 11th day of October, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

I, GERALD STEEL, under penalty of perjury under the laws of the State of Washington declare as follows:

I am the attorney for Appellant herein. On October 11, 2017, by email sent by COA2 File Upload Manager Div-2eDocManagers@courts.wa.gov, I caused *Reply Brief of Appellant* including this *Declaration of Service* to be served on:

Eric Quinn 20 Forest Glen Lane SW Lakewood, WA 98498	ericquinn@firehouselawyer2.com eric.quinn253@gmail.com
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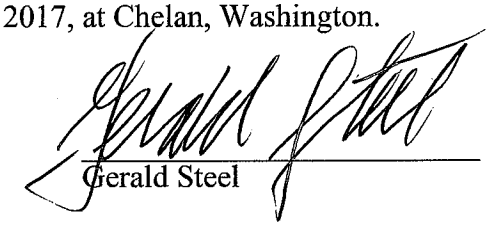
Dated this 11th day of October, 2017, at Chelan, Washington.



Gerald Steel

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