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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

**DUNGENESS HEIGHTS HOMEOWNERS, LLC, Appellant**

v.

**RADIO PACIFIC, INC., SHIRLEY TJEMSLAND, and CLALLAM COUNTY, a  
political subdivision of the State of Washington, Respondents**

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Appeal from the Superior Court of Clallam County  
The Honorable **Judge Erik Rohrer**  
Clallam County Superior Court Cause No. **16-2-00339-8**

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**BRIEF OF RESPONDENT CLALLAM COUNTY**

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By  
Clallam County Prosecuting  
Attorney's Office



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## I. PRELIMINARY STATEMENT

This is a straightforward case: Neighborhood association aggrieved by a permitting decision made by Clallam County files a Petition under Chapter 36.70C RCW, the Land Use Petition Act or “LUPA.” The Petition asks for reversal of a decision by the County’s Hearing Examiner to grant two permits, a zoning Conditional Use Permit (the “CUP”) and a height variance (“Variance”) for a cell phone tower, known more formally in the Clallam County Code (or “CCC”) as a Wireless Communication Facility or “WCF.”

The Superior Court denied the Petition. The trial court Judge did not err (1) by affirming the Findings of Fact and Conclusions of Law (hereinafter “Findings”) of Clallam County Hearing Examiner William Payne (“Examiner”); (2) by awarding costs to the Respondents; or (3) by finding that Appellant did not meet any of the standards of review under RCW 36.70C.130(1) that would authorize reversal of the Examiner’s decision..

Because this is a LUPA appeal the controlling case law is well-established, extensive and described in great detail in the Brief of co-Respondents Tjemsland and Radio Pacific, Inc. To avoid repetition of that Brief’s contents, Respondent Clallam County will focus on only two

of the standards of review Petitioner now relies upon<sup>1</sup>, specifically RCW 36.70C.130(1)(b) (“erroneous interpretation of the law”) and RCW 36.70C.130(1)(d) (“clearly erroneous application of the law to the facts”).

## II. ASSIGNMENTS OF ERROR

Petitioner provides a laundry list of 26 Assignments of Error, all of which can be boiled down to two simple assertions: The CUP should not have been granted and the Variance should not have been granted. This Brief will limit its analysis to the related legal questions: whether the Findings of the Examiner constitute either 1) an erroneous interpretation of the law; or (2) a clearly erroneous application of the law to the facts. In both cases, the case law should lead this Court to conclude “no.”

## III. COUNTER-STATEMENT OF THE CASE

A. *Scorecard: who are the players in this saga?*

**Appellant:** Dungeness Homeowners Association or “DHH”;

**Respondent #1:** Shirley Tjemsland, owner of the parcel where the WCF would be installed and thus also the Applicant;

**Respondent #2:** Radio Pacific, Inc., or “RPI,” the firm that would construct and own the WCF; and

**Respondent #3:** Clallam County, who issued the challenged permits.

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<sup>1</sup> Clallam County relies upon and incorporates herein by reference all arguments put forth by the co-Respondents with respect to the standard of review listed at RCW 36.70C.130(1)(c).

*B. The property and the neighborhood:*

The proposed 150' WCF would be located within unincorporated Clallam County some 400 feet south of Brigadoon Blvd, a residential street where some of DHH's members reside. The WCF would sit near the center of a 9.13 acre parcel owned by co-Respondent Tjemsland and close to the top of a 150' ridge that runs east-west and descends to the south. AR 515. The parcel is covered with conifer and madrona trees of some 70' to 90' in height except for two small areas where gravel was removed. AR 157, 479, 515, 733, 882-888. The parcel in question will be known as the "Subject Parcel" or "SP." AR 515. To the north is a residential subdivision known as Dungeness Heights, which gives its name to the Appellant association. To the west are two gravel pits (Kirner and Primo) of which, only Kirner is active. The area to the south contains primarily forested parcels of one to two acres, many of which contain residences. AR 515-16. See also CP 145, 146.

Sitting on that same east-west ridge as the SP, which also slopes to the north providing uninterrupted views to the NORTH of the Strait of Juan de Fuca and occasionally Canada, are some 1/3<sup>rd</sup> of the residences in Dungeness Heights. A majority of the homes within Dungeness Heights are below the ridge by some 50 to 100 feet and most *have views to the north, not to the south.* AR 519, 1538. CP 146.

C. Why did the Applicant need the now-challenged permits?

The SP and the neighboring subdivision<sup>2</sup> are zoned Rural Neighborhood Conservation (or “NC”).

Land having the NC designation is a Preference Area 3 for new WCF support towers, meaning the challenged proposal could not be authorized pursuant to the CCC unless it obtained a CUP for the new WCF support towers as required by the CCC at Table 33.49.620. CP 148.

Also required was a zoning variance since the height of the proposed WCF would exceed 100 feet [See CCC §33.49.520(1)(b)(ii)] and the height of the existing trees within the radial screening buffer would not be sufficient to meet the “2/3rds the height of the new WCF” requirement of CCC §33.49.520(3)(e). AR 516-17 and CP 153.

D. Procedural History in brief:

On March 3, 2016, the Examiner issued his Findings, granting both the CUP and the Variance. In doing so, the Examiner considered and relied upon various facts which are described in detail in the Brief of the co-Respondents RPI and Tjemsland and will not be repeated here BUT are incorporated into this Brief as if stated in full herein. Judge Rohrer of the Clallam County Superior Court issued his Memorandum Opinion

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<sup>2</sup> The Court should note that the SP is not part of the approved subdivision known as Dungeness Heights and instead is its own distinct short plat created in accordance with Chapter. 58.17 RCW.

affirming the Findings of the Examiner on February 7, 2017. This appeal was timely filed.

#### IV. LEGAL ARGUMENT

##### **A. THE STANDARDS OF REVIEW DHH HAS FAILED TO SATISFY ARE WELL-KNOWN TO THIS COURT AND THE COURT MAY AFFIRM THE DECISION OF THE HEARING EXAMINER ON ANY SINGLE GROUND IF IT SO CHOOSES**

Pursuant to LUPA Appellant DHH bears the burden to prove a violation of one of the applicable standards listed in RCW 36.70C.130(1).<sup>3</sup>

On appeal of an administrative decision, an appellate panel reviews the record before the hearing examiner, including his findings of fact and conclusions of law, rather than the trial court's finding and decision. *N. Pacific Union Conference Assn. of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, (2003) (Hearing Examiner did not err when (s)he reviewed the application against the county's definition of church and ruled the proposed structure was not a church). Of course, this vitiates the argument of DHH that the Examiner's Conclusions of Law and Findings of Fact are surplusage. RCW 36.70C.130(1) "reflects a clear legislative intention that this court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use

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<sup>3</sup> *Chinn v. City of Spokane*, 173 Wn. App. 89 (2013) (rezone for more intensive use of parcel affirmed).

regulation.”<sup>4</sup> Courts sitting in an appellate capacity view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority, in this case the Respondents.<sup>5</sup> In accordance with RCW 36.70C.130(1)(b) whether a land use decision is an erroneous application of the law is a legal question we review de novo.<sup>6</sup> The decision by the Clallam County Hearing Examiner may be found by this Court to be clearly erroneous pursuant to RCW 36.70C.130(1)(d) only when the court is left with the definite and firm conviction that a mistake has been made.<sup>7</sup>

Conversely, it is settled law that when sitting in an appellate capacity, a court may affirm the decision of the lower court or quasi-judicial body on any legal basis which is supported in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-201 (1989). This rule applies in the context of review by a higher court of a quasi-judicial decision by an administrative body or Hearing Examiner. A reviewing court may affirm

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<sup>4</sup> *Timberlake Christian Fellowship v. King County*, 114 Wash.App. 174, 180 (2002), review denied, sub nom. *Citizens for a Responsible Rural Area Dev. v. King County*, 149 Wash.2d 1013, 69 P.3d 874 (2003) (Hearing Examiner did not abuse his discretion in determining compliance with one CUP criteria by comparing size of proposed church to size of an existing nearby supermarket).

<sup>5</sup> *Julian v. City of Vancouver*, 161 Wn.App. 614, 624 (2011).

<sup>6</sup> *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 649 (2010) (planning director correctly applied this state’s strong vested rights doctrine to approve what the Friends termed as a bizarre lot configuration).

<sup>7</sup> *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 40 (2011) (Hearing Examiner applied the wrong standard of review when deciding Federal Way’s appeal of Tacoma’s SEPA threshold determination).

an agency order on any proper theory supported by the record, even if the theory is different from the one relied on by the agency in rendering the decision. *Whidbey Environmental Action v. Island County*, 122 Wn. App. 156, 168 (2004), *rev. denied*, 153 Wn.2d 1025 (2005). Thus, if any other valid legal grounds exist to support the Examiner's decision, then this Court should affirm the decision of the Superior Court.

This Court should ignore the request of DHH to utilize the methodology found in Chapter 34.05 RCW, the Administrative Procedures Act, because this lawsuit has always been a LUPA Petition and the case law relating to LUPA's procedures and substance is well-established.

Similarly, all that DHH is attacking and analyzed here are local ordinances, all of which are ambiguous and open to several reasonable interpretations such that there must be judicial deference to the interpretations of local law placed on those local law by those persons regularly dealing with them, i.e., the staff planner and the Examiner. See *City of Medina v. T-Mobil USA, Inc.*, 123 Wn. App. 19, 30 (2004) (court upheld Hearing Examiner's granting of the variance because Hearing Examiner meticulously compared the substantial evidence in the record to the city's variance criteria and found compliance with same.)

**B. DHH FAILS TO PROVE THE EXAMINER ERRED WHEN HE CONCLUDED THE HEIGHT VARIANCE SHOULD BE GRANTED TO THE APPLICANT**

All parties agree the Examiner lacked authority to grant the height variance RPI and Tjemsland sought unless he was able to conclude that seven (7) variance criteria listed in the CCC were satisfied by the Applicant. However, DHH only challenges four of those seven variance criteria, using some 25 pages of its Opening Brief to do so. Thus, the lawfulness of the Examiner's decision to find that the three unchallenged variance criteria were satisfied by the Applicant become and are "verities on appeal."

Four of those seven criteria that must be satisfied before a WCF variance may be granted are codified at CCC §33.30.030. Note well that DHH only challenges the decision of the Examiner with respect to three of them, which are listed here:

"Before a variance shall be granted, it shall be shown:

- (1) 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;
- (2) That the granting of the variances will not be materially detrimental to the public health or injurious to property or improvements thereon;
- (3) .....; or

(4) That approval of the variance will not constitute a grant of special privilege.

The Hearing Examiner shall approve of the variance request if it finds that all of the above circumstances apply to the request.”

Because this application involved a WCF and because the CCC has a separate Chapter (CCC Chapter 33.49) establishing procedures and rules for the permitting of a WCF, a variance application for a WCF must satisfy three additional criteria codified at CCC §33.49.530. Only one of those three criteria is the subject of an assertion by DHH that the Hearing Examiner erred when he found this variance criteria satisfied::

“Any applicant may request a variance from the standards of this chapter. Requests for variance shall be made in accordance with the procedures and criteria specified in Chapter 33.30 CCC, Variances. In the granting of a variance, the Hearing Examiner shall also find, in addition to the above criteria, the following:

- (1) 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;....”

Regarding each of the four criteria that DHH now challenges as improperly decided in favor of granting the Variance, the County will prove there has not been an erroneous interpretation of the applicable law (in this case a county code provision), the review standard of RCW 36.70C.130(1)(b). Nor have the four variance criteria been clearly erroneously applied to the facts reflected in the record before the County’s

Hearing Examiner, the standard of review found at RCW 36.70C.130(1)(d). DHH has satisfied neither of these standards of review.

With respect to the three variance criteria listed in the County Code at Section 33.30.030(1),(2) and (4) the Court's attention is drawn to *City of Medina*, where Division One affirmed the decision of the Hearing Examiner to grant a height variance based, in part, on variance criteria nearly identical to CCC §§33.30.030(1),(2) and (4). Not only are the variance criteria quite similar between *Medina* and this case, but so are the underlying facts. T-Mobile was seeking 20 extra feet for its WCF, needed a variance from the setback rules (a reduction from 500' to 80') and intended to construct the WCF on real property uniquely suited for siting a WCF which was also adjacent to a residential neighborhood. The County will first analyze CCC §33.30.030(1):

(1) 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;

This amounts to a challenge by DHH to the Examiner's Conclusion of Law #16 found at CP 154. Like the 9.13 acre parcel that is the subject of this application the City of Medina's Hearing Examiner concluded the "topography, location [and] surroundings' of the property reduced the

manner and type of potential uses for this site.” The *Medina* decision noted the site of the proposed WCF “has a high elevation relative to other areas of SR-520, has existing vegetation and is currently developed with a light standard.” Additionally, Medina’s ordinances identified the SR-520 corridor as the next region where WCFs should be located to improve cell phone service for citizens of Medina. For all of these reasons the *Medina* court affirmed the Hearing Examiner’s decision to grant the setback variance. *Id.* at 31-32.

DHH misinterprets the variance criteria found at CCC §33.30.030(1) when it asserts that since one residence on 1/4<sup>th</sup> of an acre is able to be built on the SP, therefore the Applicant was unable to indicate to the Hearing Examiner what right or privilege others in the neighborhood hold that it is being deprived of.

This “lowest common denominator” argument ignores the fact that the SP is not within the Dungeness Heights subdivision AND ignores nine other uses that are “allowed” uses in the NC zone [see CCC §33.10.15(2)], all uses that might for one reason or another require a variance as part of the permitting process. DHH would require the County to deny that variance because “if you can build a house on the applicant’s parcel, then it is impossible for you to show that you have been deprived of a right or privilege other landowners in the same zone hold.” The DHH argument

ignores the fact that the SP is located in a Preference 3 zone, and is for the purposes of proposing and installing a WCF, where a permit for a WCF can be obtained with a conditional use permit, meaning the neighbors as well as the Applicant always had the “right” or “privilege” to install a 100’ WCF at any parcel in the Dungeness Heights neighborhood.<sup>8</sup>

Moreover, the Examiner found there were “special circumstances” applicable to the subject property at CP 154, based, in part on the Staff Report at AR 537 and the submitted application at AR 36 and AR 947-1002, particularly AR 950 to 954. In short, the Hearing Examiner concluded the SP is particularly suitable for a 150’ WCF (AR 918 to 946) and is particularly unsuitable for the construction of residences on 97% of the property according to AR 970. This is the quintessential “area” variance authorized by this variance criteria and *Hoberg v. City of Bellevue*, 76 Wn. App. 357, 360 (1994) (request for reduction by 10’ of setback requirement is an “area variance”). The *Hoberg* court went on to define an “area variance:”

“An area variance is one which does not change the specific land use but provides relief from dimensional

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<sup>8</sup> Agreed that the neighbors will presumably not seek to build a WCF on their residential property BUT note that the neighbors in the DHH subdivision do hold that “right” or “privilege,” meaning the right or privilege to build a residence is far from the only “right” or “privilege” the aggrieved neighbors hold and the right or privilege to build a residence is not the only right or privilege against which this variance criteria should be measured.

requirements such as setback, yard size, lot coverage, frontage or height restrictions.” *Id.*

Authorizing an extra 50’ of height for the co-Respondent’s WCF does not change the “specific land use,” since the WCF of up to 100’ is authorized through the conditional use process by CCC §33.49.620 but it does provide relief from “height restrictions,” meaning this variance dovetails precisely with the *Hoberg* definition of an “area variance.” Thus the Examiner’s decision at CP 154, Conclusion of Law #16 was a correct interpretation of CCC §33.30.030(1) when he rejected the DHH argument that this variance criteria could never be met if the Applicant had even a single reasonable economic use for her parcel. CP 154. And that same variance criterion was properly applied to the inherently unsuitable nature of the SP for a residence and its unique suitability for a WCF.

With respect to CCC §33.30.030(1) DHH has failed to satisfy the standards of review found in RCW 36.70C.130(1)(b) and (d).

Next the County analyzes CCC §33.30.030(2), which states:

(2) That the granting of the variances will not be materially detrimental to the public health or injurious to property or improvements thereon;

Again this Court should conclude DHH has satisfied neither RCW 36.70C.130(1)(b) nor (1)(d) with respect to this variance criteria.

This Court should note DHH makes only a passing reference to these standards of review in its Opening Brief at section V.C.5 and instead focuses in on RCW 36.70C.130(1)(c). And for the third time (counting twice at the trial court) counsel for DHH repeats its “evidence” asserting the fair market value of a residence is decreased by the nearby presence of a WCF. By bringing forth yet again its witnesses DHH asks this court to reweigh the sufficiency of the evidence in the Administrative Record that caused the Examiner to find there was no proof that the presence of a WCF decreased the fair market value of these residences. CP 151, ¶1. This “substantial evidence” argument under RCW 36.70C.130(1)(c) is fully debunked in the Brief of the co-Respondent. However, the County adds appellate courts such as this one must not undertake the reweighing of the evidence per *Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wn.App. 541, 553 (2009) (discussing a judge’s role regarding “substantial evidence” in the context of the state’s Administrative Procedure Act). Assuming, without conceding, the testimony of DHH’s witnesses can be considered evidence of equal dignity to the evidence of no harm to housing values brought forth by the Applicant, the existence of competing evidence is not grounds to overturn an administrative decision based on RCW 36.70C.130(1)(c). *Rosemere Neighborhood Assoc. v. Clark County*, 170 Wn. App. 859, 872 (2012), *review denied*, 176 Wn.2d

1021 (2013) (PCHB heard and considered pro and con evidence regarding whether county's stipulation requiring applicants to undertake water run-off mitigation provided the same environmental protection as the Ecology permit the County was challenging and decided it did not, affirming the decision of the PCHB).<sup>9</sup>

DHH's entire argument regarding standard of review (1)(b) at its Opening Brief section V.C.5 is that the Examiner failed to repeat in Conclusion of Law #17 (CP 155) what he had previously stated in Conclusion of Law #10, found at CP 151, ¶1. This is, at worst, an editing error and at best a desire to not repeat information already in the record since the Examiner's decision consists of some 21 pages of single-spaced text. That it wasn't included in the analysis at Conclusion of Law #17 does not mean the Examiner's analysis of this variance criteria through his reliance on the threshold determination issued under the State Environmental Policy Act (or "SEPA") was insufficient. SEPA requires the regulators to investigate whether a particular proposal will have any probable, significant, adverse environmental impacts ("PSAEI") and thus is the statutory tool to determine if this criteria variance has been satisfied by a particular applicant. Here the planner and the Examiner both

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<sup>9</sup> See also *Julian v. City of Vancouver*, 161 Wn.App. 614, 631 (2011) (hearing examiner's decision to mandate a buffer at one location but not at another is upheld because it was supported by "substantial evidence," although other evidence in record supported requiring buffers at additional locations).

determined this proposal would cause no PSAEI and thus the Determination of No Significance (“DNS”) was issued and *never challenged by DHH*. DHH also fails to provide any reasoning or case law to show why the Examiner’s analysis of this variance criterion was required to include a study of residential fair market values in order to be sufficiently thorough or a correct interpretation of this criterion..

In any event, even in the absence of such a mandate, there was evidence put into the Administrative Record regarding the impact, if any, of WCF on residential values and the evidence provided by both sides was weighed and considered by the Clallam County Examiner.

As for any assertion DHH is able to satisfy the standard of review found at RCW 36.70C.130(1)(d) with respect to the variance criteria found at CCC §33.30.030(2), DHH admits that it only succeeds under (1)(d) if it also succeeds under the “lack of substantial evidence” standard of review found at RCW 36.70C.130(1)(c). Based on the case law cited above and the arguments set forth in the Brief of Co-Respondent, DHH fails to satisfy Section (1)(c) and therefore also fails to satisfy Section (1)(d) with respect to this particular variance criteria. With respect to CCC §33.30.030(2) DHH has failed to satisfy the standards of review found in RCW 36.70C.130(1)(b) and (1)(d).

Next to be analyzed is CCC §33.30.030(4), which states:

(4) That approval of the variance will not constitute a grant of special privilege.

The argument of DHH attacking the Examiner's Conclusion of Law #19, where the Examiner analyzes this variance criterion, suffers from two misapprehensions that are fatal to its argument and should lead this Court to conclude the Hearing Examiner did NOT err when he decided this criterion was satisfied by the Applicant.

Initially, while it is true there are seven WCF that predate the 2001 enactment of CCC Chapter. 33.49 (the WCF Chapter), those seven WCF do not hold the status of non-conforming, instead they are "exempt," i.e., lawful according to CCC §33.49.200(2)(a):

"(2) 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;" (Emphasis supplied.)

Because the seven WCF are exempt from complying with CCC Ch. 33.49 (with two tiny exceptions) the WCF code provisions are not a subsequently-enacted development regulation that might by its enactment have altered the alleged status of the seven WCF from conforming to non-

conforming. Thus, concluding this variance criterion was satisfied by the Applicant because of those seven exempt WCF is not a result of reliance by the planner and Examiner on “non-conforming” uses. Logically, then the “slippery slope” argument of DHH that the County is now exposing itself to circumstances where it cannot deny in the future numerous other non-conforming (too tall) WCF has no legal significance for this dispute since it based on incorrect facts. *St. Clair v. Skagit County*, 43 Wn. App. 122 (1986) does not carry the day for DHH since it is not factually on point.

Faulty is DHH’s challenge to Conclusion of Law #19 as it completely misses the point of any applicant requesting or obtaining a variance, i.e., to make lawful what would otherwise be non-conforming and thus unlawful. When a variance is granted it is permission to “vary” from what is otherwise required in order to be “conforming.” The variance is merely authorization to build something that does not meet all requirements and does not grant “conforming” status. *Instead, it grants “lawful” status not “non-conforming” status because it will never conform to all the numerical or performance standards applicable to an application of its kind.* All “conforming” uses are “lawful,” but not all “lawful” uses are “conforming,” since “lawful” uses may include prior, legal, non-conforming uses and uses authorized via both a CUP and a

variance such as this application. The County points out it is not the granting of a “special privilege” to have this proposal or any proposal obtain the status of “lawful,” through the granting of a variance because if it is a “special privilege” to get a proposal to the status of “lawful” by the granting of a variance, then it would be a futile or useless gesture to even create a process whereby a variance may be granted. CP 155, last ¶ of Conclusion of Law #19. This statement holds true for this Applicant and the Examiner did not err when he concluded this Applicant had satisfied this variance criterion.<sup>10</sup>

The County also notes DHH attempts to put this application up to a popular vote in Section V.C.2(d), asserting that more persons oppose this Application than favor it, because it supposedly will create a precedent of allowing other non-conforming uses into Preference Area 3. Initially, a 150 foot WCF granted, in part, through issuance of a variance is not a non-conforming use, it is a lawful use, a distinction with a difference in the land use arena. Actions taken pursuant to the mandates of the Growth Management Act are not subject to referendum or plebiscite. See *Snohomish County v. Anderson*, 123 Wn.2d 151, 153 (1994) (County’s ordinance enacting countywide planning policies may not be the subject of

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<sup>10</sup> Any of the aggrieved neighbors and the Applicant had the right to apply for a WCF of 100’ through a CUP and a WCF of 150’ through a CUP and a Variance.

a referendum) and *Maranatha Mining, Inc. v. Pierce County*, 59 Wn.App. 795 (1990) (general neighborhood opposition is not sufficient to support denial of application when applicant states willingness to mitigate all legitimate problems presented by its proposal.)

The last variance criterion alleged to have been erroneously decided by the Hearing Examiner (at Conclusion of Law #20, CP 155, 156) is codified in the County Code at CCC §33.49.530(1):

Any applicant may request a variance from the standards of this chapter. Requests for variance shall be made in accordance with the procedures and criteria specified in Chapter 33.30 CCC, Variances. In the granting of a variance, the Hearing Examiner shall also find, in addition to the above criteria, the following:

(1) 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;

Initially, at section V.C.4 of the Opening Brief, DHH makes the bold assertion that it knows how to construe this variance criterion (“DHH construes this requirement such that ...”). Doing so of course ignores the established case law which states the deference courts must provide to interpretations of local code authored by either planning staff or the final local decision-maker, here the Examiner. The controlling case law in this regard is discussed at page 14 of this Brief.

Jumping off from its own self-proving reading of this variance criterion, DHH then leaps to the conclusion that once “in vehicle” service is capable of being provided without a variance, then a wireless carrier such as T-Mobil “may not use a variance to provide in-building service.” This again makes futile the lawfully-enacted variance process which is never available if “in vehicle” service already exists or can be provided without the variance. The interpretation by DHH fails to take into account numerous situations where a variance might be necessary regardless of its impact on “in-vehicle” service: 1) a WCF requiring a variance to maintain the same level of service, 2) a WCF requiring a variance to replace obsolete technology with newer technology, or, most likely, 3) a WCF requiring a variance to improve their service in order to provide “in building” and “outdoor” levels of service, which are deemed superior levels of service by wireless carriers such as T-Mobil.

After rewriting and shoehorning this variance criterion to fit into its legal argument, DHH then resorts to restating at section V.4 of the Opening Brief the evidence that DHH asks this Court to REWEIGH, basically an argument made in reliance upon RCW 36.70C.130(1)(c). If such a reweighing were to occur, DHH asserts this Court would determine that the Examiner was “clearly erroneous” in applying the text of this

variance criterion to the facts and statistics found in the Administrative Record. RCW 36.70C.130(1)(d).

This Court is well aware of the rule of law regarding claims under RCW 36.70C.130(1)(d), i.e., that the Court, sitting in an appellate capacity, lacks authority to overturn the final land use decision of the County (here the decision of the Examiner) under Section (1)(d) unless the Court “is left with a definite and firm conviction that a mistake has been committed.” *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 40 (2011).

Since the Administrative Record is replete with technical information supplied by co-Respondent RPI and former party to this action T-Mobil, some 500 pages in all<sup>11</sup>, and since DHH offers only its own construction of this variance criterion and much number-crunching by its attorney, this Court will not be able to reach a “firm and definite conviction” that the Examiner’s decision with respect to this variance criterion was a mistake. The decision of the Examiner to give the most credibility to the evidence presented by T-Mobil in contrast to the lay person testimony about how T-Mobil and Fire Districts should go about their business presented by the DHH attorney is not and was not “clearly erroneous.”

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<sup>11</sup> See AR 541 to 1007, AR 1211-1346, and AR 1456 to 1481.

**C. DHH FAILS TO PROVE THE EXAMINER ERRED WHEN HE CONCLUDED THE CONDITIONAL USE PERMIT SHOULD BE ISSUED TO TJEMSLAND**

DHH also fails in its attempts to prove the Examiner's decision to grant the CUP constitutes either an erroneous interpretation of the law under Section 130(1)(b) or a "clearly erroneous" application of the law to the facts such that the Court will be left with a firm and definite conviction a mistake has been made under Section 130(1)(d).

DHH is simply 100% wrong when it asserts in its Opening Brief that the decision of the Examiner fails to consider the eight preferences listed in the WCF Ordinance at CCC §33.49.410, which states in relevant part as follows:

"The following is a listing of priorities Clallam County has identified as the uses and locations **preferred** for siting wireless communications facilities. The **priority list** is to be utilized in evaluating WCF proposals and is arranged in descending order with the highest preference first:

- (1) Co-location with legally existing WCFs on support structures or support towers in nonresidential related districts;
- (2) Co-location with legally existing WCFs on support structures or support towers in residential related districts;
- (3) "Power pole replacement" proposals as provided by CCC 33.49.510(2);
- (4) New attached WCFs on support structures not currently used for other WCFs, in nonresidential related districts;
- (5) New support towers located in Preference 1 areas (CCC 33.49.400(2)(a));
- (6) New attached WCFs on support structures not currently used for other WCFs, in residential related zones, provided

- that proposals shall make reasonable efforts to target property not used exclusively for residential purposes;
- (7) New support towers located in Preference 2 areas (CCC 33.49.400(2)(b));
  - (8) New support towers located in Preference 3 areas (CCC 33.49.400(2)(c));
  - (9) Locations other than those listed above.” (Emphasis supplied)

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.” The Examiner then goes on to state “[t]he applicant has shown that co-locating at this location with T-Mobile (sic) will decrease the number of future towers in Clallam County and T-Mobile (sic) has shown that co-locating with another WCF is not feasible to achieve their objectives.” CP 150. The Hearing Examiner goes on to discuss CCC §33.49.410 at CP 152:

“Under C.C.C. 33.49.510, new WCF’s must provide for co-locations of other wireless service providers. As a condition of the previous CUP, [RPI] was required to make a good faith effort to co-locate with another provider if they were approached with a request to do so. [RPI] has done exactly that.

**The foregoing considerations demonstrate that, although it would be preferable for the proposed [WCF] to be located in a Preference Area 1 or 2, the placement of the proposed [WCF] is appropriate in this instance. The proposal is consistent with the Clallam County Zoning Code.”** (Empahsis supplied.)

DHH might be unhappy with where the Examiner landed after considering the preference list found in CCC §33.49.410, but that doesn't mean the Examiner didn't analyze that CCC Section and then memorialize his analysis. As part of its challenge to Conclusion of Law #10, DHH again at pages 21 and 22 asks this Court to REWEIGH the evidence found in the Administrative Record, an argument under Section 130(1)(c), rebutted at length in the Brief of co-Respondents. Courts are reluctant to do that reweighing and will not "overturn an agency decision even when the opposing party reasonably disputes the evidence with evidence of equal dignity." *Ferry County v. Concerned Friends of Ferry County*, 121 Wn. App. 850, 856 (2004)

DHH has again construed a local ordinance in a manner favorable to their argument, in this case interpreting CCC §33.49.410's priority list to mean that if preference method #1, #2 or #3 is a feasible alternative for this WCF Applicant or any other Applicant, then that same Applicant cannot utilize preference method #7, #8 or #9. Such a reading of this County Code provision ignores the plain meaning of the word "preference," which speaks to what the County prefers but does not speak to what the County might have mandated with DIFFERENT Code text. A mandatory code provision would have stated that "the highest listed siting method that is also feasible for the Applicant must be used." It is the

difference between asking your child if they want peas or carrots with dinner (as the Code reads) and informing your child that if peas are available, then the child cannot have carrots, which is how DHH reads this CCC provision.

That the list in CCC §33.49.410 is intended to encourage rather than mandate behavior or decisions by WCF applicants such that WCF are built is confirmed by the related text found in the County's GMA Comprehensive Plan at CCC §31.02.720, which contains the word "should" rather than "shall:"

"(4) The County **should** support expansion of the telecommunication network. Fiber optic cables and cellular service **should** be enhanced to serve the economic development goals of the County. Cellular sites **should** be placed in locations which provide required service without significantly impacting scenic qualities of the area."  
(Emphasis supplied.)

DHH also wastes this Court's time by arguing that the WCF facility is only some 20' from the property line of the SP when it must be set back at least 110% of the height of the WCF or in this case some 165' in accordance with CCC §33.49.520(2)(a). Such a rule presumably exists so that a falling or collapsing tower does no harm to nearby persons, residences or structures. No Respondent disputes this 20' distance, and instead the Respondents point to the 175' easement that Mrs. Tjemsland created.

DHH apparently argues that short of moving the boundary line between two parcels both owned by Tjemsland there is no authority for the Applicant and the County to propose and implement a creative alternative or solution that would allow placement of the WCF at its ideal location while ALSO protecting the public via the 110% rule.

However, both the County's planner and its Examiner determined this County Code provision was satisfied by the 175' easement placed by the Tjemsland family on Lot 3 of their Short Plat, a Lot entirely surrounded by Lot 4, land also owned by Tjemsland, where the WCF would be placed.<sup>12</sup> They reached this reasonable conclusion because AR 46 shows the WCF pad as close to the top of the bank (5') as is both safe and optimally-located at the top of the east-west ridge in order to best improve wireless coverage. That the optimal location for the WCF pad is closer than 175' to the boundary line of the "homestead" lot the Tjemslands carved out for their residence (Lot 3 on AR 62) will make no difference for achieving the public policy behind the 110% rule since all nearby residences to the north (including that of Respondent Tjemsland) are at least that distance from the WCF. The Court may take judicial notice that use of the easement to meet this criteria will make no

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<sup>12</sup> See AR 62 for the recorded survey reflecting the Tjemsland Short Plat, AR 104 for the metes and bounds description of the easement and AR 46 for the relationship between the easement (the cross-hatched area on AR 46) and the proposed WCF.

difference on the ground because on the ground the location of the southerly line of Lot 3 (the homestead lot) where it meets Lot 4 is invisible and the two Lots blend into one for any visitor.

The innovative idea of Applicant granting an easement across two parcels she owns in order to provide the nearby residences with the safety margin of error of at least 110% of the WCFs height allows installation of this WCF, improves cell phone coverage in that region of the County and thus dovetails with the County's GMA Comprehensive Plan at CCC §31.02.720, the section encouraging the constant improvement of cell phone coverage and all communication technology across Clallam County. Innovative land use techniques are encouraged by RCW 36.70A.090.

In turn, this means that using the easement to meet the requirement of CCC §33.49.520(2)(a) also satisfies one of the criterion that must be reviewed before this CUP could be granted as codified at CCC §33.27.040(1)(a), which states: "[t]he proposed action is consistent with the spirit and intent of the Clallam County Comprehensive Plan." The Examiner discussed this CUP criterion at some length at Conclusion of Law #9 found at CP 149, 150.

The Court may note the other criteria any CUP applicant must meet are discussed in some detail at CP 150 to 153, although those were

NOT CHALLENGED by DHH in its Opening Brief and a Reply Brief is too late to initiate a legal argument not found in the Opening Brief. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (2005) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration [internal citation omitted.]”)

The Applicant provided an easement that, in essence, erases a property line that was created solely for their convenience (presumably so they could build a residence) and fulfills the public policy behind both improving cell phone service in the County and the 110% rule of distancing nearby residences from any WCF. The ruling regarding the 110% rule is not “clearly erroneous” such that the planner and the Examiner were obligated to reach a different conclusion regarding interpreting CCC §33.49.520(2)(a).

**D. THE COUNTY, AS THE PREVAILING PARTY IN THE TRIAL COURT AND BEING LIKELY TO PREVAIL IN THE COURT OF APPEALS IS ENTITLED TO RECOVER ITS REASONABLE ATTORNEY’S FEES PURSUANT TO RCW 4.84.370(2) AND RAP 18.1**

When a local government such as Clallam County prevails in a land use dispute being resolved through LUPA at both the trial court and

the Court of Appeals then it is entitled to its reasonable attorney's fees in accordance with RCW 4.84.370(1) and (2) as well as RAP 18.1

For this proposition see *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 (2007) (citizens who successfully opposed shoreline moratorium imposed by City as not authorized by Ch. 90.58 RCW were the “prevailing party in all prior judicial proceedings’ in a matter that qualifies for the award of attorney fees and costs.”)

Clallam County, along with the other Respondents is likely to prevail at the Court of Appeals, i.e., the decision of the Superior Court affirming the Examiner's decision is likely to be affirmed. The County's attorney with 18 years' experience in Washington State land use matters, often litigating against DHH's counsel, will be entitled to his fees pursuant to a “lodestar” calculation. See *Bloor v. Fritz*, 143 Wn. App. 718, 750 (2008) (“[t]he lodestar fee is the reasonable number of hours incurred in obtaining the successful result multiplied by the reasonable hourly rate.”) Courts presume that the lodestar amount is a reasonable fee according to *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828 (2000).

DHH has asked for costs and statutory attorney's fees in “consideration of all of the work done in this Appeal.” Difficult work or the quantity of work performed does not provide a legal basis for the

Appellant to obtain costs and statutory attorney's fees when the Appellant was the losing party below.

## V. CONCLUSION

DHH, as the Appellant in this litigation, held the burden of proof to prove to this Court that the decision of the Clallam County Hearing Examiner should be reversed under any of the standards of review listed in the LUPA statute at RCW 36.70C.130(1).

As shown in this Brief from Respondent Clallam County and the Brief submitted by co-Respondents Tjemsland and Radio Pacific, DHH fails in its efforts to prove that any of the standards of review apply such that the Hearing Examiner's decision must be reversed. Instead, this Court can rely on any one standard of review to affirm the decision below.

**RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of September, 2017

**FOR**

Clallam County Prosecuting Attorney's Office  
223 E. 4<sup>th</sup> Street, Port Angeles, WA 98362

  
\_\_\_\_\_  
**DAVID W. ALVAREZ**, WSBA #29194  
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DIVISION II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION II

BY

~~DEPUTY~~  
DUNGENESS HEIGHTS  
HOMEOWNERS, LLC,  
Appellant,

vs.

RADIO PACIFIC, INC., SHIRLEY  
TJEMSLAND, and CLALLAM  
COUNTY, a political subdivision of  
the State of Washington,  
Respondents.

NO. 50144-9-II

DECLARATION OF  
SERVICE BY MAIL

I certify and declare that:

That the declarant is a citizen of the United States and over the age of eighteen years; that on the 11<sup>th</sup> day of September, 2017, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent Clallam County, addressed as follows:

Gerald Steel  
7303 Young Road NW  
Olympia, WA 98502

Eric Quinn  
20 Forest Glen Lane SW  
Lakewood, WA 98498

I certify and declare under penalty of perjury in the that the above is true and correct.

  
\_\_\_\_\_  
Jennifer Sperline

DECLARATION OF SERVICE