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Division II  
State of Washington  
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No. 50144-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DUNGENESS HEIGHTS HOMEOWNERS  
a nonprofit corporation,  
Appellant,

v.

RADIO PACIFIC, INC., SHIRLEY J. TJEMSLAND,  
and CLALLAM COUNTY,  
Respondents.

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SUPPLEMENTAL REPLY OF APPELLANT

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## I. INTRODUCTION

The single major issue before this Court is whether Building Permit BPT2016-00770 should be found invalid (void ab initio) if this Court finds the Variance and/or Conditional Use Permit (“Zoning Permit”) invalid. (App. Supp. Br.<sup>1</sup> at 5) All parties, the trial court, and the Board<sup>2</sup> agree that the Building Permit should be found invalid if the Zoning Permit is found invalid. (County Br. at 10-12; App. Supp. Br. at 2 and 7; RPI Supp. Br. at 3; CPB79:11-14) The County and RPI argue that this result could be achieved without a need for the Building Permit LUPA Challenge (which they call “LUPA #2”)<sup>3</sup>. DHH argues that LUPA #2 is necessary under LUPA to achieve invalidity of the Building Permit.

The App. Supp. Br. at 15-19 argues that the trial court committed an error of law when it dismissed LUPA #2 for failure to state a claim upon which relief can be granted (CR 12(b)(6)) and for lack of subject matter jurisdiction (CR 12(b)(1)). The Co. Supp. Br. at 12-20 and RPI Supp. Br. at 11-24 argue that the dismissal was justified. In this Brief, DHH will reply to Respondents’ arguments.

Both Respondents claim reasonable attorney fees under RCW 4.84.370(1) if they prevail before this Court. Neither Respondent requests statutory attorney fees and costs under RCW 4.84.010 if they prevail. Even

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<sup>1</sup> “App. Supp. Br.” refers to the Supplemental Brief of Appellant Dungeness Heights Homeowners, a nonprofit corporation (“DHH”) (which is not an LLC as Respondents each state in the caption of their Supp. Br.). “Co. Supp. Br.” refers to the Supplemental Brief of Respondent Clallam County. “RPI Supp. Br.” refers to the Supplemental Brief of Respondents Radio Pacific, Inc. and Shirley Tjemsland (collectively “RPI”). Other abbreviations are the same as used in the App. Supp. Br. at 1-3, Notes 1 to 5 thereto.

<sup>2</sup> The “Board” is the Clallam County Board of Appeals that made the Land Use Decision.

<sup>3</sup> The RPI Supp. Br. and Co. Supp. Br. refer to the Building Permit LUPA challenge as “LUPA #2” and the Zoning Permit LUPA challenge as “LUPA #1”.

if Respondents were to prevail before this Court, they should not be granted reasonable or statutory attorney fees or costs for the reasons presented in this Brief.

Respondents were put on notice numerous times that if the Building Permit is found invalid or void ab initio, then any construction done in reliance on that Building Permit will need to be removed from the subject parcel. (*See* App. Sup. Br. at 9-10 and 19-21.) If the Building Permit is found invalid, this Court should provide DHH with the requested relief that RPI must remove from the subject parcel any construction done in reliance on the challenged Building Permit.

## II. ARGUMENT

### A. This Court Should Void The Building Permit When It Finds The Conditional Use Permit Is Not Valid As Approved (Board Error Nos. 1-2, 4-5, And 7; Major Issue No. 1)

This issue was addressed in the App. Supp. Br. at 12-15. All parties, the trial court, and the Board agree that the Building Permit should be found invalid if the Zoning Permit is found invalid. (County Br. at 10-12; App. Supp. Br. at 2 and 7; RPI Supp. Br. at 3; CPB79:11-14) The parties disagree regarding whether LUPA #2 is required to find the Building Permit invalid and void ab initio.

Respondent Clallam County (“County”) argues that a LUPA Building Permit challenge (“LUPA #2”) is “unnecessary and a waste of judicial resources” because, as the County argues, if the Conditional Use Permit is found invalid, the Building Permit would be “a worthless permit, because a permit cannot grant any applicant permission to install or construct what is

prohibited by the controlling development regulations.” (Co. Supp. Br. at 4) Respondent RPI concurs with the County and argues that the Building Permit challenge is “unnecessary” (RPI Supp. Br. at 2) and even “frivolous” (*Id.* at 3, 4, and 5).

But the County relies on pre-LUPA caselaw<sup>4</sup> which is no longer controlling on this issue. (*See* Co. Supp. Br. at 10-11) In *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) our Supreme Court held that under LUPA, “defects in land use determinations that could have resulted in decisions that were void ab initio under pre-LUPA cases fall within LUPA, with its express 21-day limitation period.” Elsewhere, the *Habitat Watch* Court states that a challenge to a land use decision “lies within LUPA - even where the decision is allegedly void.” (*Id.* at 408)

Therefore, under *Habitat Watch*, if this Court finds the timely-challenged Variance and/or Conditional Use Permit (“Zoning Permit”) invalid (in what the Respondents call “LUPA #1”), such that under pre-LUPA caselaw that would make the Building Permit void ab initio, today under LUPA caselaw, the Building Permit, issued in reliance on the Zoning Permit, may only be found void or void ab initio if the Building Permit is also timely-challenged within the “express 21-day limitation period.”

As we have recently interpreted LUPA in *Wenatchee Sportsmen [Ass'n v. Chelan County]*, 141 Wash.2d 169, 4 P.3d 123 (2000), *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1 (2002), and *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wash.2d 440, 54 P.3d 1194, 63 P.3d 764 (2002), once a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes

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<sup>4</sup> LUPA became effective for permit applications submitted on or after July 23, 1995. (1995 c347 first page and Sec. 701-15)

unreviewable by the courts if not appealed to superior court within LUPA's specified timeline. *See, e.g., Wenatchee Sportsmen* [at 181] ("Because [LUPA] prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed."); *Nykreim*, 146 Wash.2d at 925, 940, 52 P.3d 1.

(*Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406-07, 120 P.3d 56, (2005))

The subject Building Permit was timely-challenged under LUPA #2 and that LUPA challenge is necessary, and is not frivolous, for this Court to be able to find the Building Permit invalid after this Court finds the Zoning Permit invalid. In the App. Supp. Br., every time DHH requests voiding of the Building Permit, the App. Supp. Br. states that this request only applies if this Court first finds the Zoning Permit invalid. (Passim)

**B. This Court Stands In The Same Position As The Superior Court**

The App. Supp. Br. at 11 incorporates by reference the "Standard of Review" section in the Brief of Appellant and the "Standard of Review Reply" section in the Reply Brief of Appellant. The Brief of Appellant at 11-12 establishes that in reviewing land use decisions, an appellate court stands in the same position as the trial court. And just as the superior court in LUPA #2 relied on its decision regarding the validity of the Zoning Permit in LUPA #1, so should this Court in deciding LUPA #2, rely on its decision in LUPA #1. This is why the trial court and all parties agreed that if this Court finds the Zoning Permit invalid, it should also find the Building Permit void ab initio and visa versa. (County Br. at 10-12; App. Supp. Br. at 2 and 7, RPI Supp. Br. at 3; *See* CPB79:11-14)

When a trial court serving in an appellate capacity issues findings and conclusions, an appellate Court disregards such finding and conclusions as surplusage. (Brief of Appellant at 12) So this Court need not review the dismissal of LUPA #2 by the Superior Court, and, for judicial efficiency, may review LUPA #2 on the merits because the parties agree that the validity of the Building Permit is solely determined by the validity or invalidity of the Zoning Permit. If the Zoning Permit is found invalid, then because the Building Permit requires a valid Zoning Permit, all parties agree that this Court should find the Building Permit void ab initio. (*Supra*) And with the same logic, if this Court finds the Zoning Permit valid (which it should not do) then all parties agree that this Court should find the Building Permit valid because the only issue remaining in LUPA #2 is whether or not the Zoning Permit is valid.

C. **The Superior Court Errs When It Dismissed The Building Permit Land Use Petition (LUPA #2)**

The Superior Court erred when it dismissed the Building Permit Land Use Petition based on: failure to state a claim upon which relief can be granted (CR 12(b)(6)) and lack of subject matter jurisdiction (CR 12(b)(1)). This issue is addressed in the App. Supp. Br. at 15-19. The Co. Supp. Br. at 12-20 and RPI Supp. Br. at 11-24 argue that the dismissal was justified.

If this Court addresses the dismissal, it should find that the trial court erred because it has subject matter jurisdiction over all LUPA cases, and the statements in the LUPA #2 Land Use Petition in paragraphs 8.6 to 8.10 (CPB75) are sufficient to state a claim upon which relief can be granted. When this Court finds the Zoning Permit invalid in LUPA #1, it should then

summarily find that the Building Permit is invalid in LUPA #2 without the need for further proceedings.

**1. The Superior Court Has Subject Matter Jurisdiction Over LUPA Land Use Petitions**

The Co. Supp. Br. at 12-15 and the RPI Supp. Br. at 11-18 allege lack of subject matter jurisdiction. But the Respondents and the trial court appear to misunderstand the concept of subject matter jurisdiction. The App. Supp. Br. at 17-18, quotes from Division I which found:

subject matter jurisdiction is a particular type of jurisdiction, and it critically turns on the type of controversy. If the type of controversy is within the court's subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

*(Outsource Services Management, LLC v. Nooksack Business Corporation,* 172 Wn.App. 799, 809, 292 P.3d 147 (2013) (punctuation omitted), *aff'd,* 181 Wn.2d 272, 333 P.3d 380 (2014)). Division III concurs:

A court possesses subject matter jurisdiction when it holds authority to adjudicate the type of controversy involved in the action.

*(Eugster v. The Washington State Bar Association,* 198 Wn.App. 758, 774, 397 P.3d 131 (2017)) Neither the County nor RPI have cited to any caselaw or properly cited to any treatise that would support their position that the superior court does not have subject matter jurisdiction over LUPA cases.

The legislature adopted Chapter 36.70C ("Land Use Petition Act" (RCW 36.70C.005) or "LUPA") to provide "the exclusive means of judicial review of land use decisions" with exceptions not herein relevant. (RCW 36.70C.030(1)) RCW 36.70C.040(1) requires that "Proceedings for review under this chapter shall be commenced by filing a land use petition in

superior court.” Therefore, the legislature has explicitly given the superior court subject matter jurisdiction over the “type of controversy” raised by the Building Permit land use petition. The trial court errs when it dismisses the Building Permit LUPA petition for lack of subject matter jurisdiction.

The RPI Supp. Br. at 11-12 correctly argues that the legislature can establish procedural requirements that are jurisdictional in nature, citing to *James v. County of Kitsap*, 154 Wn.2d 574, 586, 115, P.3d 286 (2005) where the *James* Court found “LUPA bars review of a land use decision if a challenge to that decision is not brought within 21 days of its issuance.”

In order to invoke the superior court’s appellate jurisdiction under LUPA, the petitioner must satisfy the statutory procedural requirements of RCW 36.70C.040.

(*Quality Rock Products, Inc. v. Thurston County*, 126 Wn.App. 250, 267, 108 P.3d 805 (2005))

RCW 36.70C.040 sets out how to commence a land use action. The statutes plain language establishes two requirements: the petitioner must (1) timely file the land use petition and (2) serve necessary parties. . . . [I]f the body of land use petition fails to name a necessary party, the petition does not comply with RCW 36.70C.040.

(*Id.*) While failure to satisfy the statutory procedural requirements of RCW 36.70C.040 will not invoke the superior court’s appellate jurisdiction, that does not equate with a conclusion that the superior court does not have subject matter jurisdiction over LUPA cases. The trial court errs when he dismisses LUPA #2 for lack of subject matter jurisdiction. In the instant case, there is no challenge that DHH failed to satisfy the statutory procedural requirements of RCW 36.70C.040 (Co. Supp. Br. and RPI Supp. Br.) and so the trial court had appellate jurisdiction.

The Co. Supp. Br. at 12-13 and the RPI Supp. Br. at 10, frivolously argue that LUPA #2 does not even appeal the Building Permit land use decision itself. On its face, the Building Permit Land Use Petition appeals the final administrative decision on BPT #2016-00770. (CPB70-71, para. 1.2) In CPB72, para. 5.1, the LUPA #2 Land Use Petition more fully identifies the challenged Building Permit land use decision and notes that a copy of this Decision is attached to the Land Use Petition. The Land Use Petition is clear in identifying the land use decision under review.

The Co. Supp. Br. at 12-13 and the RPI Supp. Br. at 10 and 13-15 argue that the Land Use Petition does not “substantially comply” with RCW 36.70C.070(7). RCW 36.70C.070(7) states in full that a land use petition must set forth, “A separate and concise statement of each error alleged to have been committed.” The RPI Supp. Br. at 12 argues that “DHH asserts no error with respect to BPT#2016-00770 itself.” Para. 8.10 at CPB75 in the Land Use Petition is a separate and concise statement of the fundamental error alleged to have been committed,

DHH asserts that the Decision by the Board affirming BPT #2016-00770 with modification is in error because the Variance and/or Conditional Use Permit are not valid.

This is para. 8.10 in Section VIII of the Land Use Petition entitled,

A SEPARATE AND CONCISE STATEMENT OF EACH  
ERROR ALLEGED TO HAVE BEEN COMMITTED AND  
THE FACTS UPON WHICH THE CLAIMS ARE BASED

(CPB74) This statement of the fundamental error in the Board Decision complies with RCW 36.70C.070(7) and speaks to the Major Issue identified by the App. Supp. Br. at 5, Sec. III.

However, only substantial compliance is required for the form and content requirements of RCW 36.70C.070.

RCW 36.70C.070's form and content requirements do not directly further LUPA's purpose to establish expedited appeal procedures and provide timely judicial review. RCW 36.70C.010. Where a procedural requirement does not directly relate to the statute's express purpose, we have allowed substantial compliance.

(*Knight v. City of Yelm*, 173 Wn.2d 325, 338, 267 P.3d 973, (2011) (punctuation omitted)) If this Court does not find compliance with RCW 36.70C.070(7), it should find substantial compliance.

The RPI Supp. Br. at 13-14 argues that the land use petition in LUPA #2 did not identify an error made “by the Board.” But the Board relied on the Conditional Use Permit (“CUP”) issued by the Hearing Examiner that allowed a 150-foot tower. (CPB80, para. 14) That will be an error “by the Board” when the CUP is found invalid by this Court. That error is expressed in CPB75, para. 8.10.

The Co. Supp. Br. at 15 argues that without the Court finding the Zoning Permit invalid, “DHH can never succeed under LUPA #2.” This is correct and is the reason the parties and trial court agree that the Building Permit will be invalid if the Zoning Permit is found invalid and visa versa.

The Co. Supp. Br. at 15-16, in effect, argues that the Land Use Petition does not “substantially comply” with RCW 36.70C.070(9). RCW 36.70C.070(9) states in full that a land use petition must set forth, “A request for relief, specifying the type and extent of relief requested.” The County argues that because the LUPA #2 Land Use Petition (CPB70-83) does not address the standards for granting relief that are in RCW 36.70C.130(1), that

this Land Use Petition does not comply with RCW 36.70C.070(9).<sup>5</sup> (Co. Supp. Br. at 15-16) The unambiguous language of RCW 36.70C.070(9) does not request identification of which standards of review in RCW 36.70C.130(1) will be relied upon in the briefing but instead only requires the land use petition to identify the relief requested. The County does not cite to any caselaw that requires such identification of RCW 36.70C.(130)(1) standards of review in a land use petition. The “Relief Requested” satisfying RCW 36.70C.070(9) is included in Section IX of the DHH Land Use Petition at CPB75-76.

The RPI Supp. Br. at 16 argues that public policy to “unburden land use decisions from protracted litigation” and to favor “administrative finality in land use decisions” support the superior court’s dismissal of LUPA #2 instead of the Appellant’s request for a superior court stay of proceedings<sup>6</sup> until this Court issued a mandate on the CUP in LUPA #1. The statutes in Chapters 36.70B and 36.70C RCW are reasonably effective for the most part in “unburdening” and encouraging “finality” in land use decisions. But the dismissal of LUPA #2 has delayed the resolution of LUPA #1 as this Court’s processing was delayed by the supplemental briefing. This dismissal extended the period of litigation and delayed finality. This is why DHH advocated for a stay of proceedings in the superior court on LUPA #2, allowing the superior court to quickly resolve LUPA #2 when LUPA #1 was

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<sup>5</sup> The Co. Supp. Br. at 15, Note 10 argues that failure to include the RCW 36.70C.130(1) standards of review in the Land Use Petition was “too little, too late” citing to *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801 [sic.] (2005). *Cowiche* is not a 2005 case, but instead is a 1992 pre-LUPA case. It refers to a requirement to state claims of error in an Opening Brief, and does not refer to claims stated or not stated in a complaint or petition.

<sup>6</sup> DHH did not request a stay of the Building Permit pursuant to RCW 36.70C.100 but rather a stay of proceedings pursuant to RCW 36.70C.090 for good cause.

finally decided. DHH believes that a stay of superior court proceedings on a building permit challenge will reduce “protracted litigation” when the only issue is the validity of a zoning permit, and the determination of that validity is already Before a higher court. In the instant case, it would have avoided supplemental briefing because the parties had already agreed that the Building Permit would be valid if the Zoning Permit was valid and would be invalid if the Zoning Permit was invalid.

The RPI Supp. Br. at 17 argues that DHH could have sought “a declaratory judgment instead of filing a second land use petition.” But to invalidate the Building Permit, timely-filing of a second land use petition was required by *Habitat Watch* at 406-07.

The RPI Supp. Br. at 17-18 mischaracterizes the superior court decision in LUPA #1 which already established that the superior court has subject matter jurisdiction over LUPA cases. In LUPA #1, RPI and the County argued that the superior court did not have subject matter jurisdiction over LUPA #1. The superior court in LUPA #1 responded,

The motion to dismiss pursuant to CR 12(b)(1) should be denied, since the court has subject matter jurisdiction, at least in the sense that it has appellate jurisdiction over LUPA cases.

(CPB40-41) RPI and the County confuse subject matter jurisdiction with legislative requirements to invoke the court’s LUPA appellate jurisdiction. LUPA #1 already established that the superior court had subject matter jurisdiction over LUPA petitions. The RPI and County Motions for dismissal for lack of subject matter jurisdiction in LUPA #2 should have been denied and the trial court erred when it did otherwise.

The RPI Supp. Br. at 17-18 makes a frivolous argument that the LUPA #2 case is a second appeal of the prior land use decision in LUPA #1. LUPA #2 does not reargue LUPA #1, but advocates that if the Zoning Permit is found invalid in LUPA #1, the Building Permit should be found invalid in LUPA #2. (CPB75:14-19)

**2. LUPA #2 States A Claim Upon Which Relief Can Be Granted And The Trial Court Erred When It Found Otherwise**

The Co. Supp. Br. at 16-19 and the RPI Supp. Br. at 18-24 argue that the superior court properly dismissed LUPA #2 under CR 12(b)(6) for failure to state a claim upon which relief can be granted. As stated *supra* at 8, the fundamental error in LUPA #2 is:

DHH asserts that the Decision by the Board affirming BPT #2016-00770 with modification is in error because the Variance and/or Conditional Use Permit are not valid.

This is para. 8.10 in Section VIII of the Land Use Petition. (CPB75) This is a claim upon which relief can be granted by a Court.

a. This Court should grant DHH relief requested

RCW 36.70C.140 authorizes relief available under LUPA:

The court may affirm or reverse the land use decision under review or remand it for . . . further proceedings. If the decision is remanded for . . . further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings . . .

If the Zoning Permit is found invalid, this Court should reverse the trial court dismissal of LUPA #2 and should issue an order (or direct the trial court to issue an order) finding the Building Permit void ab initio because for the Building Permit to be valid requires the Zoning Permit to be valid. (*See*

CPB76:2-9) To preserve the interests of the parties and the public pursuant to RCW 36.70C.140, this Court should issue the Order requested in the App. Supp. Br. at 19-21 that all construction done in reliance on such an invalidated Building Permit be removed from the subject parcel prior to the County considering, approving, or finalizing any other Clallam County Department of Community Development permit. This relief “is necessary to ensure that applicants do not use incurred expenses as a means of exerting improper pressure upon the County to grant another application.” (App. Supp. Br. at 21) DHH requests a remand to superior court to implement this Court Order. (*Id.*)

b. The Respondents arguments are without merit

The Co. Supp. Br. at 17 repeats the frivolous argument (*see supra* at 8) that “DHH does not appeal BPT #2016-00770 *itself*.” (Emphasis in original) The RPI Supp. Br. at 21 argues similarly that “DHH requests the same relief in both actions: reversal of the Hearing Examiner.” These statements are, of course, not accurate. (*Supra* at 8 and 12) Reversal of the Hearing Examiner is only requested in LUPA #1. LUPA #2 requests reversal of the Building Permit if and only if, this Court reverses the Hearing Examiner in LUPA #1.

The major Respondent argument on this issue is made in the Co. Supp. Br. at 18 and the RPI Supp. Br. at 19-21 and is based on the dissent’s analysis in *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 116-17, 223 P.3d 861, 871 (2010):

I further note that the McCurrys attempted to raise a fraud claim in their response to Chevy Chase's CR 12(b)(6) motion by suggesting hypothetical facts that bear no logical relation to the claims raised in their complaint. Because the McCurrys failed to comply with court rules, their fraud claim was improperly raised and any related hypothetical facts provide no basis for the trial court's CR 12(b)(6) decision.

The McCurrys argued at their CR 12(b)(6) hearing and before this court that Chevy Chase may have fraudulently charged a \$2 notary fee when in fact nothing was notarized. However, there is no fraud allegation in their complaint. If the McCurrys had a good-faith belief that fraud occurred, the proper mechanism to include that claim was via a motion to amend their complaint under CR 15.<sup>7</sup>

(*McCurry* at 116) The Co. Supp. Br. fails to mention that this analysis is in the dissent in the *McCurry* case and is not an analysis adopted by the majority opinion. In the quoted analysis, the dissent comments that the McCurrys presented hypothetical facts showing possible fraudulent behavior at their CR 12(b)(6) hearing that bore “no logical relation to the claims raised in their complaint” because fraudulent behavior was not a claim in the *McCurry* complaint. The dissent goes on to state:

No mention of fraud exists, so the trial court could not properly consider hypothetical facts that bear no [sic] relation to a fraud claim when considering Chevy Chase's CR 12(b)(6) motion.

(*McCurry* at 116-17) Based on the earlier quote in the dissent, it appears that the word “no” in this last quote was intended to be the word “a” because the dissent’s argument appears to be that because fraud was not a claim in the complaint, that hypothetical facts related to fraud are not allowed in a CR 12(b)(6) motion.

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<sup>7</sup> Appellant DHH could not have amended its complaint in LUPA #2 because construction in reliance on the Building Permit did not begin until after the Notice of Appeal (CPB5-12) was filed in this Court.

The Co. Supp. Br. at 18 relies on the dissent analysis to argue,

When adjudicating a CR 12(b)(6) motion, the trial court “could not properly consider *hypothetical facts that bear no [sic] relation*” to a claim, [sic] this Petition must be dismissed.

(Emphasis in original) A similar statement is made in the RPI Supp. Br. at 19-20. Even if the dissent in *McCurry* were good law (which it is not), it does not apply to the instant case. The County seeks to use *McCurry* to argue that “DHH asks this Court to assume the **hypothetical fact** that the Variance and CUP [Zoning Permit] . . . will be declared invalid.” (Co. Supp. Br. at 18 (emphasis in original)) This Court need not make this assumption. In this consolidated case, this Court will first decide if the Zoning Permit is invalid. The result will no longer be hypothetical. Then, in the interest of judicial efficiency, this Court can rely on that result to decide if the Building Permit is invalid.

The RPI Supp. Br. at 19-20 argues that the conclusion of law that the Zoning Permit is invalid “‘bear[s] no relation’ to whether or not the issuance of BPT#2016-00770 is invalid.”<sup>8</sup> But as discussed *supra* at 4-5, the invalidity of the Zoning Permit would be the only reason why the Building Permit is invalid and this claim was made in the LUPA #2 Land Use Petition at CPB75:9-24.

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<sup>8</sup> The RPI Supp. Br. at 20, Note 10, states DHH requested that the Board reverse the Hearing Examiner Decision attached to the LUPA #1 Land Use Petition. This is not true. DHH told the Board that the original approved building permit allowed the tower to be approximately 154-feet in height above original grade while the Zoning Permit only allowed 150-feet above original grade. (CPB36) This was the only appeal issue addressed by the Board and the Board granted the appeal on this issue. (CPB78-83; App. Supp. Br. at 4 and 14, Error No. 3) However, DHH raised the issue that the Building Permit is invalid because the Zoning Permit is invalid but did not ask the Board to invalidate the Zoning Permit. (CPB37, Issue 4)

The RPI Supp. Br. at 20-21 argues that “DHH requests the same relief in both actions [LUPA #1 and LUPA #2] - invalidation of the Variance” and “reversal of the Hearing Examiner.” But as stated *supra*, DHH seeks invalidation of the Zoning Permit only in LUPA #1, and seeks invalidation only of the Building Permit in LUPA #2. (CPB76:2-9) The RPI Supp. Br. at 21, continues its argument that in both LUPA #1 and LUPA #2 “the requested relief is the same.” But as stated above, this is not true.

The RPI Supp. Br. at 22-23 argues that “the Board could not have granted the relief the DHH requested” which was “reversal of the Hearing Examiner.” As stated at 15, Note 8, DHH “did not ask the Board to invalidate the Zoning Permit” but raised the issue that the Building Permit is invalid because the Zoning Permit is invalid and the Zoning Permit is Before the Court of Appeals in LUPA #1 where that issue will be reviewed. (CPB37) Just because the Board cannot invalidate the Hearing Examiner Decision, does not mean that an Appellate Court cannot reverse the Hearing Examiner Decision and then invalidate the Building Permit Decision.

The RPI Br. at 23-24 argues that it this Court concurs with the DHH position on application of CR 12(b)(6):

then every trial court could permit any subsequent appeal of the same land use decision to move forward despite the lack of any error in the current “land use decision” being appealed.

There are two errors in this RPI argument. First, LUPA #2 is not a “subsequent appeal of” LUPA #1. LUPA #1 only appeals the Zoning Permit Decision of the Hearing Examiner and LUPA #2 only appeals the Building Permit Decision of the Board. Second, there is an error in the Building Permit Decision if ultimately in judicial review, the Zoning Decision that the

Board relied upon is found invalid. The Board will have then erred in relying on an invalidated Zoning Permit even though the Board did not know the Zoning Permit was invalid at the time of the Board's Decision.

**D. Even If The Respondent's Were To Prevail In This Action, They Should Not Be Granted Reasonable Attorney Fees Or Costs**

Both the County and RPI requested reasonable attorney fees under RCW 4.84.370 if they prevail before the Court of Appeals. (Co. Supp. Br. at 22-23; RPI Supp. Br. at 24-25) Neither the County nor RPI requested costs including statutory attorney fees under RCW 4.84.010 if they prevail before the Court of Appeals. (Co. Supp. Br. at 22-23; RPI Supp. Br. at 24-25) Because neither the County nor RPI requested costs including statutory attorney fees under RCW 4.84.010, neither are allowed costs under that statute. (*Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710, Note 4, 952 P.2d 590, (1998) ("Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs."))

If they were to prevail before the Court of Appeals (or Supreme Court), neither the County nor RPI should be awarded reasonable attorney fees or costs under RCW 4.84.370. The Supreme Court explained when reasonable attorney fees or costs should be awarded under RCW 4.84.370 in *Durland v. San Juan County*, 182 Wn.2d 55, 77-79, 340 P.3d 191, (2014).

To receive reasonable attorney fees and costs under RCW 4.84.370, the County as,

a public entity will receive attorney fees if its decision is "upheld" in two courts, which implies a ruling on the merits.

Thus, in accordance with the structure of the statute, we separate subsections (1) and (2). We award fees . . . to the public entity that made the permitting decision only when the public entity succeeds in defending its decision on the merits.

(*Durland* at 78) Because the trial court did not reach the merits but dismissed the case on jurisdictional grounds at a LUPA Initial Hearing, the County did not succeed before the trial court in defending its decision on the merits.

The Initial Hearing was scheduled before the trial court for June 2, 2017. (CPB15:9) The LUPA Initial Hearing addresses only jurisdictional and preliminary matters. (RCW 36.70C.080(1)) The Respondents filed four motions to dismiss. (CPB15:9-11) The trial court heard these jurisdictional motions to dismiss at its June 2, 2017 Initial Hearing and dismissed the case on jurisdictional grounds. (CPB7-9) Because the trial court dismissed the case on jurisdictional grounds, it did not uphold the County Building Permit Decision on the merits and therefore the County does not qualify for reasonable attorney fees and costs even if it prevails on the merits at the Court of Appeals. (*Durland* at 78)

If RPI prevails before the Court of Appeals, it still does not qualify for reasonable attorney fees and costs under RCW 4.84.370. While under *Durland* at 77-79, it would have prevailed before two courts, it did not prevail before the County at the Board proceedings. The prevailing party on appeal is only awarded reasonable attorney fees and costs under RCW 4.84.370 if:

The prevailing party on appeal was the prevailing or substantially prevailing party before the county. . .

(RCW 4.84.370(1)(a)) The only appeal issue presented to the Board was whether the original permit that allowed the support tower elevation or height

to be approximately 154-feet above original grade should be modified to limit that elevation to 150-feet above original grade. (CP17) The Board found,

17. The building permit (BPT 2016-00770) . . . authorized the construction of the cell tower to be no more than 150 feet above “finished grade.” [In para. 23 at CPB81, the Board found the “finished grade” elevation is 147.15 feet.]

18. The Building Official must measure from “original grade” . . .

20. The original elevation at the location proposed for the base of the cell tower is 143.52 feet . . .

21. The 150 foot limit applicable to the disputed cell tower will be measured from and added to that elevation of 143.52 feet.

(CPB80-81)<sup>9</sup> Therefore, the Board reduced the maximum elevation of the tower as DHH requested from 147.15 feet (at finished grade) plus 150 feet of tower, which is 297.15 feet, down to 143.52 feet (at original grade) plus 150 feet of tower, which is 293.52 feet, for a reduced maximum elevation of the top of the 150-foot tower of approximately 4-feet as requested by the DHH appeal.<sup>10</sup>

Therefore, DHH, and not RPI, prevailed before the Board. “[A] party prevails when it succeeds on any significant issue which achieves some benefit the party sought.” (*Durland* at 78) DHH prevailed before the Board

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<sup>9</sup> The Co. Supp. Br. at 8 argues that the Board Decision allowed RPI to place the cell tower anywhere on the site as long as the top elevation does not exceed 293.52. But this is only true if the tower is placed in the spot shown on the plans where the original ground elevation under the center of the tower is 143.52 feet. The Board found that the tower could not be more than 150 feet above the original ground elevation under the base of the tower. (CPB80-81)

<sup>10</sup> The RPI Supp. Br. at 1 argues that the Board did not modify the height of the WCF. However, the Board did reduce the maximum elevation of the top of the tower by about 4 feet as DHH requested. The RPI Supp. Br. at 1 quotes the Board Decision that concludes “BPT #2016-00770 was lawfully issued.” This is because the Building Official has authority to issue building permits but that conclusion does not mean that the Building Permit was not issued with errors. The Board found that the Building Official erred when the 150-foot tower height was measured from finished grade instead of correctly from original grade. (CPB80:15-18)

on the only issue addressed by the Board Decision. (App. Supp. Br. at 3 and 14, Board Error No. 3; CPB78-83)

a party in a land use case substantially prevails if it improves its position from one level of review to the next.

(*Knight v. City of Yelm*, 173 Wn.2d 325, 347, 267 P.3d 973 (2011)) DHH prevailed before the County because it improved its position going from the original Building Official Decision to the Board Land Use Decision which became the final decision of the County. Because RPI was not the prevailing or substantially prevailing party before the County, it may not be awarded reasonable attorney fees and costs under RCW 4.84.370(1) and (1)(a). Because neither RPI nor the County meets the requirements for reasonable attorney fees under RCW 4.84.370, and because neither requested costs including statutory attorney fees, under RCW 4.84.010, no costs or attorney fees should be awarded to Respondents even if they were to prevail in appellate review (which they should not).

DHH met all requirements for costs and statutory attorney fees under RCW 4.84.010 if it prevails in appellate review.

**E. Equitable Relief Requested By DHH Should Be Granted**

The equitable relief requested by DHH in the App. Supp. Br. at 21 should be granted. This is consistent with RCW 36.70C.140 as discussed *supra* at 12-13. DHH requested that if the Building Permit is found invalid that all construction done in reliance on the Building Permit shall be removed from the parcel before other permits can be considered, approved, or finalized. The Co. Supp. Br. at 4 states that if the Zoning Permit is found invalid, RPI holds a “worthless” Building Permit and there can be “no 150’

WCF south of [the DHH] neighborhood.” In Note 3 in the Co. Supp. Br. at 7, the County states:

The Respondents acknowledge the risk RPI takes by constructing the WCF prior to any decision by the Court of Appeals regarding LUPA #1, specifically, in a worst case scenario that the WCF will have to be entirely removed in both the CUP and Variance are ruled unlawful.

The Co. Supp. Br. at 11 states:

Based on these precedents a court would most likely order the dismantling of a WCF structure of 150' if there was no CUP or height Variance allowing a WCF of that height.

and the Co. Supp. Br. at 12 citing to RPB33:9-23 states, “even Respondent RPI acknowledged that it was acting in reliance on BPT #2016-0770 at its own risk.” The County did not oppose the equitable relief requested by DHH. (See App. Sup. Br. at 9-10 and 19-21.)

The RPI Supp. Br. also did not oppose the equitable relief requested by DHH. (RPI Supp. Br.) the RPI Supp. Br. at 1-2 states,

RPI concedes that if the variance at issue in the first appeal (“LUPA #1”) is reversed, then the building permit to construct a 150-foot WCF is void ab initio.

and at 3 states, “the building permit to construct a 150-foot WCF shall be nullified if the Variance is reversed in LUPA #1.”

The RPI Supp. Br. at 10-11 complains that the App. Supp. Br at 9-10 and 18-20 makes reference to “bad faith” construction. The App. Supp. Br. at 9-10 makes no reference to “bad faith” construction but does state that RPI “has done significant construction after the superior court issued its Order on June 23, 2017” and quotes from the record that any development RPI does in reliance on the challenged Building Permit is “at their own risk” and that if

the Building Permit is found invalid, DHH will request this Court to require the 150-foot tower to be removed.

The RPI Supp. Br. is correct that there is nothing in the record before the superior court that states that RPI “has done significant construction after the superior court issued its Order” and after the Notice of Appeal in LUPA #2 was filed. So this Court should only address the possibility that RPI has done significant construction of its tower after the filing of the Notice of Appeal in LUPA #2.

The App. Supp. Br. at 19 only mentions “bad faith” once when it states that,

DHH and the County made it clear to RPI that RPI would be acting in bad faith and at its own risk if it began construction on the 9-acre parcel in reliance on the challenged Building Permit.

By the term “bad faith” in the App. Supp. Br. at 19-21, DHH is referring to RPI not acting in good faith reliance on the Building Permit once the Building Permit was challenged in the on-going litigation. DHH quoted from CPB27:2-11 in the App. Supp. Br. at 20 discussing in more detail the concept of lack of good faith reliance and the appropriate equitable relief when the Building Permit is invalidated.

Beyond the RPI complaint regarding the DHH reference to “bad faith” construction, RPI did not oppose the equitable relief requested by DHH if construction of the tower has occurred at RPI’s own risk.

“[E]quity cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff.” (*Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 379, 223 P.3d 1172, (2009)) In the instant case, if construction of the tower has occurred, it was not in

good faith reliance on the Building Permit and if it occurred after filing of the Notice of Appeal to the Court of Appeals in LUPA #2 then DHH was not reasonably able to complain of this construction to the trial court because LUPA review is on the administrative record.

This Court should grant the equitable relief requested by DHH if the Building Permit is found invalid.

### **III. CONCLUSION**

If this Court finds in LUPA #1 that the Variance and/or Conditional Permit (“Zoning Permit”) is not valid as approved, then this Court should reverse the trial court’s dismissal of LUPA #2 and vacate its Judgment Summary and award costs and statutory attorney fees to DHH. For judicial efficiency, if the Zoning Permit is found not valid as approved, this Court should find that the Building Permit is void ab initio, because without a valid Zoning Permit, all of the parties, the trial court, and the Board agree that the Building Permit is void ab initio.

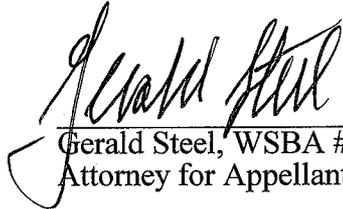
If the Zoning Permit is not valid as approved, then under authority granted by RCW 36.70C.140, this Court should issue the DHH requested Order that all construction done in reliance on Building Permit BPT2016-00770 shall be removed from the subject property before any other Clallam County Department of Community Development permits on the subject property can be considered, approved, or finalized. This Order is necessary so that RPI cannot “use incurred expenses as a means of exerting improper pressure upon the County to grant another application.” (App. Supp. Br. at 21). This Order is necessary “to preserve the interests of the parties and the

public.” (RCW 36.70C.140). This Court should remand to the trial court for implementation of this Court’s Order.

DHH also reminds the Court of the DHH Notice of Unavailability, attached hereto, that was filed on August 17, 2017 in the instant case.

Dated this 26<sup>th</sup> day of December, 2017.

Respectfully submitted,

  
Gerald Steel, WSBA #31084  
Attorney for Appellant DHH

#### 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 Appellate.

On December 26, 2017, I caused:

DHH Supplement Reply Brief of Appellant (including DOS)

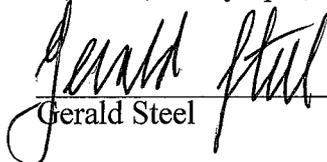
to be served by filing this document with COA2 at <https://ac.court.wa.gov/> and per agreement with the parties by requesting copies be emailed to:

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Dated this 26<sup>th</sup> day of December, 2017, at Olympia, Washington

  
Gerald Steel

**December 26, 2017 - 3:44 PM**

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