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Division II
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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**

Appeal from the Superior Court of Clallam County
The Honorable **Judge Erik Rohrer**
Clallam County Superior Court Cause No. **16-2-00226-1**

Appeal from the Superior Court of Clallam County
The Honorable **Judge Erik Rohrer**
Clallam County Superior Court Cause No. **17-2-00339-8**

SUPPLEMENTAL BRIEF OF RESPONDENT CLALLAM COUNTY

By
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I. PRELIMINARY STATEMENT

This Supplemental Brief of Respondent Clallam County (“County”) is primarily concerned with LUPA #2 (Cause #17-2-0033908), what DHH calls “the Building Permit challenge.” The Building Permit challenge is unnecessary and a waste of judicial resources.

Here is why. Imagine for a moment the Building Permit challenge was never filed AND assume that this Court rules the County unlawfully granted the zoning Conditional Use Permit (“CUP”) and the height variance (“Variance”) that authorized construction of the 150’ Wireless Communication Facility (“WCF”) (cell tower), i.e., imagine Dungeness Heights Homeowners (or “DHH”) wins the Zoning Permits appeal.

If those circumstances come true, then co-Respondent RPI holds a worthless permit, because a permit cannot grant any applicant permission to install or construct what is prohibited by the controlling development regulations. All parties agree on this point. DHH Supp. Brief at p. 15. In short, DHH held the possibility of obtaining the relief they want, i.e., no 150’ WCF south of their neighborhood¹, BEFORE they filed LUPA #2, the Building Permit challenge.

¹ The houses in Dungeness Heights are all located to the north of the proposed WCF site and are oriented to the north where they have

II. ASSIGNMENTS OF ERROR

With respect to DHH's Assignments of Error Respondent Clallam County will rely on Section B of the Supplemental Brief of Respondent RPI, found at pages 2-5, inclusive of that Brief to respond to same.

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.

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

The SP and the neighboring subdivision² 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

unobstructed views of the Strait of Juan de Fuca and Canada. See Clerk's Papers-Zoning or "CPZ 146, 232, 233.

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

authorized pursuant to the Clallam County Code or “CCC” unless it obtained a CUP for the new WCF support towers as required by the CCC at Table CCC 33.49.620. CPZ 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). ARZ 516-17 and CPZ 153.

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.

C. LUPA #1, also known as the Zoning Permits challenge

Neighborhood association known as DHH felt aggrieved by a permitting decision made by Clallam County. DHH filed a Petition under Chapter 36.70C RCW, the Land Use Petition Act or “LUPA.” The Petition asked for reversal of a decision by the County’s Hearing Examiner to grant two permits, a zoning CUP and a Variance for a cell phone tower, known more formally in the CCC as a WCF.

Judge Rohrer of the Clallam County Superior Court issued his Memorandum Opinion affirming the Findings of the Examiner on February 7, 2017. The trial court 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.

D. RPI obtains a building permit:

RPI, based on the decision in LUPA #1 affirming the lawfulness of the CUP and the Variance, applied to Clallam County for the building permit that would authorize it to build the WCF.³ The building permit is known as BPT #2016-0770. Issuance of a building permit is a ministerial action by any local government, meaning it must be granted if all of the county’s regulations are satisfied by the applicant.

DHH appealed that building permit to the County Board of Appeals, alleging that the building permit would authorize a tower that some 3.63 feet taller than the 150’ authorized by the CUP. The dispute

³ 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 if both the CUP and Variance are ruled unlawful.

arose because the site for the WCF is not level and thus the working portion of the WCF⁴ depicted on the plans submitted for the building permit may have exceeded 150' because DHH and RPI differed on which elevation at the site had to be used when measuring the height of the WCF. Measure from different locations on the uneven site and you get different heights for the WCF. The County Board of Appeals modified the building permit to state the highest point of the working portion of the WCF could not be more than 293.52' above sea level AND that the working portion of the WCF could consist of no more than 150' of the maximum allowed height.⁵ This gave discretion to RPI to place the WCF wherever it chose on the site as long as the magic number of 293.52 feet for the combination of elevation and WCF height was not exceeded. This mathematical solution to the dispute over excess height seemingly satisfied RPI, DHH and the County and an Order Modifying the Building Permit was entered on March 22, 2017. See CPB 78-83.⁶

⁴ The phrase "working portion" of the WCF is used here because the last or highest five feet (5') of the WCF will be ornamental branches used to help the WCF blend into the surrounding trees. Those highest or ornamental five feet **DO NOT** count against the 150 foot limit.

⁵ CBP 81 at Findings of Fact #21, #22 and #23.

⁶ The County will use the nomenclature generated by the Appellant and use the phrase Clerk's Papers Building or "CPB" for the Clerk's Papers generated from or as part of LUPA #2.

E. Along comes LUPA #2

Or so the Respondents thought, only to be proven wrong when LUPA #2 was filed as Cause #17-2-339-8 on April 12, 2017. CPB 70-77.

The oddity of the Petition in LUPA #2 is its complete failure to inform the reader how the building permit itself (as modified by the County Board of Appeals) is in any respect unlawful or unauthorized.

Instead, the second LUPA Petition solely asserts the building permit will become invalid ONLY when and if the CUP and the Variance are found to be unlawful and improperly issued.⁷ If “A” is the CUP and the Variance and “B” is the related subsequent building permit, then DHH is arguing in LUPA #2, “If not A, then not B.”

What is missing in all the pleadings submitted by DHH is a reason independent of “A” why this court should conclude “not B.” DHH never pointed to any aspect of “B” (as modified) that would satisfy any of the standards of review found in RCW 36.70C.130(1), or even state a cause of action, because it points to nothing within “B” that proves “B” is unlawful. The trial court Judge dismissed LUPA #2 on June 23, 2017 for lack of subject-matter jurisdiction and for failure to state a cause of action. See CPB 7-9.

⁷ For example, the reader is referred to §9.2 of the Petition in the #339-8 case, found at CPB 76.

F. Proceedings in the Court of Appeals

DHH timely filed and served a Notice of Appeal to this Court with respect to LUPA #2, and that appeal was assigned Case No. 50880-0-II. On August 31, 2017 the two appeals by DHH were consolidated under Case No. 50144-9-II, which is the appeal of LUPA #1. For the sake of clarity, on October 23, 2017 Commissioner Schmidt ordered that the briefs regarding LUPA #2 be labeled “Supplemental.”

IV. LEGAL ARGUMENT

I-RESPONDENT COUNTY ACKNOWLEDGES THE BUILDING PERMIT WILL BE NULL AND VOID SHOULD THIS COURT DECIDE THAT THE COUNTY ERRED WHEN IT GRANTED THE CONDITIONAL USE PERMIT AND THE VARIANCE

DHH is mistaken when it argues that RPI’s building permit (“B”) would live on and remain valid if not timely challenged under LUPA DESPITE the underlying permits that authorized the building permit (“A”) being declared unlawful. See in this regard *Kates v. City of Seattle*, 44 Wn. App. 754, 762, 723 P.2d 493 (1986) (building permit for second residence on parcel is invalid because applicant never applied for the subdivision approval that would have authorized a second home on that parcel.) See also *Responsible Urban Growth Group v. City of Kent*, 123

Wn.2d 376, 390, 868 P.2d 861 (1994) (since underlying rezone was deemed invalid because of procedural irregularities during its enactment, developer SDM had no vested rights in permits based on the invalid ordinance and construction it undertook at its own risk could be enjoined.)

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. Such a building permit would be void ab initio as violative of the controlling development regulations. VRP-B 39:6-14.⁸ An applicant logically can never have a valid permit to build a structure that is unlawful from the get go, despite DHH's claims to the contrary. The trial court Judge quickly came to this conclusion during oral argument at VRP-B 41:6-13:

“THE COURT: Well, I guess where it breaks down for me, I mean, does everyone agree with the general concept that if the Court of Appeals reverses the case that's currently on appeal [LUPA #1] that the permit [subject of LUPA #2] should also be, I guess, reversed, for lack of a better word, and that the converse is also true, if they affirm [LUPA #1], that the building permit [subject of LUPA #2] should be affirmed? I mean, does anyone disagree with that as a general statement of kind of how it would be fair to proceed with this?”

⁸ VRP-B is shorthand for “Verbatim Report of Proceedings-Building Permit.” Oral argument regarding the Respondents’ Motions to Dismiss LUPA #2 occurred on June 2, 2017.

DHH would be able to obtain injunctive or declaratory relief to stop the construction of the WCF IF the Court of Appeals rules that the CUP and the Variance should not have been granted. VR-B 37:6-13. LUPA #2 was never necessary, since even Respondent RPI acknowledged that it was acting in reliance on BPT #2016-0770 at its own risk. VRP-B 33:9-23.

Both appeals filed by DHH should be denied.

.....

II-THE DISMISSAL OF LUPA #2 SHOULD BE AFFIRMED FOR LACK OF SUBJECT MATTER JURISDICTION UNDER CR 12 (b)(1) BECAUSE THE PETITION IN LUPA #2 DOES NOT ALLEGE ANY ERRORS IN THE DECISION REACHED BY THE COUNTY BOARD OF APPEALS

It is well-established that the Superior Court civil rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." CR 1. Any cause of action may be dismissed for lack of subject matter jurisdiction. CR 12 (b)(1). This Petition must be dismissed because the Land Use Petition Act provides "the exclusive means of judicial review of land use decisions," but DHH has not appropriately appealed any "land use decision." RCW 36.70C.030 (1).

First, DHH has failed to establish this Court has subject-matter jurisdiction to hear and resolve LUPA #2 because DHH fails to even

“substantially comply” with the form and content requirements of RCW 36.70C.070(7) which, if substantial compliance had occurred, would grant this Court subject-matter jurisdiction. See *Knicht v. Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011) (“[i]t is well established that statutory procedural requirements must be met in order for a superior court to exercise its appellate jurisdiction.”)

At Pages 12-15 of its Supplemental Brief, utilizing the International Building Code, DHH regurgitates the argument that the building permit shall be void if LUPA #1 is resolved in favor of DHH. Again, DHH asserts no error with respect to BPT#2016-00770 itself. LUPA #2 is based on LUPA #1 and DHH is not appealing the second “land use decision.” This is evidenced by the land use petition itself:

Petitioner DHH requests that this Court find that building permit BPT#2016-00770 as modified by the Clallam County Building Code Board of Appeals (“Board”) is invalid because the final Appellate Court Decision (current case no. 50144-9-II) **will** show that the Variance and/or Conditional Use Permit this Building Permit relies upon are invalid.

CPB 070 at §1.2 (emphasis added). DHH appeals LUPA #1 only:

DHH *will be able to show* that the standards for relief in RCW 36.70C.130 (1) regarding this challenge of modified BPT#2016-00770 are met *if* the Final Appellate Court Decision finds the Variance and/or Conditional Use Permit to be invalid.

See also CPB 075 at §8.9 (emphasis added). Beyond these bold assertions listed above, LUPA #2 did not contain “a separate and concise statement of each error alleged to have been committed” by the *County Board of Appeals*. RCW 36.70C.070 (7).⁹ Without knowing what portion of the County Board of Appeals decision was erroneous or unlawful the County is unable to prepare a defense.

Belatedly, DHH in its Supplemental Brief at pages 3 and 4 lists for the first time eight errors allegedly made by the County Board of Appeals.

The eight alleged errors are unsuccessful in satisfying the requirement laid out in state law at RCW 36.70C.070(7) with respect to BPT #2016-0770. In addition to being untimely, EVEN IF all of the errors that are within the authority of the Board of Appeals to cure [all but Errors No. 4 and No. 7] were cured, the Building Permit that authorizes a WCF whose highest working portion may only be 293.52 feet above sea level would still be upheld as a valid land use decision by Clallam County. Remedying those six Errors gets DHH nowhere because they don't get the WCF to unlawful status.

Such a statement is true because of the fatal flaw in LUPA #2. DHH only succeeds in having BPT #2016-0770 ruled invalid if the CUP

⁹ Of course, DHH at Page 4 states that the appeal of DHH before the Board “was actually granted regarding the *only* issue addressed.”

and the Variance are deemed unlawful, as is alleged in Errors #4 and #7 in the Supplemental Brief. Of course, to date, the CUP and the Variance have not been found to be unlawful, so Errors #4 and #7 cannot be remedied unless a giant precondition is met, i.e., this Court would be required to take the unprecedented step of assuming the CUP and Variance should not have issued from the County. Without this precondition DHH can never succeed under LUPA #2.

Nor does the Petition in LUPA #2 state which, if any, of the standards of review under RCW 36.70C.130 have been met, amounting to a violation of RCW 36.70C.070(9).¹⁰ The Washington Legislature set forth six separate standards of review which must be met to necessitate reversal or remand of a "land use decision." See RCW 36.70C.130 (1)(a)-(f). This Court may only adjudicate "land use decisions" under LUPA. See RCW 36.70C.030 (1). Because DHH has not asserted any error with respect to BPT #2016-00770 *itself*, or asserted which of the standards of review under RCW 36.70C.130 have been met, DHH is not even appealing *this* "land use decision."

¹⁰ That the County and the Court finally learn from pages 3 and 4 of the DHH Supplemental Brief which Section 130(1) standards of review have allegedly been satisfied is "too little too late" pursuant to *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (2005).

In sum, the Petition in LUPA #2 does not reflect substantial compliance with RCW 36.70C.070 (7) and (9) because the Petition neither informs the reader how BPT #2016-00770 is legally deficient nor informs us what standards of review DHH has satisfied. In sum, then, this Court lacks subject matter jurisdiction. See CR 12(b)(1).

Respondent County relies on the arguments set forth by co-Respondent RPI with respect to collateral estoppel with respect to the lack of subject-matter jurisdiction.

III-LUPA #2 WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED SINCE DHH HAS NOT ALLEGED AND CANNOT ALLEGE FACTS SUFFICIENT FOR THE REVERSAL OF BPT #2016-00770

Under CR 12 (b)(6), a cause of action may be dismissed for failure to state a claim upon which relief may be granted if it is “clear from the complaint that the allegations set forth do not support a claim, dismissal is proper.” *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187, 190 (1977). Dismissal is proper when “plaintiff’s allegations show on the face of the complaint an insuperable bar to relief.” *Yeakey v. Hearst Communications, Inc.*, 156 Wn.App. 787, 791, 234 P.3d 332 (2010).

Within the unorthodox LUPA #2, DHH asserts that BPT #2016-00770 is invalid "because the final Appellate Court Decision (current case no. 50144-9-II) will show that the Variance and/or Conditional Use Permit this building permit relies upon are invalid." CPB 70, §1.2; CPB 75, §8.7, §8.8. LUPA #2 must be dismissed because DHH does not appeal BPT #2016-00770 *itself*.

DHH was hard-pressed to generate "errors" the County Board of Appeals allegedly made, since it admits the Board of Appeals granted DHH's appeal "regarding the only issue addressed." Error No. 3, page 4. Scrounging for other alleged errors, DHH alleges the Building Permit was granted unconditionally with respect to the Zoning Permits (Error No.1)¹¹, admits the Zoning Permits challenge is intertwined with the Building Permit challenge (the core of Respondents' argument!) at Error No. 2, suggests the Board of Appeals should have stepped into the shoes of the Hearing Examiner and declared the CUP and Variance invalid at Errors No. 4 and 7 and it alleges errors due to non-material omissions missing from the Board of Appeals decisions at Errors No. 5, 6 and 8. As stated above, none of these errors, even if

¹¹ All parties acknowledge the "if not A, then not B" relationship of "A" (the Zoning Permits) and "B," the Building Permit. This alleged "condition" would be nothing more than Respondents acknowledging they would have to comply with whatever the Court of Appeals decides. That obligation exists whether or not it is expressly stated.

cured, would lead to the Court finding the WCF building permit invalid or unlawful.

DHH has always argued the invalidity of the Building Permit rests entirely on the alleged invalidity of the two Zoning Permits, therefore DHH must have this Court make a sweeping and unprecedented determination: That the issuance of the building permit may be found invalid based on the successful appeal of *another distinct land use decision*, the decision of the Hearing Examiner affirmed in LUPA #1. This is not authorized by either statute or case law. Nor did LUPA #2 even involve the Hearing Examiner since it is an appeal of a decision by the County Board of Appeals.

When adjudicating a CR 12 (b)(6) motion, the trial court "could not properly consider *hypothetical facts* that *bear no relation*" to a claim, this Petition must be dismissed. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 116-117, 223 P.3d 861, 871 (2010) (emphasis added). DHH asks this Court to assume the **hypothetical fact** that the Variance and CUP, which have not yet been adjudicated by this Court, will be declared invalid. Contrary to Washington law, DHH asks this Court to assume hypothetical facts that **bear no relation** to whether or not the issuance of BPT #2016-00770 and its affirmance by the Board of Appeals was somehow unlawful. DHH has

not even asserted that any of the standards of review for reversal under RCW 36.70C.130 have been met, as to BPT #2016-00770. Instead, DHH invents hypothetical facts related to an entirely different litigation, to support reversal of the Order affirming and modifying BPT #2016-00770. Thus, DHH has not indicated on what basis it is appealing the issuance of BPT #2016-00770. DHH is appealing a completely separate land use decision. Consequently, LUPA #2 must be dismissed, pursuant to CR 12 (b)(6), failure to state a claim upon which relief can be granted.

If LUPA is intended to bring consistency, predictability and timeliness to litigation arising from “final land use decisions,” (see RCW 36.70C.010) then it goes against that public policy to make the co-Respondents defend against meritless subsequent LUPA Petitions that seek reversal of an earlier “land use decision” but are silent as to why or how the subsequent “land use decisions” that are the subject of those later LUPA Petitions are unlawful.

Of course, “the overwhelming purpose of LUPA was to unburden land use decisions from protracted litigation.” *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 421, 120 P.3d 56 (2005). If LUPA #2 is deemed sufficient to confer subject-matter jurisdiction on the Superior Court, then any disgruntled homeowners association could file meaningless appeals of

the first land use decision, so long as that first land use decision is still pending in the appellate courts AND the homeowners association asserts no errors with respect to the later “land use decision” being appealed.

This war of attrition might someday bankrupt a developer or so discourage it that the project initially approved does not get installed or built. In sum, not dismissing subsequent LUPA Petitions which fail to invoke subject-matter jurisdiction or to state an independent cause of action would permit the abuse of the judicial system.

The Washington Legislature, by enacting LUPA, expressed a "strong public policy favoring administrative finality in land use decisions." *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001). The Superior Court dismissed LUPA #2 to avoid contravening this strong public policy. *See* CPB 091:7-13.

IV-DHH’S REQUEST FOR A RULING ON WHETHER IT SHOULD SEEK A STAY IS A REQUEST FOR AN ADVISORY OPINION AND SHOULD BE IGNORED

At the top of Page 15 (Section V.C) DHH states it seeking “Clarification as to whether a dismissal of a Land Use Petition or A Stay of Proceedings Are Preferred When a Land Use Petition Will be Resolved by A (sic) Issue of Law Being Decided By A Higher Court.”¹²

¹² The capitalization here is simply repeating the capitalization generated by counsel for DHH.

The record below is devoid of any express or implicit reference to the stay provision of LUPA, codified at RCW 36.70C.100. For example, DHH makes no declaration that it is likely to prevail on the merits and was similarly silent that a stay was necessary to prevent irreparable harm to it, both required preconditions to obtaining a stay. Instead, DHH asked the trial court for a stay based on a provision of RCW 36.70C.090 which allows a delay in holding the hearing on the merits if good cause is shown. To further complicate matters, DHH nullifies its request for clarification when it states at the second full paragraph of page 19 of its Supplemental Brief that it doesn't want to obtain a stay because the two LUPA cases have been consolidated by the Court of Appeals and the validity of the CUP and Variance will be decided.

This muddled request for legal advice is nothing more than the quintessential advisory opinion, i.e., what should a LUPA Petitioner do when there might be a need for a second LUPA Petition intimately connected to an earlier LUPA Petition already before the Court of Appeals?

For all of these reasons, this request for "guidance" is a request for an advisory opinion and in the absence of any actual case or controversy the Court should ignore this request. See *Griffith v. Department of Motor Vehicles, State of Washington*, 23 Wn. App. 722 (1979) (state

licensing agency had evidence Griffith was practicing obstetrics, meaning his practice of “natural child birth” while holding a “drugless healer” license was neither lawful nor hypothetical and the agency and the courts had not issued an advisory opinion but instead had decided an actual case or controversy.)

V-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, has failed to meet its burden of proof to prove to this Court that the decision of the Clallam County Hearing Examiner now challenged in No. 50144-9-II should be reversed under any of the standards of review listed in the LUPA statute at RCW 36.70C.130(1).

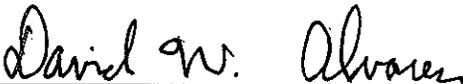
Similarly, DHH, as the Appellant in this litigation, has failed to meet its burden of proof to prove to this Court that the decision of the Clallam County Board of Appeals now challenged in No. No. 50880-0-II

should be reversed under any of the standards of review listed in the LUPA statute at RCW 36.70C.130(1).

The cases happen to be consolidated under No. 50144-9-II.

RESPECTFULLY SUBMITTED this 5th day of December 2017

FOR
Clallam County Prosecuting Attorney's Office
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Appellate Court Case Title: Dungeness Heights Homeowners, Appellant v. Radio Pacific, Inc., et al.,
Respondents
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Comments:

The attached brief is Clallam County's "Supplemental Brief of Respondent".

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