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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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SUPPLEMENTAL BRIEF OF RESPONDENTS RADIO PACIFIC, INC. and SHIRLEY  
TJEMSLAND

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## **A. RESPONSE TO INTRODUCTION**

Respondents Radio Pacific, Inc. and Shirley Tjemsland (hereinafter “RPI”) respectfully submit that the record on review for Cause No. 50144-9-II does not establish that the Dungeness Heights neighborhood is a “high-end” neighborhood. RPI partially concedes that the “Board<sup>1</sup> land use decision modifies the tower height as DHH requested.” *See* Page 7.<sup>2</sup> However, RPI maintains that the Board did not “modify” the height of the wireless communications facility (hereinafter “WCF”). Instead, the Board concluded that “BPT #2016-00770 was lawfully issued in accordance with § IBC 105.3.1 AND is only modified by this Order to clarify that the measuring point for the cell tower’s maximum height shall be the ‘original grade’ (143.52 feet above sea level).” CPB 082.<sup>3</sup>

Furthermore, RPI concedes that if the variance at issue in the first appeal (“LUPA # 1”) is reversed, then the building permit

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<sup>1</sup> Hereinafter, the term “Board” shall refer to the Clallam County Building Code Board of Appeals.

<sup>2</sup> Each time RPI references a “Page” number, RPI is referring to the Supplemental Brief of the DHH.

<sup>3</sup> RPI shall use “CPB” in the same manner as the DHH to refer to the Clerk’s Papers before this Court.

to construct a 150-foot WCF is void ab initio.<sup>4</sup> That is why this second appeal (“LUPA #2”) is unnecessary. That is why the Clallam County Superior Court should be affirmed. RPI further concedes that the parties were unable to agree to a stipulation that would “stay the proceedings before the superior court.” That is because the DHH attempted, and still attempts, to use a back-door approach to delaying and halting construction of the WCF of RPI, without obtaining a temporary restraining order. The DHH sought to invoke the subject matter jurisdiction (“SMJ”) of the superior court a second time, but the DHH was not appealing a new “land use decision.” That is why the superior court dismissed LUPA #2<sup>5</sup> pursuant to CR 12 (b)(1) and CR 12 (b)(6).

### **B. RESPONSE TO ASSIGNMENTS OF ERROR**

As a preliminary matter, each error asserted by the DHH was separately designed to invoke the SMJ of the Superior Court

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<sup>4</sup> RPI has already been granted a conditional use permit to construct a 100-foot WCF: Counsel for Respondent Clallam County accurately stated before the Superior Court that “another key factor here is that without the CUP and if [RPI] had the variance only, for instance, [RPI] could still build a tower of 100 feet because the variance was for the extra 50 feet.” Verbatim Report of Proceedings (“RPB”) 39: 15-18.

<sup>5</sup> Although this Court consolidated both cause numbers 50144-9-II (LUPA #1) and 50880-0-II (LUPA #2) into Cause No. 50144-9-II, LUPA # 1 and #2 were based on separate factual and legal bases and therefore the two shall be referred to separately in this Supplemental Brief.

without assigning any error to the actual land use decision of the Board. LUPA #2 is based entirely upon the outcome of LUPA #1, and therefore any “error” assigned by the DHH in the Supplemental Brief has no bearing on this appeal:

*Errors of the Board*

“Error No. 1” is not an error. The Board admitted that the CUP and Variance “could be reversed.” That is a statement of fact. Although the DHH states that the Board issued the building permit “unconditionally,” the building permit to construct a 150-foot WCF shall be nullified if the Variance is reversed in LUPA # 1. Consequently, such a fact need not be included in the Board’s decision. Consequently, “Error No. 1” reminds this Court that LUPA # 2<sup>6</sup> is frivolous.

Error No. 2 is belied by the facts. The DHH clearly disputed the height of the WCF before the Board. The DHH admits that this appeal was brought to “exhaust administrative remedies” in order to invoke the SMJ of the Superior Court a second time. *See* Page 2. The proceedings before the Hearing Examiner on the CUP and Variance were based on a separate administrative record. The Board did not

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<sup>6</sup> “LUPA #2” shall also be utilized to refer to the land use petition filed by the DHH in support of LUPA #2, and all proceedings before the Superior Court.

err in finding that the building permit and the CUP and Variance proceedings were distinct. For the Board to meld the two proceedings would abrogate the fact-finding authority of the Clallam County Department of Community Development (“Staff”) and Hearing Examiner, and contravene the Clallam County Code.

Error No. 3 is a use of semantics to substantiate LUPA # 2—an appeal that is designed to interpose delay—and is nothing more than that. Furthermore, the DHH concedes in Error No. 3 at Page 4 that the DHH appeal “was actually granted regarding the only issue addressed,” further revealing that LUPA #2 is frivolous.

Error No. 4 asserts that the Board “failing to find” that the Staff, Hearing Examiner and Superior Court were **all wrong** is erroneous. The Board is not responsible for reviewing the decision of all three decision makers above:

Type III permit decisions are made by the Hearing Examiner, with appeals to Superior Court or other appropriate tribunal...Type III permits include the following types of land use applications...Zoning conditional use and variances pursuant to CCC Title 33, Zoning Code

Clallam County Code (“CCC”) 26.10.210 (2)(c).

The DHH appealed the decision of the Hearing Examiner (at issue in LUPA #1) directly to Superior Court and no other tribunal.

The Board reviewed the *building permit* for consistency with the CCC, and granted the DHH the relief requested, with the exception of engaging in a Type III Permit review, which is vested in the Hearing Examiner under CCC 26.10.210 (2)(c). Error No. 4 is therefore without merit.

Error No. 5 contends that failure to “amend or revise” the WCF exactly the way the DHH desires is an error. In this case, the failure to “amend or revise” the WCF, to the DHH, is the failure to reverse the Hearing Examiner and the Superior Court, nothing more. That is why, again, LUPA # 2 is frivolous. Whether the Hearing Examiner and Superior Court shall be reversed is at issue in LUPA #1. Error No. 6 is irrelevant and merits no response.

Error No. 7 should remind this Court, again, that LUPA #2 is frivolous. For the Board to “resolve all the issues” in LUPA # 1 in a summary fashion would abrogate the fact-finding authority of Staff and the Hearing Examiner. Error No. 8 is belied by the facts. The building permit before the Board was supported by the findings of Staff, the Hearing Examiner and the Superior Court. Beyond that, the Board clarified the maximum height of the tower as based from the “original grade,” to the satisfaction of the DHH. *See* CPB 082.

*Errors of the Superior Court*

Each of these errors are based on one underlying premise: The DHH asserts that the Superior Court may not dismiss a land use petition that is based on an entirely separate land use decision (LUPA #1), which asserts no error whatsoever with respect to the second land use decision allegedly being appealed (issuance of the building permit—BPT#2016-00770).

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

The single “Major Issue” before this Court is whether the DHH properly invoked the LUPA jurisdiction of the Superior Court or stated a claim upon which relief may be granted in LUPA #2, merely because LUPA #1 is pending before this Court. The “Major Issue” is **not** whether the building permit should be found invalid if LUPA #1 is resolved in favor of the DHH.

**D. COUNTER-STATEMENT OF THE CASE**

RPI incorporates the Counter-Statement of the Case of both Respondents in LUPA #1, set forth in the Briefs of both Respondents in LUPA #1. At Page 11, DHH admits that the “final land use decision” of the Board “lowered the tower height by 4 feet

as DHH requested.”<sup>7</sup> As admitted by the DHH in its own Record and Scheduling Motion before the Superior Court:

The *only remaining issue* in the instant challenge to Building Permit BPT2016-00770 is that this building permit should be found invalid *if* either the said Variance or the said Conditional Use Permit are found invalid

CPB 111 (emphasis added). This “only remaining issue” was important to the DHH, which asserted that the building permit, if not timely appealed, would “become valid” even if LUPA #1 was resolved in favor of the DHH. In other words, the DHH asserted that RPI could construct a 150-foot WCF despite the Court of Appeals reversing the Variance that would permit RPI to do so—because RPI would still have a “valid” building permit. Superior Court Judge Erik Rohrer was mystified by this assertion:

Well, it would seem to me that this issue must just come up again and again and again if the position that you are forwarding, Mr. Steel (counsel for DHH), is correct. But there must be just about every case, I would think, involves both a zoning component and a building permit component. I mean, I can't believe this is unusual. If they kind of stand alone and they could both be separately appealed, there must be a lot of cases where they talk about this very fact pattern

RPB 42: 19-RPB 43:1.

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<sup>7</sup> Again, the Board did not “lower the tower height.” This is inaccurate as enumerated in above Section A.

The DHH set forth no such case to the Superior Court. The DHH set forth no case in which a superior court exercised LUPA jurisdiction merely because the petitioner sought to avoid a building permit becoming “valid,” even if another land use decision supporting that building permit was nullified by a court of appeals. Judge Rohrer echoed the confusion of both Respondents: “I mean, [is RPI] going to sneak in at night and build this or something because [RPI has] the permit even if the variance and conditional use permits [sic] reversed?” RPB14: 24-RPB 15:1.

Additionally, the DHH submitted no evidence at the Initial Hearing on LUPA #2 that filing a second appeal of the same land use decision (LUPA #1) would resolve this matter in the “shortest time possible,” as the DHH alleged at RPB 7:8-14. The “stay of proceedings” of the DHH was worded in a manner that could be construed as a stay of construction: The DHH admitted before the Superior Court that the parties would attempt “to develop language that makes it clear [the “stay of proceedings” in LUPA #2] is not a construction stay.” RPB 41:2-3. Because the parties could not agree that any proposed language from the DHH accomplished that, the parties now appear before this Court a second time, to resolve LUPA #1.

Ultimately, the Superior Court dismissed LUPA #2 for lack of SMJ and for failure to state a claim upon which relief may be granted:

Again, petitioner has not asserted any error with respect to the building permit itself, but, instead maintains that the issuance of the building permit may be found to be invalid based on the outcome of an appeal of another land use decision. There is no clear legal authority for this position and the court finds the position counter to the “consistency, predictability and timeliness” that the Land Use Petition Act is intended to bring to litigation involving final land use decisions

CPB 091:7-13.

#### **E. ARGUMENT**

Under the Land Use Petition Act (“LUPA”), a land use petition must contain “[A] separate and concise statement of each error alleged to have been committed” within the land use decision being appealed. RCW 36.70C.070 (7). Most importantly, “superior courts have no jurisdiction under LUPA unless the appeal involves a ‘land use decision’ as defined in [LUPA].” *Cave Properties v. City of Bainbridge Island*, 199 Wn.App. 651, 656, 401 P.3d 327, 330-31 (2017), citing *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

RPI does not dispute that the issuance of BPT#2016-0770 was a “land use decision” as defined in LUPA. However, because

the DHH alleged no error with respect to the issuance of BPT#2016-00770, but instead based LUPA #2 on an entirely separate land use decision (LUPA #1), the DHH was not appealing the issuance of BPT#2016-00770 *itself*.<sup>8</sup> Consequently, DHH divested the Superior Court of SMJ, for failure to challenge a new “land use decision,” and for failure to comply with RCW 36.70C.070 (7). Furthermore, because the DHH alleged no error with respect to the issuance of BPT#2016-00770, but instead based its land use petition on an entirely separate land use decision (LUPA #1), the DHH failed to state a claim upon which relief may be granted. This Court should affirm the Superior Court.

**1. Reference to “Bad Faith” Construction in the DHH Supplemental Brief was not part of the “Record on Review” and should not be considered by this Court**

As a preliminary matter, in an appeal before this Court, the “[T]he ‘record on review’ may consist of (1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.” RAP 9.1 (a). At Pages 9-10 and 18-20, the DHH makes reference to “bad faith” construction initiated after the Superior Court dismissed LUPA #2,

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<sup>8</sup> RPI hereby incorporates by reference this same argument, which was already set forth in Respondents’ Motion to Dismiss Pursuant to CR 12 (b)(1) and CR 12 (b)(6), contained at CPB 099-0103.

as somehow relevant to the relief requested. Any “bad faith” construction was not part of the “record on review” and therefore consideration of this “bad faith” construction has no bearing on the issues underlying this appeal—whether the Superior Court properly dismissed LUPA #2 pursuant to CR 12 (b)(1) and CR 12 (b)(6).

To the extent that the “record on review” includes the DHH “warning” RPI of “bad faith” construction, such warnings have no bearing on the issues underlying this appeal—whether the Superior Court properly dismissed LUPA #2 pursuant to CR 12 (b)(1) and CR 12 (b)(6). This Court should not consider irrelevant evidence of “bad faith” construction. Instead, this Court should limit review to the “record on review”:

**2. The Superior Court properly dismissed LUPA #2 for lack of subject matter jurisdiction**

Under Washington law, the superior court civil rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." CR 1. The Washington Legislature can establish procedural requirements that are jurisdictional in nature. *See James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005) (dismissing land use petition for lack of LUPA jurisdiction, for failure to comply with the 21-day timeline

for filing a land use petition). Consequently, Washington Courts may find a lack of subject matter jurisdiction on a case-by-case basis. *See* 15A Karl B. Tegland & Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure (2008-2009): § 9.2, authors' cmt. at 164 ("the term [subject matter jurisdiction] is sometimes used to refer to the court's authority to hear and determine a particular case, even though that case is the *kind* of case that the court would normally hear," citing *James*, *supra*.)

This Court must affirm the Superior Court because "a LUPA action may invoke the original appellate jurisdiction of the superior court, but congruent with the explicit objectives of the legislature in enacting LUPA, parties must substantially comply with procedural requirements *before* a superior court will exercise its original jurisdiction." *James* at 589-590, 115 P.3d at 293 (emphasis added).

At Pages 12-15, utilizing the International Building Code, the DHH regurgitates the argument that the building permit shall be void if LUPA #1 is resolved in favor of the DHH. Again, the DHH asserts no error with respect to BPT#2016-00770 itself. LUPA #2 is based on LUPA #1 and the DHH is not appealing a 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: 21-25 (emphasis added). The DHH appeals LUPA #1 only:

The 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.

CPB 075:19-22 (emphasis added). Beyond the bold assertion above, LUPA #2 did not contain “a separate and concise statement of each error alleged to have been committed” *by the Board*. RCW 36.70C.070 (7).<sup>9</sup>

LUPA #2 did not substantially comply with RCW 36.70C.070 (7), despite containing “Section VIII,” at CPB 074-075, which pertains only to “errors” committed by the Hearing Examiner. And LUPA #2 must comply with RCW 36.70C.070 (7) *before* the Superior Court exercises LUPA jurisdiction, pursuant to

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<sup>9</sup> Importantly, the DHH at Page 4 states that the appeal of the DHH before the Board “was actually granted regarding the *only* issue addressed.”

*James*, supra. LUPA #2 contained no substantive assertions of error committed *by the Board*. Consequently, LUPA #2 did not comply with 36.70C.070 (7). The DHH failed to invoke the court's LUPA jurisdiction.

LUPA #2 only argued that “the Decision by the Board affirming BPT#2016-00770 without modification is in error because the Variance and/or Conditional Use Permit (at issue in LUPA #1) are not valid.” CPB 075: 23-24. As set forth above, a Variance or CUP application requires Type III Permit review under CCC 26.10.210 (2)(c)(iii). A Type III Permit application is reviewed by a Hearing Examiner. *Id.* Therefore, the DHH asserts that the Board erred by not invalidating a permit that the Board had no power to fully review, as evidenced by CCC 26.10.210 (2)(c)(iii). The DHH is alleging, once again, that the Hearing Examiner erred in LUPA #1. Ultimately, the assertion in LUPA #2 that the Board erred by not invalidating a Type III Permit is not a “concise statement” of an error committed *by the Board*. This divested the Superior Court of SMJ:

In *James*, supra, the petitioner failed to timely file a land use petition within the 21-day time period set forth under LUPA and the Washington Supreme Court found a lack of LUPA jurisdiction on

that basis. *Id.* at 590, 115 P.3d at 294. Admittedly, the issue of whether the petitioner set forth a “separate and concise statement” of each error committed was not before the *James* Court. However, the *James* Court opined that “where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements *before* they will exercise jurisdiction over the matter.” *Id.* at 588, 115 P.3d at 293 (emphasis added).

Therefore, the same principle underlying the 21-day timeline for LUPA appeals is applicable to the “separate and concise statement” requirement of RCW 36.70C.070 (7). After all, the purpose of the procedural requirements of LUPA is to place local decision makers on notice of their errors, thus making such requirements jurisdictional in nature. *See James* at 589, 115 P.3d at 293. LUPA #2 only gives “notice” to Clallam County that the Hearing Examiner made a mistake. This petition does not allege any new error with respect to the issuance of BPT#2016-00770 itself (see Page 4, Error No. 3). LUPA #2 does not satisfy the spirit and intent of RCW 36.70C.070 (7), a procedural statute which is jurisdictional in nature. Thus, LUPA #2, as written, divested the

Superior Court of SMJ. This Court should affirm the Superior Court.

*This Court should find lack of subject matter jurisdiction as a matter of public policy*

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, 68 (2005). If LUPA #2 is deemed sufficient to confer SMJ on the Superior Court, then any disgruntled homeowners association could file limitless appeals of a first land use decision, so long as that first land use decision is still pending in the appellate courts, despite the fact that the homeowners association asserts no error with respect to the immediate "land use decision" being appealed.

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, 250 (2001). The Superior Court dismissed LUPA #2 to avoid contravening this strong public policy. See CPB 091:7-13, set forth in above Section D. Consequently, this Court should affirm the Superior Court.

*Remaining Subject Matter Jurisdiction Arguments of the DHH Lack Merit*

At Page 16, the DHH asks this Court for “guidance” on whether a second land use petition (LUPA #2) can be based *entirely* on a separate land use decision already under appeal (LUPA #1). The DHH should seek a declaratory judgment instead of filing a second land use petition to resolve this issue, or resort to common sense.

At Page 18, the DHH contends that RPI is barred by collateral estoppel from asserting lack of SMJ. The DHH makes this allegation because the Superior Court ruled in LUPA #1 that the superior court has “appellate jurisdiction over LUPA cases.” CPB40:27-41:3. Of course, superior courts only have LUPA jurisdiction when an actual “land use decision” is being appealed, pursuant to *Cave Properties*, supra. Admittedly, the issuance of BPT #2016-00770 is a “land use decision.” However, the DHH did not appeal *that* land use decision, but instead abused LUPA in an attempt to appeal LUPA #1 a second time.

The SMJ issue in LUPA #2—the land use petition of the DHH, as written, is not an appeal of a new “land use decision” but

instead is a second appeal of a prior land use decision—is functionally different than the SMJ issue in LUPA #1 (standing).

Furthermore, the DHH sought to invoke LUPA jurisdiction a second time, and LUPA requires that the parties “note all motions on jurisdictional and procedural issues for resolution at the initial hearing” for *each* land use petition. RCW 36.70C.080 (2). Consequently, the Washington Legislature made it clear that the question of SMJ may—and perhaps must—be reviewed each time a separate LUPA petition is before the superior court. Thus, collateral estoppel does not bar the RPI argument regarding SMJ.

**3. The Superior Court properly dismissed LUPA #2 for failure to state a claim upon which relief may be granted**

This Court reviews CR 12 (b)(6) dismissals de novo. *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 223 P.3d 861, 862 (2010). Under CR 12 (b)(6), a cause of action may be dismissed for failure to state a claim upon which relief may be granted. Under CR 12 (b)(6), “where 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, 188 (1977). CR 12 (b)(6) 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, 334 (2010). When ruling on a CR 12 (b)(6) motion, trial courts “could not properly consider hypothetical facts that bear no relation” to a claim. *McCurry* at 116-117, 223 P.3d at 871 (2010) (Johnson, J, dissenting).

Again, the DHH appeals LUPA #1 only:

The 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.

CPB 075:19-22 (emphasis added). Ultimately, LUPA #2 points to no error committed by the Board 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: 21-25.

At Page 17, arguing that resolution of LUPA #1 would amount to a “conclusion of law,” the DHH asks this Court to assume the hypothetical fact that LUPA #1 will be decided in favor of the DHH. The DHH asks this Court to assume facts—which

include conclusions of law—that "bear no relation" to whether or not the issuance of BPT#2016-00770 is invalid.<sup>10</sup> Instead, the DHH invents hypothetical facts related to an entirely different land use petition (LUPA #1), to support reversal of BPT #2016-00770. Thus, LUPA #2, on its face, demonstrates an "insuperable bar to relief."

Applying the reasoning of the dissent in *McCurry*, "hypothetical facts" that "bear no relation" to a claim can be analogized to facts that are not relevant to a claim. Importantly, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The resolution of LUPA #1 in favor of the DHH would not make the "determination of" LUPA #2 "more or less probable" because the DHH requests the same relief in both actions—invalidation of the Variance and therefore invalidation of BPT#2016-00770.

Analogizing this question of relevance further to what is known as the public duty doctrine—a "duty owed to all is a duty owed to none"—if the resolution of LUPA #1 is *all* that is relevant

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<sup>10</sup>Again, the DHH specifically states in LUPA #2 and throughout the Supplemental Brief that the Board granted the DHH the exact relief it requested, with the exception of reversing a decision made by an entirely different Clallam County decision-making body, the Hearing Examiner.

to LUPA #2 stating a claim, then the resolution of LUPA #1 is not relevant at all. For example, if this Court removed any inquiry of LUPA #1 from resolution of LUPA #2, then LUPA #2 would be rendered meaningless—the DHH obtained the relief requested before the Board. Conversely, if this Court based the validity of LUPA #2 entirely on the outcome of LUPA #1, which is exactly what the DHH requests, then LUPA #2 would also be rendered meaningless. That is because the DHH requests the same relief in both actions: reversal of the Hearing Examiner.

Therefore, the resolution of LUPA #1 is irrelevant to whether LUPA #2 stated a claim. Because the resolution of LUPA #1 is irrelevant to the validity of LUPA #2, the “hypothetical facts” surrounding LUPA #1 “bear no relation” to the validity of LUPA #2. Thus, the Superior Court did not err by finding that LUPA #2 failed to state a claim upon which relief may be granted.

CR 12 (b)(6) “weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.” *McCurry* at 101, 223 P.3d at 863. Because the requested relief is the same—reversal of the Hearing Examiner—and LUPA #2 hinges entirely on the resolution of LUPA #1, then LUPA #2 and the law

do not provide any further remedy. Thus, LUPA #2 was properly dismissed pursuant to CR 12 (b)(6).

*CR 12 (b)(6) dismissal is proper when the relief requested could not have been granted*

As “creatures of statute,” municipal corporations—and the agencies created by municipal corporations—“possess only those powers conferred on them by the constitution, statutes, and their charters.” *City of Tacoma v. Taxpayers of the City of Tacoma*, 108 Wn.2d 679, 686, 743 P.2d 793, 796 (1987). Even if the hypothetical facts asserted by the DHH are deemed true for purposes of LUPA #2, the Board was specifically created “[I]n order to hear and decide appeals of orders, decisions, or determinations made by the [Clallam County] *Building Official*,” not the Hearing Examiner. CCC 21.01.140 (1) (emphasis added). Consequently, the Board could not have granted the relief the DHH requested:

Ultimately, for the Board to reverse the CUP and Variance for not conforming “to the requirements of pertinent laws” under the International Building Code, the Board would have had to perform a Type III permit review. The Hearing Examiner, whose decision is already being challenged in LUPA #1, is solely vested with this authority. The Hearing Examiner already imposed

conditions to ensure that the CUP and Variance conform “to the requirements of pertinent laws.” The Hearing Examiner performed a Type III review, after giving notice and an opportunity for the DHH to be heard. If the Board conducted a Type III permit review a second time, this would abrogate the Clallam County Code because the Board is not vested with that authority.

Importantly, counsel for Respondent Clallam County accurately stated before the Superior Court that “based on the CUP and the variance that were upheld by this Court and the complete and accurate building permit, the County had no choice but to do its ministerial duty and issue the building permit.” RPB 27: 2-5. This Court may therefore find that LUPA #2, on its face, evidenced an “insuperable bar to relief.” That is because the Board could not have granted the relief requested by the DHH—reversal of the Hearing Examiner.

*This Court should find that LUPA #2 failed to state a claim as a matter of public policy*

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, 68 (2005). If this Court applies the CR 12 (b)(6) standard of review

purported by the DHH and concurs with its position, 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. Thus, finding that LUPA #2 failed to state a claim would further the strong public policy of finality espoused in LUPA. This Court should affirm the Superior Court.

**F. CONCLUSION**

For the reasons set forth in the Briefs of both Respondents in LUPA #1, and for the reasons set forth in this Supplemental Brief of Respondents, this Court should affirm the Superior Court in LUPA #1 and LUPA #2, consolidated as Cause No. 50144-9-II, and award reasonable attorney fees and costs to RPI and Clallam County.

**G. REQUEST FOR REASONABLE ATTORNEY FEES AND COSTS**

In accordance with RAP 18.1 (b), Respondents Radio Pacific, Inc. and Shirley Tjemsland respectfully request that this Court award reasonable attorney fees and costs to Respondents. Appellate courts are required by law to grant reasonable attorney fees and costs to the “prevailing party” in an appeal of a land use decision:

Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs *shall* be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision

RCW 4.84.370 (1) (emphasis added). Of course, “[T]he prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.” RCW 4.84.370 (1)(b). Cause No. 50144-9-II, consolidating LUPA # 1 and LUPA #2, is an appeal from a land use decision impacting a conditional use permit and variance. Consequently, RCW 4.84.370 (1) applies.

RPI prevailed before the Clallam County Hearing Examiner and the Clallam County Superior Court in LUPA #1. RPI prevailed before the Board and the Clallam County Superior Court in LUPA #2. Therefore, RPI may be deemed the “prevailing party on appeal,” and the DHH may not. Thus, not only is RCW 4.84.370 applicable to Cause No. 50144-9-II, the said statute shall require that this Court award reasonable attorney fees and costs to RPI if this Court affirms the Superior Court in any respect.

DATED this 5th day of December, 2017

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Eric Quinn', written over a horizontal line.

Eric Quinn, WSBA # 47354

Attorney for Respondents Radio Pacific, Inc. and Shirley Tjemsland

## DECLARATION OF SERVICE

I, Eric Quinn, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the attorney for Respondents Radio Pacific, Inc. and Shirley Tjemsland. On the date indicated below, I filed this Response Brief at the Washington State Appellate Courts Web Portal, for Division Two, at <https://ac.courts.wa.gov> and per agreement with the parties by requesting copies be emailed to the following persons, as proof of service:

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Dated this 5th December, at Gig Harbor, Washington

A handwritten signature in black ink, appearing to read 'Eric Quinn', written over a horizontal line.

Eric Quinn

**JOSEPH F. QUINN, P.S.**

**December 05, 2017 - 1:30 PM**

**Transmittal Information**

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**Comments:**

Supplemental Brief of Respondents Radio Pacific, Inc. and Shirley Tjemsland

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