

No. 331598

COURT OF APPEALS,  
DIVISION THREE  
OF THE STATE OF WASHINGTON

**FILED**

JUL 23 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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MARK AND JENNIFER HANNA, husband and wife,

Appellants,

v.

ALLAN AND GINA MARGITAN, husband and wife, and HAROLD L. AND  
PATRICIA CROWSTON, husband and wife, DAN R. BOND and JANE DOE BOND,  
husband and wife, DAN M. BOND and JANE DOE BOND, husband and wife, RYKEN  
LIVING TRUST and Trustees Carl and Carole Ryken, STEVE and SHANNON  
MOSER, husband and wife, and AVISTA CORPPORATION, and INLAND POWER  
& LIGHT CO., Intervenor,

Respondents.

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**RESPONDENT INLAND POWER & LIGHT CO.'s REVISED  
RESPONSE BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

Mark and Jennifer Hanna, hereinafter (“Hanna”) assert multiple assignments of error by the trial court in entering summary judgment in favor of Inland Power and Light Co., hereinafter (“Inland Power”) and the other respondents/defendants. Inland Power asserts the trial court’s grant of summary judgment was proper and supported by the law and the facts.

Respondent Inland Power joins in the briefs of each of the other Respondents but in particular the Respondents’ briefs of Avista Corporation and Rykens, et al., and incorporates each of the Respondents’ briefs and arguments as though set forth herein.

## **II. STATEMENT OF THE CASE**

The Bonds, predecessors to Hanna and Respondent, Margitans, owned the property that was divided and platted by Short Plat SP-1227-00. On May 12, 2000, the Bonds obtained the County’s approval of Short Plat SP-1227-00 and Spokane County approved the division of the Bond’s property into three tracts of approximately 5.21, 5.30 and 6.03 acres, respectively in size. (CP 364-372). In addition, Spokane County accepted the Bonds’ dedicated forty (40) foot easement for ingress, egress and utilities. The above represents the entirety of Spokane County’s “land use decision”.

In approving the Short plat, the County produced its Findings, Conclusions & Decision, hereinafter (“Decision”), which states in pertinent part at page 1, paragraph 5:

**The purpose of the proposed short plat is to create three (3) tracts approximately 5.21, 5.30 and 6.03 acres in size. . . There is an existing easement located on the site that serves the residence at the north end of the property (instrument #9202100208).** It is noted that the legal description for this easement does not match the field location of the existing road per surveyor comments on the proposed preliminary plat map. **The applicant is proposing an additional easement** to serve the 2 remaining parcels. . . (Emphasis added.) (CP 364).

Page 1, paragraph 7 of the Decision states in pertinent part:

**The subject property is located north of Charles Road, accessed via a private easement.** (This was yet another existing easement.) Since the site does not have frontage on Charles Road, no additional Future Acquisition Area is to be set aside in reserve. (Emphasis added.) (CP 364).

Accordingly, the above language and the language below clarify that there exist preexisting easements and roads that are not affected by the County’s actual “land use decision.”

Under the “Decision” section of the Decision, Spokane County determined on page 3, paragraph 2 as follows:

2. **The final short plat shall be designed substantially in conformance with the preliminary short plat of record.** (Emphasis added.) (CP 366).

The first reference above recognized the continuing existence of an easement affecting the Short Plat. (CP 364). The second reference above

required the Bonds to produce a final short plat and Final Short Plat Map that was “designed in conformance with the preliminary short plat of record.” (CP 366). As part of the short plat process, the Bonds produced several preliminary short plat maps and these preliminary short plat maps identify the recorded, preexisting easements, trails and roads on the short platted property. In the “Decision” Section of the Decision, the County determined that the preexisting easements, trails and roads survive the short plat process and the County intended that these easements, trails and roads be shown and included on the “final short plat” and Final Short Plat Map. This intent is further reiterated on page 3 of the “Decision” Section of the Decision at paragraph number 4, which states in pertinent part:

4. **Prior to filing the final short plat, the applicant shall submit to the County Division of Planning Director/Designee for review any proposed final short plats to ensure compliance with these Findings and Conditions of Approval.** (Emphasis added.) (CP 366).

The County’s “Decision” required that the Bonds submit a final short plat and the Final Short Plat Map so that these would be “substantially in conformance with the preliminary short plat of record”, which the Bonds failed to do, as reflected in the Final Short Plat Map. (CP 33). Instead, the Bonds simply produced a Final Short Plat Map that evidenced the County’s land use decision but it omitted all of the

preexisting easements, roads and trails affecting the Hannas' property. (CP 366).

The Hannas' entire theory rests upon the assertion that the Final Short Plat Map is a "land use decision". But the Hannas' theory has no factual support, as will be further explained below.

The County's Decision is the only "land use decision" and its "Findings" section discusses the breadth of the land use decision and the "Conclusion" and "Decision" sections expressly limit what was, and was not, achieved by the Bond's Short Plat. (CP 364-372).

Further support for Inland Power's position is shown by the fact that all preexisting easements, roads and trails remain untouched after the short plat approval, as evidenced on page 5 of the Decision in the Section entitled: **SPOKANE COUNTY DIVISION OF ENGINEERING AND ROADS**, which states:

- 1. Conditional approval of the plat by the County Engineer is given subject to approval of the road system as indicated in the preliminary plat of record.** (Emphasis added.) (CP 368).

The preliminary plat of record includes the preliminary plat maps that show the recorded easements, roads and trails not shown on the final plat map (CP 33).

The Hannas purchased Lot 2 in Spokane County Short Plat 1227-00 (Short Plat) in 2002, after the County's Decision. Prior to completing their purchase, the Hannas received a title report that identified the easements of record: (CP 471-482, which is Exhibit F to Allan Margitan's Declaration of December 2, 2014). The title report listed the following easements of record and the Hannas completed their purchase, fully aware of and on notice of these easements of record:

EASEMENT, including the terms, covenants and provisions thereof, as granted by Instrument;  
Recorded: March 2, 1938;  
Recording No.: 327412A

In favor of: Washington Water Power Company For: A perpetual right and easement to store, impound, increase, diminish, divert, or otherwise control or use the waters of the Spokane River which flow by, over, upon or are appurtenant to that property of the party of the first part, all of that part of the following described land in Spokane County which lies below 1533 feet above the mean sea level Affects: Said premises

6. EASEMENT, including the terms, covenants and provisions thereof,  
as granted by instrument;  
Recorded: April 10, 1941;  
Recording No.: 488165A

In favor of: Darrell D. Churchill, a bachelor For: The perpetual use of the private road now existing on said premises, for ingress and egress to and from the remainder of said quarter section affects: Said premises

8. EASEMENT, including the terms, covenants and provisions thereof, as granted by instrument;

Recorded: February 20, 1943  
Recording No.: 575308A

In favor of: Hiram G. Wilson and Elizabeth A. Wilson,  
husband and wife For: The perpetual use of the private road  
now existing on the above excepted portion of the West half of  
said Southeast Quarter for ingress and egress Affects: Said  
premises and other property.

9. OVERFLOW EASEMENT, including the terms, covenants  
and provisions thereof, as granted by instrument;

Recorded: June 23, 1949,  
Recording No.: 886792A

In favor of: Washington Water Power Company For: Perpetual  
right and easement to back and hold water upon and to flood and  
overflow with water as lies below a water surface elevation  
caused by holding the waters of Long Lake and/or the Spokane  
River to an elevation of 1536 feet, still water measurement,  
above mean sea level (as measured by the water gauge now in  
use at the Long Lake Hydro Electric Power Station), and to  
inundate and overflow the above to said elevation of 1536 feet, still  
water measurement, above mean sea level, at Long Lake Hydro  
Electric Power Station, and granting to the Washington Water  
Power Company, its successors and assigns, the right, in  
perpetuity to damage the above described land and any  
improvements or structures thereon by wave, Washington, erosion,  
seepage, inundation or similar cause, as a result of holding the  
waters of Long Lake and/or Spokane River up to said elevation  
of 1536 feet, still water measurement, above mean sea level  
Affects: Said premises and other property

10. OVERFLOW EASEMENT, including the terms,  
covenants and provisions thereof, as granted by instrument;

Recorded: August 16, 1949  
Recording No.: 896931A

In favor of: Washington Water Power Company For: Perpetual  
right and easement to back and hold water upon and to flood and  
overflow with water as lies below a water surface elevation  
caused by holding the waters of Long Lake and/or the Spokane

River to an elevation of 1536 feet, still water measurement, above mean sea level (as measured by the water gauge now in use at the Long Lake Hydro Electric Power Station), and to inundate and overflow the above to said elevation of 1536 feet, still water measurement, above mean sea level, at Long Lake Hydro Electric Power Station, and granting to the Washington Water Power Company, its successors and assigns, the right, in perpetuity to damage the above described land and any improvements or structures thereon by wave, Washington, erosion, seepage, inundation or similar cause, as a result of holding the waters of Long Lake and/or Spokane River up to said elevation of 1536 feet, still water measurement, above mean sea level  
Affects: Portion of Government Lot 5 and the Southeast Quarter of the Southeast Quarter.

12. EASEMENT, including the terms, covenants and provisions thereof, for electric transmission and/or distribution line, together with necessary appurtenances, as granted by instrument;

Recorded: May 6, 1994;

Recording No.: 9405060065

In favor of: Inland Power & Light Co., a Washington corporation affects: Portion of said premises and other property

13. EASEMENT, including the terms, covenants and provisions thereof, as granted by instrument;

Recorded: August 18, 1995

Recording No.: 9508180129

In favor of: Marion G. Bond, and Drew A. Bond and Carol A. Bond, husband and wife For: Ingress and egress and for utilities  
Affects: Said premises

22. EASEMENT, including the terms, covenants and provisions thereof, as granted by instrument;

Recorded: April 17, 2002

Recording No.: 4715117

In favor of: Allan Margitan and Gina Margitan For: Ingress and egress affects: A portion of said premises and other property

23. EASEMENT, including the terms, covenants and

provisions thereof, as granted by instrument;

Recorded: April 17, 2002

Recording No.: 4715118

In favor of: Allan Margitan and Gina Margitan For: Ingress and egress affects: A portion of said premises and other property.

In opposition to Hannas' motion for summary judgment, and as referenced in support of Inland Power's Reply briefing, Respondent Inland Power introduced two Declaration(s) of John Pederson. (CP 488-490) and (732-735). The second Declaration of John Pederson, filed by Inland Power and Light on December 31, 2014, (CP 732-35) provided:

John Pederson is the Director of Planning for the Spokane County Building and Planning Department and Mr. Pederson stated that he was familiar with the master file for the Short Plat. (CP 733).

Mr. Pederson stated that The Findings of Fact, Conclusion and Decision for the Short Plat were issued by the Spokane County on or about May 12, 2000. (CP 733).

The Department of Building and Planning has final authority regarding planning within Spokane County. (CP 733).

There are several preliminary Short Plat maps prepared that related to the Short Plat and a number of these showed the preexisting easements, roads, trails and other features that are not shown on the Final Short Plat Map. (CP 733).

Then, Mr. Pederson stated the following, relevant facts:

**The fact that the Final Short Plat Map did not display the preexisting easements, roads, trails and other features has no relevance to the Short Plat application and the County's final Decision. (CP 733).**

**The Final Short Plat Map just shows that the County approved the decision to divide the property into three parcels and the County accepted the dedication of the forty (40) foot easement to serve the Short Plat. (CP 733).**

**The County's Decision did not address or have any impact on preexisting easements, roads, trails or other features and there was no land use decision entered by the County that abandoned, voided, extinguished or otherwise affected these preexisting easements, roads, trails or other features. (CP 734).**

**The Bonds never sought a determination or hearing to abandon, void, extinguish or otherwise affect the preexisting easements, roads, trails or other features and the County's Decision did not address such a request or determination. (CP 734).**

**The Hannas' claim is mistaken that the County's Findings of Fact, Conclusions and Decision resulted in an abandonment, voiding, extinguishment or in some way otherwise affected the preexisting easements, roads, trails, and other features. (CP 734).**

(Emphasis added.)

The Hannas failed to offer any testimony or evidence that disputes or contradicts the facts stated above.

The Hannas initiated their lawsuit on October 12, 2012 against Allan and Gina Margitan seeking declaratory relief regarding the easements recorded between 1941 and 2002 (before the property was platted and as to an easement granted to Inland Power after the short plat was granted) and asserted that the preexisting easements, roads and trails were extinguished by the short plat. (CP 364-372). Inland Power entered the litigation on or about August 26, 2013, when the trial court granted its motion to intervene. On April 9, 2014, Inland Power's motion to add indispensable parties was granted by the trial court and additional defendants were included in the suit.

On June 30, 2014, the Hannas filed an Amended Complaint adding these newly included defendant property owners and easement holders in the neighborhood of the short plat, which sought a judgment extinguishing and vacating all easements (both recorded and prescriptive) before and after adoption of the short plat if the easements, roads and trails were not depicted on the short plat. (CP 316-331).

Prior to the filing of this Amended Complaint and before Inland Power joined the newly added defendants, the Hannas and

Margitans presented counter motions for summary judgment. In the Hannas' Appellant's brief, the Hannas argue that Judge Tompkins' order on summary judgment acknowledged that Short Plat 1227-00 is subject to LUPA. (CP 258-263). Inland Power concedes the facts that the Short Plat was a "land use decision" and that land use decisions are subject to LUPA but that "finding" doesn't provide any comfort to the Hannas for the reasons that are stated at great length herein.

The Hannas contend that Judge Tompkins' order prevented the trial court from considering and granting Inland Power's and the other defendants' motions for summary judgment in January 2015. (CP 803-805). For the same reasons stated in Inland Power's argument sections, Judge Tompkins order had no impact or effect on the trial court's later grant of the multiple summary judgment motions.

Moreover, the Hannas characterization of Judge Tompkins' order is woefully inaccurate. Judge Tompkins' order clearly states that the Hannas asked her to rule that all easements recorded before and after adoption of the Short Plat had been extinguished (CP 258). The May 23, 2013 order signed by Judge Tompkins clearly denied this motion. The order states: "Plaintiffs' motion is DENIED in part as to whether the Short Plat extinguishes pre-existing easements." (CP 260). As such, contrary to the Hannas' position, Judge Tompkins never made any

substantive ruling on the issues which are the very basis of the Hannas' claims that were dismissed at the later summary judgment hearing, which orders are now the subject of this appeal.

Judge Tompkins specifically denied the Hannas motion to rule that all easements were "extinguished" by adoption of the Short Plat except for the 40 foot easement depicted on that Short Plat. (CP 260). That issue was dealt with over a year later after Inland Power intervened and the other defendants were joined in the lawsuit and Inland Power and the defendants moved for summary judgment in December, 2014. (CP 619-635; CP 636-638). Inland Power's motion and the subsequent order granting summary judgment, and motions and orders entered in favor of the other joined defendants, rejected the Hannas' claim that the Short Plat extinguished Inland Power's and the defendants' pre-existing easement, roads and trails. The trial court did not "sidestep" or "ignore" Judge Tompkins' ruling in the May 23, 2013 order because there was no substantive ruling as to that issue in the prior order. The only substantive ruling came when the trial court dismissed the Hannas' claim that all easements were "extinguished" under LUPA in the orders that are the subject matter of this appeal. (CP 827-836; 811-818; 819-826; 827-836; 837-845; and, 846-851.)

After the Court entered summary judgment in favor of Intervenor,

on February 25, 2015, Inland Power moved for an award of attorney's fees pursuant to RCW 4.84.185. (CP 891-955). The other defendants also filed motions for attorney's fees pursuant to RCW 4.84.185. (CP 852-876; CP 877-880; CP 881-883; CP 956-982). The Hannas responded to the motions for attorney's fees on March 17, 2015. (CP 983-989). On March 27, 2015, the trial court requested redaction of a few items in Inland Power's Order and Judgment Summary, which the trial court questioned. Inland Power's counsel filed a Supplemental Declaration and presented it to the trial court on March 27, 2015. (CP 1017-1070). On April 2, 2015, the trial court entered an award of attorney's fees in favor of Inland Power in the amount of \$63,450.00 in attorney's fees and costs in the sum of \$861.30 for a total judgment of \$64,311.30, bearing interest at the rate of 12 percent per annum. (CP 1084-1090). On pages 2-3 of the order and judgment, the Court entered the following findings of fact and conclusions of law:

THIS MATTER having come before the Court on March 26, 2015, upon Inland Power and Light Co.'s Motion for Attorney's Fees and Costs pursuant to RCW 4.84.185 and the Plaintiffs appearing by and through their attorney Stanley Perdue; all other parties being represented by counsel; the Intervenor, Inland Power, appearing by and through its attorney, David A. Kulisch; and the Court having reviewed the pleadings on file herein and having heard argument of counsel and having considered all of the evidence to determine whether the claims asserted in this matter by the Plaintiffs against Inland Power and Light Co. were frivolous and advanced without reasonable cause, and the Court hereby specifically finding: (2) [sic] the plaintiffs failed to present any evidence to substantiate that a land use decision occurred that

affected Inland Power and Light Co. or any of the other defendants; (2) Inland Power and Light Co. received a private easement grant that cannot be terminated by a land use decision; and, (3) Plaintiffs claims against Inland Power and Light Co. were frivolous and advanced without reasonable cause; . . . (CP 1085-86).

The plaintiffs moved for reconsideration on April 7, 2015. (CP 1095-1105). The trial court entered an order denying plaintiffs' motion for reconsideration. (CP 1139-1140). Thereafter, the plaintiffs filed this appeal.

### **III. SUMMARY OF THE ARGUMENT**

Hannas' theory that the Final Plat Map was a "land use decision" is not supported in the record. Moreover, there was no evidence submitted to show that the final plat map extinguished or vacated any of the Inland Power and defendants' express and prescriptive easement rights. In fact, the only admitted evidence is to the contrary, as outlined above.

The Hannas knew before they purchased their property that the County's land use decision did not extinguish, vacate or eliminate the easements, roads and trails on their property, as evidenced in the title report provided to them. (CP 471-482).

The Hannas failed to present any evidence to support their theory that the County entered a land use decision that extinguished all of the preexisting easements, trails and roads on their property. Without such a

land use decision, the affected, neighboring landowners and the two utilities' were not required to seek relief under LUPA's twenty-one day statute of limitations because the LUPA statute of limitations never accrued or took effect.

The Decision (CP 364-372) and the two declarations of John Pederson (CP 488-490) and (CP 732-35) are the only evidence in the trial court record to show the County's actual land use decision. This uncontroverted evidence contradicts the Hannas' theory and arguments.

Inland Power's and the defendants' preexisting and subsequently granted express and prescriptive easements cannot be extinguished or vacated by the Short Plat because LUPA does not override preexisting, longstanding Washington real estate law. Hannas' assertion of LUPA's effect would violate Inland Power's and the other defendants' right to notice, due process and compensation, because such a taking is accomplished by the use of governmental authority. (Inland Power specifically adopts the arguments, citations and briefing of the Rykens and Avista Corporation in regards to Inland Power's last argument here.)

Inland Power's judgment for attorney's fees and costs should be affirmed. Plaintiffs failed to present any evidence to support their "theory" that a land use decision affected Inland Power or any of the other defendants. Moreover, the plaintiffs failed to produce any case authority

to support their additional theory that a land use decision extinguishes preexisting easements, roads and trails that were either expressly granted or obtained by prescription. Plaintiff's lawsuit was frivolous and so is this appeal. Inland Power should be granted its attorney's fees on appeal as well.

#### IV. ARGUMENT

##### **A. The standard of review is de novo for summary judgment.**

In *Hanson Indus., Inc. v. Kutschkau*, 158 Wn. App. 278, 239 P.3d 367; *rev. den.* 171 Wn.2d 1011, 249 P.3d 1028 (2011), the Court stated:

An order of summary judgment is reviewed de novo. This court engages in the same inquiry as the trial court and views the facts in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). Questions of law and questions of statutory interpretation are reviewed de novo. *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't*, 139 Wn.2d 546, 551-52, 988 P.2d 961 (1999).

##### **B. Standards and Requirements for Summary Judgment.**

The purpose of a motion for summary judgment is to examine the sufficiency of the evidence underlying a plaintiff's formal allegations to avoid unnecessary trials when no genuine issue of material fact exists. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Civil Rule 56(c) provides that a judgment “shall be rendered forthwith” if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

It is well settled under Washington law that defendants may test the plaintiff’s potential proof by moving for summary judgment “on the ground the plaintiff lacks competent [medical] evidence to make out a prima facie case of medical malpractice.” *Id.* Once a party seeking summary judgment has made an initial showing of the absence of any genuine issues of material facts and the propriety of summary judgment under applicable law applied to those facts, the non-moving party has the burden to demonstrate the existence of unresolved factual issues. *Ruffer v. St. Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990), *rev. den.*, 114 Wn.2d 1023 (1990). Established case law clearly places the burden on the non-moving party to submit affidavits affirmatively presenting the factual evidence relied upon. *Ruffer*, 56 Wn. App. at 634.

**C. What is the Purpose of the Land Use Petition Act?**

RCW 36.70C.020 (2) defines a “land use decision” as:

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved,

developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.010 describes the Act's legislative purpose, as follows:

**The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.** (Emphasis added.)

As stated in the statute, the purpose is to reform the process for judicial review and not to replace or affect Washington common law for the creation or extinguishment of property rights.

In *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), the Plaintiffs filed suit to stop their neighbors from building a house that would block their mountain view. The trial court held that the County's issuance of a building permit on September 9, 2004 was a "land use

decision”. Then, the trial court held the claims were barred by the Land Use Petition Act’s, hereinafter (“LUPA”), 21 day statute of limitations, as enacted in RCW 36.70C.040. In discussing LUPA’s legislative purpose, the Court stated at p. 796:

With some exceptions, LUPA is the exclusive means of obtaining judicial review of land use decisions. RCW 36.70C.030(1). Specifically, LUPA does not apply to state agency decisions, to writs of mandamus or prohibition, or to actions for monetary damages. RCW 36.70C.030(1)(a)-(c). LUPA’s stated purpose is to “provide consistent, predictable, and timely judicial review” of land use decisions. RCW 36.70C.010.”

To serve the purpose of timely review, LUPA provides stringent deadlines, requiring that a petitioner file a petition for review within 21 days of the date of the land use decision. RCW 36.70C.040(3). The date on which a Land Use Decision is issued is defined in the statute as three days after a written decision is mailed; the date on which the County provides notice that written decision is available; the date of an ordinance or resolution; or, if none of these apply, on the date the decision is entered in the public record. RCW 36.70C.040(4).

The above statute and case state that actual or constructive notice of a “land use decision” triggers LUPA’s 21 day “statute of limitation”. So, to avoid summary judgment, the Hannas were required to identify the “land use decision” that occurred, the date the land use decision was issued and the date that actual or constructive notice was provided to the affected parties.

Here, the Hannas failed to identify a Spokane County land use decision that affected the neighboring properties and the two utilities. Moreover, the Hannas failed to identify when the asserted land use decision was entered and the date that any notice was provided to any of the Respondents. The 21 day statute of limitation cannot accrue or begin to run unless the Hannas provided evidence to the trial court that these three things occurred and the uncontroverted evidence confirms that none of these three events occurred.

**D. What was the “Land Use Decision” in this Case?**

In the present case, the only “land use decision” substantiated in the record is the County’s approval of the Bond’s short plat dividing the property into three parcels and accepting the Bond’s dedication of the forty (40) foot easement for egress, ingress and utilities on May 12, 2000.

Hannas’ argument that the Final Short Plat Map is a “land use decision” is unsupported in the record and cannot give rise to accrual of LUPA’s 21 day statute of limitations. The Decision and Mr. Pederson’s declarations state that the Final Short Plat Map was not a land use decision and the County did not enter findings, conclusions or a decision that extinguished or vacated the

neighboring property owners' or the two utilities' preexisting easements, road and trails on the Hannas' property. (CP 364-372 and CP 732-35).

In *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005), the Supreme Court again reiterated LUPA's stated purpose:

**LUPA's stated purpose is "timely judicial review". RCW 36.70C.010.** It establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process.

Hanna's citation to this "timely judicial review" language is simply a restatement of the statute's intended purpose but it provides the Hannas no comfort and the Hannas' cited statutes and cases fail to support the Hannas' theory because of the absence any factual or legal support for their position. In fact, the Hannas go to great lengths to support their theory with multiple citations and arguments citing statutes and cases but their entire argument hinges upon the existence of a "land use decision" that never happened. So, while the Hannas' black letter case law is accurate, any application or substantiation here is imaginary.

**E. Hannas' appear to argue that the Final Short Plat Map somehow tricked them into believing that there were no pre-existing easements, roads or trails on their property.**

Hannas' briefing suggests that the Hannas were tricked into purchasing their property in reliance upon the Final Short Plat Map and they relied upon the fact that it didn't show any preexisting roads, easement or trails. This assertion is unbelievable.

As noted above, the Hannas purchased their property after the County's Decision was issued. If the Hannas were aware of the County's Decision, which seems to be what they suggest, the review of the County's short plat file shows the existence and continued viability of easements, roads and trails on their property, both in the Decision and in the preliminary short plat maps. So, either the Hannas did not thoroughly review the County's file or their theory was conveniently created after the fact based upon a misreading and misrepresentation of the purpose of the Final Short Plat Map.

More importantly, the Hannas' title report made it abundantly clear that each and every easement, road and trail existed on their property at the time of their purchase, including those that the Hannas claim were extinguished by what can only be characterized as the County's "fictional land use decision" and not the County's actual Decision, as referenced in

the record. (CP 471-482). With this knowledge and knowing the contents of their title report, the Hannas closed on their real property purchase. Consequently, there is no evidence to suggest the Hannas' were misled or tricked into anything or that they could have a good faith belief that the Final Short Plat Map extinguished all of the preexisting easements, roads and trails.

The Hannas may argue or point to testimony contained in their declarations in an attempt to raise genuine issues of material fact. In their declarations, Hannas asserted their "belief" that there were no preexisting easements, roads or trails affecting their property. This testimony is inconsistent with and contradicted by Mr. Margitan's declaration showing continuing use of easements across the Hannas' property and by the Hannas' deposition testimony in which both the Hannas concede that they read the title report and knew about the existence of these easements, roads and trails affecting their property before they closed on the purchase. In *Marshall v. A.C. & S., Inc.*, 56 Wash.App. 181, 183, 782 P.2d 1107 (1989), the Court held:

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Van T. Junkins & Assocs., Inc. v. United States Indus., Inc.*, 736 F.2d 656, 657 (11th Cir.1984); accord, *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d

271 (9th Cir.1988); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540 (9th Cir.1975). Thus, Marshall's contradictory affidavit does not raise a genuine issue of material fact.

Moreover, the Hannas' belief is not based upon admissible evidence. Instead, Hannas point to their unsupported belief, as created and argued by their attorney. The Hannas do not point to any admissible evidence that shows the existence of a land use decision that terminated or vacated the preexisting easements, roads and trails. Consequently, the Hannas' declarations cannot and do not create a genuine issue of material fact that would preclude summary judgment.

**F. LUPA does not affect previously or subsequently granted express or prescriptive property rights.**

**1. Disputed Easements are Privately Granted.**

The Hannas' theory asserts that a land use decision can terminate or vacate preexisting or subsequently granted private property rights. Hannas argued that both the preexisting easement granted to Inland Power by their predecessors, the Bonds, and Hannas' subsequently granted express, written easement, which they granted to Inland Power after they purchased their property, were vacated by the Final Short Plat Map and because Inland Power didn't seek to amend to short plat. The Hannas' arguments are not supported by facts in the court record or by any case law.

**2. Privately-Granted Easements Are Only Extinguished According to Terms of Grants and Intent of Grantors and Grantees.**

Unless the instruments that created the easements involved here so provide, the law in Washington does not recognize the easements' termination based on a lack of reference in the Final Short Plat Map. (See also, John Pederson's declarations (CP 488-490 and CP 732-735). "[T]he law disfavors termination of easements . . . ." *Littlefair v. Schulze*, 169 Wn. App. 659, 665-66, 278 P.3d 218 (2012). "[A]n easement can be extinguished only in some mode recognized by law." 1 Wash. Real Property Deskbook, § 10.6(2), at 10-27 (3d ed. 1997) (citing 28 C.J.S. Easements § 52 (1941)). "Unless the instrument that creates the easement so provides, an easement may not be terminated without the consent of the owner of the easement." *Id* (citing *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922)). "The extent and duration of the easement is to be determined from the terms of the grant." *Zobrist v. Culp*, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981) (citing Restatement of Property § 482 (1944)). For example, subdividing a property does not extinguish a pre-existing easement that runs on the property. See *Schwab v. City of Seattle*, 64 Wn. App. 742, 746, 750, 826 P.2d 1089 (1992) (appeals court affirmed trial court's holding that "the subdivision of the Andrews property did not extinguish the original

easement so that Wallis continued to have an easement across Schwab's property. . . .").

Therefore, the available procedures for extinguishing the easements in question are found in the instruments that created them and in the intent of the easements' grantors and grantees or their successors in interest, not in the Final Short Plat Map.

For example, in *Kirk v. Tomulty*, 66 Wn. App. 231, 238-39, 831 P.2d 792 (1992), the court found that "[e]ven though the map attached to the short plat application did not depict the entire easement, a comparison of the description of the easement with the property description contained in their deeds alone would have revealed that the easement extended all the way to the boundary . . . ." (emphasis added). Here, like in *Kirk*, the Final Short Plat Map did not depict the full extent of the easements existing before the Short Plat was approved by the County. But, the Hannas' title report showed the continuing existence and viability of the easements affecting their property. So, while the Final Short Plat Map depicted only the one dedicated easement, that fact doesn't support the Hannas' theory or bolster their claim that its existence extinguishes all the preexisting and subsequently granted easements, roads and trails. *See also*: Mr. Pederson's declaration. (CP 732-35).

The trial court concluded that the expressly granted easements, roads and trails, and those obtained by prescription, were not affected by the County's decision. In so concluding, the trial court relied upon Washington case law. "We determine the original parties' intent to an easement from the instrument as a whole." *Rainier View Ct. Homeowners Ass'n, Inc.*, 157 Wn. App. at 719, 720 (citing *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003)).

In sum, because the law disfavors the termination of easements, easements not created by dedication in a short plat can only be terminated according to the terms of the instruments and the intent of the parties creating such easements. See 17 Wash. Prac., Real Estate § 2.12 (2d ed.) (citing *Cowan*, 120 Wash. at 145) ("An easement or profit may be terminated at any time if its then holder or holders execute a proper instrument releasing it to the grantor or his successor. Since an easement is an interest in land that should be created by an instrument in deed form, it must be released in the same manner." (emphasis added)).

Thus, because the disputed easements here are privately-granted or obtained by prescription, as opposed to being dedicated in a short plat, the lack of reference to the easement in the short plat cannot serve to extinguish such easements. Moreover, the trial court concluded that the County's Decision did not extinguish or affect Inland Power's and the

other defendants' preexisting easements, roads and trails. The trial court's conclusion was further supported by Mr. Pederson's declaration testimony regarding the short plat's scope and effect and the fact that there was no other admissible evidence before it.

### **3. Easements Appurtenant to Benefitted Properties.**

Inclusion of the private easements in the Short Plat was not necessary to preserve the easement because the easements are appurtenant and thus tied to the lands that they are intended to benefit. See *Kirk*, 66 Wn. App. at 238-39; See: *Clippinger v. Birge*, 14 Wn. App. 976, 986-87, 547 P.2d 871 (1976), ("Easements appurtenant become a part of the realty which they benefit"; See also: John Pederson's declarations (CP 488-490) and (CP 732-35)). "There is a strong presumption in Washington that easements are appurtenant." *Kirk*, 66 Wn. App. at 238-39 (citing *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash. 608, 618, 173 P. 508 (1918)). "An easement appurtenant is an irrevocable interest in land which has been obtained for duly given consideration." *Id.* (citing *Bakke v. Columbia Vly. Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956)). An important characteristic of an easement appurtenant is that it passes to the successors in interest of the benefited land "regardless of whether it is specifically mentioned in the instrument of transfer." *Id.* It is "not

necessary that [the easement] be specifically mentioned in the instrument conveying the property to which it is appurtenant . . . ." Id. (citing *Loose v. Locke*, 25 Wn.2d 599, 603, 171 P.2d 849 (1946)); ("Unless limited by the terms of their creation or transfer, they follow possession of the dominant estate through successive transfers."). "Th[is] rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement." *Clippinger*, 14 Wn. App. at 986-87 (emphasis added) (citing Restatement of Property § 488 (1944)). Therefore, the existence and continuation of the easements here are not governed by the short plat, but by the ownership of the dominant and servient estates underlying each easement in conjunction with the terms of the instruments creating the easements and the intent of the easements' grantors and grantees.

The Hannas cited *M.K.K.I., Inc. v. Krueger*, 135 Wash.App. 647, 145 P.3d 411 (2006), for the proposition that an easement is extinguished when a LUPA short plat is granted. This interpretation is seriously flawed and completely misreads the Krueger Court's decision and its reasoning.

Krueger involved a short plat owner who attempted to vacate his easements that were dedicated as part of short plat application. The Krueger case confirms real property common law that requires a writing to grant or dedicate property as an easement, whether such grant is

independent of or made as part of a plat application. In *Krueger*, the Roses short platted the property they owned. The Roses filed deeds and the deeds included the dedication of easements for the benefit of adjoining lots involved in the short plat. See: RCW 58.17.020(3) and (8) and RCW 58.17.165.

The Court held that the deeds dedicating the easements were effective transfers of the Roses' real property interests to the adjoining lot owners and could not be unilaterally withdrawn. See: RCW 64.04.175. LUPA limits how dedicated easements may be extinguished, requiring that the short plat be amended and it prohibits the dedicating landowner from unilaterally withdrawing the dedication. *Krueger* has no application to the preexisting easements that Hanna claims were extinguished by the short plat.

The Court cited LUPA as a bar when the Roses tried to "amend or modify" the short plats by vacating these dedicated easements after a final land use decision, which did not comply with RCW 64.04.175. (The equivalent situation here would be if the Hannas or Margitans sought to modify the dedicated forty (40) foot easement that was included in the short plat.) The *Krueger* court relied upon real property common law for the proposition that "dedication" of the easements passed a real property interest to the adjoining landowners and once dedicated and approved by

the County, the County's acceptance of the dedicated easement (a final land use decision) could not be undone without an application for an amendment or an appeal within the statutory 21 days.<sup>1</sup> LUPA was important in the *Krueger* case because the Roses attempted to undo their previous dedication without following the necessary steps as required by LUPA and RCW 64.04.175. Moreover, even if the Roses had submitted an appropriate application to the County that complied with LUPA, common law real property rules and LUPA prohibited the Roses from vacating the dedicated easement because it benefitted adjoining third party landowners. Plaintiffs' citation of *Krueger* is misplaced because *Krueger* has no application to the situation before this Court.

What *Krueger* actually holds is that a dedicated easement may not be removed from an approved short plat without asking the granting governmental entity to do so. If the other Respondents or Inland Power were attempting to extinguish, modify or amend the forty (40) foot dedicated easement present in this case, the *Krueger* case would apply

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<sup>1</sup> Had the Roses still owned the adjoining property, and assuming they could comply with RCW 64.04.175, Washington law would allow them to vacate the dedication with a quit claim deed (this would be a legitimate real property vacation and termination of the easement because no third party was affected); however, even under that situation where the easement was dedicated in a short plat, LUPA required that the Roses file an amendment to amend or modify the short plat. The short plat dedication was needed for LUPA purposes so that the government's land use plans are clear and accurate. The Hannas fail to distinguish between the effect of real property law and the import of LUPA, which is to allow local jurisdictions to manage and record land use decisions and provide for timely appeal of land use decisions through the Courts.

because the County's land use decision was affected and the party seeking to obtain the amendment would need to file a request with the County to amend the plat. However, none of the Respondents dispute the County's land use decision dividing the property into three parcels or accepting the dedicated easement.

Hannas fail to explain how the County's actual land use decision leads to this illogical result and further fails to explain how the County's Decision automatically extinguishes recognized, preexisting property rights. There is no Washington statutory or case law authority for the Hanna's argument.

## V. ATTORNEY'S FEES AND COSTS IN THE TRIAL COURT.

### 1. **The Standard of Review for Attorney's Fees Granted Pursuant to RCW 4.84.185 is Abuse of Discretion.**

The Washington Supreme Court unequivocally has stated:

[T]his court has held that an award of **attorney fees** that is authorized by statute is left to the trial court's discretion and will not be disturbed "in the absence of a *clear* showing of abuse of discretion." ... This **standard of review** is appropriate for decisions under **RCW 4.84.185**. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wash.2d 614, 625, 724 P.2d 356 (1986) (citations omitted).

Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971); see also: *Highland School District No. 203 v. Racy*, 149 Wn.App. 307, 202 P.3d 1024 (2009).

2. **A Trial Court may Grant Attorney’s Fees under RCW 4.84.185 when there is a Frivolous Lawsuit that cannot be supported by a Rational Argument.**

By its express terms, the court may impose sanctions for any action that is “frivolous and advanced without reasonable cause.” *Id.*

Nothing in the statute requires a court to find that the action was brought in bad faith or for purposes of delay or harassment.

*Highland School District* at p. 311.

3. **Plaintiffs’ Lawsuit was Frivolous because it was advanced without Reasonable Cause, Factual or Legal Support.**

RCW 4.84.185 provides, in pertinent part, as follows:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

In this matter, the trial court’s order provided as follows:

THIS MATTER having come before the Court on March 26, 2015, upon Inland Power and Light Co.’s Motion for Attorney’s Fees and Costs pursuant to RCW 4.84.185 and the Plaintiffs appearing by and through their attorney Stanley Perdue; all other parties being represented by counsel; the Intervenor, Inland Power, appearing by and through its attorney, David A. Kulisch; and the Court having reviewed the pleadings on file herein and having heard argument of counsel and having considered all of the evidence to determine whether the claims asserted in this matter by the Plaintiffs against Inland Power and Light Co. were frivolous and advanced without reasonable cause, and **the Court hereby specifically finding: (2) [sic] the plaintiffs failed to present any evidence to substantiate that a land use decision occurred that**

**affected Inland Power and Light Co. or any of the other defendants; (2) Inland Power and Light Co. received a private easement grant that cannot be terminated by a land use decision; and, (3) Plaintiffs claims against Inland Power and Light Co. were frivolous and advanced without reasonable cause; . . . (CP ).**

**a. The Adequacy of the Trial Court Findings.**

Plaintiffs argue that Inland Power's order does not provide adequate findings of fact and conclusions of law to support an award of attorney's fees, citing *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), *overruled on others grounds by Matsyuk v. State Farm Fire & Cas. Ins. Co.*, 173 Wn.2d 643, 658-59, 272 P.2d 802 (2012).

The Court's Order includes specific findings of fact stating that:

(1) Hannas failed to present any evidence to show that a land use decision occurred that affected Inland Power or the other defendants; and, (2) Inland Power received a private easement grant that could not be terminated by a land use decision (especially a land use decision that didn't occur or that did not affect Inland Power as shown above). Based upon those findings, the Court concluded that Plaintiffs' claims against Inland Power were frivolous and advanced without reasonable cause.

The Order contains the required findings of fact and conclusion of law, notwithstanding the Hannas protestations to the contrary. Moreover, the Order specifically references the Court's review of the motions,

memoranda , declarations and arguments, which contain largely the same information submitted to this Court in response to the Hannas’ appeal. The trial court’s grant of Inland Power’s summary judgment motions and denial of the Hannas’ summary judgment, and its “theories” of liability, are additional proof of the lack of reasonable cause for the advancement of the Hannas’ claims.

Finally, this Court is in a position to evaluate the very same arguments that were presented by the Hannas to the trial court and make a separate judgment whether the Hannas’ claims were advanced without reasonable cause. If this Court agrees with the trial court’s findings and conclusions, the record was adequate. If not, the attorney’s fee awards and costs will be reversed. However, it is clear that the Hannas’ claims, and their reasonableness, were given a thorough review by the trial court.

**b. A Sufficient Explanation of the Objective Basis of the Fee Request.**

The Hannas’ second issue with the award of attorney’s fees seems to be that the trial court did not make an adequate review of the fee amounts. First, this issue was not raised below to the trial court, even in the Hannas’ motion for reconsideration. “The failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wash.2d

230, 240, 588 P.2d 1308 (1978); RAP 2.5(a). “The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.” *Estate of Ryder*, at 114, 587 P.2d 160. Since the Hannas failed to submit any evidence to substantiate the amount of Inland Power’s attorney’s fees below, the Hannas’ failed to preserve this issue on appeal and this Court should not review it.

Notwithstanding the above, Hannas’ citation to *Mahler* regarding the adequacy of the trial court record is distinguishable. In *Mahler*, the Court was dealing with a record where the trial court granted attorney’s fees and there was a very real question whether the trial court had even examined the multiple, conflicting declarations supporting the fee request. In distinguishing the *Mahler* situation from the present case, the Supreme Court stated regarding the need for findings of facts and conclusions of law in *Mahler* at p. 435:

Consistent with such an admonition is the need for an adequate record on fee award decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Smith v. Dalton*, 58 Wash.App. 876, 795 P.2d 706 (1990); *Rhinehart v. Seattle Times*, 59 Wash.App. 332, 798 P.2d 1155 (1990); *Bentzen v. Demmons*, 68 Wash.App. 339, 842 P.2d 1015 (1993); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wash.App. 580, 871 P.2d 1066, *review denied*, 124 Wash.2d 1018, 881 P.2d 254 (1994). Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

This case exemplifies the rationale for such a rule. **The record discloses affidavits from four different counsel or firms who represented Mahler. We cannot discern from the record if the trial court thought the services of four different sets of attorneys were reasonable or essential to the successful outcome. We do not know if the trial court considered if there were any duplicative or unnecessary services. We do not know if the hourly rates were reasonable. We note the trial court found two different amounts reasonable, depending upon whether MAR 7.3 or *Olympic S.S.* [*Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991)] was the basis for fees.** (Emphasis added).

Unlike *Mahler*, the trial court received separate motions from Inland Power and each defendant supported by separate declarations and separate requests for attorney's fees and costs. Inland Power's declaration included billing records showing the descriptions, hourly increments and fees charged. (CP 895-945). After the trial court reviewed Inland Power's first declaration and accompanying fee and costs request, the trial judge questioned several entries therein and requested that Inland Power review and revise its request. Inland Power's counsel reviewed, redacted and provided a supplemental declaration and supplemental request for fees and costs. (CP 1017-1070). The Hannas presented no specific objections to individual entries or charges and they made only a general objection to the amount. Inland Power's supplemental declaration and supplemental billing

records were reviewed and approved by the trial court. Then, the trial court entered the Judgment. (CP 1084-1090).

So, the trial court met its burden of determining whether Inland Power's fee request was reasonable by inspecting the billing records and the fee and cost request and requiring Inland Power's counsel to adjust the fee requests by deleting certain entries and fees that the trial court determined were not recoverable.

**c. Hannas' Presented no admissible facts or law to support the arguments made to the trial court or on appeal.**

Hannas continue to misrepresent the summary judgment order entered by Judge Tompkins. It is correct that Judge Tompkins found that there was a land use decision. However, this "finding" doesn't support the Hannas' theories or arguments. Inland Power and the defendants agree that a land use decision occurred, as proven above by the County's Decision and Mr. Pederson's declarations. Inland Power concedes that the County approved the Bonds' request to split their property into three parcels and the County accepted the dedicated forty (40) foot easement for ingress, egress and utilities. But, that was the extent of the County's action and it was the only evidence before the trial court. Hannas offered no contradicting evidence and no explanation to support their argument that some portion of Judge Tompkins' order supports their arguments.

Instead, Hannas' make an implausible and unsupported leap of illogic from the entry of a portion of Judge Tompkins' order on summary judgment to the argument that the "Final Short Plat 'land use decision' does not depict the easements of the Defendants on its face . . ." so that Final Short Plat Map suddenly becomes a "land use decision" that must be enforced or appealed.<sup>2</sup>

Once again, the Hannas ignore the uncontroverted evidence shown in the County's Decision and in Mr. Pederson's declaration, which destroy the factual foundation of this argument. Hannas' approach seems to be that if they say it often enough it must be true while ignoring their legal duty to present admissible facts that support any argument. The trial court correctly recognized and rejected the serious flaws in their theory.

Hannas follow the above non-sequitur with yet another. The Hannas presume from the above "proof" that their "final plat map land use decision" triggers RCW 36.70C.030's "exclusive means of judicial review" of LUPA decisions. So, the Hannas assert, incorrectly, that Inland Power and the defendants' exclusive remedy was to "appeal" within 21 days the County's fictitious land use decision, which never occurred, which isn't supported or shown anywhere in the record, and which didn't

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<sup>2</sup> Appellant's Brief at p. 46.

affect Inland Power or any of the defendants' preexisting easements, roads or trails in any way. The Wikipedia definition of circular reasoning is:

Circular reasoning (Latin: *circulus in probando*, "circle in proving"; also known as circular logic) is a logical fallacy in which the reasoner begins with what they are trying to end with. The components of a circular argument are often logically valid because if the premises are true, the conclusion must be true. **Circular reasoning is not a formal logical fallacy but a pragmatic defect in an argument whereby the premises are just as much in need of proof or evidence as the conclusion, and as a consequence the argument fails to persuade.** (Emphasis added.)

The Hannas' argument is a perfect example of circular reasoning and demonstrates why the trial court rejected the Hannas' theory, deemed it to violate RCW 4.84.185 and granted Inland Power and the defendants' their attorney's fees and costs.

## **VI. ATTORNEY'S FEES AND COSTS ON APPEAL**

Pursuant to RCW 4.84.185 and RAP 18.9 (a), Inland Power requests its attorney's fees and costs on appeal. RCW 4.84.185 was cited above and Inland Power has demonstrated that the Hannas' claims lacked reasonable cause for the advancement of their claims.

Moreover, Inland Power is entitled to its attorney's fees and costs on appeal pursuant to RAP 18.9 (a), which states:

**(a) Sanctions.** The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of

proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

Hannas' appeal is frivolous and Inland Power should be awarded its attorney's fees and costs on appeal for the reasons set forth in this Supplemental response brief.

## VII. CONCLUSION

The trial court's orders granting summary judgment to Inland Power should be affirmed and Inland Power should be granted its attorney's fees on appeal pursuant to RCW 4.84.185 and RAP 18.9 (a).

DATED this 23<sup>rd</sup> day of July, 2015.

RANDALL | DANSKIN, P.S.

By: 

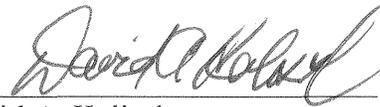
David Kulisch, WSBA # 18313  
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## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 23<sup>rd</sup> day of July, 2015, addressed to the following:

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