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State of Washington  
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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

Case No. 358381

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RST PARTNERSHIP, a general  
partnership

Appellant,  
v.

CHELAN COUNTY, a municipal  
corporation.

Respondent,

v.

NSJB ENTERPRISE, INC., a  
Washington corporation

Additional Parties.

NSJB ENTERPRISE, INC., a  
Washington corporation d/b/a  
EVERGREEN PRODUCTION

Appellant,  
v.

CHELAN COUNTY, a municipal  
corporation.

Respondent,

v.

RST PARTNERSHIP, a general  
partnership; POORMAN  
ENTERPRISES, LLC, a Washington  
limited liability company,

Additional Parties.

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APPELLANTS' JOINT REPLY BRIEF

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**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASE LAW:</u></b>	
<i>Broughton Lumber Co. v. BNSF Ry. Co.</i> , 174 Wn.2d 619, 635, 278 P.3d 173 (2012)	4.
<i>Durland v. San Juan Cty.</i> , 182 Wn.2d 55, 64, 340 P.3d 191, 196 (2014)	6.
<i>Habitat Watch vs. Skagit County</i> , 155 Wn.2d 397, 120 P.3 56 (2005)	5.
<i>Hamill v. Brooks</i> , 32 Wash. App. 150, 152, 646 P.2d 151, 152 (1982).	7.
<i>Irvin Water Dist. No. 6 v. Jackson P'ship</i> , 109 Wash. App. 113, 130, 34 P.3d 840, 850 (2001).	4.
<i>Planned Parenthood of Great Nw. v. Bloedow</i> , 187 Wn. App. 606, 621–22, 350 P.3d 660, 667 (2015)	4.
<i>Rest. Dev., Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 682, 80 P.3d 598 (2003)	3.
<i>Rivard v. State</i> , 168 Wn.2d 775, 783, 231 P.3d 186 (2010)	3., 4.
<i>Wash. State Coalition for the Homeless v. Dep't of Soc. &amp; Health Servs.</i> , 133 Wash.2d 894, 907–08, 949 P.2d 1291 (1997)	4.
<b><u>WASHINGTON STATUTES:</u></b>	
RCW 36.70C.040(2)	6., 7.
RCW 36.70C.040(5)	6., 8.
<b><u>OTHER AUTHORITIES:</u></b>	
Chelan County Code (CCC) 1.61.140	3.
CCC 1.61.140	4., 5.
CR 4(g)(5)	7., 8.
CR 4(j)	8.

## **1. INTRODUCTION**

The Brief of Respondent asks this Court to look the other way regarding its own compliance with codified service and delivery requirements; but argues that Appellants' bilateral, voluntary agreement regarding emailed service and delivery nonetheless deprives the Superior Court of jurisdiction.

First, there is a statute (a municipal ordinance) that directly details by whom, when and how Chelan County is to issue a decision of the hearing examiner. "Actual notice," which does not even substantially comply with this statute, cannot be used to replace it. Consequently, notice was never properly given and the Superior Court erred by finding that "actual knowledge" of the hearing examiner's decision justifies Chelan County's failure to follow its own code regarding service of such decisions.

Second, Respondent argues that Appellants' acceptance of emailed service of each others' land use petitions offends strict compliance with the provisions of LUPA, and therefore the Superior Court lacks jurisdiction. This is also incorrect, since Appellants' service of their land use petitions upon each other via email is consistent with the provisions of LUPA and Washington law. The Superior Court erred by finding that

counsel may not agree to serve and be served via email on behalf of their clients instead of by first class mail in a LUPA case.

## **2. FACTS**

Appellants restate the facts outlined in their Opening Brief.

## **3. ARGUMENT**

### **3.1 “Actual Knowledge” Of The Hearing Examiner’s Decision Does Not Justify Chelan County’s Failure To Properly Follow Its Own Code Regarding Service Of Such Decisions.**

Despite finding “the undisputed facts establish that the county did not follow its own code provision when it failed to mail copies of the final decision,” the Superior Court nonetheless treated this omission as harmless by stating:

[I]t is undisputed that the county’s attorney e-mailed a copy of the hearing examiner decision to counsel of record for both Appellants on June 6, 2017. In fact, one of the attorneys acknowledged receipt of the e-mail; the other attorney does not deny receiving the e-mail. Thus, it appears that the decision was issued on June 6, 2017.

*See Court’s Decision, at Page 3. CP 34 Trial No.: 17-2-00548-1; See also Brief of Respondent, at page 3.* The “other attorney” described in the quoted language above refers to Robert McVay, NSJB’s former counsel who did not participate in the LUPA appeal, and thus had no chance to testify or put information into the record. Consequently, the record in this matter is silent regarding receipt (or “actual notice”) of such an email by

Mr. McVay or NSJB itself. The Superior Court’s finding of “actual notice,” as such notice relates to NSJB can only be described as “opt-out notice” where the public engaging the County’s administrative process must prove the negative (e.g. here, that notice was not received). Particularly where there is a statute in place to guard against this type of confusion, this burden shifting is inappropriate.

Respondent argues in support of the Superior Court’s decision by suggesting that “actual notice” is sufficient for service of the decision, thus allowing the County to simply create new criteria on the fly and ignore its specific codified procedural requirements. The problem is that (1) there is no evidence in the record that NSJB’s former counsel or NSJB itself received “actual notice,” and (2) “actual notice” in this situation completely replaces a codified requirement directly related to service. The statute in question states:

[t]he department shall mail copies of the examiner’s decision by certified mail to the applicant and by regular first-class mail to other parties of record not later than three working days following the filing of a written decision by the examiner.

Chelan County Code 1.61.140.

This Court must construe statutes such that all of the language is given effect. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Moreover, a construction that would render a portion of a statute meaningless or superfluous should be avoided. *Rivard v.*

*State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). And finally, Courts avoid interpretations that yield unlikely, absurd or strained consequences. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 635, 278 P.3d 173 (2012); *Planned Parenthood of Great Nw. v. Bloodow*, 187 Wn. App. 606, 621–22, 350 P.3d 660, 667 (2015).

Using the context of this case law, it is difficult to understand how the Superior Court could completely ignore the specific procedural requirements outlined in CCC 1.61.140. It is well settled that the word “shall” is obligatory when used in a statute. *See e.g. Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wash.2d 894, 907–08, 949 P.2d 1291 (1997); *Irvin Water Dist. No. 6 v. Jackson P'ship*, 109 Wash. App. 113, 130, 34 P.3d 840, 850 (2001). Following the word “shall” in the statute is the requirement that Chelan County must “mail copies of the examiner’s decision by certified mail to the applicant and by regular first-class mail to other parties of record . . . .” The Superior Court simply cannot read this obligation out of the ordinance altogether. The requirement that the applicant receive notice of the hearing examiner’s decision by certified mail was inserted by County’s legislative body to ensure consistency and predictability in the land use appeal process. Allowing the executive branch (e.g. the Planning Department and/or the County Attorney’s Office) to ignore it completely defeats this purpose. To interpret this statute in a manner that would allow the County to disregard

these procedural safeguards would render the majority of the language of CCC 1.61.140 meaningless and without effect, and would yield absurd and strained consequences for the Appellants in this matter who would otherwise have their cases dismissed for lack of jurisdiction by the Superior Court.

The Superior Court and Respondent use the case of *Habitat Watch vs. Skagit County*, 155 Wn.2d 397, 120 P.3 56 (2005) to support the proposition that “actual knowledge” of the decision from the Chelan County Hearing Examiner is sufficient to begin the 21-day statute of limitations under LUPA. *See* Court’s Decision, at Page 4. CP 34 Trial No.: 17-2-00548-1; Brief of Respondent, at page 13-14. But unlike the *Habitat Watch* case, the instant case has an actual statute that specifically directs the County regarding dissemination of the hearing examiner’s decisions. The court in *Habitat Watch* did not opine that “actual notice” could replace an existing statutory obligation. The case of *Habitat Watch* is inapposite here.

Finally, it should be noted that Respondent doesn’t argue, nor could it, that there was “substantial compliance” with CCC 1.61.140, as emailed notice completely offends the direct language of the statute requiring a mailing by certified mail.

In short, the Brief of Respondent doesn’t raise any support for the proposition that Chelan County can ignore its own service requirements by

creating new, ad-hoc standards for compliance that act to ambush a putative appellant who is otherwise waiting for and expecting full statutory compliance. Moreover, since there is no substantiation in the record to support the suggestion that NSJB had “actual notice” of the hearing examiner’s decision, the Superior Court’s decision to find otherwise must be reversed.

**3.2 The Superior Court Erred By Finding That Counsel May Not Be Served Via Email On Behalf Of Their Clients In A LUPA Case.**

Respondent’s briefing argues that the Chelan County Superior Court was justified in its finding that it lacked jurisdiction over Appellant’s Land Use Petitions because RCW 36.70C.040(2) required Appellants to mail copies of their Petitions to each other via first class mail rather than emailing them for the sake of convenience. *See* Court’s Decision, at Page 4. CP 34 Trial No.: 17-2-00548-1.

However, LUPA and Washington case law allow Appellants to serve each other via email. Context is important. An appeal under LUPA invokes the appellate jurisdiction of the Superior Court. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 64, 340 P.3d 191, 196 (2014). As such, LUPA treats service of a LUPA petition in a much more casual manner than when the Superior Court’s original jurisdiction is invoked. Specifically, RCW 36.70C.040(5) provides that service of a LUPA petition upon an Additional Party can be accomplished simply by placing a copy of the

petition in first class mail. This is because Additional Parties in a LUPA action voluntarily participated in the underlying administrative action, and are often actively participating in the preparation of a subsequent LUPA appeal, or are at the very least are not caught off guard by the potential for a LUPA appeal as they have been engaged in the administrative process for months by that point.

Attorneys for Appellants timely filed their LUPA petitions with the Chelan County Superior Court on June 26, 2017 [*See* Court's Decision, at Page 2 CP 34 Trial No.: 17-2-00548-1], and personally served the petitions on the Chelan County Auditor and each other via email on the same day. *See* Declaration of Taud Hume at Paragraph 3-6. CP 22 Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 5-7. CP 23 Trial No.: 17-2-00548-1. Nothing more is required to invoke the Court's jurisdiction under RCW 36.70C.040(2). As pointed out in Appellants' Opening Brief, LUPA service requirements incorporate the Washington civil rules. CR 4(g)(5) specifically provides that proof of service of process is demonstrated by "[t]he written acceptance or admission of the defendant, the defendant's agent or attorney." *Hamill v. Brooks*, 32 Wash. App. 150, 152, 646 P.2d 151, 152 (1982). There are declarations in the record from Appellants respective attorneys attesting to the dissemination and acceptance of service on behalf of each their respective clients. *See* Declaration of Taud Hume at Paragraph 5. CP 22

Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 7. CP 23 Trial No.: 17-2-00548-1.

It is important to note that Respondent doesn't argue that Appellants' agreement regarding service worked to prejudice it. Respondent doesn't argue that it wasn't properly served. And Respondent doesn't dispute that Appellants voluntarily consented to the jurisdiction of the Superior Court.

Because RCW 36.70C.040(5), CR 4(g)(5), CR 4(j) and Washington law allow Appellants to accept service of the land use petitions on behalf of their respective clients, the decision of the Superior Court dismissing these petitions for failure to comply with LUPA should be reversed.

#### **4. CONCLUSION**

How the Court should treat the emailing of documents is a central issue in this case. But there is a difference between the emailed notice of decision by Respondent and the emailing of LUPA petitions as between Appellants.

The stakes are high for a putative appellant who is trying to understand when the hearing examiner's decision is officially "issued," as that event starts the running of the 21-day statute of limitations period for an appeal under LUPA. The Superior Court and Respondents argue that despite the fact that there is no evidence in the record demonstrating

whether notice was actually received by NJSB or its counsel to constitute “actual notice”; and despite the fact that there is a specific statute detailing exactly how the County is required to provide notice of the hearing examiner’s decisions; and regardless of what dire consequences this ultimately produces for the Appellants; the County was justified in emailing the decision of the hearing examiner to counsel.

Conversely, even when the LUPA petitions have been filed and County has been correctly served, the Court and the County argue that Appellant’s LUPA petitions should be dismissed where Appellants cooperated on the drafting and filing of their respective LUPA petitions and agreed to accept service of those petitions via email instead of first class mail.

However, Washington law does not allow Respondent to ignore its own code, but does grant the Appellants the discretion to consent to emailed service of LUPA petitions instead of having to receive them through the mail. Based upon the foregoing arguments and the pleadings and papers filed herein, Appellants respectfully request the decision of the Chelan County Superior Court be reversed.

Respectfully submitted this 5<sup>th</sup> day of November 2018.

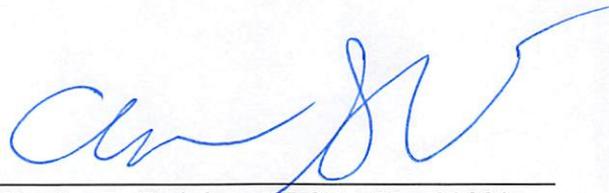
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