

FILED
Court of Appeals
Division III
State of Washington
8/9/2018 2:09 PM

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

Case No. 358381

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.

APPELLANTS' JOINT OPENING BRIEF

Charles R. Steinberg, WSBA No. 23980
The Steinberg Law Firm, P.S.
323 N Miller Street
Wenatchee, Washington 98801
Telephone: (509) 662-3202

Attorneys for Appellants RST Partnership

Taudd A. Hume, WSBA No. 33529
PARSONS | BURNETT | BJORDAHL | HUME, LLP
Steam Plant Square, Suite 225
159 S. Lincoln Street
Spokane, Washington 99201
Telephone: (509) 252-5066

Attorneys for Appellants NSJB ENTERPRISES, INC.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii.
1. INTRODUCTION	1.
2. ASSIGNMENTS OF ERROR	2.
2.1 Assignment of Errors	2.
2.2 Issues Pertaining to Assignments of Errors	2.
3. STATEMENT OF THE CASE	3.
4. STANDARD OF REVIEW	6.
5. ARGUMENT AND AUTHORITIES	8.
6. CONCLUSION	17.

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON CASE LAW:</u>	
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)	14.
<i>Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island</i> , 106 Wn.App.461, 24 P.3d 1079 (2001)	8.
<i>City of Spokane v. Fischer</i> , 110 Wn.2d 541, 754 P.2d 1241 (1988)	7.
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	7.
<i>Durland v. San Juan Cty.</i> , 175 Wash. App. 316, 305 P.3d 246 (2013)	11, 13.
<i>Durocher v. King County</i> , 80 Wn.2d 139 (1972), 492 P.2d 547 (1972)	13.
<i>Ha v. Signal Elec., Inc.</i> , 182 Wash. App. 436, 332 P.3d 991 (2014)	16.
<i>Habitat Watch v. Skagit County</i> , 155 Wash.2d 397, 120 P.3d 56 (2005)	8.
<i>Haller v. Wallis</i> , 89 Wash.2d 539, 573 P.2d 1302 (1978)	16.
<i>Hamill v. Brooks</i> , 32 Wash.App. 150, 646 P.2d 151 (1982)	15.
<i>Heller Bldg., LLC (HBC) v. City of Bellevue</i> , 147 Wash.App. 46, 194 P.3d 264 (2008)	11, 13.
<i>In re Welfare of H.S.</i> , 94 Wn. App. 511, 973 P.2d 474 (1999)	14.
<i>Isla Verde Int'l Holdings Inc. v. City of Camas</i> , 146 Wn.2d, 740, 49 P.3d 867 (2002)	7.
<i>Overhulse Ass'n v. Thurston County</i> , 94 Wn.App. 593, 972 P.2d 470 (1999)	14.

<i>Professional Marine Co. v. Those Certain Underwriters at Lloyd's</i> , 118 Wash. App. 694, 77 P.3d 658 (2003)	16.
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wash.2d 674, 41 P.3d 1175 (2002)	16.
<i>Rodriguez v. James-Jackson</i> , 127 Wash. App. 139, 111 P.3d 271 (2005)	8.
<i>Russell v. Maas</i> , 166 Wash. App. 885, 272 P.3d 273 (2012)	16.
<i>Samuel's Furniture, Inc. v. Dep't of Ecology</i> , 147 Wash.2d 440, 54 P.3d 1194 (2002)	10.
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003) (citing <i>Nat'l Elec. Contractors Ass'n v. Riveland</i> , 138 Wn.2d 9, 978 P.2d 481 (1999))	7.
<i>State v. Wentz</i> , 149 Wn.2d 342, 68 P.3d 282 (2003)	6.
<i>Thayer v. Edmonds</i> , 8 Wash. App. 36, 503 P.2d 1110 (1972)	15.
<i>WCHS, Inc. v. City of Lynnwood</i> , 120 Wash.App. 668, 86 P.3d 1169 (2004)	11-13.
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wash.2d 169, 4 P.3d 123 (2000))	8.

WASHINGTON STATUTES:

RCW 36.70.670	12.
RCW 36.70C	2, 5, 10.
RCW 36.70C.010	13.
RCW 36.70C.020(2)	12.
RCW 36.70C.020(2)(c)	10.
RCW 36.70C.030	10.
RCW 36.70C.040	1, 3.
RCW 36.70C.040(2)	14, 17.

RCW 36.70C.040(5)	15, 17.
RCW 36.70C.130(1)(b)	7.

OTHER AUTHORITIES:

Chelan County Code 1.61.140	3, 9, 10, 13.
CCC 14.98.530	9.
CR4	2.
CR4.Process, 3A Wash. Prac., Rules Practice CR4 (6th ed.)	14.
CR4 (g)(5)	15, 17.
CR4(j)	15, 17.

1. INTRODUCTION

Appellant NSJB Enterprise, Inc. d/b/a Evergreen Production (herein “Evergreen” or “Tenant”) is a tenant in an industrial building located in Chelan County, which is owned by Appellant RST Partnership (herein “RST” or “Landlord”) (Landlord and Tenant are collectively referred to herein as the “Appellants”). Tenant leases the building from Landlord for the purpose of operating a cannabis growing and processing business under a Washington State Tier II license.

Via its January 4, 2018 Order of Dismissal With Prejudice, the Chelan County Superior Court granted Chelan County’s (herein “County” or “Respondent”) Motion to Dismiss by issuing a contradictory ruling. On the one hand, the Court found that it was not imperative for Chelan County to comply with its own code requiring a decision of the Chelan County Hearing Examiner to be issued by certified and regular mail to the Appellants. On the other hand, the Court held that it was nevertheless essential for Appellants to comply with the service provisions of RCW 36.70C.040, when attorneys representing both the Landlord and the Tenant waived service of process on behalf of their respective clients and accepted emailed copies of their own Land Use Petitions rather than having those copies be sent via first class mail.

In short, the Court found that Appellants' attorneys were authorized to accept emailed notification of the hearing examiner's decision, but were not authorized to send and receive emailed copies of their respective LUPA petitions to and from each other. It is undisputed that both of Appellants' land use petitions were timely filed with the Superior Court and served on Chelan County.

The Superior Court erred in its conflicting conclusions of law because (1) the failure of Chelan County to observe its own code regarding dissemination of the hearing examiner's decision means that the decision is not yet a "final determination" subject to review under Washington's Land Use Petition Act under RCW 36.70C, and (2) CR4 allows for service of process to be accepted and acknowledged by an attorney representing a party in a LUPA dispute.

2. ASSIGNMENTS OF ERRORS

2.1 Assignments of Errors

1. The Superior Court erred by finding that "actual knowledge" of the hearing examiner's decision justifies Chelan County's failure to properly follow its own code regarding service of such decisions.
2. The Superior Court erred by finding that counsel may not be served via email on behalf of their clients in a LUPA case.

2.2 Issues Pertaining to Assignments of Errors

1. Whether the Chelan County Superior Court erred by not finding that Chelan County must adhere to its own

process for disseminating a decision by the Hearing Examiner.

2. Whether the Chelan County Superior Court erred by finding that service of process upon an “Additional Party” under RCW 36.70C.040 can not be waived by counsel who accepted an emailed copy of the Land Use Petition rather than requiring it to be sent via first class mail.

3. STATEMENT OF THE CASE

The facts in this case are largely undisputed. On or about February 10, 2017, the County delivered a Notice and Order to Appellants asserting various violations related to the use of the site for production and processing of cannabis. *See* Court’s Decision, at Page 2 CP 34 Trial No.: 17-2-00548-1.

On February 24, 2017 Appellants appealed this Notice and Order to the Chelan County Hearing Examiner. *See* Land Use Petition, at Page 7. CP 2 Trial No.: 17-2-00548-1. On May 17, 2017 a public hearing was held before the Chelan County Hearing Examiner, who issued his Findings of Fact, Conclusions of Law and Decision on June 5, 2017 denying Appellants’ appeal and affirming the February 10, 2017 Notice and Order. *See* Land Use Petition, at Page 7. CP 2 Trial No.: 17-2-00548-1.

Chelan County Code 1.61.140, entitled “Notice of Hearing Examiner Decisions,” describes how a putative appellant can expect to receive “official” notice of Hearing Examiner decisions: “[t]he [Community Development] 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."

However, on June 6, 2017 Deputy Prosecutor April Hare emailed a copy of the Hearing Examiner's decision to Robert McVay (Evergreen's previous counsel) and Charles Steinberg (as counsel for RST). This was presumably done based upon the County's assumption that the attorneys were authorized to receive notice on behalf of their respective clients. *See Court's Decision*, at Page 2 CP 34 Trial No.: 17-2-00548-1.

Then, on June 13, 2017 the Chelan County Community Development Department sent another copy of the hearing examiner's decision in an email from the Community Development Department to the attorneys entitled "Administrative Appeal File: CE2016-0040/AA2017-060," which stated:

Please find attached the Hearing Examiner's Decision from the public hearing dated May 17, 2017, regarding RST Enterprises' Administrative Appeal.

If you have any questions pertaining to this decision please feel free to contact the Community development Department at 509-667-6225.

This email attached a copy of the hearing examiner's decision. *See Declaration of Charles Steinberg*, at Paragraph 3. CP 23 Trial No.: 17-2-00548-1. It is undisputed that no copy of the hearing examiner's decision was ever sent by certified mail to the applicant or by regular first-class mail to any other parties of record. *See Court's Decision*, at Page 3. CP 34

Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 4. CP 23 Trial No.: 17-2-00548-1.

On June 26, 2017 Appellant Evergreen filed a petition, pursuant to Washington's Land Use Petition Act ("LUPA" - Chapter 36.70C RCW), as Superior Court Cause No. 17-2-00548-1. On June 26, 2017 Appellant RST also filed its own LUPA petition as Superior Court Cause No. 17-2-00549-0. *See* Court's Decision, at Page 2 CP 34 Trial No.: 17-2-00548-1.

Counsel for Appellant Evergreen and Appellant RST had been in contact regarding the LUPA filings and were well aware of each other's pending petitions. *See* Declaration of Taudd Hume at Paragraph 3. CP 22 Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 5. CP 23 Trial No.: 17-2-00548-1. In fact, because counsel for Evergreen is located out of town, counsel of RST agreed to have his staff physically served a copy of Evergreen's LUPA petition on the Chelan County Auditor. *See* Declaration of Taudd Hume at Paragraph 4. CP 22 Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 6. CP 23 Trial No.: 17-2-00548-1. A copy of Evergreen's LUPA petition was emailed to counsel for RST on June 26, 2017 and his staff personally served the Chelan County Auditor's Office with Evergreen's LUPA Petition on June 26, 2017. *See* Declaration of Taudd 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.

Both counsel for RST and Evergreen had agreed to waive service of original process on each other, since they were cooperating and coordinating on their respective LUPA petitions. *See* Declaration of Taudd Hume, at Paragraph 4. CP 22 Trial No.: 17-2-00548-1; *see also* Declaration of Charles Steinberg, at Paragraph 5. CP 23 Trial No.: 17-2-00548-1. Counsel agreed to electronic service of process, and acknowledged such in our agreements, which were memorialized in the declarations on file with the court. *Id.* RST transmitted the conformed copies of its LUPA petition to counsel for Evergreen on June 28, 2018. *See* Declaration of Charles Steinberg, at Paragraph 5. CP 23 Trial No.: 17-2-00548-1. It is undisputed that the Appellants' respective LUPA petitions were filed with the Superior Court and served on Chelan County in a timely fashion.

4. STANDARD OF REVIEW

In the instant case the Appellate Court is asked to review a dispositive determination by the Superior Court regarding procedural issues, and not the underlying decision of the Hearing Examiner pursuant to RCW 36.70C.130(1). Interpretation of a statute is a question of law that this court reviews de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (*citing City of Pasco v. Pub. Emp't Relations Comm'n*, 119

Wn.2d 504, 507, 833 P.2d 381 (1992)). The duty of the Court in conducting statutory interpretation is to “discern and implement” the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Where the plain language of a statute is unambiguous, and legislative intent is therefore apparent, the court will not construe the statute otherwise. *Id.* However, plain meaning may be gleaned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The same principles apply to interpretation of municipal or county ordinances. *City of Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988) (citing *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982)).

The appellate court's review of any claimed error of law in the Superior Court's interpretation of an ordinance is undertaken de novo. *Isla Verde Int'l Holdings Inc. v. City of Camas*, 146 Wn.2d, 740, 751, 49 P.3d 867(2002); RCW 36.70C.130(1)(b). Additionally, the Superior Court's decision may be reversed where it's application of the law to the facts is clearly erroneous. Under the “clearly erroneous application” test, the court applies the law to the facts and will overturn the land use decision if the court is left with a “definite and firm conviction” that the

decision maker committed a mistake. *Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island*, 106 Wn.App.461, 473, 24 P.3d 1079 (2001). The trial court's ruling on whether a plaintiff has satisfied the requirements for service is a question of law, reviewed by the appellate court de novo. *Rodriguez v. James-Jackson*, 127 Wash. App. 139, 111 P.3d 271 (2005).

Finally, in reviewing an administrative decision (e.g. the decision of Chelan County to disseminate the hearing examiner's decision via email from the prosecuting attorney's office), the appellate court stands in the same position as the superior court. *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 405–06, 120 P.3d 56 (2005); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000)).

5. ARGUMENT AND AUTHORITIES

5.1 The Hearing Examiner's Land Use Decision Is Not A "Final Determination" Subject To Appeal Under LUPA Unless Chelan County Has Complied With The Codified Process For Disseminating It.

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 because neither counsel for Appellants disputed actually receiving a copy via email. *See* Court's Decision, at Page 3. CP 34 Trial No.: 17-2-00548-1. The Superior Court, citing *Habitat Watch v. Skagit*

County, 155 Wn.2d 397, 407 (2005), found that this service was sufficient to give Appellants the “acquisition of knowledge . . . from which notice ought to be inferred as a matter of law.” *See* Court’s Decision, at Page 4. CP 34 Trial No.: 17-2-00548-1.

However, under Washington law the County must comply with its own process before the Hearing Examiner’s decision will be considered a “Final Determination” subject to appeal under the Land Use Petition Act.

The Chelan County Code contains very specific requirements for how the hearing examiner’s decisions are to be sent to appealing parties. Chelan County Code 1.61.140, entitled “Notice of examiner’s decision” states that “the 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.” This statute is important as it helps a putative appellant understand exactly when the 21-day LUPA appeal clock will begin ticking, by detailing: (a) who to expect the decision from, and (b) how it will arrive. First, the statute says that the official decision will come from the “department,” which is defined elsewhere in the County’s code as the Community Development Department. CCC. 14.98.530. Second, the statute tells an appellant that the decision will be mailed “by certified mail to the applicant and by regular first class mail to all other parties of record.”

The obvious danger here is that a putative appellant is informed by the statute (CCC 1.61.140) to expect that the 21-day LUPA appeal period will begin upon the issuance of the decision as described therein. Instead, the County's deceptive practice of emailing the decision leaves an appellant uncertain. Does the June 6, 2017 email communication from the deputy county attorney start the 21-day clock? Does the email communication from the Chelan County Community Development Department start the 21-day clock? Or, is the appellant waiting for full compliance with the statute before the 21-day clock begins? Doesn't an appellant have the right to rely upon the County acting consistently with its own code?

Washington's Land Use Petition Act (Chapter 36.70C RCW – "LUPA") is the "exclusive means of judicial review of land use decisions." RCW 36.70C.030. Relevant to the instant case, RCW 36.70C.020(2)(c) defines a "Land Use Decision" as "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: . . . (c) [t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property." "[A] final decision is 'one which leaves nothing open to further dispute and which sets at rest cause of action between parties.'" *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wash.2d 440,

452, 54 P.3d 1194 (2002) (quoting Black's Law Dictionary 567 (5th ed.1979)).

Where a local jurisdiction sets forth a process for making a land use decision, the land use decision is not final unless the jurisdiction has complied with the process and the entire process is complete. *See Heller Bldg., LLC (HBC) v. City of Bellevue*, 147 Wash.App. 46, 55–56, 194 P.3d 264 (2008) (stop work order not final land use decision where it did not contain information required by city code, which would have informed landowner of substance of violations in a way that would allow homeowner to correct violation or make informed decision whether to challenge city's decision); *WCHS, Inc. v. City of Lynnwood*, 120 Wash.App. 668, 679–80, 86 P.3d 1169 (2004) (letters from city to landowner not final land use decisions because, among other reasons, they did not comply with city's own code requirements for distributing notice of decisions); *see also In Durland v. San Juan Cty.*, 171 Wash. App. 1019 (2012), *as amended on denial of reconsideration* (Jan. 22, 2013)(Court agreed that pursuant to *Heller Bldg* and *WCHS*, under San Juan County Code a “final determination,” which would then be appealable under LUPA, would require the County to fully adhere to the process for issuing compliance plans).

In *WCHS* the Court held that the City’s letter regarding a building permit application did not constitute a final appealable decision because

the letter did not comply with the City's own code as it "was sent by standard mail to the architect for WCHS, with no copy to WCHS, and was not sent in accordance with other requirements for distributing notice of decisions." *WCHS*, 120 Wn.App. at 679 – 680; 86 P.3d at 1175.

In the instant case, the Superior Court's decision states that *WCHS* was inapplicable here because "there is no issue as to the sufficiency of the hearing examiner's decision." *See* Court's Decision, at Page 3. CP 34 Trial No.: 17-2-00548-1. This statement misunderstands the application of the *WCHS* case as Appellants did argue, and the Court noted in its opinion, that because of the failure to follow prescribed processes no appealable decision had yet been issued. *See* Court's Decision, at Page 3. CP 34 Trial No.: 17-2-00548-1. Just like in *WCHS*, in this case the Court should find that because Chelan County failed to follow its adopted procedures means that the hearing examiner's decision emailed by a deputy prosecuting attorney is not a "final determination" leading to a "Land Use Decision" as defined by RCW 36.70C.020(2), which would otherwise trigger review under LUPA.

Moreover, the enabling statute - RCW 36.70.670 - left to the board of county commissioners (i.e., the legislative body) the power to administer zoning:

The board may determine and establish administrative rules and procedures for the application and enforcement of official controls, and may assign or delegate such

administrative functions, powers and duties to such department or official as may be appropriate.

Washington courts acknowledge that this authority is solely vested within the legislative branch, unless assigned or delegated. *Durocher v. King Cty.*, 80 Wash. 2d 139, 146, 492 P.2d 547, 551 (1972).

Here, the legislative body of Chelan County has not authorized service of the hearing examiner's decision in any other manner. The County cannot legislatively adopt statutes, thus creating an expectation from the public, and then have the executive branch choose to ignore them. Rather, the County must maintain consistency in the observance of its regulations, and cannot arbitrarily decide when it wants to comply with something as important as service of the hearing examiner's decision¹. This type of inconsistent and unpredictable statutory adherence is exactly what the Land Use Petition Act attempted to address:

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.

RCW 36.70C.010.

Pursuant to *Heller*, *WCHS* and *Durland*, no "final determination" has been made that is appealable under LUPA, and this Court should

¹ Chelan County's compliance with CCC 1.61.140 is inconsistent at best. For example, a recent decision by the hearing examiner (Seven Hills appeal) was mailed by the Community Development Department to counsel for Seven Hills and there was no emailing of the decision by the County Attorney's office. *See e.g.* Declaration of Taud A. Hume, at Paragraph 6. CP 22. This also does not comply with the statutory

reverse the decision of the Chelan County Superior Court decision to hold otherwise.

5.2 Washington Law Allows Appellants To Be Served Through Their Respective Lawyers.

The Chelan County Superior Court held 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. In support of this determination the Court analogized the instant matter to the case of *Overhulse Ass’n v. Thurston County*, 94 Wn.App. 593 (1999)² and held that “petitioners likewise failed to comply with the requirements of the statute in serving the necessary parties.”

The Superior Court is wrong. Notice is a matter of personal jurisdiction. *In re Welfare of H.S.*, 94 Wn. App. 511, 526, 973 P.2d 474 (Div. 3 1999); CR4.Process, 3A Wash. Prac., Rules Practice CR 4 (6th ed.). Personal jurisdiction is a waiveable right. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14, 105 S.Ct. 2174, 2182 n. 14, 85 L.Ed.2d 528 (1985).

² The Court’s reliance on *Overhulse* is misplaced as the Petitioner in *Overhulse* served an entirely incorrect party – the County Commissioners instead of the Auditor. *Overhulse* did not address the situation, like here, where a petition was served on the correct party, but sent via email to an attorney agreeing to waive service of process on behalf of his client.

LUPA allows service on all parties, other than the local jurisdiction, “in accordance with the superior court civil rules or by first-class mail” RCW 36.70C.040(5). 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) (service sufficient where defendant admitted in a deposition that he had received the summons and compliant). In the instant case, Appellants’ agreement to electronically serve process upon each other comports with due process, CR 4(g)(5) and the service provisions of RCW 36.70C.040.

In addition CR 4 also states “these rules do not exclude the use of other forms of process authorized by law.” CR 4(j). In fact, service of process is legally recognized in a number of different ways. For example, a defendant is under no obligation to arrange for service of process at a given time and place, or in a given manner. However, if the defendant voluntarily does so, and the process server delivers the papers in the agreed manner, service is valid even though the papers are not personally handed to the defendant. *See Thayer v. Edmonds*, 8 Wash. App. 36, 503 P.2d 1110 (1972) (agreement to leave papers in doorway).

Or, a contract itself may specify the manner of serving one or both parties, in the event of litigation arising out of the contract. In general, courts will enforce such agreements, and service in conformance with the

contract will be valid even if accomplished in a manner not authorized by statute. *Professional Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wash. App. 694, 77 P.3d 658 (2003) (in insurance dispute, service by delivery to insurer's law firm in New York, as specified in insurance policy, was valid even though not in conformance with statutes governing service of process; court refused to vacate default judgment against insurer).

Attorneys routinely accept service of process on behalf of their clients. It is well settled law in Washington that once a party has designated an attorney to represent the party in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention. *Haller v. Wallis*, 89 Wash.2d 539, 547, 573 P.2d 1302 (1978). Absent fraud, the actions of an attorney authorized to appear for a client are generally binding on the client. *Haller*, 89 Wash.2d at 545–47, 573 P.2d 1302; *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wash.2d 674, 679, 41 P.3d 1175 (2002); *Russell v. Maas*, 166 Wash. App. 885, 889–90, 272 P.3d 273, 276 (2012); *Ha v. Signal Elec., Inc.*, 182 Wash. App. 436, 447, 332 P.3d 991, 996 (2014)(finding that attorney had authority to accept service of process on behalf of client).

There is no dispute that Appellants timely filed their LUPA petitions on June 26, 2017, and served the petitions on each other through their respective attorneys. Nothing more is required to invoke the Court's jurisdiction under RCW 36.70C.040(2).

Furthermore, there are no facts in the record that the County or the Appellants were prejudiced by the emailing of the petitions in violations of due process considerations. In fact, the Appellants, through the filing of their own respective (and virtually identical) land use petitions, were consenting to the jurisdiction of the court – not trying to evade it.

6. CONCLUSION

Chelan County must follow its own statutorily adopted administrative processes. The hearing examiner's land use decision is not a "final determination" subject to appeal under LUPA unless Chelan County has complied with the codified process for disseminating it. As such, Chelan County has yet to legally disseminate the hearing examiner's decision in this matter, which would otherwise trigger an appeal under the Land Use Petition Act. Moreover, RCW 36.70C.040(5), CR 4(g)(5), CR4(j) and Washington law allow Appellants to accept service of the land use petitions on behalf of their clients – thus subjecting them to the jurisdiction of the Superior Court.

Appellants respectfully request the following relief from the Court:

1. That the Court reverse the decision of the Superior Court related to the County's failure to adhere to its own administrative procedures, and recognize that such a failure means that a "final determination" has yet to be issued that would otherwise be appealable under LUPA.
2. That the Court reverse the decision of the Superior Court which failed to recognize that counsel for Appellants are legally able to serve their respective LUPA petitions via email upon each other.
3. That Appellants be awarded their costs and attorneys fees incurred herein.
4. That Appellants be granted such further relief as the Court may deem just, equitable and proper.

Respectfully submitted this 9th day of August 2018.

PARSONS | BURNETT | BJORDAHL | HUME, P.S.



Taud A. Hume, WSBA No. 33529
Attorneys for Appellant NSJB Enterprise, Inc. d/b/a
Evergreen Production

STEINBERG LAW FIRM, LLP



Charles R. Steinberg, WSBA No. 23980
Attorneys for Appellant RST Partnership

THE STEINBERG LAW FIRM PS

August 09, 2018 - 2:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35838-1
Appellate Court Case Title: RST Partnership v. Chelan County and NSJB Enterprise, Inc., et al
Superior Court Case Number: 17-2-00549-0

The following documents have been uploaded:

- 358381_Briefs_20180809140847D3444765_4709.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Joint Opening Brief.pdf

A copy of the uploaded files will be sent to:

- April.Hare@co.chelan.wa.us
- Subreena@ncwlaw.com
- Trey@ncwlaw.com
- julie@mjbe.com
- kharper@mjbe.com
- prosecuting.attorney@co.chelan.wa.us
- thume@pblaw.biz

Comments:

Appellants RST Partnership and NSJB Enterprise, Inc. Joint Opening Brief

Sender Name: Charles Steinberg - Email: charles@ncwlaw.com
Address:
323 N MILLER ST
WENATCHEE, WA, 98801-1905
Phone: 509-662-3202

Note: The Filing Id is 20180809140847D3444765