

83151-3

FILED
JUN - 1 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
09 MAY 28 PM 1:40
STATE OF WASHINGTON
BY *DL*
DEPUTY

NO. 37281-9-II.

DIVISION II COURT OF APPEALS OF THE STATE OF
WASHINGTON

TED SPICE AND PLEXUS DEVELOPMENT, LLC,
Petitioner

v.

PIERCE COUNTY, a political subdivision,
and
CITY OF PUYALLUP, a municipal corporation
Respondents

PETITION FOR REVIEW BY THE SUPREME COURT

Carolyn A. Lake, WSBA #13980
Goodstein Law Group PLLC
1001 Pacific Ave, Ste 400
Tacoma, WA 98402
(253) 779-4000
Attorney for Petitioners

ORIGINAL

TABLE OF CONTENTS

I: IDENTITY OF PETITIONER.....1

II. RELIEF REQUESTED.....1

III. COURT OF APPEALS DECISION.....1

IV. ISSUES PRESENTED FOR REVIEW.....1

V. STATEMENT OF THE CASE2

VI. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED.....4

 A. Decision Conflicts with Supreme Court, Federal Case law, and
 Division I Court of Appeals.....5

 B. Case Involves Issue of Substantial Public Interest That Should Be
 Determined By The Supreme Court..... 11

VII. CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy., 96 Wash.2d 201, 208, 634 P.2d 853 (1981)13

Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 965 (9th Cir.2007)..5, 8

Harbor Lands LP v. City of Blaine, 146 Wash.App. 589, 191 P.3d 1282 Wash.App. Div. 1, 20085, 9

Hart v. Dep't of Social & Health Servs., 111 Wash.2d 445, 448, 759 P.2d 1206 (1988).....12

In re Cross, supra, 99 Wash.2d at 377, 662 P.2d 828 (citing *Sorenson v. Bellingham*, 80 Wash.2d at 558, 496 P.2d 512)13

Keron v. Namer Inv. Corp. (1971) 4 Wash.App. 809, 484 P.2d 11527

Leonard v. Bothell, 87 Wash.2d 847, 848, 557 P.2d 1306 (1976)13

Mall, Inc. v. Seattle, 108 Wash.2d 369, 386, 739 P.2d 668 (1987).....13

Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wash.2d 255, 264, 956 P.2d 312 (1998)8

Purchase v. Meyer, 108 Wash.2d 220, 229-30, 737 P.2d 661 (1987).....13

Sorenson v. Bellingham, 80 Wash.2d 547, 558, 496 P.2d 512 (1972)12

Sutton v. Hirvonen, 113 Wash.2d 1, 9-10, 775 P.2d 448 (1989).....8

United States v. Munsingwear, Inc., 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950).....8

<i>Wachovia SBA Lending v. Kraft</i> , 138 Wn. App. 854, 861, 158 P.3d 1271 (2007).....	6
<i>Wiles v. Department of Labor & Industries</i> (1949) 34 Wash.2d 714, 209 P.2d 462	5, 6

STATUTES

36.70C RCW	2, 9
------------------	------

RULES

CR 41(b)	2, 3
CR 60(b)(5) and (11)	3
CR41	7
RAP 12.3(d).....	11
RAP 13.4(b).....	1, 4
RAP 13.4(b)(4).....	11

I. IDENTITY OF PETITIONER

Petitioners Ted Spice & Plexus Development asks for the relief designated in Part II. Petitioners are represented by the Goodstein Law Group PLLC.

II. RELIF REQUESTED.

Petitioners ask the Supreme Court to accept review of the decision of the Court of Appeals, Division II in Case No. filed March 31, 2009, and Decision Denying Petitioners' Request for Reconsideration filed May 1, 2009. In ruling the appeal frivolous and by awarding fees and costs, the Division II Court makes errors of fact and law. The decision meets the criteria for RAP 13.4(b). The Washington Supreme Court should accept review, reverse that portion of the Division II opinion which found the appeal frivolous and should vacate the attorney fee and cost award.

III. COURT OF APPEALS DECISION

The decision of the Court of Appeals, Division II in Case No. filed March 31, 2009, and Decision Denying Petitioners' Request for Reconsideration filed May 1, 2009 are attached in the Appendix.

IV. ISSUES PRESENTED FOR REVIEW

A. Decision Conflicts With Supreme Court Finding That Courts Have A Duty To Annul Void Judgments

B. Decision Conflicts With Federal And Washington Law Allowing Equitable Vacatur Of Judgments That Have Become Moot But Which May Nonetheless Have Claim Or Issue Preclusive Effects

C. Decision Directly Conflicts with Recent Division I Ruling Which Vacated a Superior Court LUPA Judgment Because Case was Moot at the Time Judgment Entered

D. Case Involves Issue of Substantial Public Interest That Should Be Determined By the Supreme Court

V. STATEMENT OF THE CASE

The facts upon which this motion is based supplement the omissions to the facts as contained in the Division II Court's Opinion, which is cited to as "Opinion." The Division II Court correctly describes that on November 17, 2007 Spice and Plexus, appellants of an administrative land use ruling, voluntarily and formally withdrew their Chapter 36.70C RCW Land Use Petition Act (LUPA) petition from superior court, and served their "withdrawal" on the City and the County. The Court also correctly describes that thereafter, on November 22, 2007 Pierce County, supported by the City of Puyallup, moved the Superior Court for an order to dismiss Spice and Plexus's LUPA petition **with prejudice** under CR 41(b). On December 8, 2007 with only the County and the City present, the superior court entered an Order dismissing Spice and Plexus's (already withdrawn) LUPA petition **with prejudice**. CP 96-128, 148-174.

In lieu of pursuing their LUPA appeal, Petitioners thereafter sought additional relief at the administrative level from the Pierce County

Hearing Examiner. Opinion at Page 3, Footnote 4. Thirteen months later, the matter had once again returned to Superior Court, via a second LUPA appeal. CP 96-128, 148-174. That appeal prompted Petitioners to address the prior defective Superior Court Order of Dismissal **with prejudice**, in order to eliminate any potential confusion and or argument of collateral estoppel. Therefore, on January 3, 2008, Spice and Plexus filed a motion in superior court under CR 60(b)(5) and (11) and CR 41(b) to vacate its December 8, 2006 order dismissing their LUPA petition **with prejudice**.

In support of the Order, Petitioners asserted (1) the appeal had previously been withdrawn, via the voluntary action, and thus (2) the court lacked authority to act. Petitioners asserted that Order should be vacated pursuant to CR 60 (b)(5) and (11), because (1) the Court lacked jurisdiction to enter an Order of Dismissal *with prejudice* where Petitioners had *already voluntarily dismissed their appeal* pursuant to CR 41(a); and (2) the Court lacked jurisdiction to enter an Order dismissing the matter “*with prejudice*” pursuant to CR 41(b), which only allows dismissal **without** prejudice. Id. The Superior Court denied the Motion to vacate CP 175-176., and Petitioners appealed.

Division II’s Opinion characterizes Petitioners’ appeal as “frivolous” and awards attorney fees to the City and County. However, the Court’s Opinion **grants the ultimate relief requested by Petitioners:**

(2) a ruling that the Petitioners' voluntary Notice of Withdrawal effectively terminated the Petitioners' prior LUPA action, and (2) a ruling that the Superior Court's Order of Dismissal **with prejudice**, which was entered **after** Petitioners' voluntary withdrawal has no force and effect. It was the County and City which *initiated, urged and defended* the Superior Court's Order of Dismissal **with prejudice**, which Division II subsequently ruled was moot, and which **Petitioners** sought to have cleared from the record of this case.

Yet despite these two favorable rulings for Petitioners, and no corresponding ruling in favor of the City and County, which *pursued and defended* the moot Order, Division II granted attorney fees against the Petitioners. The decision is contrary to the facts and the law, and meets the criteria for RAP 13.4(b). The Washington Supreme Court should accept review, reverse that portion of the Division II opinion which found the appeal frivolous and should vacate the attorney fee and cost award.

VI. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under prongs one, two and four of this rule. The Decision conflicts with rulings from the Supreme Court and other Divisions. Significant public interest issues exist.

A. Decision Conflicts with Supreme Court,¹ Federal Case law,² and Division I Court of Appeals³

1. Division II Conflicts with Supreme Court Decision.

Petitioners filed initially the Motion to vacate, and subsequently their appeal of LUPA I, purely as a defensive action to “clean up” the record and prevent any potential future arguments of res judicata in the LUPA II matter, as a result of the Court’s (unauthorized) use of the term “with prejudice” in the (superfluous) Order of Dismissal.⁴

¹ *Wiles v. Department of Labor & Industries* (1949) 34 Wash.2d 714, 209 P.2d 462.

² *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir.2007)

³ *Harbor Lands LP v. City of Blaine*, 146 Wash.App. 589, 191 P.3d 1282 Wash.App. Div. 1, 2008,

⁴ In its Ruling, this Court agreed with Appellant’s two primary contentions on appeal:

(1) that Petitioners’ “voluntary withdrawal of their LUPA petition”, “**terminated all further review of the County Hearing Examiner’s ruling by any court under LUPA (chapter 36.70C RCW) and its corresponding procedures,**” and

Washington Case law not only allows this type of relief, it compels a duty to do so: “Where judgment is invalid as **for want of jurisdiction** either of person or of subject matter, or of question determined and **to give particular relief granted, rendering judgment void** as distinguished from merely voidable or erroneous, **it is duty of court to annul such judgment.**” *Wiles v. Department of Labor & Industries* (1949) 34 Wash.2d 714, 209 P.2d 462.

2. Division II Conflicts with Federal Case law.

Petitioners also were motivated to vacate the Order, based on the consequences of the term “*with prejudice*” in that superfluous Order. As this Court noted in its Opinion, “The effect of a party's voluntary dismissal or withdrawal of an action renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred”. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007)⁵ A voluntary withdrawal is a dismissal *without prejudice*, under sub (a)(1)(B) of this rule [CR41] is **not** final determination and, accordingly, is **not** res

(2) “the superior court's subsequent orders dismissing Spice and Plexus's LUPA petition ... were moot” ...

The Division II Court's rulings make clear that the Superior Court's Order of Dismissal **with prejudice** is moot, because the appeal had already terminated based on Appellant's voluntary withdrawal of the appeal. That is precisely the relief sought by Appellant by filing this appeal.

⁵ Ironically, the Court quoted from Petitioners' Opening Brief.

judicata as to any claims or issues contained therein. *Keron v. Namer Inv. Corp.* (1971) 4 Wash.App. 809, 484 P.2d 1152. In contrast, a dismissal *with prejudice* has res judicata effect.

This is a multi-layered action. At its core, the City of Puyallup has resisted providing commercial water service to Petitioners' site, despite the fact that the City currently provides residential water service. CP 32-33. Since Petitioners' initial voluntary dismissal, the matter has been back to the Hearing Examiner, back to Superior Court, and remanded back to the hearing examiner again. Petitioners' motion to vacate and this appeal were pursued solely to defeat the City of Puyallup's claim that the Order of Dismissal **with prejudice** (at issue in this case) could preclude further rulings by the Superior Court during this case's second return to Superior Court. *Id.* By moving to vacate the void Superior Court Order, Petitioners sought a ruling that Petitioners' voluntary withdrawal terminated the case and sought to remove from the record the superfluous Order that contained the offending term of dismissal "with prejudice", with its attendant possible consequences. The Court's present ruling – that the withdrawal terminated that appeal and that the offending order is moot – provides that relief, sought by Petitioners.

Equitable vacatur of judgments that have become moot but which may nonetheless have claim or issue preclusive effects is a common

practice in the federal courts. *See Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir.2007) (vacating trial court's judgment in moot case “ ‘is commonly utilized ... to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences’ ”) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950)).

In Washington, as in the federal courts, a judgment in a cause that has subsequently become moot may be preclusive if left of record. *See Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash.2d 255, 264, 956 P.2d 312 (1998); *cf. Sutton v. Hirvonen*, 113 Wash.2d 1, 9-10, 775 P.2d 448 (1989) (vacatur necessarily eliminates preclusive effect of judgment). Because the Order of Dismissal with prejudice was moot when the superior court entered judgment, that judgment must be vacated, and the appeal which sought that relief is **not** frivolous. The Supreme Court should accept review.

3. Court's Opinion Conflicts With Division I and Washington Law.

The Division II ruling finding the appeal frivolous conflicts directly with a very recent and very similar Division I case, wherein that appellate court found it appropriate to vacate a Superior Court LUPA judgment because the case was moot at the time judgment was entered.

That is *precisely the relief requested, granted, but found frivolous* in Petitioners' appeal.

In *Harbor Lands LP v. City of Blaine*, 146 Wash.App. 589, 191 P.3d 1282 Wash.App. Div. 1, 2008, Harbor Lands petitioned the superior court, pursuant to the Land Use Petition Act, chapter 36.70C RCW (LUPA), seeking reversal of the hearing examiner's decision. Harbor Lands concurrently filed a separate lawsuit against Blaine, which the City removed to the United States District Court. The parties stipulated to and were granted a stay in that action, citing as their rationale that the resolution of the issues in this case could be determinative of the questions presented therein.

By the time that the *Harbor Lands* case came on for decision in the superior court, the stop work orders had been rescinded, a transfer of real estate had been effectuated between the parties, the construction had been completed, and occupancy permits had been issued. The council had also amended Blaine's zoning code to provide express authority for the issuance of stop work orders under the circumstances presented by Harbor Lands' project.

On appeal, the Division I Court found that the Superior Court decision in favor of Harbor Lands conferred no additional relief. Nevertheless, the superior court ruled on the merits of the case, entering a

judgment adverse to the City.⁶ Id at 592-5. The City appealed, based on the sole contention that the judgment should be vacated because **the case was moot at the time judgment was entered. The appellate court agreed:** “Because this case was moot when the superior court entered judgment, that judgment **must** be vacated. Vacated and remanded.” Id at 595.⁷

The same is true in this case, and the same relief should be granted, and in fact, **has** been granted, in part. Here, Petitioners sought to remove from the record a Superior Court Order which was defective when entered. Division II Court ruled affirmatively that indeed the Superior Court Order was moot when entered. Yet, the conflict occurs by that same Division II ruling incongruously penalizing Petitioners with a finding of frivolous and the attorney fee award. This Court should accept review to correct the conflict.

⁶ At the time the trial court entered judgment, it suggested that the case might be moot. The parties disagreed, and the City did not argue mootness until it moved for reconsideration. Id at 592.

⁷ That case shared a second issue with the present matter, as *Harbor Lands* contested the mootness of the Order, based on the potential impact the Order would have on a pending related matter in a different court. “The sole basis asserted by harbor lands in support of its contention that this action is not moot is its status as plaintiff in the federal court lawsuit. Accordingly, the determinative issue before us is whether the potential preclusive effect of a judgment entered in one lawsuit upon issues raised in a second proceeding constitutes a legal right, preventing the first case from becoming moot.” The Court found the existence of the related case did not prevent the Order from being moot.

B. Case Involves Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

In this present case, Division II issued its current opinion in “published” form. See Opinion. The criteria for issuing a published opinion, is near identical to the criteria of RAP 13.4(b)(4) for accepting review:

- **that the decision determines an unsettled or new question of law or constitutional principle;**
- the decision modifies, clarifies or reverses an established principle of law; **decision is of general public interest or importance; or**
- **the decision is of general public interest or importance, or**
- the case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d).⁸ Thus Division II has determined that its ruling involves an issue of **substantial public interest**. For these same reasons that justified issuing a published opinion, this Court should accept review.

Even if the Superior Court Order was moot, this case also meets one or more of the mootness exemptions allowing review, and meet the criteria of RAP 13.4(b)(4). The issues are public in nature, guidance in this

⁸ RAP 12.3(d), “In determining whether the opinion will be published in the

Washington Appellate Reports, the panel will use at least the following criteria: (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance; or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.”

area is both desirable and necessary and the issue is likely to recur. An appellate court may still properly consider a moot issue if any of several factors exist. The three factors considered essential” for application of the public interest exception “are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.” *Hart v. Dep't of Social & Health Servs.*, 111 Wash.2d 445, 448, 759 P.2d 1206 (1988)

“It is a general rule that, where only moot questions or abstract propositions are involved, the appeal ... should be dismissed.” *Sorenson v. Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972). However a well recognized exception to this general rule lies within the court's discretion when “matters of continuing and substantial public interest are involved.” *Sorenson*, at 558, 496 P.2d 512.

In 1972, this Washington Supreme Court adopted criteria to consider in deciding whether a matter, though moot, is of continuing and substantial public interest and thus reviewable. *See Sorenson v. Bellingham, supra*. The three factors considered essential are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *In re Cross, supra*, 99 Wash.2d

at 377, 662 P.2d 828 (citing *Sorenson v. Bellingham*, 80 Wash.2d at 558, 496 P.2d 512). The appellate courts have exercised their discretion to consider various moot issues because of the importance of the issues involved. See, e.g., *In re Bowman*, *supra* (case involving definition of death); *Seattle v. State*, *supra* (public campaign financing and election limit ordinance in Seattle); *Mall, Inc. v. Seattle*, 108 Wash.2d 369, 386, 739 P.2d 668 (1987) (Seattle's building and zoning ordinances; opinion written but not yet published when case mooted by settlement); *Purchase v. Meyer*, 108 Wash.2d 220, 229-30, 737 P.2d 661 (1987) (negligence of a third party supplying liquor to a minor; opinion written but not yet published when case mooted by settlement); *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wash.2d 201, 208, 634 P.2d 853 (1981) (large development project and Environmental Impact Statement requirements); *Leonard v. Bothell*, 87 Wash.2d 847, 848, 557 P.2d 1306 (1976) (referendum to repeal city ordinance).

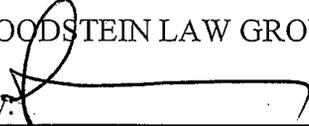
VII. CONCLUSION

The Washington Supreme Court should accept review because the Appeals Court Division II Decision at issue conflicts with rulings by the Supreme Court, federal court and Division I rulings and is of substantial public interest. The Washington Supreme Court should accept review, reverse that portion of the Division II opinion which found the appeal

frivolous and should vacate the attorney fee and cost award.

RESPECTFULLY SUBMITTED this 28th day of May, 2009.

GOODSTEIN LAW GROUP PLLC

By: 

Carolyn A. Lake, WSBA #13980

1001 Pacific Ave, Ste 400

Tacoma, WA 98402

(253) 779-4000

Attorneys for Petitioners.

APPENDIX A

OPINION OF THE COURT OF APPEALS.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE AND PLEXUS
DEVELOPMENT, LLC,

Appellant,

v.

PIERCE COUNTY, a political subdivision, and
CITY OF PUYALLUP, a municipal
corporation,

Respondents.

No. 37281-9-II

PUBLISHED OPINION

Hunt, J. — Ted Spice and Plexus Development, LLC (Spice and Plexus) appeal the superior court’s denial of their CR 60(b)(5) and (11) motion to vacate the superior court’s dismissal of their LUPA¹ petition, challenging the Pierce County Hearing Examiner’s Findings of Fact, Conclusions of Law, and Decision, concerning their water service dispute with Pierce County and the City of Puyallup. Spice and Plexus argue that (1) the superior court lacked jurisdiction to enter an order of involuntary dismissal after they had already voluntarily dismissed their LUPA appeal under CR41(a); (2) the superior court’s dismissal order with prejudice was void because CR 41(b) limits its authority to dismissal without prejudice; (3) thus, the superior court erred in denying their motion to vacate this “void” dismissal order; (4) the superior court erred in denying their motion to vacate the dismissal order as untimely because they brought the motion within a reasonable time; and (5) the superior court erred in denying their motion to vacate because it had prematurely entered the involuntary dismissal order after only ten months,

¹ Chapter 36.70(C) RCW.

contrary to CR 41(b)'s requirement of a one-year lapse before the trial court can enter such an order. Underlying Spice and Plexus's arguments in their briefing is their contention, articulated during oral argument, that we must resolve these issues to prevent the County and the City from raising *res judicata* and *collateral estoppel* in ongoing water-seeking applications and hearing examiner proceedings.

We hold that Spice and Plexus's voluntary withdrawal of their LUPA petition from superior court finally terminated *all* further appellate review of the County Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision.² Accordingly, we dismiss Spice and Plexus's appeal as frivolous and award attorney fees and costs to the County and to the City under RAP 18.1 and 18.9(a).

FACTS

On February 2, 2006, Ted Spice and Plexus Development, LLC, filed a petition in superior court under LUPA, RCW 36.70C, seeking review of a primarily favorable³ January 12 Pierce County Deputy Hearing Examiner's decision in their development-related water services dispute

² At that point, any *collateral estoppel* or *res judicata* consequences flowed directly from Spice and Plexus's termination of their LUPA petition. Thus, the superior court's subsequent dismissal of Spice and Plexus's LUPA petition, with or without prejudice, had no bearing on *collateral estoppel* or *res judicata* consequences; and the superior court's order denying Spice and Plexus's motion to vacate is moot. Moreover, such consequences apparently have been raised below in parallel ongoing proceedings, which are not currently before our court.

³ In their LUPA petition, Spice and Plexus asserted that although the Deputy Hearing Examiner had granted reconsideration of their development proposal and provided nearly all of the remedies that they had sought, nevertheless, they wanted the superior court to provide a "full measure of relief," namely requiring the City of Puyallup to abide by its duty to provide water services to them and other similarly situated property owners.

37281-9-II

with the City of Puyallup and Pierce County. On November 17, Spice and Plexus formally withdrew their LUPA petition from superior court appeal.⁴ They served their “withdrawal” on the City and the County.

On November 22, the County moved the superior court to dismiss Spice and Plexus’s LUPA petition with prejudice under CR 41(b). On December 6, Spice and Plexus moved to continue the hearing date for the motion to dismiss. The County opposed the continuance. On December 8, with only the County and the City present, the superior court entered an order dismissing Spice and Plexus’s LUPA petition with prejudice. Spice and Plexus neither moved the superior court to reconsider its dismissal with prejudice, nor did they appeal the superior court’s dismissal to us.

Thirteen months later, on January 3, 2008, Spice and Plexus filed a motion in superior court under CR 60(b)(5) and (11) and CR 41(b))to vacate its December 8, 2006 order dismissing their LUPA petition, which they had previously withdrawn. On January 11, the superior court denied Spice and Plexus’s motion to vacate its 13-month-old order of dismissal. Spice and Plexus

⁴ “Petitioner’s [sic] Withdrawal of Petition for Judicial Review (LAND USE PETITION ACT)” stated in full:

Petitioners Ted Spice and Plexus Development, LLC, by and through their attorneys, Carolyn A. Lake of the Goodstein Law Group PLLC, hereby withdraws their Petition to the Pierce County Superior Court for review of the Pierce County Deputy Hearing Examiner’s May 19, 2005 Decision in the Resolution of a Water Service Dispute involving Ted Spice and Plexus Development, LLC and the City of Puyallup and the Deputy Examiner’s January 12, 2005 Decision on Reconsideration for same (“Decision”).

Petitioner intends to seek alternative, supplemental relief as set forth in Pierce County Deputy Hearing Examiner’s January 12, 2005 Decision on Reconsideration. A copy of this withdrawal will [be] sent to all parties.

Clerk’s Papers (CP) at 29.

37281-9-II

now appeal the superior court's denial of their motion to vacate the court's order dismissing their previously voluntarily withdrawn LUPA appeal.

ANALYSIS

We do not address the bulk of Spice and Plexus's arguments because (1) there is no meaningful relief we can grant them; and (2) the order they appeal is moot in light of their prior voluntary withdrawal of their LUPA petition, which terminated all further review of the County Hearing Examiner's ruling by any court under LUPA (chapter 36.70C RCW) and its corresponding procedures.

I. Voluntary Withdrawal of LUPA Petition

An appeal from an administrative tribunal invokes the appellate, rather than the general, jurisdiction of the superior court. *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284, review denied, 142 Wn.2d 1001 (2000). Acting in its appellate capacity, the superior court has limited statutory jurisdiction, and all statutory requirements must be met before it properly invokes this jurisdiction. *Chaney*, 100 Wn. App. at 145 (citing *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)).

The legislature intended LUPA to function as "the exclusive means of judicial review of land use decisions." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (quoting RCW 36.70C.030(1)). To serve the purpose of timely review, LUPA provides stringent deadlines, requiring the parties to file a petition for review and to serve it on the parties within 21 days of the date of the land use decision. *Asche v. Bloomquist*, 132 Wn. App. 784, 795, 133 P.3d 475 (2006), review denied, 159 Wn.2d 1005 (2007); citing RCW 36.70C.040(3). "[O]nce a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable by the courts if not appealed to the superior

court within LUPA's specified timeline." *Habitat Watch*, 155 Wn.2d at 406-07 (holding that even illegal decisions under local land use codes must be challenged under LUPA within the 21-day period).

Spice and Plexus complied with the initial LUPA requirements when they filed their LUPA petition in superior court within 21 days of the County hearing examiner's decision. If they had pursued their LUPA petition and obtained superior court review, sitting in its appellate capacity, they could have sought further appellate review in our court.

Instead, Spice and Plexus served and filed a formal pleading that withdrew their LUPA petition from the superior court.⁵ The effect of a party's voluntary dismissal or withdrawal of an action renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007); *Logan v. North-West Ins. Co.*, 45 Wn. App. 95, 99, 724 P.2d 1059 (1986) (where an original action is dismissed, a statute of limitations continues to run as though the action had never been brought). But unlike a party's ability to dismiss a complaint without prejudice and to refile before expiration of the applicable statute of limitations, if a party fails to file a LUPA petition within 21 days of a land use decision or, alternatively, terminates a timely filed LUPA petition (and does not refile within the required time period), the statute bars any further judicial review of the land use decision, rendering further attempts to seek judicial review frivolous. RCW 36.70C.040. Thus, when Spice and Plexus voluntarily withdrew their timely-filed LUPA petition from Pierce County Superior Court more than 21 days after the Hearing Examiner's

⁵ See n.3, *supra*.

37281-9-II

decision, they extinguished their statutory right to judicial review of the County hearing examiner's January 12, 2006 decision.

Accordingly, we hold that the superior court's subsequent orders dismissing Spice and Plexus's LUPA petition and denying their motion to vacate the dismissal order were moot for purposes of the matter currently before us. Moreover, because Spice and Plexus voluntarily withdrew their LUPA petition from superior court, there is no relief we can provide and the issues they raise are not properly before us. For these reasons, we further hold that their appeal before our court is frivolous⁶ and dismiss it. In addition, we grant attorney fees under RAP 18.1 and 18.9(a) to the County and to the City as they request in their respective briefs.⁷

Hunt, J.

We concur:

Armstrong, J.

Van Deren, C.J.

⁶ We note, but do not include as a reason for finding this appeal frivolous, that Spice and Plexus acknowledge in their brief, CP at 1, that the County hearing examiner's January 12, 2006 decision, for which they initially sought LUPA review, was primarily favorable to them. As their attorney commented during oral argument, they withdrew their LUPA appeal in order to pursue an alternative allowed by the same hearing examiner's order. Moreover, there are currently pending proceedings before either the City or County hearing examiners in this matter. And at oral argument, the City represented that it is still waiting for Spice and Plexus to file a request for water service from the City, which they can file at any time.

⁷ Our court commissioner will determine these fees and costs upon the County and the City's compliance with RAP 18.1.

37281-9-II

APPENDIX B

COURT OF APPEALS DECISION DENYING RECONSIDERATION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE AND PLEXUS
DEVELOPMENT, LLC,

Appellants,

v.

PIERCE COUNTY, a political
subdivision, and CITY OF
PUYALLUP, a municipal corporation,

Respondents.

No. 37281-9-II

ORDER DENYING MOTION TO
RECONSIDER

(2/4/09) doc
protax
law
4/11/09 25

APPELLANT moves for reconsideration of the Court's decision terminating review,
filed March 31, 2009. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Van Deren, Armstrong, Hunt

DATED this 15th day of May, 2009.

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

Kevin John Yamamoto
Gary Neil Mclean
City of Puyallup
333 S Meridian
Puyallup, WA, 98371-5913

Carolyn A. Lake
Goodstein Law Group PLLC
1001 Pacific Ave Ste 400
Tacoma, WA, 98402-4440

David Brian St Pierre
Pierce County Ofc of Pro Atty - Civil
955 Tacoma Ave S Ste 301
Tacoma, WA, 98402-2160