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COURT OF APPEALS  
DIVISION II

NO. 37281-9-II 08 JUL -2 PM 1:38

STATE OF WASHINGTON

BY           
DEPUTY

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

TED SPICE and PLEXUS DEVELOPMENT, LLC, Appellants

v.

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

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**BRIEF OF RESPONDENT PIERCE COUNTY**

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## Table of Contents

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. COUNTERSTATEMENT OF FACTS.....</b>	<b>2</b>
<b>III. ISSUES .....</b>	<b>3</b>
1. Was the dismissal void? .....	3
2. Did Petitioners untimely file their motion to vacate the dismissal?.....	3
3. Does the total lack of any benefit to the Petitioners for appealing the Superior Court's decision to this Court constitute a frivolous appeal requiring sanctions?.....	3
<b>IV. ARGUMENT.....</b>	<b>3</b>
1. Dismissal was not void because Petitioners' "withdrawal" was ineffective. ....	3
A. Civil Rules and RCW .....	3
B. Rules of Appellate Procedure.....	4
C. Res Judicata .....	4
2. Petitioners' 13-month delay in filing its motion to	

vacate the dismissal was flagrantly untimely..... 6

A. Res Judicata & Issue Preclusion..... 6

B. Equity & Laches ..... 9

3. Petitioners gain absolutely no legal benefit from pursuing this appeal, therefore, its only value is for the harassment of Respondents, which warrant sanctions. .... 12

**V. CONCLUSION..... 14**

## Table of Authorities

	<u>Page</u>
<b>Cases</b>	
<u>Bland v. Mentor</u> , 63 Wn.2d 150, 157, 385 P.2d 727 (1963).....	9
<u>Christensen v. Grant County Hosp.</u> , 152 Wn.2d 299, 96 P.3d 957 (2004) .....	8
<u>Conom v. Snohomish County</u> , 155 Wn.2d 154, 162, 118P.3d 344 (2005) .....	5, 6
<u>Delany v. Canning</u> , 84 Wn. App. 498, 510, 929 P.2d 475, <u>review denied</u> 131 Wn.2d 1026, 937 P.2d 1101 (1997) .....	13
<u>State ex rel. Citizens v. Murphy</u> , 151 Wn.2d 226, 241, 88 P.3d 375, 2004 (2004) .....	9
<b>Statutes</b>	
Chapter 36.70C RCW .....	3
RCW 36.70C.010 .....	5, 6, 10
RCW 4.27.030 .....	11
RCW 4.72.020 .....	11
<b>Rules</b>	
Civil Rule 41 .....	3, 4, 7

CR 41(a)(4) .....	4
CR 41(b).....	6
CR 60.....	8, 11
CR 60(b)(11) .....	9
RAP 18.2 .....	7
RAP 18.9 .....	12

## I. INTRODUCTION

309 days after filing a LUPA appeal with Pierce County Superior Court, the Petitioners' petition was dismissed with prejudice for flagrantly failing to prosecute their appeal.

391 days after that, Petitioners noted a motion to vacate that dismissal. The Superior Court correctly denied that motion.

Petitioners now ask this Court to reverse the Superior Court on multiple grounds. But why? The statute of limitations for filing another appeal, if a first LUPA was dismissed in this matter, expired 690 days before they filed their motion to vacate and 882 days before the filing of this brief.

Petitioners' pursuit of this appeal provides absolutely no possible remedy of any kind to the Petitioners. Even if this Court grants Petitioners' appeal, Petitioners gain absolutely nothing. Therefore, this appeal amounts to nothing more than the use of legal process to harass Respondents and, as such, epitomizes the classical definition of frivolous. This Court should deny the appeal and award sanctions.

## II. COUNTERSTATEMENT OF FACTS

21 days after the January 12, 2006, Pierce County Hearing Examiner's Decision on Reconsideration, Petitioners filed their LUPA appeal in Pierce County Superior Court. CP 1-28. After failing to prosecute their LUPA appeal for 288 days, Petitioners filed a document strangely entitled: "Withdrawal of Petition For Review" on November 17, 2006. CP 29. Unsure of that document's legality, Pierce County filed on November 22, 2006, a motion to dismiss, with prejudice, for Petitioners' flagrant violations of LUPA time lines. CP 34-37. After Petitioners answered (CP 49-68), and Pierce County replied (CP 47-48), Judge Felnagle dismissed the petition with prejudice on December 8, 2006. CP 69-70.

391 days later, on January 4, 2008, Petitioners filed a motion to set aside the 13-month old dismissal on various theories. CP 71-95. After both Pierce County (CP 129-147) and Respondent City of Puyallup (CP 192-197) answered and Petitioners replied (CP 148-174), Judge Felnagle denied

Petitioners' motion (CP 175-176), holding that the 13-month old dismissal was not void and that the motion to vacate it was untimely made (RP 15). This appeal followed. CP 177-180.

### III. ISSUES

1. Was the dismissal void?
2. Did Petitioners untimely file their motion to vacate the dismissal?
3. Does the total lack of any benefit to the Petitioners for appealing the Superior Court's decision to this Court constitute a frivolous appeal requiring sanctions?

### IV. ARGUMENT

1. Dismissal was not void because Petitioners' "withdrawal" was ineffective.

#### A. Civil Rules and RCW

The legal significance of a "withdrawal" of a Land Use Petition Act appeal under Chapter 36.70C RCW is unknown as a "withdrawal" is not addressed in either that Chapter of the RCW or the Civil Rules of the Superior Court. Petitioners' "withdrawal" failed to comport with Civil Rule 41 on Dismissal of Actions. If, by some stretch, Petitioners' "withdrawal" is

considered to be a voluntary dismissal under CR 41 then its unstated effect, pursuant to CR 41(a)(4), would be a dismissal without prejudice. However, the Petitioners did not file a voluntary dismissal.

#### B. Rules of Appellate Procedure

Moreover, should the Rules of Appellate Procedure apply (since a LUPA is an appellate review of an administrative land use decision), then Petitioners failed to comport with RAP 18.2 on voluntary Withdrawal of Review because that rule requires Petitioners to bring a motion to withdraw before the Court. Petitioners did not file a motion to withdraw.

#### C. Res Judicata

Concerned with the finality of the decision below and legal effectiveness of the Petitioners' "withdrawal," Pierce County filed a motion to have the Petition dismissed with Prejudice to ensure the res judicata effect that a CR 41 dismissal with prejudice ensures and to ensure that the appeal was either dismissed or it is not. CP 34-37. Petitioners were not

entitled to a “without prejudice” determination. Petitioners had flagrantly failed to prosecute their LUPA appeal. The purpose of LUPA is to establish uniform, expedited appeal procedures and to provide consistent, predictable, and timely judicial review. RCW 36.70C.010. Strict adherence to statutory time limits is necessary in order to preserve the finality of administrative decision. Conom v. Snohomish County, 155 Wn.2d 154, 162, 118P.3d 344 (2005).

In Conom, the Supreme Court held that failure to note an initial LUPA hearing within the seven days of serving a LUPA petition requirement of LUPA statutory time limits was a procedural violation but did not remove jurisdiction from the court. However, the court went on to hold that if the hearing still occurred within the requisite statutory time period (35 to 50 days from service) the purpose of LUPA was preserved.” Id.

Though Petitioners timely noted an initial hearing, they then struck the hearing. No initial hearing occurred within 35-50 days of service. CP 34-37. In fact, no hearing had occurred

within the 309 day period until Judge Felnagle dismissed the petition. The purpose of LUPA had not been preserved. Petitioners had inexcusably failed to prosecute their LUPA appeal.

Dismissal was not void precisely because Petitioners' "withdrawal" was ineffective. Pursuant to CR 41(b), Judge Felnagle dismissed the petition with prejudice to ensure the res judicata effect of the Hearing Examiner's decision below.

2. Petitioners' 13-month delay in filing its motion to vacate the dismissal was flagrantly untimely.

#### A. Res Judicata & Issue Preclusion

Petitioners moved the court to vacate the dismissal 391 days after the Superior Court issued its dismissal of the petition. There is no excuse. Petitioners' extraordinary failure to prosecute, including flagrant violations of LUPA statutory time periods, combined with the instant appeal, are all in violation of the purpose of LUPA which is to establish uniform, expedited appeal procedures and to provide consistent, predictable, and

timely judicial review (RCW 36.70C.010; Conom v. Snohomish County, 155 Wn.2d 154, 162, 118 P.3d 344 (2005)).

Petitioners never filed a motion for reconsideration of the dismissal nor did Petitioners appeal the dismissal with this Court of Appeals.

Instead, Petitioners waited over 13 months then moved to vacate the dismissal but without offering any new evidence nor new legal argument. Petitioners simply repeated each and every argument made 13 months before. CP 71-95. Specifically raised and argued by the County 13 months earlier were all of the issues (1) that the Petitioners' "withdrawal" was ineffective under CR 41 & RAP 18.2 and did not remove the jurisdiction of this court, (2) that a CR 41 dismissal with prejudice was required to ensure the "res judicata" (claim preclusion) effect of the dismissal on the decision below, and (3) that flagrant violations of the LUPA statutory time periods were adequate and specific grounds for a CR 41 dismissal with prejudice. CP 34-37.

13 months later, Petitioners finally wanted to respond to the issues that the County had raised but to which the Petitioners chose not to respond to at that time. Petitioners simply repeat their argument of 13 months earlier that the Superior Court lacked jurisdiction to enter its dismissal making the dismissal void under CR 60.

Issue Preclusion (collateral estoppel), prohibits the court from allowing the re-litigation of issues previously argued and promotes judicial economy and serves to prevent inconvenience or harassment of parties. Christensen v. Grant County Hosp., 152 Wn.2d 299, 96 P.3d 957 (2004).

The issue of lack of jurisdiction, thus the order being void, was argued 13 months before to the same Court. Petitioners were given full opportunity to challenge the dismissal with prejudice on those or any grounds either at the time of the hearing, or by a motion to reconsider, or by appealing the dismissal. Petitioners chose not to do so then. After waiting 13 months, Petitioners finally got around to

moving the Superior Court to reconsider its dismissal order.

Because the Petitioners neither moved for reconsideration nor appealed the dismissal, and because all of the Petitioners' instant arguments have already been considered and rejected, the well-settled doctrines of res judicata and issue preclusion, prevents re-litigation of these issues. Petitioners do not get another bite at the apple.

#### B. Equity & Laches

“He who seeks equity must do equity.” Bland v. Mentor, 63 Wn.2d 150, 157, 385 P.2d 727 (1963). This ‘clean hands’ maxim applies here as Petitioners seek equitable relief under CR 60(b)(11). Laches is the principle governing whether an action is taken “within a reasonable time” when equitable relief is requested. Laches consists of two elements: (1) inexcusable delay, and (2) prejudice to the other party from such delay. State ex rel. Citizens v. Murphy, 151 Wn.2d 226, 241, 88 P.3d 375, 2004 (2004). While a court may look to various factors, including similar statutory and rule limitation periods to

determine whether there was an inexcusable delay, the main component of laches is prejudice to the other party. Id.

Petitioners failed to file a motion for reconsideration of the dismissal. Petitioners failed to appeal the dismissal. As stated above, 13 months later, Petitioners raised no new legal arguments nor presented newly discovered facts since entry of the dismissal to warrant setting aside the dismissal on equitable grounds. Petitioners' delay is inexcusable.

Furthermore, as stated above, the legislature has spoken as to what constitutes prejudice when it enacted LUPA for the specific purpose of providing consistent, predictable, and timely judicial review. RCW 36.70C.010. Respondents are prejudiced by being denied the finality of a Hearing Examiner's decision below, as promised under LUPA, and have had to suffer the continuation of legal process and its related costs.

I direct the court to the SUBJOINED DECLARATION OF COUNSEL in the January 4, 2008, motion to vacate (CP 81-82) and the SUBJOINED DECLARATION OF COUNSEL

from the December 6, 2006, PETITIONERS' REPLY  
OPPOSING MOTION TO DISMISS & SUBJOINED  
DECLARATION OF COUNSEL (CP 41-42). They are  
virtually identical in substance and show absolutely NO new  
facts, information, or rationale as a basis for the granting of  
equitable relief.

CR 60 and RCW 4.72.020 & RCW 4.27.030 indicate that  
one year is the maximum time allowed to bring an action to set  
aside a judgment for most of the reasons that such relief would  
be granted. Although this 12 month limit is not jurisdictional as  
to reasons based on lack of jurisdiction (judgment being void)  
or when equity is requested, it is a persuasive measure of  
reasonableness under laches.

Yet the Petitioners argue that equity compels that this  
court ignore both laches and the cleanliness of Petitioners'  
hands. The court must not ignore them. Equity does not lie.

Petitioners' other grounds for relief are merely  
duplicative and do not address why they waited 391 days to file

their motion to vacate.

3. Petitioners gain absolutely no legal benefit from pursuing this appeal, therefore, its only value is for the harassment of Respondents, which warrant sanctions.

As of the date of the filing of this brief, the statute of limitations for filing a LUPA in this matter had been expired for 882 days (21 days after the January 12, 2006, Pierce County Hearing Examiner's Decision on Reconsideration). Petitioners' pursuit of this appeal provides absolutely no possible remedy of any kind to the Petitioners. Even if this Court grants Petitioners' appeal, Petitioners gain absolutely nothing. Therefore, this appeal amounts to nothing more than the use of legal process to harass Respondents and, as such, epitomizes the classical definition of frivolous. This Court should deny the appeal and award sanctions.

Pierce County requests sanctions against Petitioners by being awarded its attorney fees under RAP 18.9 because this appeal is frivolous. That rule authorizes sanctions against a

party who "files a frivolous appeal." RAP 18.9(a). An appeal is frivolous if, considering the record as a whole, there are no debatable issues upon which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475, review denied 131 Wn.2d 1026, 937 P.2d 1101 (1997).

Petitioners gain absolutely no benefit, no legal right of redress, nor receive any remedy of any kind in pursuing this appeal. This appeal continues to use legal process by a meritless appeal, as a means to coerce Respondents into granting them the relief they requested and were denied by the Pierce County Hearing Examiner. This, combined with the lack of compliance with court rules and inexcusable neglect of LUPA time lines, justifies the award of sanctions.

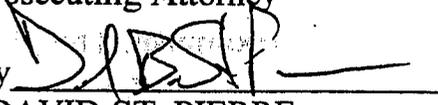
Respondent Pierce County requests that the Court order Petitioners to pay the County \$1,000 in attorney fees for responding to this appeal.

V. CONCLUSION

Petitioners have utterly failed their burden for bringing and maintaining this appeal. Petitioners' pursuit of this appeal provides absolutely no possible remedy of any kind to the Petitioners. Therefore, this appeal amounts to nothing more than the use of legal process to harass Respondents and, as such, epitomizes the classical definition of frivolous. This Court should deny the appeal as frivolous and sanction Petitioners by awarding \$1,000 in attorney fees to Pierce County.

DATED: July 2<sup>nd</sup>, 2008

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**TED SPICE and PLEXUS DEVELOPMENT, LLC, Appellants**

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**DECLARATION OF SERVICE**

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The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. BRIEF OF RESPONDENT PIERCE COUNTY

to be served on July 3, 2008, on the following parties and in the manner indicated below:

Gary McLean, City Attorney  
Kevin Yamamoto, Deputy City Attorney  
City of Puyallup  
330 Third Street SW  
Puyallup, WA 98371

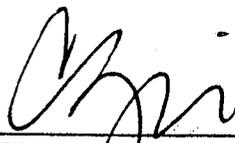
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Tacoma, WA 98402

by legal messenger.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of July, 2008.

  
\_\_\_\_\_  
Chandra R. Zimmerman  
Legal Assistant