

AUG 29 2012

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

Court of Appeals No. 302415-III

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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PROSSER HILL COALITION, LISA WATTS-MCKEE, DANIEL  
SPISAK, JACQUELYN OLSON, JACK WILCOX, TOM WHITFIELD,  
JANICE WHITFIELD, ROBERT HEINEMANN, MELAINE  
ZIMMERMAN, ROY WILSON, STEVE BAIRD, RANDY  
SUNDERLAND, RICK OLSON, and CINDY PHILLIPS,

Respondents/Cross Appellants,

v.

COUNTY OF SPOKANE, SILVERBIRD LLC, and DENNIS P. REED,

Appellants/Cross Respondents.

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**CROSS-APPEAL REPLY BRIEF**

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**A. INTRODUCTION.**

Appellants assert that a party must achieve virtually a total victory in order to be deemed a “prevailing party” for the purposes of recovering statutory attorney fees and costs. Case law and common sense indicate the contrary.

Here, Respondents sought a remand of the County’s decision on both procedural and substantive grounds. Without ruling on the substance of the matter, the Superior Court remanded the matter to the County’s hearing examiner for the County’s procedural errors regarding notice. This remand will result in a new hearing and, possibly, a separate LUPA proceeding challenging the new findings of the hearing examiner.

Respondents received what they sought – a decision determining that the County erred and a remand. They are prevailing parties entitled to recovery of statutory attorney fees and costs. For these reasons, this Court should reverse the decision of the Superior Court denying the award of attorney fees and costs in this matter.

**B. ARGUMENT IN REPLY.**

**1. RESPONDENTS ARE PREVAILING PARTY IN THIS MATTER FOR THE PURPOSE OF AWARDING ATTORNEY FEES AND COSTS.**

Respondents are prevailing parties for the purpose of recovering attorney fees and costs in this proceeding. RCW 4.84.030 explicitly states

“[in] any action in the Superior Court of Washington the prevailing party shall be entitled to his or her costs and disbursements.” This explicitly includes the award of a \$200 attorney fee, RCW 4.84.010(6), .080(1), as well as filing fees and the record. RCW 4.84.010(1), (5). Likewise, the Land Use Petitions Act (“LUPA”) itself, explicitly calls for the award of costs for production of the record when the Petitioner is the prevailing party. RCW 36.70C.110(4).

A determination of whether a party is a prevailing party does not requiring a finding that a party that is prevailing in all matters, but rather whether the party is the substantially prevailing party:

We may award statutory attorney fees under RCW 4.84.030 if Koenig had substantially prevailed. RAP 14.2; *Day v. Santorsola*, 118 Wn. App. 746, 770–71, 76 P.3d 1190 (2003), *review denied*, 151 Wash.2d 1018, 91 P.3d 94 (2004). Generally, the prevailing party is the party who receives an affirmative judgment in his or her favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). But if neither party wholly prevails, “ ‘then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties.’ ” *Day*, 118 Wn. App. at 770, 76 P.3d 1190, (*quoting Riss*, 131 Wn.2d at 633, 934 P.2d 669).

*City of Lakewood v. Koenig*, 160 Wn. App. 883, 250 P.3d 113 (2011). *See also Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 773–74, 677 P.2d 773 (1984) (A prevailing party need not succeed on its entire claim to qualify for attorney fees, but it must

substantially prevail in order to be entitled to such an award). “Additionally, a party in a land use case substantially prevails if it improves its position from one level of review to the next.” *Knight v. City of Yelm*, 173 Wn.2d 325, 347, 267 P.3d 973 (2011).

Likewise, RCW 36.70C.110(4) does not require that a party totally prevails in a matter allowing the award of the costs of preparing the administrative record “[i]f the relief sought by the petitioner is granted in whole or in part.”

Appellants urge this Court to ignore the law in this matter and find that Respondents are not prevailing parties. Appellants argue that Respondents are not prevailing parties because they merely obtained an Order remanding the matter because of the County’s erroneous procedural notice. This argument fails for three reasons.

First, Respondents substantially prevailed in this matter having received a favorable ruling in regards to the procedural issues in this matter. The Superior Court’s Order granted the judgment sought by Respondents, stating that the decision to approve the project was “remanded.” CP 1050. The relief requested by the Superior Court was precisely what Respondents requested. Respondents requested that the Superior Court issue an Order that determines that the County acted erroneously either as to procedure or substance:

The Court is respectfully requested to review the Hearing Examiner Decision and determine it is based upon an **unlawful procedure**, a clearly erroneous interpretation of the law, an erroneous interpretation of the law as applied to the facts, and/or that it is not supported by substantial evidence.

CP 21. Moreover, the issues addressed by this Court regarding inadequate notice are the very first two issues addressed in the Petition. CP 13-14. Appellants prevailed on no matters.

Second, the Superior Court ordered a remand and a “new hearing consistent with the decision of this Court.” CP 1050. That hearing will result in a new decision from the hearing examiner and be subject to a separate review pursuant to the Land Use Petition Act. The Superior Court declined to hear the merits of the case and does not need to because the matter was remanded for a new hearing – “Having remanded the matter for further proceedings as described above, this Court declines to consider the remaining issues in the Land Use Petition.” *Id.* The Superior Court did not retain jurisdiction over the matter. Accordingly, there is nothing more that will be considered by the Superior Court, absent a new appeal of the Hearing Examiner’s new decision.

Third, the cases cited by Appellants do not support Appellants’ position that the award of fees and costs must a decision on the merits of the substantive matters. For example, Respondents cite *Ennis v. Ring*, 56

Wn.2d 465, 472-73, 341 P.2d 885 (1959) to support their argument. However, *Ennis* does not address the situation present here. The court in *Ennis* addressed the issue of fees and costs after an appeal court ordered a retrial – “In the event of a retrial the determination of who is the prevailing party must await the outcome of the second trial.” *Id.* Here, this case does not involve an appellate court order of a retrial, but rather a determination that the County was procedurally erroneous.

Appellants also cite *Moritzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985). However, that case did not deal with a situation where a matter was remanded for a second and entirely new hearing before a hearing examiner, but dealt with what party is considered “prevailing” when both parties were determined by the court to be entitled to judgments. *Id.*

In fact, none of the cases cited by Appellants address the situation at issue in this matter. Appellants’ argument that Respondents were not prevailing parties by virtue of an order of remand is without merit.

Accordingly, this Court must reverse the decision of the Superior Court denying the request for fees and costs.

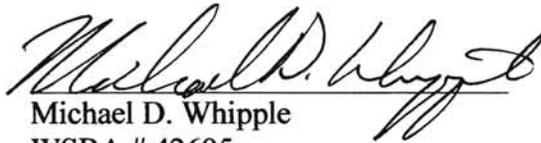
**C. REQUEST FOR FEES AND COSTS.**

Upon the Court's ruling in Respondents' favor, Respondents request an order awarding appropriate fees and costs pursuant to Chapters 4.84 and 36.70C RCW.

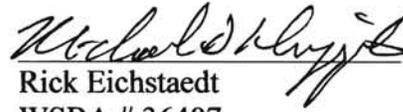
**D. CONCLUSION.**

For the reasons set forth above and in the previous brief, Respondents requests that this Court reverse the findings of the Superior Court and find that the Coalition was a prevailing party in this matter and order the award of statutory fees and costs in this matter.

Respectfully submitted this 29<sup>th</sup> day of August, 2012.



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v.  
  
COUNTY OF SPOKANE et al,  
  
Respondents.

NO. 302415-III

(Spokane County Superior  
Court Cause  
No. 2011-02-00085-5)

DECLARATION OF SERVICE

STATE OF WASHINGTON        )  
  )  
COUNTY OF SPOKANE        )        ss.

I, MICHAEL D. WHIPPLE, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am one of the attorneys for Prosser Hill Coalition, et al. herein. On the date and in the manner indicated below, I caused the Cross-Appeal Reply Brief to be served on:

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DATED this 29<sup>th</sup> day of August, 2012, at Spokane, Washington.

  
MICHAEL D. WHIPPLE