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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF SKAGIT**

8 ANNIE JANICKI,

Petitioner,

No. 08-2-01130-8

9 vs.

10 CITY OF SEDRO-WOOLLEY, a municipal
11 corporation, and DELUXE RECYCLING
AND DISPOSAL, LLC, a Washington limited
liability company,

**RESPONDENT CITY OF SEDRO-
WOOLLEY'S REPLY IN SUPPORT
OF ITS MOTION TO DISMISS**

12 Respondents,

13 vs.

14 SKAGIT COUNTY, a municipal corporation
of the State of Washington

15 Intervenor.

16
17 The City of Sedro-Woolley ("City"), by and through its attorneys, Robert A.
18 Carmichael and Simi Jain of Zender Thurston, P.S., and Eron Berg, City Attorney for the
19 City, submit this Reply in Support of its Motion to Dismiss Petitioner's Petition for Relief
20 Under the Land Use Petition Act ("LUPA").

21 **I. STATEMENT OF FACTS**

22 The facts relevant to this motion are not in dispute. The hearing examiner did not
23 identify any property owner in his written decision. The Skagit County Assessor's records
24 for the property at issue list Fire Ridge LLC, as the taxpayer and owner of the property.
25

1 When Petitioner filed her appeal, Fire Ridge LLC was listed as the taxpayer for the
2 property in the Skagit County Assessor's records. Petitioner failed to check the Skagit
3 County Assessor records to determine the taxpayer for the property. Consequently,
4 Petitioner did not name and serve Fire Ridge LLC, the owner and taxpayer for the
5 property.¹

6 The City's motion to dismiss is based on the foregoing undisputed facts. In
7 response to this motion, the County argues the merits of the underlying petition. The City
8 disputes the County's arguments on the merits, and most of its allegations. Unless
9 otherwise directed by the Court, however, the City will refrain from supplying
10 supplemental briefing on any of the issues beyond the bounds of the present motion. The
11 City reserves the right to move to strike evidence offered by the County which is
12 determined to be outside of the record and/or unsubstantiated.

14 II. ISSUES

- 15 1. Does LUPA require that persons listed in RCW 36.70C.040(2)(b)(i) AND
16 (b)(ii) be timely served with the petition on appeal?
- 17 2. Does LUPA require that parties to the appeal inform the Petitioner of her failure
18 to satisfy RCW 36.70C.040(2) when the Assessor's records contained the
19 information Petitioner needed to comply with LUPA?

20 III. AUTHORITY

- 21 A. **LUPA requires persons listed under RCW 36.70C.040(2)(b)(i)
22 AND (b)(ii) be timely served.**

23 In a LUPA petition, the superior court's appellate jurisdiction is not properly

24 ¹ The owner prior to Fire Ridge LLC was Tree Source Acquisition Company, LLC. *Declaration of Steve*
25 *Seeger*. Neither entity was named or served when the petition was filed on the last day, because the Petitioner
did not check the assessor's records.

1 invoked unless all statutory procedural requirements are met. *Overhulse Neighborhood*
2 *Assc. v. Thurston County*, 94 Wash. App. 593, 597, 972 P.2d 470 (1999). The issues
3 presented herein center on the interpretation of RCW 36.70C.040. The rules of statutory
4 construction apply to this court's review of the proposed interpretations.²

5 RCW 36.70C.040 provides in part:

6 (2) A land use petition is barred, and the court may not grant review,
7 unless the petition is timely filed with the court and timely served on the
8 following persons who shall be parties to the review of the land use
9 petition:

10 (b) Each of the following persons if the person is not the petitioner:

11 (i) Each person identified by name and address in the local
12 jurisdiction's written decision as an applicant for the
13 permit or approval at issue; and

14 (ii) Each person identified by name and address in the local
15 jurisdiction's written decision as an owner of the property
16 at issue;

17 (c) If no person is identified in a written decision as provided in (b)
18 of this subsection, each person identified by name and address as a
19 taxpayer for the property at issue in the records of the county assessor,
20 based upon the description of the property in the application;

21 RCW 36.70C.040(2)(b).

22 RCW 36.70C.040(2) requires that each of the persons listed in RCW

23 ² The aim of statutory interpretation is "to discern and implement the intent of the legislature." *State v. J.P.*, 149
24 Wn.2d 444, 450, 69 P.3d 318 (2003); *Campbell & Gwinn*, 146 Wn.2d at 9. A reviewing "court is required,
25 whenever possible, to give effect to every word in a statute." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d
467, 479, 745 P.2d 1295 (1987). Where the meaning of a provision is "plain on its face, then the court must
give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10.
A provision's plain meaning may be ascertained by an "examination of the statute in which the provision at
issue is found, as well as related statutes or other provisions of the same act in which the provision is found."
Id. at 10 (citing, inter alia, *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d
262 (1999))...Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be

1 36.70C.040(2)(b)(i) and (2)(b)(ii) must be timely served and named as parties. Petitioner
2 and the County argue that service on the applicant alone is sufficient, but if this were true
3 then the statute would not connect the requirements in 2(b)(i) and 2(b)(ii) by the word
4 "and." The argument of Petitioner and the County would be correct if subsections 2(b)(i)
5 and 2(b)(ii) were connected by the word "or." But they are not so connected. The
6 connection by the word "and" of the requirement to serve the applicant under 2(b)(i) and the
7 property owner under 2(b)(ii) means that both the applicant and the property owner must be
8 served. RCW 36.70.040(2)(b). Service on one or the other alone is insufficient by the plain
9 language of the statute.
10

11 RCW 36.70C.040(2)(c) directs that "if no person" is listed as indicated in RCW
12 36.70.040(b), then the petitioner must name and serve the taxpayer for the property at issue.
13 The Petitioner and County argue that because the applicant was named and served, the "no
14 person" threshold for requiring timely service on the taxpayer under RCW 36.70C.040(2)(c)
15 is not met. This argument, however, advances an erroneous construction of the statute.
16

17 Again, Section RCW 36.70C.040(2)(c) provides:

18 (c) If no person is identified in a written decision **as provided in (b)** of
19 this subsection, each person identified by name and address as a taxpayer
20 for the property at issue in the records of the county assessor, based upon
21 the description of the property in the application;

22 (Emphasis added).

23 RCW 36.70C.040(2)(c) requires that the Petitioner locate the taxpayer of record "if no
24 person is identified in a written decision **as provided in (b)** of this subsection . . .".

25 "appropriate [for a reviewing court] to resort to aids to construction, including legislative history." *Campbell & Gwinn*, 146 Wn.2d at 12. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295 (Wash. 2006).

1 (Emphasis added). This language directs the reader back to subsection (2)(b) and expressly
2 modifies the “no person” term to mean “as provided in (b) of this subsection.” Subsection
3 2(b) requires **both** (2)(b)(i) **and** (2)(b)(ii) to be satisfied, not just one subsection or the
4 other. Therefore, the “no person” language in subsection 2(c) necessarily applies to both
5 subsections 2(b)(i) and 2(b)(ii) and requires service on the taxpayer of record when the
6 property owner is not identified in the hearing examiner’s decision.
7

8 Here, because the hearing examiner did not name the owner of the property at issue
9 in his written decision, the Petitioner was required to serve Fire Ridge LLC under RCW
10 36.70C.040(2)(c). This reading of RCW 36.70C.040(2) is also consistent with RCW
11 36.70C.070 which requires “Identification of each person to be made a party under RCW
12 36.70C.040(2)(b) through (d); must be included in the petition for review.” Indeed, a
13 logical and plain reading of LUPA necessitates that both the applicant and the owner be
14 served with a petition.

15 The City’s interpretation is also consistent with the historic inclusion of the property
16 owner in writs of certiorari for an appeal of a land use decision. Historically, the owner of
17 the property at issue was an indispensable party whose rights are affected by a land use
18 appeal affecting their property. *Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802
19 P.2d 792 (1990).³ While LUPA replaced writ of certiorari for land use appeals, property
20 owners remain indispensable parties. Therefore, it was logical that the legislature would
21 require that both the applicant and the owner, if named in the local jurisdiction’s written
22

23
24 ³ Citing to *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 207, 634 P.2d 853
25 (1981); *Woodward v. Spokane*, 51 Wn. App. 900, 903, 756 P.2d 156, review denied, 111 Wn.2d 1027 (1988);
Veradale Vly. Citizens' Planning Comm. v. Board of Cy. Comm'rs, 22 Wn. App. 229, 588 P.2d 750 (1978);
Andrus v. County of Snohomish, 8 Wn. App. 502, 509, 507 P.2d 898 (1973), and cases cited therein.

1 decision, must be parties under RCW 36.70C.040(2)(b). In the event that one of these
2 essential parties is not listed, then the taxpayer on the Assessor's rolls is turned to as the
3 next person whose rights would most likely be affected by a land use appeal. RCW
4 36.70C.040(2)(c).

5 It is not entirely clear whether the Petitioner and County intend to argue that
6 Petitioner substantially complied with service requirements when they allege a yet to be
7 proven business relationship between Fire Ridge LLC and Deluxe Recycling and Disposal,
8 LLC ("Deluxe"). *Assuming arguendo* that such a relationship exists, it does not warrant
9 Petitioner's failure to comply with the requirements of RCW 36.70C.040. Washington
10 case law is clear, substantial compliance is not a defense for failure to comply with
11 LUPA's RCW 36.70C.040 procedural requirements. *Overhulse*, at 599.

12 The facts demonstrate that no effort was made by Petitioner to timely name or serve
13 the taxpayer of record, as required. This failure constitutes inexcusable neglect.⁴
14 Petitioner seems to argue that since Fire Ridge LLC was not the taxpayer or owner at the
15 time of the written decision, that noncompliance with RCW 36.70C.040(2)(c) when the
16 petition was filed is excusable. *See* Petitioner's Response at 2-6. Again, the Petitioner did
17 not even seek to name or serve the taxpayer or owner that preceded Fire Ridge LLC;
18 Petitioner's failure to comply with RCW 36.70C.040 cannot be excused or allowed as
19 substantial compliance with the statute.
20
21

22 **B. The Skagit County Assessor's records listed Fire Ridge LLC as**
23 **the taxpayer for the property at issue, therefore neither the**

24 ⁴ In *Suquamish Indian Tribe v. Kitsap County*, the tribe's failure to name a citizens' group as a necessary party
25 in its original petition constituted inexcusable neglect. The court reasoned that the LUPA statute gives clear
instruction as to the identity of the necessary parties and dismissed the petition. *Suquamish Indian Tribe v.*
Kitsap County, 92 Wn. App. 816, 825-826, 965 P.2d 636 (1998).

1 **City nor Deluxe had any responsibility to inform under RCW**
2 **36.70C.050.**

3 The plain language of RCW 36.70C.050 is consistent with the requirement in RCW
4 36.70C.040 that the taxpayer of record must be named and served where the property owner
5 is not identified in the local government's written decision. Responsibility to inform under
6 RCW 36.70C.050 only arises when "any person" not identified in the records referred to in
7 RCW 36.70C.040(2)(b) and (c) should be joined for a just adjudication. RCW 36.70C.050
8 (emphasis added). The records referred to in RCW 36.70C.040(2)(b) and (c) are
9 respectively, the local jurisdiction's written decision and the taxpayer records of the county
10 assessor. In this case, the hearing examiner's decision identified the applicant and the
11 records of the county assessor identified the taxpayer for the subject property at issue.
12 Therefore, the applicant is not responsible for informing the Petitioner of her
13 responsibilities under section RCW 36.70C.050. The applicant would only be responsible
14 for informing the parties of any persons not included in RCW 36.70C.040(2)(b) and (2)(c).
15

16 The last sentence of RCW 36.70C.050 is helpful to understanding the statute:

17 Failure by the petitioner to name or serve, within the time required by
18 RCW 36.70C.040(3), persons who are needed for just adjudication but
19 who are not identified in the records referred to in RCW 36.70C.040(2)(b),
or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of
jurisdiction to hear the land use petition.

20 The significance of the foregoing provision lies in its inverse. If failure to timely name or
21 serve persons needed for just adjudication but who are not identified in the records referred
22 to in 2(b) or 2(c) does not deprive the court of jurisdiction, then it may be inferred a failure
23 to timely name or serve such persons who are identified in 2(b) or 2(c) records does deprive
24 the court of jurisdiction. That is the situation here. The Petitioner's failure to name and
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1 serve the persons identified in RCW 36.70C.040(2)(b) and (2)(c) results in the deprivation
2 of this court's jurisdiction. RCW 36.70C.050.

3 **IV. CONCLUSION**

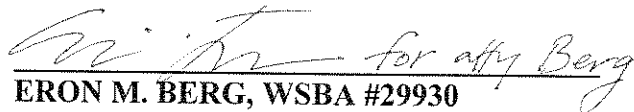
4 Based on a plain reading of RCW 36.70C.040(2), RCW 36.70C.050, and RCW
5 36.70C.070 and case law, the City's motion to dismiss should be granted and this LUPA
6 petition dismissed with prejudice.
7

8 Dated this 23rd day of July, 2008.
9

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