72809-1

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NO. 72809-1-i

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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DANIEL THOMPSON and THEODORE MISSELWITZ,

*Appellants,*

vs.

CITY OF MERCER ISLAND,

*Respondent,*

ON THE ROCK, LLC and ANDERSON ARCHITECTURE

*Additional Parties.*



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**APPELLANTS' REPLY BRIEF**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes.....Pages**

## I. INTRODUCTION

There are really three different appeals in this case.

The first is an appeal of the trial court's order of dismissal under CR 12(b)(6) for lack of standing when the LUPA petition had been timely filed and served, and the City and On The Rock never raised standing at the administrative level despite the fact that the city attorney and outside counsel were involved as early as September 24, 2013. CP 919 (privilege log). The appellants filed their appeal to this Court before the conveyance deed was discovered. In their opening brief and in this brief the appellants have argued that the procedural abuses, motions and representations to the trial court from these lawyers cannot be explained as inexcusable neglect. Although this Division has issued several decisions attempting to stamp out the tansy ragwort of drive by jurisdictional rulings, the point of this case is there never was any subject matter to begin with, at the administrative level or the superior court. *Cole v. Harveyland LLC,* 163 Wn.App 199, 208 (2011).

The second appeal is On The Rock's motion for substitution under RAP 3.2 with relation back to the commencement of the petition in the superior court. Appellants spent quite a few pages in their motions stating they are not sure that this relief exists. Even John Budlong didn't ask for this relief. See, *Martin v. Dematic,* 182 Wn.2d 28 (2014).

The third appeal is about the remedies available in this appeal.

Appellants believe On The Rock's motion for substitution, Mr. Lell's letter, and his and Mr. Gibson's declarations are materially false (as opposed to materially misleading). There are no tax advantages to an LLC; it is a pass through taxable entity, or what the IRS defines as a disregarded entity. The gains and losses flow through to schedule C of the member owner, whether a sole proprietorship, partnership corporation, or other ownership. No one moves development properties between LLC's based on long and short term development because there is no distinction for capital gains or losses based on long or short term ownership. No one moves properties from On The Rock to GIB because the purpose of the LLC is *limited liability.*

The first remedy appellants request are their attorney's fees and costs. It was the terror of fee shifting on appeal that the lawyers and parties in this matter counted on to conceal the conveyance. A few days after appellants filed their appeal Mr. Lell sent Thompson a "courtesy notice" "conservatively estimating" his attorney's fees at more than four years of college tuition for one of Thompson's children. Ironically, the party who has primary statutory responsibility for appellants' attorney's fees for failing to join GIB is the applicant, Leif Anderson, because his attorney's never got around to setting up an LLC for him. Appellants

believe they should not be required to chase down LLC's as quickly as Mr. Kusunose can notarize deeds. Any award of attorney's fees at the Court of Appeals and superior court should attach to the property in this matter, and probably should be joint and several with the attorneys in this case as the Court of Appeals has done in some unpublished decisions.

The next remedy for appellants needs to address the subject matter jurisdiction they were never going to be able to obtain in this matter in the first place.

One significant issue on the remand is the City's pooled insurer. The City is a member of a pooled insurance group. When Mr. Walter appeared, any possible momentum towards the third party out of department review ended. It is this critical relationship, and the pooled insurer's duty to citizens in administrative proceedings, that is what the Court in *Lauer* and fee bifurcation in *Durland* are searching for: real subject matter jurisdiction at the administrative level when there is a financially conflicted city, and a pooled insurer with a conflicted fiduciary duty.

## II. SELECTED QUOTES FROM THE CITY'S MOTION TO DISMISS AND OCTOBER 31, 2014 INITIAL HEARING

**Quotes from the City's motion to dismiss.**

The City's nineteen page motion to dismiss begins at CP 73. On The Rock's twelve page motion to dismiss begins at CP 54. The appellants have argued in their motions to this Court that the motions to dismiss and representations made to the superior court by On The Rock and the City are so legally questionable they are indefensible because no one thought appellants would appeal.

Outside counsel for the city Michael Walter and Mr. Lell both each emailed the superior court on September 23, 2014 noting they would be filing motions to dismiss at the initial hearing, which had been continued from October 3, 2014 to October 31, 2014. CP 1548; Decl. of Thompson in support of motions to supplement et. al, Exh. 2:6. On the afternoon of October 23, 2014 the City filed and served its motion to dismiss together with the 1,213 page administrative record and 116 page partial hearing transcript. CP 97-101. These were served on the appellants in electronic form. CP 1257-1258.

In its motion to dismiss the City quotes the Court of Appeals' decisions in *Durland v. San Juan Co.,* 305 P.3d 246 (July 1, 2013). CP 80, ll.14; CP 80, ll.26 - CP 81, ll. 4. (Pacific Reporter citation in original). The City does not quote *Durland* as to the standard of review for a CR 12(b)(6) motion, or *Durland's* quotation from *West* quoted in full in

appellants' opening brief, p. 31-32. The following quotes are from the City's motion to dismiss:

> "This motion is brought pursuant to RCW 36.70C.080, KCLCR 7 and the Court's Scheduling Order, to be decided at the LUPA Initial Hearing set for October 31, 2014."

CP 81, ll. 13 -14. (Actually, the scheduling order required eight day's notice under LR 7 for procedural motions, and LR 12(b) requires 28 days notice. CP 29. Dispositive motions were governed by CR 56. CP 31.)

> "More importantly, there is absolutely no evidence in the record created before the Planning Commission - the only record this Court can review as part of this LUPA appeal- that Petitioner Thompson has in any way been specifically, perceptively or personally harmed by the Planning Commission decision upholding the staff approval of the OTR plat. *TR, generally; AR, generally."*

CP 77, ll. 27 - CP 78 ll.4 (emphasis in original)

> "This motion is based on an established and unchallengeable record created before the Planning Commission. *See: Verbatim Transcript of The July 23, 2014 Planning Commission proceedings; Certified Administrative Record.* This established record cannot be supplemented or modified through new or extraneous evidence. *See,* RCW 36.70C.120(1). Accordingly, Petitioners cannot defeat this motion by resting on the claims or allegations in their LUPA petition. "Pleadings are not evidence." *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 278 P.3d 197, *rev. den.* 175 Wn.2d 1027 (2012). A party wishing to defeat dismissal may not rely on mere allegations, and must set forth specific facts establishing that there is a genuine issue for trial. *Id."*

CP 81, ll.20-27 - CP 82 ll.1-5. (emphasis original) (Without stating the obvious, *Moore* addressed summary judgment).

> "Second, and more importantly, the record before the Planning Commission is utterly devoid of any evidence of harm, injury or impact to Mr. Thompson or his property from the preliminary short plat approval or creation of "tract X", or the Planning Commission's affirmance of that decision. *See: TR, generally; AR, generally"*

CP 89, ll. 3-6.

There were six lawyers involved in the City's and On The Rock's motions to dismiss: Zachary Lell and Bio Park, CP 65; Mario Bianchi, CP 70; and Michael Walter, Katie Knight, Christina Schuck for the city, CP 91. Five lawyers signed the motions. In 1999 the Court in *Suquamish Tribe* held that the initial hearing under LUPA is subject to the rules of civil procedure. *Suquamish Tribe v. Kitsap Co.,* 92 Wn.App 816, 823 (1998). Motions under CR 7 let alone CR 12(b)(6) are not limited to a 1,213 page administrative record and 116 page hearing transcript "*generally.*" Three years earlier the Supreme Court in *Lauer v. Pierce Co.,* 173 Wn.2d 242, 254 (2011) held that if standing is not raised at the administrative level the petitioner can submit additional evidence outside the record to establish standing. *Lauer* is not cited in either motion

**City's statements to the trial court at the October 31, 2014 hearing.**

The following quotes are from the October 31, 2014 initial hearing before Judge Bradshaw:

> "MR. WALTER: Secondly, we're not here to talk about the merits of the case at all. I know petitioners in their briefing made some argument that the City and, I think, the other parties were trying to argue the merits and we were not. The information that was provided and the fact --
>
> THE COURT: How can I evaluate the extent of any harm without doing that?"

RP P.6, ll. 6 -12.

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> "THE COURT: And one thing -- maybe you're going to address this, but just to be clear, you and the City, you've beaten this drum pretty loudly about lack of perceptible, tactile harm to Petitioner here which begs this question so forgive the elementary nature of it, but I think you're well-suited to answer this. What's the point? What are you doing with the project if it has no effect on anyone?
>
> MR.LELL: I think that's an excellent question and it's a very legitimate one. The point -- and we've tried to explain this in our briefing -- is that the previous configuration of the lots, which were not done by my client, On The Rock, LLC, created some design inefficiencies in the future development of the property."

RP P. 26, ll. 6 - 17.

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> "THE COURT: Thank you. Mr. Thompson, you are --
>
> MR. THOMPSON: Your honor, thank you.
>
> THE COURT: You are outgunned --

MR. THOMPSON: I know.

THE COURT: -- a half dozen to one."

RP P. 31, ll. 15-19

**********

"THE COURT: as you all have recognized, there's a substantial record before the Court and to some degree necessitates review to consider the merits or harm issue. Also the court will want to review Knight v. Yelm, the Chelan County case as well as now Jones v. Hunts Point. So I'll be doing that when I'm not in session presiding over our criminal jury trial next week. So it's my intent to give you the Court's ruling in one week. Have a nice weekend. Nice to meet you all."

RP P. 59, ll. 7-15

**City's statements to the superior court regarding Misselwitz' standing**

The following quotes or statements are: 1) Mr. Walter's statements to the superior court with the city attorney, assistant city attorney and Travis Sanders sitting next to him, 2) the public notice of open record appeal hearing that was issued twice by Travis Saunders because the first hearing had to be rescheduled, and 3) the applicable sections from Title 19 of the Mercer Island City Code 19.15.020(J) Appeals, and E public notice, referenced in Mr. Walter's statements to the trial court.

1)

"MR. WALTER: I'm just going to mention again, too: Speaking at a quasi-judicial public hearing like this and

being a party of record, which clearly Mr. Misselwitz was because he spoke, does not mean you are an appellant. And if the Court is going to make that ruling today, if that's their position, then we've just eviscerated the Mercer Island City Code 19.15.020(J) which has a specific clearly delineated appeal process for persons to became an appellant. And we know that Mr. Misselwitz didn't do any of those things. Just speaking at the hearing doesn't convey appellant status."

RP P.53 ll. 23- RP P. 54 ll.7.

2.

PUBLIC NOTICE OF OPEN RECORD APPEAL HEARING

Only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive a notice of the decision and have the right to appeal.

CP 318 (notice for May 21, 2014 hearing); CP 327 (public notice for July 23, 2014 hearing) CP 317 - 319 (declarations of mailing to Thompson and Misselwitz public notice of May 21, 2014 hearing) CP 330 - 331 ( declarations of mailing to Thompson and Misselwitz public notice of July 23, 2014 hearing).

**MICC 19.15.020(J)**

"J Appeals

1. Any party of record on a decision may file a letter of appeal on the decision. Appeals shall be filed with the city clerk within 14 days after the notice of decision or after other notice that the decision has been made and is appealable.

4. Public notice of an appeal shall be provided in the manner specified in subsection E of this section."

**MICC 19.15.020(E)**

"E. Public Notice.

3. The public notice shall include the following

e. A statement that only those persons who submit written comments or testify at the open record hearing will be parties of record; and only parties of record will receive a notice of the decision and have the right to appeal."

Exh. 5, P. 16 - 17; Exh. 5 P. 11 - 12, Appendix to appellants' opening brief

Mr. Walter's statements to the superior court are directly contradicted by the MICC. Mr. Walter has represented the City of Mercer Island in past land use and LUPA matters, both at the administrative level and superior court. The city attorney, assistant city attorney, and planner Travis Sanders were sitting next to Mr. Walter when he made these comments to Judge Bradshaw, and obviously had to know the statements were untrue.

## III. STANDARD OF REVIEW

The City and On The Rock do not address the requisite burden of proof in their motions to dismiss filed below. The City argues to this Court that appellate review of jurisdiction is de novo, citing *Knight v. City*

*of Yelm*, 173 Wn.2d 325, 336 (2011). City brief p. 10-11. The City further states:

> The appellate court will not disturb the superior court's decision to dismiss absent a manifest abuse of discretion. *Escude v. King Co. Pub. Hosp. Dist.*, 117 Wn. App 183, 190, 69 p.3d 895 (2005). "Abuse" occurs when the ruling is manifestly unreasonable or when discretion was exercised on untenable grounds. *Id.*

City brief, p. 10 - 11.

*Escude* addressed dismissal under CR 41(a)(1)(B), and has no relevance to this appeal. Under LUPA, the Court of Appeals stands in the same position as the trial court in reviewing a land use decision. *Wenatchee Sportsmen Ass'n. v. Chelan Co.*, 141 Wn.2d 169, 176 (2000). Even under RCW 36.70C.130(1) the standard of review of a decision on the merits is either (1) de novo, (2) whether a sufficient quantum of evidence in the record persuades a reasonable person the premise is true when viewed in light of the whole record, or (3) the decision is clearly erroneous when, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been committed. *Phoenix Dev., Inc. v. City of Woodinville,* 171 Wn.2d 820, 828-829 (2011).

On The Rock argues that standing is a threshold issue that appellate courts review *de novo* as a question of law, citing *In Re*: *Estate*

*of Becker,* 177 Wn.2d 242, 246 (2013), and judicial review in a LUPA appeal is confined to the record created during the administrative proceedings below. On The Rock brief p. 10. On The Rock further argues that in this appeal the appellants must prove that one or more of the standards for relief under RCW 36.70C.130(1) has been met. *Id* at p.11, fn. 3.

The City and On The Rock fail to address, either to the trial court or to this Court, the burden applicable to their motions to dismiss under CR 12(b)(6). In appellants' opening brief they set forth the full quote from *West v. Stahley*, 155 Wn. App. 691, 696 (2010), as well as this Division's decision in *Durland v. San Juan Co.,* 175 Wn. App. 316 (2013) in the hope the City and On The Rock would finally address the inconsistency in their motions to dismiss below and arguments to this Court: a motion to dismiss under CR 12(b)(6) is limited to the pleadings, it requires the trial court to find beyond a reasonable doubt that no facts justifying recovery exist, the plaintiff's allegations are presumed to be true, and the court may consider hypothetical facts not part of the formal record. Only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief should a motion to dismiss under CR 12(b) be granted. Appellants opening brief p. 31-32.

## IV. PROCEDURAL REQUIREMENTS FOR CR 12(b)(6) MOTIONS TO DISMISS IN KING COUNTY

Appellants set forth in their opening brief a lengthy recitation of the procedural rules applicable to motions to dismiss under CR 12(b)(6) or CR 56 in King County Superior Court. p. 32-36.

On The Rock argues to this Court that "Appellants retreat into irrelevance with their attack of the trial court's procedure below." p. 33, and "[N]either the City nor Additional Parties relied upon CR 12(b)(6) in their respective motions, which by their plain terms were presented under Civil Rule 7, King County Local Rule 7, RCW 36.70C.080 and the superior court's August 14, 2004 case scheduling order rather than CR 12(b)(6)." p. 35.

CR 7(b) does not address the procedural or notice requirements for filing motions, but instead only addresses form.

The point appellants tried to make is there *is no* CR 12(b) under the King County Local Rules. See Appellants' opening brief, p. 32-36. As noted, LCR 7(b)(1) is applicable to *procedural* motions. LCR7 (b)(1) specifically excludes motions under LCR 12(b). LCR 12(b) states that motions under CR 12(b) are subject to the page limitations and scheduling requirements of CR 56 and LCR 56. The City's motion to dismiss was 19 pages long; LCR 7(5)(b)(vi) limits motions to twelve pages.

The are several practical reasons for LCR 12(b): 1) motions brought under CR 12(b) inevitably devolve into motions under CR 56, just like the motions below in this case.; 2) there is little point to filing motions to dismiss under CR 12(b) when the motion can be brought just as easily under CR 56 without the burden under CR 12(b); 3) motions under CR 12(b) usually are a waste of the trial court's time; and 4) the only possible purpose of filing a motion under CR 12(b) is to prejudice the other party with shorter notice, which was the exact purpose of the motions filed below.

In this case, the superior court clearly had subject matter jurisdiction as the petition was timely filed and served. Any motion to dismiss, despite the timeline, could only be brought under CR 12(b)(6) as noted in On The Rock's brief. p. 35. Under CR 12(b)(6) if matters outside the pleadings are presented to and not excluded by the court the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Finally, both On The Rock and the City misread the superior court's civil case schedule, which states that "Motions on jurisdictional *and* procedural issues shall comply with CR 7 and KCLR 7, except that the minimum notice of hearing requirement shall be 8 days." CP 29.

(emphasis added). King County Superior Court is familiar with CR 6, and did not come up with a standard civil case schedule in which eight days is the same as six days under CR 6, as On The Rock and the City argue. The civil case schedule holds that *procedural* motions require a minimum of eight day's notice. *Jurisdictional* motions must comply with KCLR 7 which references LCR 12 and LCR 56. The civil case schedule itself sets forth the requirements for filing motions under CR 56. CP 31. The civil case schedule increases the notice for procedural motions for the initial hearing from six to eight days; it does not reduce the procedural and notice requirements under LCR 12 and LCR 56 from twenty eight days to eight days, and then to six days under CR 6.

## V. THE PROCEDURAL ABUSES BELOW PREJUDICED BOTH THE APPELLANTS AND THE SUPERIOR COURT

On The Rock and the city argue that the procedural abuses at the trial court did not prejudice Thompson or Misselwitz. On The Rock p. 36-37. City brief p. 11-12. The more nuanced question is who the procedural abuses were designed to prejudice, and whether such basic procedural errors are just one more incident of inexcusable neglect, or intent.

The appellants find it ironic that the City moved for 45 additional days to submit its brief to this Court (75 total days) to simply defend its own motion to dismiss filed at the Superior court on October 23, 2014.

CP 73. The assistant city attorney signed the City's brief, and has been involved in every stage of the proceedings, including at the administrative level, superior court, and Court of Appeals. See CP 92 (privilege log). Ms. Schuck signed the City's motion to dismiss at the superior court. CP 919. Ms. Schuck represented the City at the administrative hearing. CP 1257. It is almost certain that Ms. Schuck prepared the very strange July 27, 2014 Planning Commission decision that omits all reference to On The Rock as the owner of the property or name of the short plat *except* in the computer generated footer on the decision, because that is the name of the short plat. CP 103-105.

What the City and On The Rock argued at the trial court, and argue to this Court, is that the standard of review for their motions is under RCW 36.70C.130(1) for a decision on the merits. On The Rock cites RCW 36.70C.130(1) in its brief as the standard of review, despite three days notice to the appellants, and 6 to the trial court, including the filing and service of the 1,213 page administrative record. On The Rock brief. p.11.

Appellants have argued throughout that the procedural abuses at the superior court were to place a busy superior court in an impossible situation which would force the superior court to have to choose the party it felt it could trust, was least conflicted, most knowledgeable, and who

would propose an order it could defend. This is why the City had four representatives at the October 31, 2014 hearing; outside counsel Michael Walter, city attorney Katie Knight, assistant city attorney Christina Schuck and the land use planner Travis Sanders. RP P.5, ll. 13-18.

## VI. MISSELWITZ EXHAUSTED HIS ADMINISTRATIVE REMEDIES AND HAS STANDING

The City and On The Rock argue that *every* citizen must file his or her own separate administrative appeal, and pay the separate administrative appeal fee, in order to become a party with the right to file an appeal to the superior court from an open record hearing the citizen has participated in. (One of the issues raised in appellants petition is the fee is abusive at $837 for even one citizen. CP 24). Even the husband and wife would need to each file separate administrative appeals according to On The Rock's and the City's reading of *Jones v. The town of Hunts Port*, 166 Wn. App 452 (2011). City's brief p. 19-20. On The Rock's brief p. 21. Both the city and On The Rock concede that Misselwitz satisfies all other bases under RCW 36.70C.060(2).

In their opening brief, the appellants cite the relevant provisions of the MICC, RCW 36.70B (project permit statute) and RCW 58.17 (subdivision statute). Appellants' brief p. 36 - 42. None support the City and On The Rock's argument that a citizen must file his own separate

administrative appeal and pay the administrative fee in order to become a party and have the right to appeal to the superior court from an open record hearing. The elephant in the room has always been that the City and On The Rock request what no other jurisdiction in Washington has requested since LUPA was enacted: that as a matter of law only the administrative appellant has "standing" to appeal from an open record hearing he or she participated in and was a party of record to.

The City's and On The Rock's arguments on this issue are not consistent. On The Rock argues that although Misselwitz "participated" in the open record hearing, he did not "file an administrative appeal in his own right or otherwise formally join in the administrative appeal filed by Mr. Thompson." p. 14. On The Rock further argues that the two public notices specifically mailed to Misselwitz and publically posted regarding the open record hearing are ineffective since they are local regulations determining participation and/or standing to appeal to the superior court, and are preempted by LUPA, citing *Durland v. San Juan Co.,* 175 Wn. App 316, 324 (2013). p. 16. Finally On The Rock argues Misselwitz may not raise equitable exceptions to LUPA's exhaustion requirement for the illegal public notice.

The City argues however that Misselwitz did not participate to the full extent allowed, although he prepared and submitted a letter and spoke

for the full three minutes he was afforded. City brief p. 18. The City then argues that its own public notices it posted and mailed to the neighbors within 300 feet of SUB 13-008 are an incorrect statement of law and state law prevails over the City's notice form." City's brief p. 18.

This Court's decision in *Durland* held just the opposite: the superior court was bound by the local jurisdiction's regulations determining a final land use decision and the time periods in which to file an administrative appeal. 175 Wn. App at 324. Misselwitz has never raised an equitable defense. Misselwitz argues that the MICC and state law provide exactly as set forth in the two public notices he received. The irony, as set forth in the appellants' opening brief, is that the public notices mailed to Misselwitz were the only public notices issued by the city that complied with the MICC or state law. Appellants opening brief p. 38 - 42.

Neither the City nor On The Rock cite a single case supporting or addressing their position. The cases cited by both simply address instances in which no administrative appeal was timely filed, and therefore a final land use decision was never issued. The City relies on the fact that LUPA repeatedly refers to "person" in the singular without noting that RCW 36.70C.020(4) defines person as including an individual, partnership, corporation, association, public or private organization or governmental entity or agency. Neither the city nor On The Rock address

the plain language in RCW 36.70C.040(2)(d) that states that persons who later intervened or joined in the appeal are not *required* to be made parties to the superior court action under this subsection. At the administrative level, there are no formal procedures for joinder. In its motion to substitute, both On The Rock and the City misunderstand what joinder means. Joinder is not the motion to amend the pleadings under CR 15, because that simply obtains leave to add the new party to the caption and the body of the complaint or petition. Joinder is the *service* of the amended complaint or petition under CR 5, and the filing of proof of service. Whether a party shows up and participates or not, they are joined.

The motions previously filed in this matter have discussed joinder of necessary parties under RCW 36.70C.050. Again, joinder under .050 is no different than joinder of Misselwitz at the administrative level: naming of the new party, service by mail of the cause of action, and although not specifically listed filing of the proof of service. .050 is applicable to the joinder of parties who may be needed for just adjudication of the petition. On The Rock and the City never address who these necessary parties could be if they did not file their own administrative appeal. RCW 36.70C.040(d) requires the administrative appellant to be named and served in the initial petition. If the necessary party under RCW 36.70C.050 had not filed his or her own administrative appeal, they

could never have standing according to On The Rock and the City, and this provision as well as RCW 36.70C.040(d) would be completely superfluous.

## VII. THOMPSON HAS ESTABLISHED HARM

As noted in the appellants' opening brief, they do not believe that when the petition is timely filed and served, all available administrative remedies have been exhausted, a final land use decision has been issued, the petitioners are adjacent land owners who allege injury to their property, and the defense of lack of standing was not raised at the administrative level dismissal under CR 12(b)(6) is available.

The City in its brief argues that allegations that a proposed subdivision overcrowds land, does not provide adequate light and air, does not meet the local jurisdiction's regulations for subdivisions or conform to the jurisdiction's zoning standards, are "generalized complaints [that] fail to establish the requisite injury in-fact as to Thompson." p. 27. However, those are the stated purposes in the state subdivision statute, RCW 58.17.010. Survey discrepancies are required to be disclosed on the plat itself. RCW 58.17.255. As discussed in the appellants' opening brief, these are the same purposes listed at the beginning of the MICC. p. 45, 49. In *Bierman v. City of Spokane,* 90 Wn.App 817, 824 (1998), the Court held that blockage of air and light alone invalidated building permit.

Throughout On The Rock's and the City's brief are endless comments of the minor configural effects of SUB 13-008 without citation to the record. However, both the City and On The Rock in their briefs plainly admit that Tract X, a separate legal parcel, is solely designed to exceed the applicable impervious surface allowance for the property. The City states:

> The application sought to alter the design of the existing layout of the two lots by creating a small driveway to the two properties, described as "Tract X." CP 121; 140-141. The proposal did not change the number of existing building lots and only proposed to add Tract X to concentrate impervious surface on Tract X, thereby allowing greater impervious surface on the two building lots.

City brief p. 2.

On The Rock states:

> Pursuant to Section 19.02.020(D) of the Mercer Island City Code (MICC), the maximum impervious surface of a lot is limited to 35 percent of its gross square foot area. Under this standard, the entire area of the original shared access easement under the 2009 short plat would be characterized as "impervious surface" for purposes of calculating the maximum coverage limitation for Lot 1. CP 122-23, CP 1320. The prior easement thus restricted the available area on Lot 1 for the building footprint, patios, driveways, overhangs, etc., each of which would be considered impervious surfaces under the MICC. Incorporating the newly created Tract X into the plat design allowed additional usable impervious surface area to be available for the ultimate development of that lot. CP 122-23.

On The Rock brief p. 4.

Attached as exhibit 8 in the appendix to the appellants' opening brief is Administrative Interpretation Number 07-05. This interpretation clearly sets forth all of the local regulations regarding impervious surface for easements, and notes that the impervious surface of the easement is charged to the subservient lot. It is axiomatic that any division of land creates only legally buildable lots, which is why the definition of lot includes Tract. RCW 58.17.020 (a); MICC 19.16.010, appellants' appendix, Exh. 6 p. 14.

The City and On The Rock also continually misrepresent the underlying building permits for the houses as "speculative." In fact, the permits for the houses were applied for before SUB 13-008 because the houses did not fit within the existing code. Both house plans have been finalized and approved pending resolution of this matter. See CP 794 (email re: plans); CP 745-836 (permits).The appellants will bring full copies of the approved plans to oral argument for the Court's review.

## VIII. REMEDIES/ATTORNEY'S FEES AND COSTS

### A. Attorney's Fees and Costs

On The Rock requests appellants be assessed attorney's fees and costs pursuant to RCW 4.84.370. However, On The Rock has no standing in this matter, and never had any standing at the superior court. The doctrine of standing prevents a party from raising the rights of another,

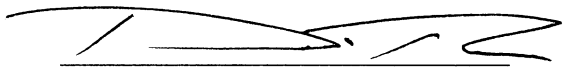
and the claims of a party that lacks standing cannot be resolved on the merits. *McCarthy Fin. Inc. v. Premera,* 182 Wn. App 1, 23 (2014). A party that lacks standing cannot request its attorney's fees and costs in the litigation. *Trinity Universal Ins. v. Ohio Cas. Ins.,* 176 Wn. App 185, 208-209 (2013). It is not clear that the applicant, who is an agent of On The Rock, would have standing to pursue attorney's fees and costs even if the applicant had paid any of his attorney's fees. See *Mangat v. Snohomish Co.,* 176 Wn. App 324, 330 (2013) ("[L]and use permit rights run with the land, and are not personable to the person who obtained the permit.") Furthermore, the applicant had the primary responsibility under RCW 36.70C.050 to join the proper owner of the property and failed to do so.

The conveyance deed was disclosed on June 1, 2015. The appellants filed their corrected opening brief one week later, and requested attorney's fees under RAP 18.1 citing *Crystal Lotus Enters v. Shoreline*, 167 Wn. App 501-508, (2012) (the failure of a party to name or join an indispensable party is a basis for finding that the appeal was frivolous and for award for attorney's fees). After On The Rock filed its motion for substitution, the parties filed several motions that have been referred to the panel as the motions go to the merits. The appellants in their reply brief in support of appellants' motions to supplement, vacate, remand, join and for

attorney's fees and costs included claims for attorney's fees citing cases noting the award of fees due to parties lacking standing to appeal are subject to award of fees and costs, and parties willful and potential failure to produce requested discovery subject to award of attorney's fees and cost. p. 9.

DATED this 28th day of September, 2015

By:



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