66423-9

66423-9

NO. 66423-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBORAH BUCK,

Appellant,
v.

CITY OF SHORELINE and CRISTA MINISTRIES,

Respondents.

BRIEF OF RESPONDENT CRISTA MINISTRIES

Alan L. Wallace, WSBA # 18205
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent CRISTA Ministries

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

TABLE OF CONTENTS

I. SUMMARY 1

II. COUNTERSTATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Background 2

C. Master Development Plan Permit 3

D. Buck's Participation in the MDPP Application Review Process 5

E. Proceedings in the Superior Court on Buck's LUPA Petition 9

III. STANDARD OF REVIEW 12

IV. ARGUMENT 14

A. This Appeal Is Not About Process, Because Buck Waived Complaints About the City's Application-Review Process 14

B. Even if This Appeal Were About Process, Buck's Complaints Lack Merit Because She Was Given (and Availed Herself of) Opportunities to Submit Written Comments and to Speak at Public Hearings Before the City Approved CRISTA's Permit Application 14

C. Buck's Standing Was Limited to the Traffic-Impact Aspects of the MDPP that She Raised During the City's Permit-Review Process 15

1. Other than *Citizens for Mount Vernon*, the standing decisions on which Buck relies are not pertinent 15

2. Not everyone has standing under LUPA 17

3. As *Citizens for Mount Vernon* teaches, to have standing under LUPA, a petitioner must, as a participant in the administrative process, have raised the permit approval issues that she proposes to raise on appeal 18

4. Vicarious standing is confined to First Amendment cases 24

5. Buck's argument that the City denied her the opportunity to exhaust administrative remedies misses the point 26

D. CRISTA Is Entitled to Its Attorney Fees and Expenses for Appeal 26

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Anderson v. Pierce County,
86 Wn. App. 290, 936 P.2d 432 (1997) 16

Chelan County v. Nykreim,
146 Wn.2d 904, 52 P.3d 1 (2002) 16

Citizens for Mount Vernon v. City of Mount Vernon,
133 Wn.2d 861, 947 P.2d 1208 (1997) ..... 1 and passim

Estate of Friedman v. Pierce County,
112 Wn.2d 68, 768 P.2d 462 (1989) 13

Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake,
150 Wn.2d 791, 83 P.3d 419 (2004) 17-18, 25

Hadley v.. Maxwell,
144 Wn.2d 306, 27 P.3d 600 (2001) 12

In re Parentage of L.B.,
121 Wn. App. 460, 89 P.3d 271, *aff'd in part, reversed in part on other grounds, Carvin v. Britain*, 155 Wn.2d 679, 122 P.3d 161 (2005) 13

King County v. Boundary Rev. Bd.,
122 Wn.2d 648, 860 P.2d 1024 (1993) 20, 21

Kucera v. State Dept. of Transp.,
140 Wn.2d 200, 995 P.2d 63 (2000) 16

S&K Motors, Inc. v. Harco Nat'l Ins. Co.,
151 Wn. App. 633, 213 P.3d 630 (2009) 13

Save a Valuable Environment v. City of Bothell,
89 Wn.2d 862, 576 P.2d 401 (1978) 16

State v. Goucher,
124 Wn.2d 728, 881 P.2d 210 (1994) 25

Suquamish Indian Tribe v. Kitsap County,
92 Wn. App. 816, 985 P.2d 636 (1998) 16

Washington Equip. Mfg. Co. v. Concrete Placing Co.,
85 Wn. App. 240, 931 P.2d 170 (1997) 13-14

FEDERAL CASES

Club 21 LLC v. City of Shoreline,
2009 U.S. Dist. LEXIS 30950 (W.D. Wash., Apr. 10, 2009) 25

Goat Hill Homeowners Ass'n, Inc. v. King County,
686 F. Supp.2d 1130 (W.D. Wash. 2010) 25

STATE STATUTES AND ORDINANCES

RCW 4.84.370 ..... 2, 26, 27

RCW 34.05.554 20

RCW 36.70B.110(6) 21

RCW 36.70B.110(6)(c) 1, 2, 23, 24

RCW 36.70B.110(9) 15

RCW Chapter 36.70C 2

RCW 36.70C.020(2)(a) 15

RCW 36.70C.030 15

RCW 36.70C.060 17

RCW 36.70C.060(2) 18, 19

RCW 36.70C.060(2)(a) 16, 22

RCW 36.70C.060(2)(d) ..... 1 and passim

RCW 36.70C.080 11

RCW 36.70C.130(1) 10, 12

RCW 36.70C.130(a) 12

RCW Chapter 43.21C 4

Shoreline Municipal Code § 20.30.090 3

Shoreline Municipal Code § 20.30.353(f) 3

RULES

RAP 5.3(f) 13

RAP 10.3(a)(4) 12

RAP 18.1 27

OTHER AUTHORITIES

15 Moore's Federal Practice § 101.51[3][e] 25

I. SUMMARY

One has standing under the Land Use Petition Act (LUPA), only if one has "exhausted his or her administrative remedies to the extent required by law." RCW 36.70C.060(2)(d). A person has "exhaust[ed] his or her administrative remedies as required by law" if the issues he or she seeks to raise in a LUPA appeal are ones *he or she* raised as a participant in the administrative process. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869-870, 947 P.2d 1208 (1997); RCW 36.70B.110(6)(c). Deborah Buck participated in the City of Shoreline's process for reviewing CRISTA Ministries' Master Development Plan Permit (MDPP) application, raising the single issue of whether issuing a SEPA Mitigated Determination of Non-Significance (MDNS) for the application, instead of requiring an Environmental Impact Statement, was clearly erroneous or unsupported by substantial evidence in light of traffic impacts that a planned early childhood center would have on Greenwood Avenue North. Buck claims she was entitled, on appeal, to raise issues other than traffic impacts because she had told the City that she was adopting by reference "all of the comments of [unspecified] others that deal with [unspecified] environmental effects and [unspecified] mitigations for our general neighborhood." CP 81.

That adoption-by-reference statement did not meet the requirement in RCW 36.70B.110(6)(c) that comments on land use applications be "as specific as possible." Nor did Buck's purported adoption by reference of unspecified comments of unspecified *others* operate to exhaust "*her* administrative remedies" with respect to non-traffic issues.

This Court should affirm and award CRISTA its attorney fees and expenses on appeal pursuant to RCW 4.84.370.

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

This was an appeal under the Land Use Petition Act (LUPA). RCW Ch. 36.70C. Deborah Buck filed the appeal as "an individual," not as representative of any group or association. CP 3. Buck's LUPA Petition sought the vacation of a resolution of the Shoreline City Council approving a 20-year Master Development Plan Permit application for CRISTA Ministries' 57-acre campus, subject to mitigation conditions recommended by the City Planning Commission. CP 10, 12.

B. Background.

Since 1949 CRISTA Ministries has owned an irregularly shaped tract of about 57 acres in Shoreline known as the CRISTA Campus. CP 13; Certified Appeal Board Record ("BR") 17. Buildings on the campus

date back to 1913. BR 17-19. There are 13 different "access points" to the campus from public streets, including on Greenwood Ave. N. BR 17.

C. Master Development Plan Permit.

On March 6, 2009, CRISTA submitted an application to the City for a Master Development Plan Permit ("MDPP") to guide growth on, development of, and City permitting for, its campus over the next 20 years. CP 13 ("Project Description), 14 (¶ 11), 57 (¶ 6).[1] As Buck acknowledged below, CP 7 (¶ 3.5), uses of the campus will not change under CRISTA's 20-year plan; existing uses of the campus will continue. The development plan is confined to the campus, and envisions adding some new buildings and remodeling, replacing, or demolishing some older ones. CP 15-18, 313 (¶ 3), 318-19.[2]

---

[1] Before submitting the MDPP application, CRISTA held a community impact meeting as required by Shoreline Municipal Code (SMC) § 20.30.353(f) and a neighborhood meeting, as required by SMC § 20.30.090.

[2] The adjective "mega" that Buck's opening brief (*e.g.*, pages 1, 10) uses to describe the development CRISTA plans for the next two decades is the product of rhetoric by her counsel, not of the record or applicable law. The CRISTA Campus already includes, among other facilities, administrative offices for 850 employees, 525 assisted or independent senior residential units, a broadcasting facility, a stadium with football-sized field, and schools for about 1200 children and K-12 students, with associated playfields. BR 17-18. Under the MDPP, the campus area would not be expanded and existing uses would continue. School enrollment capacity would rise from 1,570 to 1,610 (2.5%) by building a new early childhood center that could accommodate 40 more children, BR 21, 27, 54, CP 23; the capacity of facilities for senior housing, assisted living, and skilled nursing would rise over 20 years from 525 to 629 (19.8%), BR 28, CP 24; the ratio of dwelling units per acre, 24, would be at half the density allowed under the zoning code, CP 26; the total number of dwelling units would be less than 25% of what the zoning code would allow, BR 30, CP 26; and CRISTA will retain 66% of the significant trees on the property and replace all removed trees with trees of greater size than the local code requires, BR 29, CP 25.

Under SEPA,[3] the City was required to evaluate environmental impacts potentially generated by CRISTA's MDPP, and it did so. CP 44, 18 (¶ 30). On March 25, 2009, notices of the application and public hearing dates were mailed to owners of properties adjoining the CRISTA Campus, CP 58 (¶ 8), but, because of complaints that fewer than all campus neighbors had received notice, the process was restarted. Using a new mailing list, the City on November 18, 2009 mailed a "Re-Notice" of the MDPP application to addresses within 1,000 feet of the CRISTA Campus. CP 58-59 (¶¶ 9-11), CP 77-79. There is no dispute that Buck and her attorney received that notice. CP 59 (¶ 11).

The Re-Notice informed Buck and other recipients:

> -- that individuals had the right to submit written comments on or before December 4, 2009, and would have the right to participate in the public hearing on the application on a date not yet scheduled;
>
> -- that the City expected to issue a SEPA MDNS (and not require a full Environmental Impact Statement, or EIS);
>
> -- that the optional DNS process identified in WAC 197-11-355 was being used and "[t]his may be the only opportunity to comment on the environmental impacts of this proposal"; and
>
> -- that no administrative appeal was available but that the City's permit action could be appealed to the King County Superior Court.

[3] The State Environmental Policy Act, RCW ch. 43.21C.

CP 77. The notice listed categories of proposed types of mitigations of plan impacts, and provided the name of an associate City planner, phone numbers, a website, and e-mail address to use in seeking information. *Id.*.

D. Buck's Participation in the MDPP Application Review Process.

Buck lives at 221 N. 196th Place. CP 3, 81. That street is a cul-de-sac; one must use a segment of Greenwood Ave. N. for ingress from or egress to N. 195th St. and public streets beyond. BR 41, 43. Buck's house is at the corner of Greenwood Ave. N. and 221 N. 196th Place, and thus is situated across the street from, and west of, the northernmost section of the CRISTA Campus. CP 7 (¶ 3.3).

Under the MDPP, a new early childhood center would be built at the northwest corner of the campus; a parking lot to serve it would be accessed from Greenwood Ave. N. across from the eastern terminus of N. 196th Place and thus roughly across the street from Buck's house. BR 50.

On December 4, 2009, the last day of the written comment period and 18 days before the contemplated MDNS was issued, Buck submitted a letter to the City. CP 81-82. Buck prefaced her comments with:

> I adopt by this reference all of the comments of others with environmental effects and mitigations for our general neighborhood.

CP 81. Buck cited no specific comments by any identified or described "other" individual or organization. Buck did not explain what she meant

by "comments. . . that deal with environmental effects and mitigations," or "general neighborhood." CP 81. Buck did not assert in her December 4, 2009 comment letter (and did not assert in the Superior Court proceedings) that, when she submitted the letter, she had read the comments submitted by any other person(s).

Buck's letter went on to express concern about impacts on traffic that would result from a planned "new entrance to CRISTA's property" on Greenwood Ave. N. (the access to the planned early childhood center, *see* CP 50). CP 81. Buck asserted that "[t]he environmental documents do not disclose the issues related to that new entrance"; that "the existing conditions, impact, and mitigation discussions need to discuss inclement weather situations"; that "I can see a complete failure to consider the impacts associated with inclement weather, a new access point at the top of a steep hill, [and] dropping off students at the intersection of North 195th Street and Greenwood Avenue North," which "should be sufficient for someone to wake up and realize the need for a full EIS." CP 81.[4]

---

[4] Buck's letter asserted that CRISTA's traffic engineering consultant, Transpo, although "well regarded," must either have been on a very limited budget or inadequately informed concerning "what [CRISTA] well understands about the neighborhood," and that "[t]his is exactly why we have EIS's for projects such as this," and "I request such an EIS with no limitations that would cause experts to do other than a fine job sufficient to lead to mitigations yielding a fine project." CP 81-82. Thus, Buck's comments implied that she considered the MDPP "fine" except for the way traffic impacts on Greenwood Ave. N. had been addressed. Buck cited a need to take care of her elderly mother and inability to access Capacity Analysis Worksheets on a City website as reasons she had not had "time to specify in more detail the flaws that the documents contain." CP 81.

Buck's written comments were considered by City Planning Department staff. CP 60 (¶ 13). Thereafter, the City SEPA Responsible Official, Rachael Markle, issued the MDNS on December 22, 2009, CP 61 (¶ 18), CP 86-87, instead of requiring an EIS. The MDNS included numerous conditions, seven of which addressed mitigation of traffic impacts that the 20-year development plan could have at several locations, including Greenwood Ave. N. CP 86-87.

The City Planning Commission held an open record public hearing on January 21, 2010, which was continued to and reconvened on February 18 and then re-continued to and re-reconvened on March 18. CP 62 (¶ 21) -64 (¶ 25). Buck not only attended all three sessions of the public hearing but spoke at all three sessions and expressed, each time, her concerns about traffic impacts on Greenwood Ave. N. CP 62-63 (¶ 21), 95-101; CP 63 (¶ 23), 102-03; CP 63-64 (¶ 24), 104-08. Buck explained why she believed "adding a new access point at this location is a recipe for disaster," CP 97, 101, a "traffic nightmare," CP 107, and "an accident waiting to happen," CP 108, and objected that the MDPP's traffic plan, even with recommended mitigations, reflected inadequate accounting for snow-and-ice conditions to which the street is subject because of shade and low-sun angles in the winter, CP 105-07.

There is no record of Buck making reference, at any of the public hearing sessions, to comments or objections expressed by others or to non-traffic environmental impacts. There is no record of Buck making reference at any of the public hearings to historic preservation, handling of storm water, or other, more general issues to which she would later refer in her LUPA Petition (*see* CP 5 (¶ 2.4.2), 7 (¶ 3.8), 8 (¶ 3.10), 9 (¶ 4.3)).[5] Buck has never claimed that any other person commented or spoke as her representative during the administrative process, or that she spoke as anyone else's representative.

On March 29, 2010, the Planning Commission adopted 24 pages of Findings, Conclusions, and Recommendations for City Council approval of CRISTA's MDPP with conditions. BR 17-29 (those relating to traffic impacts are at BR 22-23, 31-32, 35-36, and 84-85). On May 10, 2010 by Resolution No. 301, CP 12, the Shoreline City Council adopted the Planning Commission's findings and approved the MDPP subject to the recommended conditions (including those for traffic impact mitigations).

Buck timely filed a LUPA Petition. CP 3. No one else filed an appeal with respect to Resolution No. 301.

[5] Buck did inform the Planning Commission that she has "a brother who knows how to litigate EIS cases and I will use him to do that." CP 98, 101.

E. Proceedings in the Superior Court on Buck's LUPA Petition.

Buck's LUPA Petition included assertions that she has standing. CP 5-6 (¶¶ 2.4.1-2.4.4). The Petition included an assertion that Buck and others had been "denied the right to comment, even in writing," apparently concerning whether to amend the Shoreline Municipal Code to provide for a "SEPA hearing on December 8, 2010" or "to allow for a consolidated hearing." CP 6 (¶ 2.5). With respect to the MDNS and MDPP approval, Buck's Petition asserted that:

> 3.8. The City failed to assure compliance with its substantive environmental standards in connection with numerous elements of the environment, such as storm water handling and maintaining traffic levels above LOS F, listed by way of example only.
>
> 3.9 [Buck], in her objection to the SEPA checklist and proposed mitigations, incorporated by references objections to numerous environmental impacts that were not studied, were not mitigated, and for which no alternatives were analyzed.
>
> 3.10. [The] MDNS was inadequate to justify destruction of three Firlands buildings that the MDPP allows to be destroyed [because they are] eligible for listing in the National Register of Historic Places [and t]he record shows no justification for such a lack of process.
>
> 3.11. The approval of the MDPP is a major action having probable significant, adverse environmental impact, thus requiring preparation of an EIS.
>
> 3.12. The mitigations incorporated in the MDNS were inadequate. See attached Exhibit B (MDNS). For instance, the City failed to adopt the mitigations recommended by the consultants and staff.

> 3.13. The City did not provide [Buck] and others notice that was required by the Shoreline Municipal Code.

CP 7-8. As Grounds for Reversal, Buck alleged violation by the City of RCW 36.70C.130(1)(a)-(d) and (f), CP 9, in failing to conduct a SEPA environmental review, to adequately mitigate "the impacts that arise from the land use decision," to adequately study "alternatives," to follow "required [but unspecified] SEPA procedures," to follow required (but unspecified) City procedures and apply "its [unspecified] substantive standards," and in denying "a right to comment on SEPA proceedings." Buck requested review by the court of the "record with regard to [unspecified] issues other than SEPA" and an order vacating the City's decision to approve CRISTA's MDPP. CP 12. Buck subsequently informed the court that she was limiting her challenge to the City SEPA Responsible Official's December 22, 2009 decision to issue the MDNS (rather than require an EIS). CP 339.

The City moved for, and Buck's counsel stipulated to, summary dismissal, with prejudice, of her claims based on lack of notice and failure to provide a SEPA administrative hearing. CP 44-55; 303-05. Buck's counsel signed, and the court entered, an Order Granting the City's Unopposed Motion for Summary Judgment. CP 347-49.

CRISTA and the City moved for partial summary judgment based on standing. Their motion sought to limit the issues Buck could raise on appeal to the traffic-impact issues she had raised with the City. CP 131-37; 342-46; 143-61. Respondents' motion argued that Buck had not raised with the City any other basis for objection to the MDPP, and thus had failed to exhaust available administrative remedies with respect to issues other than Early Childhood Center traffic impact mitigation, and therefore lacked standing to raise any other issue on appeal. CP 131-37.

Buck's argument in opposition to the partial summary dismissal motion relied on the "adoption by reference" statement in her December 4, 2009 written comments (CP 81). CP 149-51, 154-56. Buck asserted it would amount to "sandbag[ging]" her for the court to adopt "a startling new rule nullifying incorporation by reference," CP 158.

The Superior Court, Judge Gregory Canova, granted respondents' motion at the initial LUPA hearing. CP 350-51.[6] Following the final LUPA hearing, Judge Canova found that Buck had not established that the issuance of the MDNS for CRISTA's MDPP was clearly erroneous or

[6] RCW 36.70C.080 requires the court to hold an initial LUPA hearing no sooner than 35 days and no more than 50 days after filing of a LUPA petition, at which any motions challenging the petitioner's standing are heard, unless the court orders discovery. Buck did not request, and the Superior Court did not order, any discovery.

unsupported by substantial evidence, CP 419,[7] and entered a final Order denying Buck's LUPA Petition, CP 418-20. Buck timely filed a notice of appeal, mentioning and attaching only the final Order. CP 421-25.

III. STANDARD OF REVIEW

Buck's brief includes no assignments of error. *See* RAP 10.3(a)(4). Based on the absence of argument in Buck's brief about the finding made by the Superior Court in its final Order, CP 421-25, CRISTA concludes that Buck is appealing only from the standing-based summary dismissal (CP 350-51) of her challenge to the City's decision to issue an MDNS with respect to CRISTA's MDPP, which ruling prevented Buck from basing her LUPA appeal on arguments other than ones having to do with traffic impacts of the planned new early childhood center on Greenwood Ave. N.[8]

---

[7] RCW 36.70C.130(1) provides that the superior court, "acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70.120. The court may grant relief only if the party seeking relief has carried the burden of establishing . . . [that] (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; (d) The land use decision is a clearly erroneous application of the law to the facts; (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or (f) The land use decision violates the constitutional rights of the party seeking relief."

[8] CRISTA presumes the Court will overlook the omission of an assignment of error with respect to entry of the summary judgment order. *See, e.g., Hadley v.. Maxwell*, 144 Wn.2d 306, 311 n.1, 27 P.3d 600 (2001) (failure to comply with the assignment-of-error requirement does not preclude appellate review where the issue is fully argued in briefing). CRISTA also presumes that, even though Buck's Notice of Appeal, CP 421-

Standing is an issue of law subject to *de novo* review. *In re Parentage of L.B.*, 121 Wn. App. 460, 470, 89 P.3d 271, *aff'd in part, reversed in part on other grounds, Carvin v. Britain*, 155 Wn.2d 679, 122 P.3d 161 (2005). Whether administrative remedies have been exhausted is also an issue of law. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 76, 768 P.2d 462 (1989).

Buck is mistaken in asserting that this Court must "interpret" all assertions of fact in her opening brief "in the light most favorable to [her]." *App. Br. at 3 and passim.* Buck challenges only the Superior Court's initial standing ruling, and whether Buck has standing depends on whether she exhausted her administrative remedies as required by RCW 36.70C.060(2)(d).

Based on the arguments Buck offers, whether she exhausted her administrative remedies with respect to more than traffic-impact issues turns on the legal sufficiency of the "adoption by reference" statement in her December 4, 2009 letter, CP 81. There is no dispute about what Buck's letter said. When parties do not dispute the material facts, review is *de novo*. *Washington Equip. Mfg. Co. v. Concrete Placing Co.*, 85 Wn.

25, did not identify the summary judgment Order as a ruling she was appealing, this Court will exercise its authority under RAP 5.3(f) to consider her challenge to that Order, as it has in other cases where an appellant's notice of appeal did not identify and attach the summary judgment order that the appellant's brief addressed. *E.g.*, *S&K Motors, Inc. v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 638, 213 P.3d 630 (2009).

App. 240, 244, 931 P.2d 170 (1997). To the extent that any assertion Buck makes is relevant, the record either does or does not support it. No assertion in Buck's brief must be taken as true on its face.

IV. ARGUMENT

A. This Appeal Is Not About Process, Because Buck Waived Complaints About the City's Application-Review Process.

Buck complains throughout her opening brief about, and disparages, the City of Shoreline's review process and lack of provision for SEPA administrative appeal. Buck neglects to acknowledge that her counsel expressly did not oppose the City's motion for summary judgment as to her due process claims, CP 303-05, and that she did not appeal from the order granting that motion and dismissing her claims of lack of notice and failure to provide a SEPA administrative hearing with prejudice, CP 347-49, CP 421-25. This appeal thus is not about process.

B. Even if This Appeal Were About Process, Buck's Complaints Lack Merit Because She Was Given (and Availed Herself of) Opportunities to Submit Written Comments and to Speak at Public Hearings Before the City Approved CRISTA's Permit Application.

Buck's assertions that the City denied her a hearing and opportunity to be heard are not true. As the record shows, Buck, along with everyone else who lived within 1,000 feet of the CRISTA Campus, was notified – *before* the comment period and *before* the three-session public hearing – that the City expected to issue an MDNS and that any

appeal of the ultimate decision on CRISTA's MDPP would be to King County Superior Court. CP 59 (¶ 11), CP 77.[9] Because LUPA expressly excuses cities from having to provide an administrative appeal, RCW 36.70B.110(9), there is no basis for a complaint that no administrative appeal was provided. Nor was Buck shut out of the administrative process and denied an opportunity to express her objections to CRISTA' MDPP. Buck not only attended all three sessions of the public hearing on the MDPP, but spoke at all three sessions and expressed, each time, her concerns about traffic impacts on Greenwood Ave. N., and about nothing else (except the fact that there was no *administrative* appeal process). CP 62-63 (¶ 21), 95-101; CP 63 (¶ 23), 102-03; CP 63-64 (¶ 24), 104-08.

C. Buck's Standing Was Limited to the Traffic-Impact Aspects of the MDPP that She Raised During the City's Permit-Review Process.

1. Other than *Citizens for Mount Vernon*, the standing decisions on which Buck relies are not pertinent.

The controlling decision for this appeal is *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997), which Buck discusses at pages 15-17 of her brief and which CRISTA

[9] The City's decision to issue the MDNS could not be appealed until the City made its final decision on CRISTA's MDPP, because LUPA provides the exclusive means for seeking judicial review of a "land use decision," RCW 36.70C.030, and the term "land use decision" is defined by RCW 36.70C.020(2)(a) to mean the local agency's "final determination" on an application.

discusses at pages 19-22 below. None of the five other standing decisions that Buck's brief discusses are pertinent.

Kucera v. State Dept. of Transp., 140 Wn.2d 200, 213, 995 P.2d 63 (2000), *Anderson v. Pierce County*, 86 Wn. App. 290, 936 P.2d 432 (1997), and *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978), which Buck discusses at pages 12-14 of her brief were neither LUPA cases nor standing cases that involved the exhaustion-of-remedies element of standing.

Buck refers to *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), and *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 985 P.2d 636 (1998), at pages 12-13 of her brief. Both are LUPA standing decisions, but they involved LUPA standing issues different from the one raised by the partial summary judgment motion that respondents brought in this case. *Suquamish Indian Tribe* expressly noted, 92 Wn. App. at 828, that the LUPA petitioners' arguments were made only under RCW 36.70C.060(2)***(a)***, and thus addressed no exhaustion of administrative remedies issue under RCW 36.70C.060(2)***(d)***. *Chelan County* did address exhaustion of administrative remedies, but only insofar as it held that the LUPA petitioners had appealed at all available *stages* of the administrative level before filing their LUPA appeal. CRISTA and the City of Shoreline did not argue that Buck neglected to avail herself of all administrative

opportunities to appeal. Rather, CRISTA and the City challenged, under *Citizens for Mount Vernon*, 133 Wn.2d at 869-70, Buck's standing to raise issues other than the traffic impacts that she had identified in her written comments and at hearings at the administrative level. CP 135, 309.

2. Not everyone has standing under LUPA.

RCW 36.70C.060 provides that, other than the applicant – in this case, CRISTA – only "the following persons" have standing to challenge a land use decision under LUPA:

> (2) ***Another person aggrieved or adversely affected by the land use decision***, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. ***A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present***:
>
> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
>
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
>
> (d) The petitioner has exhausted ***his or her administrative remedies*** to the extent required by law. [Emphases added.]

Standing doctrine was developed at common law to prevent one person from raising another's legal right. *Grant Cty. Fire Prot. Dist. No. 5 v. City*

of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). RCW 36.70C.060(2) expresses that principle for LUPA purposes and in specific terms.

Because this case is a LUPA case and RCW 36.70C.060(2) is the applicable LUPA standing provision, Buck's appeal necessarily is about whether she has standing under that statute. More specifically, Buck's appeal is about whether she "exhausted . . . ***her administrative remedies to the extent required by law***" within the meaning of RCW 36.70C.060(2)***(d)***. LUPA does not define what "exhausted . . . her administrative remedies to the extent required by law" means. Buck contends, *App. Br. at 16*, that the answer is found at pages 869-870 in *Citizens for Mount Vernon*, 133 Wn.2d 861. CRISTA agrees, but maintains that the Superior Court's standing ruling is correct under that decision.

3. As *Citizens for Mount Vernon* teaches, to have standing under LUPA, a petitioner must, as a participant in the administrative process, have raised the permit approval issues that she proposes to raise on appeal.

Although it should go without saying, *Citizens for Mount Vernon*, 133 Wn.2d at 869-870, holds that, in order to have standing under LUPA, and thus the right to seek judicial review of a local land use decision, one thing a person must have done is participate in the administrative process.

Thus, one cannot simply follow a land use permit application review process in the newspapers or via the internet until a final decision is made and then pursue a LUPA challenge to the decision. Buck certainly did participate in the administrative process. Furthermore, in order to have standing under LUPA to raise *certain issues* in court, *Citizens for Mount Vernon* holds that one's participation must have been such as to *raise those issues* in the administrative process, and to at least some degree of specificity, if not to the most sophisticated degree possible.

In *Citizens for Mount Vernon*, a citizens group filed a LUPA petition to challenge a city's approval of a commercial planned unit development and rezone on the ground that the development was incompatible with the city's comprehensive plan and existing zoning regulations. The trial court held in the citizens group's favor. On review, the developer, Haggen, argued, among other things, that the citizens group lacked standing under RCW 36.70C.060(2) because it had not raised the points at issue on appeal at the city level. The Supreme Court, after noting that it had not previously "addressed how much participation at a public hearing is required to exhaust an administrative remedy" for LUPA standing purposes, provided guidance for this and other LUPA cases in explaining its decision rejecting Haggen's standing challenge.

The court initially explained that, under the exhaustion requirement of the Administrative Procedures Act, RCW 34.05.554[10], "prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency" (citing *King County v. Boundary Rev. Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993)), and that, to satisfy the issue-raising requirement, the would-be appellant must have provided "more than simply a hint or a slight reference to the issue in the record." *Citizens for Mount Vernon*, 133 Wn.2d at 869. The court went on to apply the law to the case before it:

> The record here reflects Citizens participated in all aspects of the administrative process ***and raised the appropriate project approval issues***. Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential. The precise, legal argument is compatibility between the project and the underlying zoning. ***Citizens opposed the Haggen commercial development project before the city council on the grounds it was inconsistent with the comprehensive plan; that the Haggen proposal was not a neighborhood grocery store; and that the Haggen proposal was inconsistent with the residential zoning regulations surrounding the site.***

Citizens for Mount Vernon, 133 Wn.2d at 869-70 (emphases added). Thus, because the citizens group had raised *those specific project approval issues* as a participant in the administrative process, the group had

[10] That statute provides in pertinent part that "(1) Issues not raised before the agency may not be raised on appeal, except [under circumstances not present here]."

standing to mount an incompatibility-with-comprehensive-plan-and-zoning challenge to the development in its LUPA appeal. Under *Citizens for Mount Vernon*, the exhaustion of administrative remedies requirement of RCW 36.70C.060(2)(d) thus includes both a participation component and a preservation component.

The Supreme Court rejected Haggen's argument that the citizens group's arguments to the city had been insufficiently technical. The court acknowledged that *Boundary Rev. Bd.*, 122 Wn.2d at 668, holds that "there must be more than simply a hint or slight reference to the issue in the [administrative] record" in order to say that the issue was properly raised administratively, 133 Wn.2d at 869, but held that a participant does not need to "raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney," *id.* at 870. The *Citizens for Mount Vernon* court did not address the issue of whether the citizens group's comments during the administrative process had been specific *enough* to satisfy RCW 36.70B.110(6), which provides that:

> A local government shall integrate the permit procedures in this section with environmental review under chapter 43.21C RCW as follows:
>
> (a) Except for a threshold determination, ***the local government may not issue a decision or a recommendation on a project permit until the expiration of the public comment period*** on the notice of application.

> (b) If an open record predecision hearing is required and the local government's threshold determination requires public notice under chapter 43.21C RCW, the local government shall issue its threshold determination at least fifteen days prior to the open record predecision hearing.
>
> (c) ***Comments shall be as specific as possible.*** [Emphases added.]

In this case, neither CRISTA nor the City of Shoreline disputed Buck's standing to raise in her LUPA Petition the issue she had raised in the administrative process, *i.e.*, whether traffic impacts of the early childhood center on Greenwood Ave. N. were such that the City's decision to issue a SEPA MDNS with traffic mitigation conditions rather than require an EIS was clearly erroneous or unsupported by substantial evidence. Nor did CRISTA or the City claim that Buck lacked standing under LUPA to raise traffic-impact issues because her comments at the administrative level had not been technical or specific enough. What CRISTA and the City did argue was that, with respect to SEPA arguments *not* having to do with traffic impacts, Buck lacked standing because she had not raised such issues *at all* in the administrative process, and thus had not satisfied RCW 36.70C.060(2)(d).[11]

---

[11] Considering the size of the geographic area and sheer number of homes to which notices of the MDPP were mailed, *see* BR 46, it is not self-evident, nor can it be presumed, that all or many other people who submitted comments raised issues as to which Buck could plausibly claim the same injury-in-fact nexus necessary for standing under RCW 36.70C.060(2)(a) by virtue of residing in a "general neighborhood."

Buck's only argument is that she adequately exhausted ***her*** administrative remedies by prefacing the written comments (CP 81) that she submitted on December 4, 2009 (before public hearings) with the statement "I adopt by this reference all of the comments ***of others*** with environmental effects and mitigations for our general neighborhood [emphasis added]" without saying which or whose comments she purported to "adopt" and without asserting that she even knew what any other commenters' comments were when she purported to adopt them. *Citizens for Mount Vernon*, 133 Wn.2d at 869, holds that "there must be more than simply a hint or slight reference to the issue in the [administrative] record" in order to confer standing. Buck's adoption by reference statement was less than a hint or slight reference to any issue other than traffic impact on Greenwood Ave. N. Whatever level of specificity might suffice for purposes of RCW 36.70B.110(6)(c), Buck's comment adopting unspecified comments of unspecified others lacked it. Because exhaustion of ***her*** administrative remedies is one of the four explicit and separate requirements for LUPA standing, Buck did not have standing to seek relief under LUPA based on SEPA issues that she had not raised at the City level.

Buck, without citation to authority, argues that one should not have to "repeat the arguments of the other 21 objectors," and "write

voluminous, repetitive letters. . . articulating the very same objections raised by each other objector" in order to have LUPA standing, because that would serve only to "cause public hearings to run for hours upon hours." *App. Br. at 14-15.* But that is a classic straw man argument. CRISTA and the City have not argued that one must repeat comments others make, or even that adoption by reference can never be effective. In comments by a participant in a land use hearing or comment process, adoption by reference of a *specific* comment, statement, or argument by someone else may well deserve to be given effect for exhaustion-of-remedies purposes. But nothing like that occurred in this case. Buck purported to adopt by reference "all comments of others" in a letter in which she also implied that CRISTA's 20-year development plan for its campus would be "fine" if only it provided for better traffic impact mitigations for Greenwood Ave. N. RCW 36.70B.110(6)(c) requires that comments on proposed land use applications be "as specific as possible." Other than her comments about traffic impacts on Greenwood Ave. N., Buck's comments were as *un*specific as they could possibly have been.

4. Vicarious standing is confined to First Amendment cases.

Buck's attempt to leverage her standing under RCW 36.70C.060(2)(d) and *Citizens for Mount Vernon* through the adoption-by-reference-of-all-comments-of-others device amounts to a request,

unsupported by citation to authority, that this Court expand the doctrine of vicarious or third-party standing. Vicarious or "third-party" standing has been recognized, however, only where First Amendment rights are implicated. *See Club 21 LLC v. City of Shoreline*, 2009 U.S. Dist. LEXIS 30950 *10 (W.D. Wash., Apr. 10, 2009) ("While third party standing is disfavored as a prudential matter, overbreadth challenges under the First Amendment raise unique concerns that "may at times outweigh the policies behind the general rule against third-party standing" (citing 15 Moore's Federal Practice § 101.51[3][e])). This case does not implicate First Amendment rights and Buck does not claim it does, and Washington does not recognize vicarious or third-party standing even to raise Fourth Amendment issues. *State v. Goucher*, 124 Wn.2d 728, 787, 881 P.2d 210 (1994) ("Fourth Amendment rights are personal and cannot be vicariously asserted"). Counsel for CRISTA have found no decision in any jurisdiction granting vicarious standing in a land use case. As the court held in *Goat Hill Homeowners Ass'n, Inc. v. King County*, 686 F. Supp.2d 1130, 1139-40 (W.D. Wash. 2010) one may not pursue a LUPA appeal vicariously as another's assignee.[12]

[12] *Representative* standing may also sometimes exist, *see, e.g.*, *Grant County*, 150 Wn.2d at 803, but Buck did not comment or sue as anyone's representative and has not asserted representative standing.

5. Buck's argument that the City denied her the opportunity to exhaust administrative remedies misses the point.

Buck argues, *App. Br. at 17-19,* that the City of Shoreline, not she, is to blame if she failed to exhaust her administrative remedies for purposes of RCW 36.70C.060(2)(d) because the City did not afford her an administrative SEPA appeal. As already explained, any complaint about how much process the City afforded Buck is moot, because Buck stipulated to the dismissal of her process-based claims. And respondents are not contending that Buck neglected to participate at each available step of the City's application-review process or that Buck could and should have taken an administrative appeal before filing a LUPA Petition. Buck participated at each available administrative step, but the only issue she exhausted her administrative remedies with respect *to* – and the only basis she had for appealing under LUPA – was whether an EIS should have been required due to the traffic impacts on Greenwood Ave. N.

D. CRISTA Is Entitled to Its Attorney Fees and Expenses for Appeal.

RCW 4.84.370 provides in pertinent part that:

> Notwithstanding any other provisions of this chapter, ***reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a*** county, ***city***, or town ***to issue***, condition, or deny ***a development permit involving a*** site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, ***or similar land use approval or decision***. The court shall award and determine

> the amount of reasonable attorneys' fees and costs under this section ***if***:
>
> (a) ***The prevailing party on appeal was the prevailing or substantially prevailing party before the*** county, ***city***, or town . . .; ***and***
>
> (b) ***The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings***.

Buck has been the non-prevailing party at all levels in this case. As Buck appreciates, *App. Br. at 23-24*, she must pay respondents' attorney fees if she loses this appeal. Pursuant to RCW 4.84.370 and RAP 18.1, CRISTA requests an award of attorney fees and expenses for appeal.

V. CONCLUSION

For the foregoing reasons, the Superior Court's Order limiting the issues Buck could raise in her LUPA appeal, CP 350-51, and the Order denying Buck's LUPA Petition, CP 418-20, should be affirmed. CRISTA Ministries should be awarded its attorney fees and expenses on appeal.

RESPECTFULLY SUBMITTED this 4th day of April, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Alan L. Wallace, WSBA #18205
Daniel W. Ferm, WSBA #11466
Attorneys for Respondent CRISTA Ministries

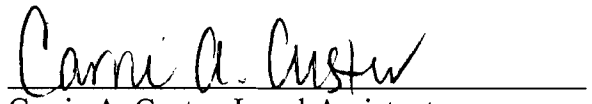
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that, on the 4th day of April, 2011, I caused a true and correct copy of the foregoing document, "Brief of Respondent CRISTA Ministries," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellant: Peter L. Buck, WSBA #05060 THE BUCK LAW GROUP PLLC 2030 First Ave., Suite 201 Seattle, WA 98121 Ph: (206) 448-6229	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail
Counsel for Respondent City of Shoreline: Flannary P. Collins, WSBA #32939 City of Shoreline 17500 Midvale Ave N Shoreline, WA 98133-4905 Ph: (206) 801-2222	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail
Counsel for Respondent City of Shoreline: Stephanie E. Croll, WSBA #18005 KEATING, BUCKLIN & MCCORMACK, INC., P.S. 800 Fifth Ave., Suite 4141 Seattle, WA 98104-3175 Ph: (206) 623-8861	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☐ E-file / E-mail

DATED this 4th day of April, 2011, at Seattle, Washington.



Carrie A. Custer, Legal Assistant

2011 APR -4 PM 3:14