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DIVISION II

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STATE OF WASHINGTON
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No. 37853-1-II

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

ARTHUR WEST

Vs.

KEITH STAHLEY, et al

**Appeal from the rulings of the Honorable
Christine Pomeroy and Christopher Wickham**

APPELLANT'S BRIEF

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SUMMARY OF ARGUMENT

This case concerns the issue of whether the intent of the legislature in adopting LUPA to promote finality, consistency, and predictability

requires that a final Land Use Determination of a City Hearing Examiner vacating a project land use approval, which was not appealed, has res judicata effect. In addition the issue is presented of whether LUPA authorizes a city to subvert the finality of a formal quasi-judicial adjudication by means of a deliberate and clandestine ministerial reissue of a permit under false color of the exact same land use determination that was previously voided. The Constitutionality of LUPA is also questioned.

The facts are not in dispute. On December 19, 2006, Olympia Hearing Examiner voided a land use approval issued on June 16, 2006, for improvements related to the proposed Weyerhaeuser Office and Shop being constructed to facilitate the relocation of Weyerhaeuser operations to the Port of Olympia. Neither the Port, City, or Weyerhaeuser appealed this final LUPA adjudication, which then became a final and irrevocable determination for the purposes of the Land Use Petition Act.

Notwithstanding this final and binding determination, the city attempted an end run around their own final action, and, on September 5, 2007, secretly issued building permits under the authority of the same land use determination that had been voided by the Hearing Examiner. The City deliberately concealed the action from multiple citizens who requested information, including the parties to the original adjudication,

and failed to admit that it had issued the permits until October 9, 2007, over a month after the action had been covertly taken

These permits **on their face referenced the voided determination of June 16, 2006**. Significantly, the fact of their issuance was deliberately concealed by the city until October 9, 2007, with the intent of evading the terms of the December 19 2006 determination and making any LUPA review impossible.

In a manner that failed to comport with of due process, equal protection, and the appearance of fairness, the Superior Court, first (on November 2, 2007) refused to consider plaintiff's regularly noted motion (while granting relief in the form of intervention to Weyerhaeuser on shortened notice), second, stayed the matter for four months making any relief requested by plaintiffs impossible, then third, after the four months had passed, the court transferred the case, like a lukewarm potato, to another magistrate, who just happened to be a member of the same Thurston County Chamber of Commerce that had formed the Port of Olympia to begin with and which actively and virulently supported the project.

Confident in their ability to prejudice the court, the defendants sought over \$40,000 in sanctions against the plaintiffs, and an order barring them from exercising their first Amendment liberties in retaliation

for conduct that largely consisted of activities protected under 4.25.210, (including filing a request for investigation of unconstitutional expenditures of funds with the attorney General) for which penalties against the defendants were warranted under the express terms of RCW 4.25.210. Needless to say, the Honorable Chamber of Commerce member (and Judge) Wickham refused to even consider granting plaintiff's requested relief under 4.25.210, and made wholly unsupported findings that the action was made without any good faith basis in fact or law.

This finding was so devoid of any legal or factual authority as to constitute a manifest abuse of discretion and a confirmation of the lack of both the appearance and the substance of fairness in the Thurston County Court.

ASSIGNMENTS OF ERROR

1. The Court erred¹ in failing to uphold the finality of the quasi-judicial LUPA decision made by the City Hearing Examiner on December 19, 2006 which required comprehensive environmental review of a project, and in deferring to subsequent and contradictory illegal permit which was deliberately concealed to deny review and foster piecemealed development.

2. The Court erred² in ruling contrary to all principles of res judicata and collateral estoppel upholding a manifestly illegal and clandestine action by the City of Olympia in secretly issuing an unlawful permit on September 5, 2007, based upon a land use determination that was expressly voided by a final LUPA determination of the City of Olympia of December 19, 2006.
3. The Court erred³ in ruling contrary to the black letter law of *Detray v. City of Olympia* that Final Determinations of City Examiners have res judicata effect upon substantially similar applications.
4. The court erred⁴ in violating the appearance of fairness by ruling in a manner contrary to the black letter law of *SAVE v. Bothel*, when membership in the Chamber of Commerce and the Chamber's role in the formation of the Port of Olympia would raise reasonable doubts about the impartiality of the court.
5. The Court erred⁵ in failing to abate the clear public nuisance or grant declaratory or other extraordinary relief caused by the issue of permits for construction on a toxic waste site without proper evaluation of the dangers of release of toxic material, and in the absence of comprehensive environmental review of the entire project.

1-8 In the orders of November 2, 2007, (CP 84-6) May 2, 2008, (CP 129-30), and May 19 (CP 140-41)

6. The Court erred⁶ in denying plaintiffs effective relief, failing to rule on their motions, and failing to award penalties under RCW 4.25.210 for defendants' attempts to retaliate against them for protected conduct, thus failing to afford plaintiffs due process of law, or equal protection under the law.
7. The Court erred⁷ in failing to recognize taxpayer standing in regard to the mandatory statutory requirement of adoption of Harbor Improvement Schemes by Port Commissioners, and in making a finding that their action was groundless and taken in the absence of good faith.
8. The Court erred in applying an unconstitutional statute in a manner that not only constituted an impermissible restriction on the right to petition for redress, but also undermined the inherent power of the people and encouraged secret and illegal government action.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court err in failing to uphold the finality of the quasi-judicial LUPA decision made by the City Hearing Examiner on December 19, 2006 which required comprehensive environmental review of a project, and in deferring to subsequent and contradictory illegal permit which was deliberately concealed to deny review and foster piecemealed development?
2. Did The Court err in ruling contrary to all principles of res judicata and collateral estoppel upholding a manifestly illegal

and clandestine action by the City of Olympia in secretly issuing an unlawful permit on September 5, 2007, based upon a land use determination that was expressly voided by a final LUPA determination of the City of Olympia of December 19, 2006?

3. Did The Court err in ruling contrary to the black letter law of *Detray v. City of Olympia* that Final Determinations of City Examiners have res judicata effect upon substantially similar applications?
4. Did The court err in violating the appearance of fairness by ruling in a manner contrary to the black letter law of *SAVE v. Bothel*, when membership in the Chamber of Commerce and the Chamber's role in the formation of the Port of Olympia would raise reasonable doubts about its impartiality?
5. Did The Court err in failing to abate the public nuisance or grant declaratory or other extraordinary relief caused by the issue of permits for construction on a toxic waste site without proper evaluation of the dangers of release of toxic material, and in the absence of comprehensive environmental review of the entire project and when relevant records were concealed?
6. Did The Court err in denying plaintiffs effective relief, failing to rule on their motions, and failing to award penalties under RCW 4.25.210 for defendants' attempts to retaliate against them for protected conduct, thus failing to afford plaintiffs due process of law, or equal protection under the law?
7. Did The Court err in failing to recognize taxpayer standing in regard to the mandatory statutory requirement of adoption of Harbor Improvement Schemes by Port Commissioners, and in

making a finding that their action was groundless and taken in the absence of good faith?

8. Did the Court err in applying an unconstitutional statute in a manner that not only constituted an impermissible restriction on the right to petition for redress, but also undermined the inherent power of the people and encouraged secret and illegal government action?

STATEMENT OF THE CASE

1. On June 16, 2006 the City of Olympia issued a Land Use Approval and SEPA DNS for a project proposal concerning the construction of office buildings submitted by the Weyerhaeuser Corporation, the project applicant. (CP 7, at 3.1)

2. On December 19, 2006, the City's June 16, 2006 Land Use Approval and DNS for the project was vacated by a decision by City Hearing Examiner Thomas Bjorgen. The Examiner ruled that all of the impacts of the Weyerhaeuser Lease and the operation of the proposed Log Yard were required to be reviewed in one environmental document.(CP 7 at 3.3)

3. This final Land Use determination was not appealed by the City (CP 7, 3.3), and as such became a final LUPA determination with legally binding effect.

4. The core deficiencies addressed by the examiner in the December 19 ruling were as follows:

4A. The DNS "did not properly consider the environmental impacts of both the buildings and the export operations under the lease". The DNS also did not consider the impacts relating to the Cascade Pole site".

4B. Specifically, the City "did not consider the impacts of increased air emissions from truck and vessel traffic, the impacts of increased noise, the impacts of increased lighting, or the impacts of pollution from vessels, all as related to the log export operations.

4C. The DNS also did not consider the impacts relating to the Cascade Pole site".

5. Rather than comply with the terms of the hearing examiner's order, or address the deficiencies of the original application, the defendants contrived to have a virtually identical application approved by the port of Olympia under SEPA 07-2.

6. The insubstantial "changes" in said second application (for essentially the same land use project) did nothing to the original application's core defects.

7. Notwithstanding the ruling of the examiner, and the pendency of a second substantially identical application, on September 5, 2007, the

City of Olympia secretly issued permits and an authorization letter under the vacated June 16 SEPA DNS and its underlying land use determination. On September 20, further unlawful permits were issued. (CP 8-10)

8. This action was deliberately concealed and deliberately concealed its action from the plaintiffs and other citizens for over a month in an attempt to frustrate review (CP 6-7)

9. On October 18, 2008, plaintiffs filed the original complaint in this action, charging that the defendants issue of permits based upon a determination vacated in a final LUPA decision constituted a nuisance, and seeking a writ of mandamus and declaratory relief. (CP 3-23)

10. On October 26, 2008, plaintiff's filed a motion to abate the nuisance caused by the sec ret permit approval for construction on a toxic waste site without adequate safeguards, asserting that the original December 19 determination of the Examiner had res judicata effects under LUPA. The complaint also sought Declaratory Relief, a writ of Mandamus, and asserted a cause of action for unconstitutional expenditure of funds. (CP 24-28) A letter to the attorney general was attached.

11. On 10/29 Weyerhaeuser moved to intervene (CP 29-75)

12. On November 2, 2008 a "hearing" was held on Plaintiff's motion to abate a public nuisance and on the motion to intervene. Despite plaintiff's having properly noted their motion, the Court arbitrarily refused

to consider or rule upon the motion to abate, or grant any relief sought by plaintiffs pending a ruling, while inexplicably granting Weyerhaeuser's motion on shortened notice. This substantially prejudiced the plaintiffs and denied due process of law, since relief was granted to Weyerhaeuser on a manifestly unfair basis. (See transcript of November 2, 2007 page 24, lines 12-15)

13. At the November 2, 2007 hearing, the Court issued a Stay of proceedings that completely suspended plaintiff's access to the court in response and retaliation for their having sought an Writ in the Supreme Court of a related determination. (CP 84), and an Order Granting motion to intervene (CP 85-6)

14. On December 12, 2007, defendants moved for a protective order to evade having to comply with discovery. Although it was not granted, no discovery was made.

15. On March 21, 2008, four (4) months after granting a stay, Judge Pomeroy recused herself from the case. Over 90 days passed without any consideration of Plaintiff's Motion.

16. On April 4, 2008, intervener Weyerhaeuser filed a motion to dismiss (CP109-122), which was apparently the only type of motion considered by the Superior Court in regard to plaintiff's cases.

17. On April 11, Plaintiffs filed a motion to strike. (CP 123-128)

18. On April 25, the Court indicated overt prejudice and the fact that it had already determined to rule against the plaintiffs when it directed its fellow Chamber associate Jeffrey Myers to present an order of dismissal the next week. (Transcript of April 25, page 3, line 25)

19. On May 2, 2008, a hearing was held before the Honorable Judge, and admitted Thurston County Chamber of Commerce Member Christopher Wickham (Transcript May 2, p. 3, lines 22-25, page 5, lines 24-25).

20. Despite having been provided with excerpts of *SAVE v. Bothel*, and evidence that the Port of Olympia was created by the Thurston County Chamber, with which it continued to maintain close ties, and despite his previous display of having already determined the matter without any apparent examination of the file or merits of the case, the Honorable Judge Wickham refused to recuse himself from ruling on motions filed by and on behalf of his fellow Chamber of Commerce members the Port of Olympia, Weyerhaeuser and Law Lyman Kamerrer and Bogdanovich. (Transcript May 2, p. 3, lines 22-25).

21. Playing upon the apparent prejudice of the court, defendants City and Weyerhaeuser also sought tens of thousands of dollars in punitive fines, and an order barring plaintiffs from access to the courts of this state and republic, largely on the basis of their exercise of freedom of speech

(Transcript May 2, page 8 line 25- page 9 line 1) and in retaliation for private communications with government officials. (Transcript May 2, page 9, line 21) They also sought to retaliate against plaintiffs for their exercise of federal jurisdiction and their status as witnesses in federal proceedings, and their filing of a bar complaint against Weyerhaeuser counsel Erick Laschever.

22. Significantly, the primary basis for these fines and limitation were not legal pleadings, but seem to have been largely based upon counsel's intent to retaliate against plaintiff for communications protected under RCW 4.25.210, and an invidious discriminatory animus against plaintiff's "flamboyance" (May 2 Transcript, P. 21 line 20- P. 22 line 8)

23. The Court entered an order granting the defendant's motion to dismiss and denying their request for a vexatious litigant order. However, the court made findings that the case was not well grounded in fact, not warranted by existing law or any good faith argument for extension, modification, or reversal...(Transcript Page 31, lines 6-10)

24. In so ruling, the court failed to specify any lack of facts or any precedent contrary to plaintiff's claims that a final LUPA determination of December 19 was entitled to preclusive effect or that LUPA did not wholly preclude nuisance actions or extraordinary relief. (Transcript, P. 24 lines 10-23)

25. On May 2, 2008, Plaintiffs moved to reconsider the order of dismissal and for an award under 4.25.210. (CP 131-9)

26. On May 19, the Court denied the parties motion and refused to award civil penalties under RCW 4.25.210. (CP 140-1)

27. On June 18, 2008, the Plaintiffs timely appealed from the final order of dismissal. (CP 142-9)

ARGUMENT

I THE COURT FAILED TO ENSURE CONSISTENCY, PREDICTABILITY AND FINALITY IN ACCORD WITH THE LETTER AND MANIFEST INTENT OF LUPA

The Land Use Petition Act (LUPA, RCW 36.70C) was adopted with the intent of promoting finality consistency, and predictability in Land Use determinations. As the Supreme Court has stated...

LUPA's purpose is "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." Richards v. City of Pullman, 134 Wn. App. 876 (2006) Admittedly, these were laudable goals at the time.

However, as Justice Chambers observed in a concurring opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, (2005), the Courts, though methodically plodding from tree to tree, have lost their way in the Dark LUPA forest of legislative intent. As Justice Chambers' concurring opinion notes...

I am now of the view that we have interpreted 'land use decision' and 'aggrieved party' far too broadly. In so doing we have lost the fundamental principle that LUPA overlays and, read correctly, is in accord with basic due process protections....

The legislature did not intend that parties had to pursue an administrative and judicial review of every ministerial decision. It is my view now that the 21-day limit for seeking review was intended to apply to quasi-judicial decisions made by those with the highest and final authority.

If there are any possible factual situations that would persuade the Courts that Justice Chambers is correct, they exist in the circumstances of the present dispute, where (initially) a long and drawn out administrative adjudication occurred which resulted in a final LUPA determination of the City hearing Examiner on December 19, 2006.

This was a final quasi-judicial determination with preclusive effect under LUPA. Not content with this determination, respondents attempted to evade the terms of the final LUPA determination by submitting a subsequent substantially identical proposal for approval. On September 5,

2007, the City secretly issued a secret ministerial determination, and granted a permit based upon the very final Land Use approval vacated by the December 19 Hearing Examiner's quasi-judicial ruling.

In order to make review of the subsequent determination impossible, the city deliberately concealed the existence of the permit's issuance, despite a concerted citizen's campaign to seek information as to whether any such permits had been granted. Under these circumstances, it is apparent that the Superior Court erred in dismissing plaintiff's claims when its ruling undermined the policy of finality in land use determinations that LUPA was adopted to ensure, and had the effect of undercutting the legitimacy of the entire Land Use approval process.

The aim of statutory construction is to effectuate the legislature's intent. *Bosteder v. City of Renton* , 155 Wn.2d 18 , 42, 117 P.3d 316 (2005). To discern that intent, this court begins by looking at the plain language and ordinary meaning of the statute, but also considers the legislative enactment as a whole. *Id.* ; *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* , 154 Wn.2d 224 , 238-39, 110 P.3d 1132 (2005). Cited in *Richards v. City of Pullman* 134 Wn. App. 876 (2006)

In the instant case, the Trial Court erred in failing to uphold the intent of the legislature in adopting LUPA, to insure consistency, finality,

and predictability. The result is a determination which is manifestly an abuse of discretion and which subverts the very consistency, finality and predictability that LUPA was designed to ensure. As the honorable Justice Sanders noted, dissenting, in *James v. Kitsap County*, 154 Wn.2d 574, at 596, citing *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994). "We do not interpret statutes to reach absurd and fundamentally unjust results."

Unfortunately, it is evident in the record of this proceeding that the philosophy of the Honorable Justice was not shared by the Trial Court in this case, for the interpretation of LUPA by Judge Wickham to allow a ministerial permit action to invalidate a formal quasi judicial determination under LUPA was both absurd and manifestly unjust.

II THE COURT FAILED TO RULE IN ACCORD WITH PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL AS THEY APPLY TO FINAL ADJUDICATIONS UNDER LUPA

In upholding the September 5, 2007 clandestine revocation of a binding Land Use Petition Act determination, the Thurston County Superior Court also violated the clearly established principles of res judicata and collateral estoppel.

As the Washington State Supreme Court has ruled, in *Christensen v. Grant County Hosp. Dist. No. 1*...

The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. *TEGLAND, CIVIL PROCEDURE* § 35.21, at 446. Collateral estoppel provides for finality in adjudications. *Trautman, Claim and Issue Preclusion*, 60 WASH. L. REV. at 806...

This principle was applied to LUPA in *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995), where the Court ruled that “In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim in a subsequent land use application.”

This instant case involving the City of Olympia is analogous to the circumstances in *Detray, and West Coast, Inc. v. Snohomish County*, 104 Wn. App. 735 (2000), in that...the project upon which this appeal is based went through all the usual procedures required by ...land use and development rules. A (SEPA document) was issued, and appeals regarding issues ...were taken and decided. ..(It) was not appealed The time for appeal expired.

Like the appellants in *West Coast*, the respondents in this case may not circumvent a final and binding land use determination under guise of a different action without a direct appeal.

As the *Detray* Court maintained...

Respondent's alleged major modification action ...does not constitute a fundamentally different kind of plat/land use application. '...No matter how *West Coast* (or the respondents in this case) attempts to spin the second application, it is merely trying to avoid previously determined issues." On these facts it was incumbent upon the superior court to preclude this attempt at evading finality.

Moreover, the City of Olympia's September 5 permit is a classic example of a violation of the general policy of *res judicata* in quasi-judicial land use actions as enunciated by our State Supreme Court in *Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30-31, 891 P.2d 29 (1995). As the Court stated, "a second application may be considered if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself." *Hilltop Terrace Homeowner's Ass'n*, 126 Wn.2d at 33 Here, the alleged major modification action does not constitute a substantial change in circumstances.

The Supreme Court has been nothing less than intrepid in correcting what it perceives to be erroneous land use decisions of local jurisdictions. See, e.g. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998); *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179, 943 P.2d 265 (1997); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992). This Court should be no less fearless in correcting the flagrant disregard for the law that occurred in this case. See *Rural Residents v. Kitsap County*, 141 Wn.2d 185 (2000)

Requiring ...a LUPA petition to contest a local government decision...is also consistent with this state's "strong public policy favoring administrative finality in land use decisions." *Skamania County*, 144 Wn.2d at 48. See also *Sintra, Inc. v. City in Seattle*, 119 Wn.2d 1, 5, 829 P.2d 765 (1992) (concluding that a "body of cogent, workable rules...is essential to resolving land use regulation disputes). *Samuel's Furniture, Inc. v. Dep't of Ecology*.

The general public interests in repose and consistency, which underlie the core evil that LUPA was adopted to remedy are also relevant to this case where the City seeks to clandestinely evade the clear requirements of law in the absence of any attempt at a lawful appeal of the decision that it, in effect, vacated in a back room proceeding that was then concealed from the public to make review impossible.

Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. *Astoria Fed. Sav. & Loan Ass'n v. Solimino* , 501 U.S. 104, 107-08, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) 308 *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299 (2004)

In this context it is to be further noted that the City had no rational or factual basis for a land use decision that was voided, violating the clear precedent of *Zink v. City of Mesa*, 137 Wn. App. 271 (2007), see also *Zink v. City of Mesa Div. III No. 24322-2-III*, 8/23/07, in that no valid administrative record supported their determination.

Under such Circumstances it was the respondents whose position was frivolous and subject to sanction as a matter of law. The Court abused discretion in failing to award penalties to appellants under the anti SLAPP statute (RCW 4.25.510) when it was clear that the city's entire strategy for dealing with the public is a never ending series of secretive actions taken in bad faith, prior restraints, SLAPPS, and outright physical assaults.

III THE COURT FAILED TO RULE IN ACCORD WITH THE DETERMINATION IN DETRAY THAT CHANGES MUST RESOLVE THE PEVIOUSLY DISPUTED CONDITIONS

It should be noted that neither counsel for the port or City should be unfamiliar with the ruling in *Detray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116, (2004). In this case the Supreme Court set the standard for determining whether a new proposal is “substantially different” for the purposes of evading *res judicata* and collateral estoppel. The Court ruled in *Detray* that...

Neither *Hilltop* nor *Davidson* permits consideration of a new application based solely on significant changes to a proposal. Rather, the changes must be relevant to and resolve the disputed conditions in the previous application....

In *Detray*, the Court, in conformity with the decisions in *Davidson* and *Hilltop*, established the principle that...the principle that if changes in the second application (for essentially the same land use project) do not resolve, or at least mitigate the original application's disputed condition(s), then the second application's changes are not "substantial." Consequently, *res judicata* bars reasserting essentially the same previously rejected feature (the county access road) in a subsequent land use application. *See Hilltop* , 126 Wn.2d at 31

In this case, the “new project” (as evidenced by the secret September 5 permits) not only failed to resolve the deficiencies in the

previous vacated proposal, they were issued under the express authority of that selfsame defective proposal. Under these circumstances, the Trial Court committed obvious error in upholding the City's frivolous and arbitrary and capricious action. See also Zink, supra, (City position frivolous where Land Use determination unsupported in record)

IV THE COURT RULED IN VIOLATION OF THE APPEARANCE OF FAIRNESS AS ESTABLISHED IN THE EXPLICIT REQUIREMENTS OF SAVE V. BOTHELL

Perhaps the Court's ruling in this regard can best be understood in light of the undisputed fact that the Honorable Judge Wickham was a member of the Thurston County of Commerce, the entity that founded the Port of Olympia and vigorously supported the project at issue with vituperative statements remarkably similar to those made by the Honorable Chamber of Commerce Member Judge Wickham in castigating the appellants for their interference with a Chamber supported project. The trial Court erred in failing to recuse itself when by so doing it violated the appearance of fairness and the explicit ruling of the Court in Save v. Bothell 89 Wn.2d 862, 576 P.2d 40, (1978), which also, coincidentally, considered Chamber of Commerce membership. As the SAVE Court ruled...

The main thrust of appellant's argument is these ties to the Chamber of Commerce are "associational ties" which are minimal contacts insufficient to violate the appearance of fairness...We disagree...The rule does not prohibit membership in community organizations; it prohibits participation in at least quasi-judicial proceedings when such membership demonstrates the existence of an interest which might substantially influence the individual's judgment. Therefore, we hold the zoning ordinance must be set aside for the additional reason that consideration and approval of the matter was vitiated by participation of commission members whose other interests appeared to be capable of substantially influencing their judgment.

In this case, the Magistrate violated the appearance of fairness in the same manner as the individuals in Bothell, by being a card carrying member of an organization committed to development and inimically opposed to the plaintiff's cause. With all due respect to the venerable and "flamboyant" Magistrate (Transcript of may 2, Page 22, line 5) this is sufficient to trigger appearance of fairness concerns in a reasonable person, in addition to violating the clear letter of the precedent in SAVE.

If there is one organization that no prudent quasi judicial officer in the State of Washington that is called upon to make land use determinations on development projects should belong to, it is that one expressly designated in SAVE as establishing a reasonable prospect of a conflict of interest. While it is true that not all foxes are known to raid henhouses, just as not all chamber members are known to be biased toward development, prudent policy forbids, for good reason, such entities

being vested with discretionary responsibilities that might be seen to cause a conflict of interest.

V THE COURT FAILED TO ABATE A NUISANCE UNDER 7.16, GRANT DECLARATORY JUDGMENT, OR ISSUE EXTRAORDINARY RELIEF ALLOWED UNDER 36.70C.030(1) (b)

The Court erred and abused discretion in failing to abate the clear public nuisance or grant declaratory or other extraordinary relief caused by the issue of permits for construction on a toxic waste site without proper evaluation of the dangers of release of toxic material, and in the absence of comprehensive environmental review of the entire project. As noted by The Supreme Court...

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997), cited in Grandmaster Shen Yeng Lu, supra.

It is clear from the transcript of the May 2nd hearing, at Page 24, line 16 through Page 25, line 3, that the court completely misunderstood the legal standards for declaratory and mandamus relief, which he

considered entirely precluded by LUPA. This determination, and the court's rulings and attendant findings of fact, were in stark contrast to the explicit language of statute as well as the analysis in *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App 92, (2002)

LUPA, RCW 36.70C, was enacted to establish uniform procedures for appeal of land use decisions made by local jurisdictions. RCW 36.70C.010. LUPA replaces the writ of certiorari for appeal of land use decisions and is the exclusive means of judicial review of land use decisions, with certain exceptions. RCW 36.70C.030. For example, LUPA specifically excludes from its coverage writs of mandamus or prohibition. RCW 36.70C.030(1)(b). *James, supra, Pacific Rock v. Clark County*, 92 Wn. App. 777, (1998)

The Trial Court in this case completely abridged the appellant's rights to seek relief sought in the complaint under mandamus for the issue of an illegal permit. By failing to even consider the possibility of such relief, when the facts and circumstances would have supported such a writ, the court manifestly abused its discretion and failed to afford basic due process of law.

Again, the trial Court refused to consider the standard for declaratory relief set forth in CR 57 and *Ronken v. Bd. of County Comm'rs*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977) " CR 57 provides in part:

'The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.' Cited in Grand Master Sheng , supra. Where the adequate remedy had been deliberately foreclosed by the city, and was otherwise onerous, declaratory and other relief is entitled to at least a fair consideration by the court, and the trial Court abused its discretion in applying an improper standard which denied a fair review or consideration.

Similarly, the trial court refused to even consider the nuisance issue, despite the fact that the nuisance claim was not based upon any new interpretation of a zoning ordinance or rule, but sought to enforce a previous, lawful, and conclusively binding quasi-judicial LUPA determination

As the court said in *Asche*,

...although there may be some nuisances, either private or public, which may be brought outside LUPA's framework, in this case the claims directly related to the invalidity or the misapplication of the zoning ordinance. *Asche v. Bloomquist*, 132 Wn. App. 784 (2006)

If we accept that the County's application of its zoning ordinance for this specific property was correct, the building permit is valid and not in contravention of the zoning ordinance. Therefore, under the *Asches'* public nuisance theory, it is not a nuisance...

In conclusion, Since the appellant's claims for alternate modes of relief were not foreclosed by LUPA in the manner perceived by the Court, and since they were based upon the finality of a LUPA determination that had no relation to any interpretation of a County zoning ordinance, and since the land use determination was void and illegally and wrongfully issued in violation of LUPA itself, the court erred in failing to even fairly consider, let alone grant, the relief sought by the appellant.

VI THE COURT FAILED TO AFFORD PLAINTIFFS TIMELY AND EFFECTIVE RELIEF OR AWARD PENALTIES FOR RESPONDENT'S RETALIATORY SLAPP ATTACKS

The Court erred in denying plaintiffs timely relief, failing to rule on their motions, and failing to award penalties under RCW 4.25.210 for defendants' attempts to retaliate against them for protected conduct, thus failing to afford plaintiffs due process of law, and equal protection under the law, and contributing to a chilling of constitutional rights.

In this matter the court manifestly failed to allow plaintiff's a fair hearing in accord with Article I section 10, and Article IV section 20.

Article I of the State Constitution, section 10 states

ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

Article IV, section 20 states

DECISIONS, WHEN TO BE MADE. Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; *Provided*, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a hearing.

By staying all proceedings on the relief sought by plaintiffs and then summarily dismissing their claims without any opportunity for them to receive a timely of fair hearing the court denied fundamental due process of law.

In addition, the court abused discretion and acted in defiance of fact and precedent when it failed to consider or rule upon plaintiff's anti SLAPP defense, which was argued at the hearing on May 2, as well as in plaintiff's motions for reconsideration.

It is apparent that respondents motion for sanctions was in reality a counterclaim seeking to penalize appellant West for his having contacted the Government, including, shockingly enough, the filing of a letter requesting action from the attorney general regarding unconstitutional expenditure of funds. (See transcript, of May 2, Page 21 lines 20-24)

The Anti-SLAPP statute applies when a communication to influence a governmental action results in (a) a civil complaint or

counterclaim (b) filed against nongovernment individuals or organizations . . . on (c) a substantive issue of some public interest or social significance. Right-Price Recreation v. Connells Prairie, 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (quoting George W. Pring & Penelope Canan, SLAPPS: Getting Sued For Speaking Out 8-9 (1996)).

A person who communicates a complaint or information to any branch or agency of federal, state, or local government..., is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and ...statutory damages of ten thousand dollars.... RCW 4.25.510 [2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

Intent – 2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

It is clear from the tenor of the respondents' pleadings representations in court and, most recently, their response to appellant's motion for a brief extension of time that they seek to penalize and

stigmatize those who exercise their constitutional rights. In such an atmosphere of hostility, retaliation and outright physical assault, which respondent City and port have nowhere denied, it is necessary for this Court to send a clear message and remand this matter back to the trial court with instructions to award the statutory \$10,000 to appellant for continuing to resist respondents continuing attempts to stigmatize them and deny them all civil rights in general..

VII THE COURT FAILED TO RECOGNIZE TAXPAYER STANDING IN REGARD TO MANIFESTLY ILLEGAL EXPENDITURES, AND MADE A WRONGFUL FINDING THAT THE ACTION WAS GROUNDLESS AND TAKEN IN BAD FAITH

The Court erred in failing to recognize taxpayer standing in regard to unconstitutional expenditures of public funds in violation of the mandatory statutory requirement of adoption of Harbor Improvement Schemes by Port Commissioners, and in making a finding that their action was groundless and taken in the absence of good faith when there were a number of issues involving unconstitutional expenditures and the illegal permits that were by no possible stretch of the imagination frivolous.

In Washington, it is black letter law that a taxpayer has standing to challenge the legality of the acts of public officers if he first requests or demands that a proper public official bring suit on behalf of all taxpayers. Tacoma v. O'brien, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); Reiter v.

Wallgren, 28 Wn.2d 872, 876-77, 184 P.2d 571 (1947). Farris v. Munro, 99 Wn.2d 326, 662 P.2d 821 (1983) "

In addition, as the Farris Court determined, when the issues are of serious public importance such as those presented in this case, questions of standing must be given a less draconian interpretation...

Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer. Washington Natural Gas Co. v. PUD 1, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); Accord, Vovos v. Grant, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976).

Attached to this appeal is an exhibit filed by respondents in this case. It demonstrates that as early as 2006, plaintiff had requested the Washington state Attorney general to take action without success. As the Supreme Court has held,

We never have held that, in a proper case where the attorney general refused to act to protect the public interest, a taxpayer could not do so. We have not had occasion to pass upon such a question, and we trust we never shall. Reiter v. Wallgren, 28 Wn.2d 872, 184 P. (2d) 571 (1947) See also Farris v. Munro, supra

As the supplemental brief attached hereto demonstrates, relaxed standing requirements were also required to be applied due to the fact that port compliance with the Harbor Improvement Act is a matter of statewide concern in the 76 ports of this state, few of which have any proper plans adopted.

The court's finding of bad faith is especially offensive and evident of bias in that on December 8, 2008, the port officially adopted a Comprehensive Scheme of Harbor Improvements in almost exactly the manner that the plaintiffs had been Asserting was required.

As the Supreme Court in *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 509 P.2d 390 (1973) has recognized, compliance with the harbor improvement Act is a necessary prerequisite for compliance with the regulatory scheme of other laws such as SEPA and the shoreline management Acts. See also *Hutchinson v. Port of Benton*, 62 Wn.2d 452, 383 P. (2d) 500 (1963), *In re Port of Grays Harbor*, 30 Wn. App. 855, 638 P.2d 633(1972)

Under these circumstances it was manifest error, abuse of discretion and against the preponderance of evidence and contrary to all precedent for the court to make the findings of fact appearing below.

Due to the court's improper prejudice and the improper and prejudicial effect of respondent's scurrilous allegations, the court made

findings of fact that were not based on any precedent, or preponderance of evidence or any inference therefrom.

Appellant specifically objects to each and every finding of fact and conclusion of law made by the trial court, including...

1. That the complaint in this case was not well grounded in fact, that it is not warranted by existing law or good faith argument for its extension, modification, or reversal of existing law or the establishment of new law.

THE COURT ERRED IN APPLYING LUPA IN A MANIFESTLY UNCONSTITUTIONAL MANNER TO ENCOURAGE SECRET AND ILLEGAL GOVERNMENT ACTION AND ABRIDGE THE RIGHTS TO NOTICE, DUE PROCESS AND OF PETITION FOR REDRESS

While the legislature may have had laudable goals in mind when they subordinated land use appeals in the civil justice system to the ends of timeliness, consistency and finality, the chosen remedy has come to be worse than the ills it was proposed to alleviate.

As various regular and dissenting opinions of this court have recognized, LUPA not only impermissibly discriminates financially (See Sanders, dissenting in Habitat Watch), both on appeal and as to the provision of a record, it denies review based upon the illusory premise of “notice” that could only have been received “telepathically” (Owen,

dissenting in Samuels Furniture) Further, it insulates even manifestly illegal actions from review, even when, as in the present case, no notice was given. (see Asche, Habitat Watch)

The lack of procedural safeguards in LUPA is especially problematic in light of the Supreme Court's "Supreme" authority set forth in Petrarcha v. Halligan , 83 Wn.2d 773, 522 P.2d 827 (1974), that Court Rules supersede inconsistent statutes. As the Supreme Court noted in Curtis Lumber Co. v. Sorter, 83 Wn.2d 764, 522 P.2d 822 (1974)... "the basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as `the sporting theory of justice.'"

Pursuant to this authority the Supreme court has adopted CR 2, which expressly states...

There shall be one form of action to be known as "civil action."

By creating a new form of civil action which lacks the procedural safeguards of the "one form of action" required by the Supreme Court, and which places undue financial burdens on the appellants as recognized by Justice Sanders, the Legislature has at once encroached into the rights of both the judiciary to set fair procedure and the citizen to due process of law. Further, as shown in Justice Owens' dissent (in which Alexander

Johnson, and Madsen concurred) in the Samuels case, the State is also deprived of regulatory authority by this bad law, which can also be seen to violate the doctrine of separation of powers.

The majority protests that Ecology's alternative to acquiescence is " *only* . . . [to] follow the proper procedures"...That alternative is illusory, however, since it rests on Ecology's ability to receive notice of such decisions telepathically.

Thus, the majority has, in effect, determined that, as an alternative to acquiescence, Ecology need *only* appeal within 21 days an undated local government decision - and do so without having received any notice of that undated decision.

Such a construction leaves both the State and citizens powerless to contest local government determinations, and openly fosters the unconscionable policy of encouraging local governments to act secretly and illegally

At oral argument, the following question was posed to counsel for Samuel's Furniture: "How would a good citizen protect the shorelines . . . from a city . . . willing to turn a blind eye to the SMA . . . ? Are you saying that Ecology could do nothing . . . ?" Counsel replied, "Well, I would say Ecology cannot do anything." TVW, Washington State's Public Affairs Network, Wash. State Supreme Court oral argument, *Samuel's Furniture v. Dep't of Ecology* (Jan. 17, 2002), *audio available at* <http://www.tvw.org>.

Such a statute would not only be impermissible unconscionable, it would violate the State Constitution's requirement in Article I, Section 1

that "All political power resides in the people..." as well as the prohibition of Article I, Section 4, that the right to petition shall not be abridged

The right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" in order to "petition the government." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876), Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental. . . . [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions--principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . . Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the Government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961).

The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government.

Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 -15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842_(1980)

Under these circumstances, LUPA must be seen as an unlawful "second form of civil action" that impedes and abridges the right to access to the courts and the right to petition for redress. This is especially apparent in the application of the Statute in this case. The Washington constitution requires, at Article 1, Section 4, that "The right of petition and of the people peaceably to assemble for the common good shall never be abridged."

The true ancient forest that has been obscured by the piecemeal series of LUPA adjudications since 1994 is the thick growth that has, for centuries, hedged about the people's rights to due process and petition. With this history in mind, this Court should adopt the advice of Justice Chambers, concurring in Habitat Watch..."We should revisit our

precedents with the forest in mind.... (w)e should not apply LUPA to bar the courthouse door to those who had no notice, especially when the decisions at issue were decisions made by lower level staffers....requiring parties to seek review of ministerial acts is often a waste of time and judicial resources and may lead to absurd results.

By limiting access to the courts by the means of an onerous and financially burdensome petition process that lacks adequate procedural safeguards for just adjudication, and requiring parties to appeal decisions that they have no notice of, or be barred from seeking relief, LUPA goes beyond the absurd to the constitutionally defective, as the ruling of the trial court in this case upholding a covertly made and manifestly illegal decision demonstrates.

CONCLUSION- THE COURT'S RULING SHOULD BE VACATED

If the clear legislative intent of LUPA was to ensure finality, consistency and predictability of land use determinations, the present situation facing this Court, where a final land use decision issued on the basis of a full quasi-judicial adjudication was undermined by a secret agency determination, would be an intolerable affront to that intent.

If, on the other hand, LUPA is intended and applied to limit the right of petition and deny review or recourse to a wide range of unlawful

and unannounced local government actions, it is unconstitutional, either as written or as applied in this case. Either way, the Trial Court's ruling in this case should be appropriately consigned to the Tumbrel wagon, since the September 5, 2007 permits (and the ones that followed), were manifestly illegal in that the land use action they were expressly based upon was voided by the hearing Examiner of December 19, 2006.

While the Legislature's intent of reforming the land use appeal process was laudable, it is appellant's belief that the Courts of this State have indeed become lost in the Black Forest of LUPA precedent, taken a wrong turning at Nykrem, and ended up at a witches cauldron of contradictory rulings in violation of the rights of the Citizenry to reasonable notice and review of the land use actions of local entities.

While the idea of reforming the law in a manner to make it prompt, severe, and inflexible has a certain superficial appeal⁸, the history of such experiments has always ended in a sticky and unpleasant manner.

As the prominent legal reformer Robespierre came to learn sharply on the 28th of July in 1794, single minded adherence to the ideals of "finality, consistency and predictability" in the legal realm, untempered by procedural safeguards, do not an equitable justice system make.

⁸ Terror is only justice **prompt, severe and inflexible**; it is then an emanation of virtue;... M. Robespierre, "On the Principles of Political Morality" (1794)

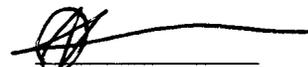
If the present action of the city is upheld, it will encourage government to disregard the effect of formal land use adjudication, and set a precedent that encourages and rewards cities for concealing their illegal actions from the public when they covertly act to undermine the Legitimacy of the land use appeal process as a whole.

The respondents' covert, contentious, strident and vicious tactics, both in the Trial Court and on appeal, demonstrate incontrovertibly that their intent is to intimidate the citizenry into compliance with their illegal acts by means of threats, intimidation, and outright violent assaults. Appellant does not concur with the view that such conduct constitutes an "emanation of virtue" by any stretch of the imagination.

This Court should order a remand with instructions to the Trial Court to vacate the orders entered in this case, and all of them, and to grant the relief requested by the appellant, including the abatement of the nuisance caused by the respondent's manifestly outrageous conduct.

Done January 1~~8~~, 200~~8~~.

I, Arthur West, certify the foregoing to be true.


ARTHUR WEST

CERTIFICATE OF SERVICE

I, Arthur West, certify the following:

On January 10, 2009, I served one copy of Appellant's

Opening Brief on each party, by mailing it to the

following addresses:

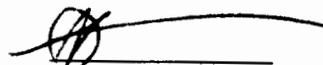
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Attorney at Law
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Goodstein Law Group, PLLC
1001 Pacific Avenue, Suite 400
Tacoma, Washington 98402

I certify the foregoing to be correct and true.

Done January 10, 2009.


ARTHUR WEST

FILED
COURT OF APPEALS
DIVISION II
09 JAN 21 PM 12:05
STATE OF WASHINGTON
BY  DEPUTY

08/10/2007 FRI 14:54 FAX

002/014

X-P



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

April 17, 2006

Mr. Jerry Lee Dierker, Jr.
1720 Bigelow St., NE
Olympia, WA 98506

MR. JOE COLE
6127 THORNEBURY CT., SE
OLYMPIA, WA 98513

Arthur S. West
3217-A 18th Ave., SE
Olympia, WA 98501

Port of Olympia - Dierker

Dear Messrs. Dierker, Cole and West:

This is in response to your request that the Attorney General investigate and take action against the Port of Olympia for "unconstitutional expenditure of public funds and/or use of public resources, etc." by "official misconduct and false representations made to public permitting agencies". I have reviewed the materials that you submitted to this office (and to the Thurston County Prosecutor) relating to this request. In large measure, they are comprised of allegations and conclusions concerning the manner in which the Port of Olympia acted under the State Environmental Policy Act (SEPA) with respect to projects that you refer to as its "Marine Deepwater Port Expansion". In this respect, I note my understanding that the "findings" that you attribute in your memo of January 27, 2006, to yourselves "and/or" the Department of Ecology, or other agencies are not statements of the Department, but your characterizations of comments by the Department of Ecology as part of the SEPA review process, and other matters.

This office generally will not become involved in a matter challenging actions committed to local government, absent a clear violation of the law by the responsible officials that will result in significant harm to taxpayers. I do not find that standard satisfied based on the circumstances set forth in your letter or my follow-up inquiries with respect to them.

If your request to this office was made for purposes of establishing taxpayer standing, this letter is not intended to comment on whether requirements for taxpayer standing would be met. Nor is it intended to comment on the ultimate merit of any SEPA or permit appeals that may be ongoing with respect to these projects.

Sincerely,

Maureen Hart
Solicitor General

EXHIBIT 28

scanned



MC PUBLIC EXHIBIT I

****Revised Cover Memo****

Commission Meeting

Topic SEPA No 07-2 Combined Port Infrastructure and Weyerhaeuser Log Handling Project Appeal

Date of Commission Meeting June 18, 2007
Location of Meeting LOTT Board Room

Type of Action Requested
 Action
 Resolution
 Advisory

Presented By Carolyn Lake

Business Unit or Department Marine Terminal

Directors Jeff Lincoln & Jim Amador

The purpose of this agenda item is twofold 1) to provide the Commission with the procedural background of an appeal of the Port's State Environmental Policy Act determination No 07-2, for the Combined Port Infrastructure and Weyerhaeuser Log Handling Project, and 2) outline the procedural appeal options for Commission consideration and action

In summary, the Port Infrastructure and Weyerhaeuser Log Handling Project consists of improvements and additions to the Port Marine Terminal, including extending water and sanitary sewer, addition of modular office buildings, construction of a pre-engineered metal building and other miscellaneous small structures and improvements necessary to accommodate a log export operation on the terminal

Here is a summary of key procedural milestones for this Project

December 7, 2006 The Port as lead agency issued a Mitigated Determination of Non-Significance (MDNS) for Port infrastructure/cargo yard improvements in the NE cargo yard including paving, stormwater treatment and extension of utilities

June 16, 2006 The City of Olympia as lead agency issued a MDNS for Weyerhaeuser Company's site plan for it log-handling operations located at the Port of Olympia

December 19, 2006 The City of Olympia Hearing Examiner Vacated the City of Olympia SEPA Determination of Non-significance for the Weyerhaeuser Company Project

January 22, 2007 The Port withdrew the MDNS for the Port's NE cargo yard project



City of
OLYMPIA

PO Box 1967 Olympia, WA 98507-1967

Attachment 1,
5 pages

MC PUBLIC #2 1
EXHIBIT Z

September 5, 2007

Port of Olympia
Attn Mr Rick Anderson
915 Washington St N E
Olympia, WA 98501

COUNCIL

Mark Foutch
Mayor

Laura Ware
Mayor Pro Tem

TJ Johnson

Karen Messmer

Jeff Kingsbury

Doug Mah

Joe Hyer

CITY MANAGER

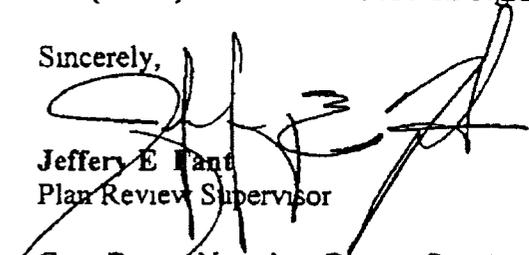
Steven R Hall

**SUBJECT Port of Olympia - Cargo Yard Improvements (CD# 07-0959)
Reid Middleton Plan Set - Sheets T1 0-1 1, C1 0-10 0
Authorization to Proceed at Own Risk**

The City of Olympia accepts your proposal to proceed at your own risk and begin construction of the Cargo Yard Improvements at 1101, 1511-1517 Marine Dr NE, Olympia, WA, 98502 (Project CD# 05-2839) The Port of Olympia is responsible for any change in project approval should an administrative or judicial appeals prevail

This authorization is subject to 1) All permit conditions applicable to said project, 2) City of Olympia Land Use Approval and State Environmental Policy Act (SEPA) Determination of Non-Significance (DNS) issued on June 16, 2006

Sincerely,

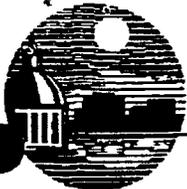

Jeffery E Fant
Plan Review Supervisor

Cc Darren Nienaber, Deputy City Attorney
Becky Dickinson, Engineering Plans Examiner
Project Files CD# 07-0959 and CD# 05-2839

Handwritten notes:
vacated 1/11
K. B. Brown

City Council	(360) 753 8447	Community Planning & Development	(360) 753-8314	Police	(360) 753 8300
City Manager	(360) 753 8447	Fire	(360) 753 8346	Public Works	(360) 753 8362
City Attorney	(360) 753-8449	Human Resources	(360) 753 8442		
Administrative Services	(360) 753 8325	Parks Arts & Recreation	(360) 753 8380		

S E A N N E D



City of OLYMPIA

Department of Community Planning & Development

MCDONALD #2

Application Number . 07-00000959 Date 9/05/07
 Property Address 915 WASHINGTON ST NE
 Land ID Number 19911
 Tax Parcel Number 66130000100
 Old Location Number 0010366
 Tenant nbr, name CARGO YARD IMPROVEMENTS
 Application description ENG PLAN REVIEW-UTILITY/FACILITY EXTEN
 Subdivision Name FIRST CLASS TIDELANDS
 Property Use
 Property Zoning INDUSTRIAL
 Application valuation 0

Owner Contractor

 PORT OF OLYMPIA OWNER
 915 WASHINGTON ST NE
 OLYMPIA WA 985016931
 (360) 586-6150

Permit . PERMIT PRECONSTRUCTION MEETING
 Additional desc
 Phone Access Code 953240
 Permit Fee .00 Plan Check Fee 00
 Issue Date 9/05/07 Valuation 0

Permit PERMIT EROSION CONTROL
 Additional desc
 Phone Access Code 953232
 Permit Fee 00 Plan Check Fee 00
 Issue Date 9/05/07 Valuation 0

Permit . PERMIT R/W OBSTRUCTION
 Additional desc
 Phone Access Code 953216
 Permit Fee 175 00 Plan Check Fee 00
 Issue Date 9/05/07 Valuation 0

CONTRACTOR AFFIDAVIT
 I certify that I am a currently registered contractor in the State of Washington and the City of Olympia.
 I am aware of the ordinance requirements regarding the work for which the permit is issued and all work will be done in conformance therewith.
 Firm _____
 By _____ Date _____

I hereby certify that I am owner of the property for which this permit is issued, and that all work done will be in conformance with City of Olympia ordinances and as noted on this permit.
 X _____
 SIGNATURE DATE

(Note: Water billing charges commence on date of installation of meter and all deposits will be adjusted to actual cost.)
 APPLICANT _____ Date _____

- PRIOR TO COMMENCING WORK WITHIN RIGHT OF WAY**
1. Arrange with the city inspector to have permit card issued on the job site which will authorize work to begin. This can be scheduled by calling 753-8314 between 7 am and 8 am. A minimum of 72 hours notice is required. Failure to comply will be cause for issuance of a "STOP WORK" order on the project.
 2. Notify underground location assistance 48 hours prior to any excavation (1-800-424-5555).
 3. Notify Metro traffic control 48 hours prior to obstruction of city right of way (753-8001).
 4. The attached plan check letter is made a part of the permit condition.

RIGHT-OF-WAY PRECONSTRUCTION MEETING CAN BE SCHEDULED FOR
 PROJECT ON SOUTHEAST PAT BOYSEN (753-8274) WESTSIDE/KEVIN
 WITT (753-8248) or NORTH EAST KEITH MIZNER (753-8291)
 Inspector signoff/initial, date. S C A N N E D



Application Number

07-00000959

Page

2

Date

9/05/07

Qty	Unit Charge	Per		Extension
1 00	175 0000	PER	PRMT/INSP OBSTRUCT-NO TRFC CNT	175 00

Permit	PERMIT/INSP STORM PIPE			
Additional desc	2058 LINEAR FEET			
Phone Access Code	953166			
Permit Fee	10187 10		Plan Check Fee	00
Issue Date	9/05/07		Valuation	0

Qty	Unit Charge	Per		Extension
2058 00	4 9500	LF	PRT/INSP STORM SEWER PIPE	10187 10

Permit	PERMIT/INSP STORM, FACILITY			
Additional desc				
Phone Access Code	953174			
Permit Fee	645 00		Plan Check Fee	00
Issue Date	9/05/07		Valuation	0

Qty	Unit Charge	Per		Extension
			BASE FEE	645 00

Permit	PERMIT/INSP WATERMAIN			
Additional desc	50 LINEAR FEET			
Phone Access Code	953125			
Permit Fee	147 50		Plan Check Fee	00
Issue Date	9/05/07		Valuation	0

Qty	Unit Charge	Per		Extension
50.00	2 9500	LF	PRMT/INSP WTRMAIN-INSIDE CITY	147.50

Permit	PERMIT/INSP WATERMAIN CONNECT			
Additional desc	2 CONNECTIONS			
Phone Access Code	953141			

CONTRACTOR

CONTRACTOR AFFIDAVIT

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Firm _____

By _____ Date _____

OWNER

I hereby certify that I am owner of the property for which this permit is issued and that all work done will be in conformance with City of Olympia ordinances and as noted on this permit.

X _____
SIGNATURE DATE

WATER

(Note: Water billing charges commence on date of installation of meter and all deposits will be adjusted to actual cost.)

APPLICANT _____ Date _____

RIGHT OF WAY WORK

PRIOR TO COMMENCING WORK WITHIN RIGHT OF WAY

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PROJECT ON SOUTHEAST PAT BOYSEN (753-8274) WESTSIDE/KEVIN
WILL (753-8248) or NORTH EAST KEITH MIZNER (753-8291)
Inspector signoff/initial.date. S C A N N E D



City of
OLYMPIA

Department of Community Planning & Development

MC PUBLIC #2 4

Application Number	07-00000959	Page	3
Permit Fee	380 00	Date	9/05/07
Issue Date	9/05/07	Plan Check Fee	00
		Valuation	0

Qty	Unit Charge	Per	Extension
		BASE FEE	380 00

Permit	PERMIT/INSP PAVE PARKING LOTS		
Additional desc			
Phone Access Code	953182		
Permit Fee	25 00	Plan Check Fee	00
Issue Date	9/05/07	Valuation	0

Qty	Unit Charge	Per	Extension
		BASE FEE	25 00

Permit	PERMIT/GRADE 1001-10000 CY		
Additional desc	9805 CY		
Phone Access Code	953208		
Permit Fee	325 00	Plan Check Fee	.00
Issue Date	9/05/07	Valuation	0

Qty	Unit Charge	Per	Extension
9 00	14 5000	PER	130.50
		BASE FEE	194 50
		ENG GRADE PERM/1001-10000 CY	

Permit	PERMIT/INSP SANITARY SWR MAIN		
Additional desc	1134LF-INCLUDING E-ONE GRINDER		
Phone Access Code	953158		
Permit Fee	3345 30	Plan Check Fee	.00
Issue Date	9/05/07	Valuation	0

Qty	Unit Charge	Per	Extension
1134 00	2 9500	LF	3345 30
		PRMT/INSP SAN SWR -INSIDE CITY	

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By _____ Date _____

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X _____ DATE _____
SIGNATURE

(Note: Water billing charges commence on date of installation of meter and all deposits will be adjusted to actual cost.)

APPLICANT _____ Date _____

PRIOR TO COMMENCING WORK WITHIN RIGHT OF WAY

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PROJECT ON SOUTHEAST PAT BOYSEN (753-8274) WESTSIDE/KEVIN
WITT (753-8248) or NORTH EAST KEITH MIZNER (753-8291)
Inspector signoff/initial/date.

SCANNED



Department of Community Planning & Development

Application Number 07-00000959 Page 4
 Permit PERMIT/INSP TREE NEW COMMERCIA Date 9/05/07
 Additional desc
 Phone Access Code 953224
 Permit Fee 1500 00 Plan Check Fee 00
 Issue Date 9/05/07 Valuation 0
 Expiration Date 2/26/09

Qty Unit Charge Per Extension
 BASE FEE 1500 00

Special Notes and Comments
 Contract number 298 (port number)

Other Fees A P/C-TREE NEW COMMERCIAL 1500 00
 A P/C-SEWER-INSIDE CTY 940.30
 A P/C-STORM (PIPE) 1356.10
 A P/C-STORM(FACILITY) 474.10
 A P/C-WATER-INSIDE CTY 452 50
 ENG PLAN GRD/1001-10000CY 49.25
 TELEVISIONING FEE-SAN SEWER 1134 00

Fee summary	Charged	Paid	Credited	Due
Permit Fee Total	16729 90	00	00	16729 90
Plan Check Total	00	00	00	00
Other Fee Total	5906 25	00	00	5906 25
Grand Total	22636 15	00	.00	22636 15

CONTRACTOR AFFIDAVIT

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APPLICANT _____ Date _____

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X [Signature] 9/5/07
 SIGNATURE DATE

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 WITT (753-8248) or NORTH EAST KEITH MIZNER (753-8291)
 Inspector signoff/initial,date.

08/10/2007 FRI 14:54 FAX

002/014

Handwritten mark



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

April 17, 2006

Mr. Jerry Lee Dierker, Jr.
1720 Bigelow St., NE
Olympia, WA 98506

MR. JOE COLE
6127 THORNEBURY CT., SE
OLYMPIA, WA 98513

Arthur S. West
3217-A 18th Ave., SE
Olympia, WA 98501

Dear Messrs. Dierker, Cole and West:

This is in response to your request that the Attorney General investigate and take action against the Port of Olympia for "unconstitutional expenditure of public funds and/or use of public resources, etc." by "official misconduct and false representations made to public permitting agencies". I have reviewed the materials that you submitted to this office (and to the Thurston County Prosecutor) relating to this request. In large measure, they are comprised of allegations and conclusions concerning the manner in which the Port of Olympia acted under the State Environmental Policy Act (SEPA) with respect to projects that you refer to as its "Marine Deepwater Port Expansion". In this respect, I note my understanding that the "findings" that you attribute in your memo of January 27, 2006, to yourselves "and/or" the Department of Ecology, or other agencies are not statements of the Department, but your characterizations of comments by the Department of Ecology as part of the SEPA review process, and other matters.

This office generally will not become involved in a matter challenging actions committed to local government, absent a clear violation of the law by the responsible officials that will result in significant harm to taxpayers. I do not find that standard satisfied based on the circumstances set forth in your letter or my follow-up inquiries with respect to them.

If your request to this office was made for purposes of establishing taxpayer standing, this letter is not intended to comment on whether requirements for taxpayer standing would be met. Nor is it intended to comment on the ultimate merit of any SEPA or permit appeals that may be ongoing with respect to these projects.

Sincerely,

Maureen Hart

Maureen Hart
Solicitor General

Port of Olympia - Dierker

MC PUBLIC #2

RECEIVED EXHIBIT 4
CENTRAL OFFICE, 2007

TO WASHINGTON STATE ATTORNEY GENERAL
AND THURSTON COUNTY PROSECUTOR OCT 18 P3 26

RE UNCONSTITUTIONAL EXPENDITURE
OF PUBLIC FUNDS BY AND ON BEHALF
OF THE PORT AND CITY OF OLYMPIA

FROM ARTHUR WEST AND JERRY DIERKER
120 STATE AVENUE NE #1497
OLYMPIA, WA 98501

ORIGINAL COPY RECEIVED
OF WASHINGTON COUNTY
PROSECUTOR ATTORNEY
OCT 18 2007
BY _____
TIME _____

Please consider this a formal request to investigate and take any appropriate action concerning the unlawful and unconstitutional expenditure of public funds by and on behalf of the Port of Olympia and City of Olympia

The facts are as follows

The Port of Olympia has commenced construction and expenditure of public funds on a series of Marine Terminal Improvements based upon a facially void permit authorization by the City of Olympia issued under a 2006 SEPA DNS that was vacated on December 12, 2006 The City has also expended public funds unlawfully in issuing a void authorization and permits to proceed

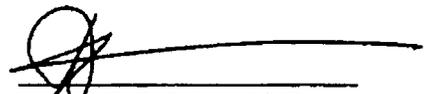
The Port of Olympia also has no duly adopted comprehensive scheme of Harbor Improvements covering or authorizing the instant project or the other Weyerhaeuser related developments proposed, as required by RCW Title 53 20 10-20, prior to any lawful expenditure for such improvements

This ongoing construction and expenditure of public resources with no Harbor Improvement Plan and under a facially void authorization constitutes an unconstitutional expenditure of funds, which we request you to investigate and take action to halt

Please contact us if any further information is required

Done October 17, 2007


JERRY DIERKER


ARTHUR WEST
120 State Ave N E #1497
Olympia, Wa 98501

EXHIBITS

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EXPEDITE (If filing within 5 court days of hearing)

Hearing is set:
 Date: _____
 Time: _____
 Judge/Calendar: _____

MAY 07 2008

SUBMITTED BY
 BETTY J. WOOD
 THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
 FOR THURSTON COUNTY

No.: **08-2-01093-4**

In Re the Matter of:
 THE RECALL OF PAUL TELFORD AND BILL
 MCGREGGOR PORT OF OLYMPIA
 COMMISSIONERS

PETITION TO APPROVE SYNOPSIS
 AND DETERMINE SUFFICIENCY
 OF CHARGES

COMES NOW EDWARD G. HOLM, Thurston County Prosecuting Attorney, through
 DAVID KLUMPP, Chief Civil Deputy, pursuant to RCW 29A.56.130, and certifies and
 transmits the recall charges against PAUL TELFORD and BILL MCGREGGOR, Port of
 Olympia Commissioners, as set forth in Exhibit A which is attached, and further certifies and
 transmits the following synopsis:

Should Paul Telford, Port of Olympia Commissioner, be recalled from office for conduct
 alleged in the recall charges, to wit:

1. On or about 2007, Port of Olympia Commissioner Paul Telford approved expenditures for cargo yard expansion and the Weyerhaeuser developments without a specific harbor improvement plan describing the project.
2. On August 24, 2005, Port of Olympia Commissioner Paul Telford approved a lease which committed the Port of Olympia to developments that were not contained in a scheme of harbor improvements or reviewed under the State Environmental Policy Act.

PETITION TO APPROVE SYNOPSIS AND
 DETERMINE SUFFICIENCY OF CHARGES - 1
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 McGreggor.doc

EDWARD G. HOLM
 Thurston County Prosecuting Attorney
 Civil Division
 2424 Evergreen Park Dr. SW, Suite 102
 Olympia, WA 98502
 360/786-5574 FAX 360/709-3006

Should Bill McGregor, Port of Olympia Commissioner, be recalled from office for conduct alleged in the recall charge, to wit:

1. On or about 2007, Port of Olympia Commissioner Bill McGregor approved expenditures for cargo yard expansion and the Weyerhaeuser developments without a specific harbor improvement plan describing the project.

Petitioner further petitions the Court to approve the synopsis and to determine the sufficiency of the charges.

DATED this 7 day of May 2008.

EDWARD G. HOLM
PROSECUTING ATTORNEY



DAVID KLUMPP, WSBA # 10910
Chief Civil Deputy

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