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COURT OF APPEALS
DIVISION II

09 FEB 25 PM 12:29

STATE OF WASHINGTON
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No. 37853-1-II

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 FEB 23 PM 3:31

Arthur West,

Appellant,

v.

Keith Stahley, et al.,

Respondents.

RESPONDENT WEYERHAEUSER COMPANY'S BRIEF

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ORIGINAL

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I. INTRODUCTION

This Appeal pertains to an engineering permit issued by the City of Olympia (the “City”) to the Port of Olympia (the “Port”). The engineering permit authorized the Port to install utilities serving several areas of the Port, including an area leased by the Port to Weyerhaeuser Company (“Weyerhaeuser”).

The Olympia Municipal Code (the “OMC” or “City Code”) and the Land Use Petition Act (“LUPA”) required the Appellant, Arthur West (“Mr. West”), to appeal the engineering permit to the City Hearing Examiner before appealing the permit to Superior Court.

Mr. West failed to follow this simple process. He appealed the engineering permit to Superior Court first by filing an “Original Complaint” (the “Complaint”). He filed an appeal with the Hearing Examiner later, after the jurisdictional deadline expired for such appeals.

The Honorable Judge Wickham dismissed the Superior Court Complaint because of Mr. West’s failure to exhaust the available administrative remedies. Judge Wickham also found the Complaint to be frivolous.

Mr. West’s appeal here of Judge Wickham’s simple dismissal of the case below is like his original case, not well founded in fact or law. Weyerhaeuser respectfully asks this Court to dismiss this appeal.

II. RESTATEMENT OF THE ISSUES

- Issue I: Whether Judge Wickham misapplied LUPA when he dismissed Mr. West's Complaint because Mr. West failed to exhaust administrative remedies?
- Issue II: Whether *res judicata* or *collateral estoppel* precluded Judge Wickham from dismissing Mr. West's appeal of the electrical permit when the subject matter, claims asserted, and parties to the Complaint were different from the subject matter, claims asserted, and parties to the Hearing Examiner proceeding on the 2006 Land Use Approval?
- Issue III: Does the ruling in *Detray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116 (2004) preclude dismissing the Complaint when the electrical permit was a different permit, issued to a different applicant, for a different project than the 2006 Land Use Approval?
- Issue IV: Whether Judge Wickham abused his discretion when he determined Mr. West had failed to show that Judge Wickham's membership in the Olympia Chamber of Commerce created an issue of impartiality prior to hearing argument on the LUPA petition?
- Issue V: Whether Judge Wickham properly dismissed Mr. West's declaratory judgment, writ, and nuisance claims where Mr. West's Complaint failed to allege necessary facts or where such claims were available only if no alternative remedy existed?
- Issue VI: Did Judge Pomeroy (the judge preceding Judge Wickham) properly stay the proceedings after Mr. West filed an Original Petition in the Supreme Court against Judge Pomeroy and Judge Hicks, and did Judge Wickham properly decline to hear Mr. West and Jerry Dierker's CR 11 and anti-SLAPP action motion when Mr. Dierker conceded the motion was untimely?
- Issue VII: Did Judge Wickham properly dismiss Mr. West's Harbor Improvement Act claim, when the LUPA petition failed to allege the Attorney General had refused to act on Mr. West's

allegation that the Port illegally spent or obligated the funds?

Issue VIII: Whether Judge Wickham applied LUPA in a manner that denied Mr. West's constitutional rights when the City provided notice of issuance for the engineering permit but Mr. West still failed to timely file a notice of appeal?

III. STATEMENT OF THE CASE

Weyerhaeuser is a Washington corporation. In addition to its other business activities, Weyerhaeuser operates a log yard on real property leased from the Port.

Weyerhaeuser plans to construct four buildings to serve the log yard. The Port separately constructed utilities that serve the Weyerhaeuser log yard, the proposed Weyerhaeuser buildings, and other parts of the Port's Marine Terminal.

In 2006, Weyerhaeuser applied for a Land Use Approval authorizing it to construct the four proposed buildings. CP 5. The City issued a State Environmental Policy Act ("SEPA") Mitigated Determination of Nonsignificance ("MDNS") reviewing the environmental impact of the buildings and operations. The City Hearing Examiner later determined on December 19, 2006 that the 2006 MDNS was insufficient because the environmental review had not examined the Port infrastructure as well as the proposed Weyerhaeuser buildings and operations. CP 5.

In April 2007, the Port issued a new MDNS that included a review of the proposed Weyerhaeuser buildings and operations and the Port's 2007 infrastructure projects. CP 504-509. Mr. West and Mr. Dierker¹ challenged the Port's SEPA determination in a separate Superior Court appeal, Case No. 07-2-1198-3. CP 488-499.

On September 5, 2007, the City issued an engineering permit allowing the Port to construct utility improvements at the Port's Marine Terminal. CP 11-14. The City entered the permit into the public record on October 9, 2007. CP 5. Mr. West had actual knowledge of the permit by at least October 10, 2007. CP 380-383. Under the City Code, individuals challenging an engineering permit must appeal the permit to the City Hearing Examiner within 14 days of the final staff decision. OMC 18.75.020.

Rather than filing an appeal with the Hearing Examiner, Mr. West and Mr. Dierker filed the Complaint on October 18, 2007.² The Complaint asked the Superior Court to require the City of Olympia to revoke the engineering permit. CP 3. Mr. West and Mr. Dierker contended that the engineering permit was void, the work authorized by

¹ Mr. Dierker is a *pro se* litigant who has challenged a number of Port actions along with Mr. West. Mr. Dierker originally joined Mr. West in the case below but did not file an appeal brief before this Court.

² Thurston County Cause No. 07-2-02101-6.

the engineering permit constituted a nuisance, and the work was an unconstitutional expenditure of public funds. CP 3-4.

A letter addressed to the Thurston County Prosecutor (the “Prosecutor”) and the Washington State Attorney General (the “Attorney General”) dated October 17, 2007—one day before the Complaint was filed—was attached to the Complaint. The letter asked the Prosecutor and the Attorney General to restrain “the unlawful and unconstitutional expenditure of public funds by and on behalf of the Port of Olympia and the City of Olympia.” CP 15. The letter is stamped as received by the Attorney General and the Prosecutor on October 18, 2007, the same day the Complaint was filed. *Id.* The Complaint alleged that Mr. West and Mr. Dierker sent a letter to the Prosecutor and the Attorney General, but it did not allege the Prosecutor and Attorney General refused to act on their request. CP 4.

Mr. West and Mr. Dierker filed a Motion to Abate the Nuisance (the “Motion to Abate”) on October 26, 2007. CP 24-28. On October 31, 2007 Weyerhaeuser responded to the Motion to Abate. CP 299-334. Among other things,³ Weyerhaeuser argued Mr. West and Mr. Dierker’s claim under the Harbor Improvement Act had no chance of success because Mr. West and Mr. Dierker failed to assert in the Complaint that

³ Weyerhaeuser also argued that Mr. West once again failed to follow court rules and timely note his Motion to Abate. CP 229-334.

they had asked the Attorney General and Prosecutor to bring an action against the Port and that the Attorney General and the Prosecutor had failed to take action. CP 306.

On November 1, 2007, the day after receiving Weyerhaeuser's response identifying the defect in the Complaint, Mr. West and Mr. Dierker filed a "Clerical Correction" to "correct the minor clerical errors." CP 83. The correction added a sentence to the Complaint alleging the Attorney General and the Prosecutor "refused to act." *Id.*

On October 30, 2007, 12 days after filing the Complaint, 20 days after Mr. West and Mr. Dierker received notice of the engineering permit, and 55 days after issuance of the engineering permit, Mr. West and Mr. Dierker appealed the engineering permit to the City Hearing Examiner. CP 377.

The Hearing Examiner dismissed the appeal as untimely because it was not filed within the 14-day appeal period required by the City Code. CP 380-383 (February 11, 2008 Order on Motions). In doing so, the Hearing Examiner concluded that "even if [Mr. West and Mr. Dierker's] claim were accepted that the appeal period did not start to run until they received such notice of issuance of the engineering permit . . . [their] appeal is untimely and must be dismissed." *Id.*

On October 11, 2007, Mr. West and Mr. Dierker filed an Original Petition with the Supreme Court alleging Judge Hicks (the presiding in judge in the related Case No. 07-2-01198-3) and Judge Pomeroy (the presiding judge for the Complaint and formerly presiding over Case No. 07-2-01198-3) had “acted unlawfully and in excess of jurisdiction.” CP 469-588 (Ex. L). Among other allegations, Mr. West and Mr. Dierker alleged that the Superior Court improperly transferred their Case No. 07-2-01198-3 from Judge Pomeroy to Judge Hicks. *Id.*

On November 2, 2007, Judge Pomeroy conducted a hearing in Case No. 07-2-02101-6. CP 84. She found the issues raised in the Complaint were related to issues in Case No. 07-2-01198-3, another appeal by Mr. West and Mr. Dierker against Weyerhaeuser and the Port that was pending with Judge Hicks. *Id.* Judge Pomeroy stayed Case No. 07-2-02101-6 pending resolution of the Original Petition to the Supreme Court. *Id.* She further ordered that the judge hearing Case No. 07-2-01198-3 would hear Case No. 07-2-02101-6 also in the interest of judicial economy. *Id.*

On February 22, 2008, the Supreme Court Deputy Commissioner dismissed the Original Petition. CP 488-498. The Deputy Commissioner imposed monetary sanctions on Mr. West and Mr. Dierker, finding the petition was “lacking in demonstrated factual or legal merit, [and] that

there was no reasonable possibility this court would grant petitioners relief.” *Id.* The Deputy Commissioner declined to restrict petitioners’ future filings in Superior Court, concluding such orders, if found necessary, should issue from the Superior Court.

On March 21, 2008, Judge Pomeroy recused herself from Case No. 07-2-02101-6, and the Superior Court assigned the case to Judge Wickham. On March 21, 2008, Judge Wickham conducted a status conference on Case No. 07-2-1198-3. CP 452. At the hearing, Mr. West and Mr. Dierker filed a declaration asserting Judge Wickham was prejudiced because he was a member of the Chamber of Commerce. Judge Wickham explained his membership was “associational”—that is, not of the character found to be a problem in *SAVE v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978). *Id.*

On April 4, 2008, Weyerhaeuser filed its Motion to Dismiss the Complaint. CP 109-122. Weyerhaeuser subsequently filed a Motion for Sanctions and Vexatious Litigant Order. CP 469-588. Both motions were noted for hearing on May 2, 2008. On April 30, 2008, three days prior to the hearing, Mr. West and Mr. Dierker filed an untimely Motion for CR 11 Sanctions and Anti-SLAPP Award. CP 661-672.

On May 2, 2008, Judge Wickham heard Weyerhaeuser’s motions. During argument on the motions, Mr. Dierker conceded the Motion for

CR 11 Sanctions and Anti-SLAPP Award was untimely. RP 14. Judge Wickham declined to hear the CR 11 and anti-SLAPP motion. *Id.* Judge Wickham ultimately granted Weyerhaeuser's Motion to Dismiss. RP 23-25; CP 129-130. Judge Wickham determined the Complaint to be frivolous under CR 11; however, he declined Weyerhaeuser's request for sanctions or for an order requiring prior screening of complaints filed by Mr. West and Mr. Dierker. RP 31.

IV. ARGUMENT

A. Issue I: Judge Wickham Properly Dismissed the Complaint Because Mr. West and Mr. Dierker Failed to Exhaust Administrative Remedies.

A trial court's decision to dismiss an action for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6) is a question of law that the Court of Appeals reviews *de novo*. *Berst v. Snohomish County*, 114 Wn. App. 245, 251, 57 P.3d 273 (2002). A trial court should dismiss a case under CR 12(b)(6) only after it appears beyond a reasonable doubt that no facts justifying recovery exist. *Id.* When considering CR 12(b)(6) motions, courts presume the allegations in the complaint are true for the purpose of the motion. In instances where materials outside the pleadings are considered, courts treat the CR 12(b)(6) motion as a summary judgment motion pursuant to CR 56. When reviewing CR 56 motions, courts will affirm an order granting summary

judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008) (appellate court engages in same inquiry as trial court). All facts and reasonable inferences must be considered in the light most favorable to the non-moving party. The court reviews questions of law *de novo*. *Potter*, 165 Wn.2d at 78 (2008).

Mr. West argues Judge Wickham erroneously interpreted LUPA by dismissing the case for failure to exhaust administrative appeals of the “ministerial” engineering permit. Appellant’s Brief at 20. Mr. West also argues that by dismissing the claim, Judge Wickham somehow improperly invalidated the Hearing Examiner’s early December 2006 decision related to the City’s SEPA MDNS . *Id.* Both arguments fail for several reasons.

First, there is no dispute that LUPA, as a matter of law, required Mr. West and Mr. Dierker to exhaust administrative remedies by appealing the engineering permit to the Hearing Examiner. Their failure to timely appeal the engineering permit to the Hearing Examiner created a lack of standing to file a petition in Superior Court. *See* RCW 36.70C.060(2)(d) (“[s]tanding” to bring a LUPA claim requires “[t]he petitioner has exhausted his or her administrative remedies to the extent required by law”). Notably, Mr. West does not claim he exhausted

administrative remedies. Instead he argues, based on Justice Chambers' concurring opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), that “[t]he legislature did not intend that parties had to pursue an administrative and judicial review of every ministerial decision.” Appellant’s Brief at 18 (*quoting Habitat Watch*, 155 Wn.2d at 418 (Chambers, J., concurring)). Mr. West then disregards Justice Chambers’ next sentence, which states “the 21-day limit for seeking review was intended to apply to quasi-judicial decisions made by those with the highest and final authority.” *Habitat Watch*, 155 Wn.2d at 418. In this case, the City designated the Hearing Examiner as the City’s highest and final authority for decisions regarding engineering permits. OMC 18.75.060. The Hearing Examiner makes his decision following a quasi-judicial hearing. Justice Chambers’ opinion supports Judge Wickham’s determination that Mr. West and Mr. Dierker’s Complaint should be dismissed for failure to exhaust administrative remedies.

Second, it is undisputed that the Hearing Examiner dismissed Mr. West and Mr. Dierker’s administrative appeal because they filed it 20 days after they received actual notice of the engineering permit, rather than within 14 days as required by OMC 18.75.020. CP 380-383. The Hearing Examiner’s dismissal, which was based on Mr. West and Mr. Dierker’s actual notice of the engineering permit, refutes Mr. West’s

suggestion that the City concealed the permit from him, which prevented him from filing a timely administrative appeal.⁴

Third, Judge Wickham did not rule on the merits of Mr. West and Mr. Dierker's claims. He took no action on the December 2006 Hearing Examiner Decision. In other words, Judge Wickham did not invalidate the Hearing Examiner's 2006 decision because he did not consider that decision.

In sum, Mr. West and Mr. Dierker slept on their rights and squandered their opportunity to be heard by the Hearing Examiner and the Superior Court. Judge Wickham properly dismissed Mr. West and Mr. Dierker's LUPA claim. As described in RCW 36.70C.060(2)(d), "[s]tanding" to bring a LUPA claim requires that "[t]he petitioner has exhausted his or her administrative remedies to the extent required by law."

B. Issue II: *Res Judicata* and *Collateral Estoppel* Do Not Bar the Court's Dismissal of Appellant's LUPA Petition.

Mr. West argues that Judge Wickham's dismissal of the Complaint was precluded by *res judicata* and *collateral estoppel* because those

⁴ The Hearing Examiner's decision was part of the record below but not included in Mr. West and Mr. Dierker's Complaint. If the Court of Appeals considers this document, it should apply the summary judgment standard in CR 56. Under that standard, there are no material disputes regarding the date when the engineering permit became available and the deadline when Mr. West and Mr. Dierker should have filed their administrative appeal.

doctrines bar “reasserting the same claim in a subsequent land use application.” Appellant’s Brief at 21. Mr. West provides no authority—either on appeal or before the Superior Court—for the proposition that these doctrines somehow excuse his failure to exhaust remedies under LUPA, or create jurisdiction in Superior Court when none exists, and therefore provides no basis for reversing the trial court’s decision. Nonetheless, these arguments fail of their own accord because there is no identity of subject matter, cause of action, or parties in the two matters, as is required by the doctrine of *res judicata*. *Hilltop Terrace Homeowner’s Ass’n v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995) (citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

Here there is no identity of subject matter because the engineering permit at issue in the Complaint is different from the Land Use Approval for the proposed Weyerhaeuser buildings that were the subject of the 2006 Hearing Examiner Decision. The engineering permit is not a “second application” for the same proposal, as Mr. West contends; it is an entirely different application (an application for an engineering permit to install utilities, not a Land Use Approval to construct buildings). The engineering permit was submitted by a different applicant (the Port), for

different projects (the Port's utilities, not the Weyerhaeuser buildings).⁵

The subject matter of the two appeals could not be more different.

There is no identity of claims. The challenge to the 2006 Land Use Approval was a claim under SEPA. CP 3. The Hearing Examiner in that case addressed whether the City violated SEPA when it conducted the 2006 Land Use Approval because the City's environmental review did not include a review of the Port's utilities. CP 3. This case, by contrast, does not involve SEPA challenges at all.⁶ Mr. West and Mr. Dierker's Complaint here makes only a passing reference to SEPA, and instead focuses on invalidating the engineering permit.⁷ CP 3-23.

Most importantly, Mr. West was not a party in the 2006 Land Use Approval appeal before the Hearing Examiner.⁸

⁵ CP 3. Mr. West and Mr. Dierker's Complaint is clear on this point. The Complaint states, "[T]he City issued a Land Use Approval . . . for a project proposal concerning the construction of office buildings submitted by the Weyerhaeuser Company, the project application The Port was not the project applicant for the city's June 16, 2006 action, and no independent Port marine terminal improvements were assessed or reviewed in said June 16, 2006 City Land Use Approval" *Id.*

⁶ For the same reason, Mr. West's allusions to *collateral estoppel* fail as well. *Collateral estoppel* requires, *inter alia*, "the issue decided in the prior adjudication is identical with the one presented in the second action." *Thompson v. State Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999). The issue previously before the Hearing Examiner was the whether the 2006 Land Use Approval complied with SEPA; the issue before the trial court here was whether the City's decision to issue an engineering permit was a nuisance or violated the Harbor Improvement Act. These issues are not "identical."

⁷ Mr. West did not raise SEPA challenges in the Complaint because he filed a separate lawsuit challenging the validity of the Port's revised SEPA analysis. *See* CP 488-498.

⁸ Mr. West makes no allegation to the contrary.

Mr. West attempts to compare this case to *West Coast, Inc. v. Snohomish County*, 104 Wn. App. 735, 16 P.3d 30 (2000), and argues “[l]ike 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.” Appellant’s Brief at 22.

Weyerhaeuser and the other respondents do not seek to avoid the Hearing Examiner’s decision in the 2006 Land Use Approval. To the contrary, in response to the Hearing Examiner’s decision, the Port and Weyerhaeuser prepared an entirely new environmental checklist that addressed the potential impacts of the Weyerhaeuser proposal and the possible impacts of the Port’s infrastructure. CP 504-509.

Mr. West’s argument on this issue ignores the legal requirements of the doctrines on which he relies and misstates the facts regarding the subject of the 2006 Land Use Approval and the engineering permit.

Mr. West’s claims are frivolous and should be dismissed.

C. Issue III: The Court’s Dismissal of Appellant’s LUPA Petition Is Not Barred by *Detray v. City of Olympia*.

Mr. West argues Judge Wickham’s decision somehow violates the principle articulated in *Detray v. City of Olympia* that *res judicata* bars a land use decision where the application is “for essentially the same land use project” but does not “resolve, or at least mitigate[,] the original

application's disputed condition(s)." Appellant's Brief at 25. This argument suffers the same defects as those assigned in Issue II.

Judge Wickham dismissed Mr. West and Mr. Dierker's Complaint without reaching the merits of their argument regarding *Detray*. The dismissal was based on two grounds: Mr. West and Mr. Dierker's appeal was untimely, and they did not exhaust administrative remedies.

Moreover, as discussed above, *res judicata* does not apply in this case because Mr. West was not a party to the appeal of the 2006 Land Use Approval, the subject matter addressed in the 2006 Land Use Approval and engineering permit are different, and the claims were different. Most importantly, in response to the Hearing Examiner's ruling on the 2006 Land Use Approval, the Port and Weyerhaeuser prepared a revised environmental checklist and environmental studies that analyzed the Weyerhaeuser project together with the Port's infrastructure. CP 504-509.

D. Issue IV: Judge Wickham Is Not a Chamber of Commerce Employee or Board Member; Therefore, He Did Not Violate the Appearance of Fairness Doctrine.

Mr. West challenges Judge Wickham's decision to preside over the case under the appearance of fairness doctrine. To prevail under the appearance of fairness doctrine, a claimant must provide "some evidence of the judge's . . . actual or potential bias." *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). Prejudice is not presumed. *State v.*

Dominguez, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996). After a claimant presents sufficient evidence of potential bias, the court the considers whether the appearance of fairness doctrine was violated. *Id.* at 329-30. “The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial.” *Id.* at 330.

Relying on *SAVE v. City of Bothell*,⁹ Mr. West argues a judge who is a member of the Chamber of Commerce may not hear a case on which the Chamber of Commerce has taken a position. Appellant’s Brief at 26. This argument misreads *SAVE*. In *SAVE*, the court found that the paid executive director of the Chamber of Commerce and a member of the Chamber’s Board should have recused themselves from a zoning decision under the appearance of fairness doctrine. 89 Wn.2d at 874. The court emphasized the specific positions the individuals held with the Chamber, rather than their general membership, as the basis for its ruling. *Id.* at 872-73.

The rule articulated in *SAVE* does not prohibit membership in community organizations; rather, it prohibits participation in a quasi-judicial proceeding when the nature of the involvement in the organization “demonstrates the existence of an interest which might substantially

⁹ 89 Wn.2d 862, 576 P.2d 401 (1978).

influence the individual’s judgment.” *Id.* at 874. Mr. West and Mr. Dierker did not demonstrate that Judge Wickham was a paid member of the Chamber’s staff or on the Chamber’s Board, or that he had any other involvement in the Chamber that resulted in an interest “which might substantially influence [his] judgment.” *Id.*

Significantly, Judge Wickham explained his involvement in the Chamber in detail and why it distinguished his circumstances from those in *SAVE* when he ruled on the Affidavit of Prejudice filed by Mr. West and Mr. Dierker in Case No. 07-2-01198-3, the related case heard concurrently by Judge Wickham. Weyerhaeuser has filed a motion to introduce the transcript in which Judge Wickham provides an analysis addressing his involvement in the Chamber.

E. Issue V: Appellant’s Complaint Failed to Establish Claims for a Writ of Mandamus or Prohibition, Declaratory Relief, or Nuisance.

Judge Wickham dismissed Mr. West and Mr. Dierker’s requests for a writ of mandamus, declaratory judgment, and nuisance claims on the pleadings. RP 24. The Judge found there was no basis in law or fact to support the claims or that Mr. West and Mr. Dierker lacked standing. *Id.* As noted above, a trial court’s ruling under CR 12(b)(6) on a motion to dismiss for failure to state a claim upon which relief can be granted is a question of law that receives *de novo* review on appeal.

1. Appellant's Mandamus/Prohibition Action Is Improper Because LUPA Provides an Adequate Alternative Remedy.

Mr. West and Mr. Dierker's mandamus and prohibition causes of action fail for a number of reasons. Parties seeking mandamus or prohibition must demonstrate standing by alleging they are "beneficially interested" in the underlying action. *See* RCW 7.16.170, 7.16.300; *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003). The interest alleged must be "beyond that shared in common with other citizens." *Eugster*, 118 Wn. App. At 403 (internal quotation marks and citation omitted). The allegation of standing must be in an "affidavit" filed in accordance with RCW 7.16.170 and 7.16.300. The lack of a properly filed affidavit is grounds for dismissal. *See Birch Bay Trailer Sales, Inc. v. Whatcom County*, 65 Wn. App. 739, 829 P.2d 1109 (1992) (dismissing writ of review where affidavit was not timely filed).

Mr. West and Mr. Dierker did not file an affidavit in support of standing. Even assuming their Complaint could be construed as an "affidavit," it does not allege facts sufficient to show Mr. West and Mr. Dierker are "beneficially interested" in the City's land use decision in a manner "beyond that shared in common with other citizens." Since Mr. West and Mr. Dierker failed to satisfy the jurisdictional standing

requirements, their mandamus and prohibition causes of action were properly dismissed as a matter of law.

Statutory writs of mandamus and prohibition are available only where there is no adequate remedy at law. *See* RCW 7.16.170 (writ of mandamus may be granted “where there is not a plain, speedy and adequate remedy in the ordinary course of law”); *see also* RCW 7.16.300 (writ of prohibition is available where “there is not a plain, speedy and adequate remedy in the ordinary course of law”). As previously discussed, LUPA provides a plain, speedy, and adequate remedy to appeal land use decisions made by the City.

Mr. West and Mr. Dierker could have sought a stay prohibiting the Port’s construction or requiring the City to comply with applicable laws under LUPA. *See* RCW 36.70C.100 (authorizing stay of land use decision). Their failure to establish standing under LUPA does not render that remedy any less “plain, speedy, and adequate.” Nor does Mr. West and Mr. Dierker’s failure to timely appeal to the Hearing Examiner make LUPA’s remedy inadequate. *See Torrance v. King County*, 136 Wn.2d 783, 792-93, 966 P.2d 891 (1998) (failure to use administrative appeals was “fatal” to writ of certiorari, rendering writ “legally unavailable”). Mr. West and Mr. Dierker’s mandamus and prohibition causes of action were properly dismissed by the trial court.

2. Mr. West and Mr. Dierker’s Declaratory Judgment Action Is Improper Because LUPA Provides an Adequate Alternative.

As with the mandamus and prohibition claims, Mr. West and Mr. Dierker are not entitled to relief under the declaratory judgment act because LUPA provides a completely adequate remedy at law. *See Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002). The *Grandmaster* court upheld the dismissal of a declaratory judgment claim because LUPA provides “a completely adequate alternative to this declaratory judgment action.” *Id.*

Mr. West argues the court should have considered granting declaratory relief because the City deliberately foreclosed using LUPA. Appellant’s Brief at 30. No facts are presented to support this assertion. As discussed in Section IV.A above, the Complaint stated that the City entered the engineering permit into the public record on October 9, 2007. CP 5. Nothing precluded Mr. West and Mr. Dierker from filing an administrative appeal within the 14 days required by the City Code. Instead, Mr. West and Mr. Dierker filed an administrative appeal with the City Hearing Examiner on October 30, 2007. The facts in the Complaint refute Mr. West’s arguments. His request for declaratory relief is barred under CR 12(b)(6).

This result is further supported by the Hearing Examiner’s decision dismissing Mr. West and Mr. Dierker’s administrative appeal of the electrical permit as untimely. As discussed above, even when calculated from the date Mr. West and Mr. Dierker received actual notice of the

engineering permit, their administrative appeal was still untimely. CP 380-383 (“the evidence shows they received such notice no later than October 10, 2007”). LUPA does not become an inadequate remedy simply because Mr. West and Mr. Dierker failed to follow its procedural requirements. To the extent the Complaint sought relief for an alleged impropriety in the City’s issuance of the engineering permit, the claims were nonetheless untimely and were appropriately dismissed as a matter of law.

3. Appellant’s Complaint Failed to Allege Facts Constituting a Nuisance.

Judge Wickham dismissed Mr. West and Mr. Dierker’s nuisance claim as having no basis in law or fact, or alternatively for lack of standing. As discussed below, Mr. West and Mr. Dierker’s “public and private” nuisance claims fail as a matter of law and were properly dismissed.

As an initial matter, LUPA bars public nuisance claims based on defects in the City permitting process. *See Ashe v. Bloomquist*, 132 Wn. App. 784, 790-92, 133 P.3d 475 (2006) (dismissing public nuisance claim that sought injunction to stop home construction based on LUPA’s exclusive remedy provisions).

Moreover, Mr. West and Mr. Dierker failed to allege facts necessary for a cause of action under private nuisance. Under RCW

7.48.010, a nuisance is defined as an action that “essentially interfere[s] with the comfortable enjoyment of . . . life and property.” The Complaint does not allege facts to show that the Port’s construction activities under the engineering permit substantially interfered with their use and enjoyment of property. CP 7. A private nuisance claim cannot be supported simply by alleging that the defendants were “engaged in business in defiance of the laws” and that such actions were “damaging the Appellant particularly.” CP 7. This failure to allege facts to make a prima facie nuisance claim warrants dismissal. *See Asche*, 132 Wn. App. at 801-02.

Mr. West and Mr. Dierker also did not identify which of the statutorily enumerated “public nuisances” in RCW 7.48.140 they believe occurred. Instead, the Complaint relies on blanket allegations of “damaging the Appellant particularly,” without specifically identifying Mr. West’s property interests, or how those interests were harmed by particular acts of the City or the Port. By failing to allege facts sufficient to make out a cause of action under nuisance, Mr. West and Mr. Dierker failed to state a claim upon which relief can be granted, and the nuisance claim was properly dismissed. *Asche*, 132 Wn. App. at 801-02.

F. Issue VI: The Superior Court Properly Stayed the Proceedings When Mr. West and Mr. Dierker Sued Judge Pomeroy and Judge Hicks, and Judge Wickham Properly Declined to Rule on Mr. West and Mr. Dierker’s Untimely Motions.

Mr. West makes various arguments that the court below somehow denied him due process by declining to rule on various motions, including his anti-SLAPP claim. The record provides no support for his claims of due process violations. As discussed below, Judge Pomeroy properly stayed the proceeding when Mr. West and Mr. Dierker filed an action in the Supreme Court against Judge Hicks and her. After the case was transferred to Judge Wickham, he properly declined to rule on Mr. West and Mr. Dierker’s untimely motion.

1. Judge Pomeroy Properly Stayed the Proceedings When Mr. West and Mr. Dierker Sued Her.

Mr. West argues the Superior Court denied him due process “[b]y staying all proceedings on the relief sought by plaintiffs.” Appellant’s Brief at 32. Mr. West conveniently fails to mention the court imposed the stay after he and Mr. Dierker filed an Original Petition to the Supreme Court against Judge Pomeroy and Judge Hicks. CP 31-33. Neither judge could rule on his motions because Mr. West was challenging the assignment of the case in the Supreme Court. CP 488-498. Mr. West cannot reasonably complain about a delay where the delay resulted directly from his own decision to file suit against the presiding judge—a

decision the Supreme Court Deputy Commissioner found was frivolous.

Id.

2. Judge Wickham Properly Declined to Hear Mr. West's Untimely Motion Under RCW 4.25.210.¹⁰

Mr. West argues the court abused its discretion when it failed to consider his anti-SLAPP claim, "which was argued at the hearing on May 2, [2007] as well as in [Mr. West and Mr. Dierker's] motions for reconsideration." Appellant's Brief at 32. This argument is not supported by the facts in this case.

Mr. West's insistence that his anti-SLAPP claim was heard is not well grounded in fact. Mr. West and Mr. Dierker filed the motion containing the anti-SLAPP claim on April 30, 2007, three days before the May 2 hearing in this matter. Mr. Dierker represented the Appellants during argument on May 2, where Mr. Dierker conceded the motion was untimely.¹¹ Judge Wickham then declined to hear the motion. The transcript is clear on this point:

Mr. Dierker: [O]ur motion for CR 11 sanctions and for anti-slapp suit is based upon the fact that - -

The Court: Now, your motion was filed yesterday.

¹⁰ Mr. West cites RCW 4.25.210. The correct citation to the anti-SLAPP statute is RCW 4.24.510.

¹¹ Nor is this the first time that Mr. West failed to comply with court rules by timely noting motions. *See* CP 229-334 (noting Mr. West's failure to timely note his Motion to Abate).

Mr. Dierker: No, this was filed April 30th.

The Court: That would have been - -

Mr. Dierker: Three days ago.

The Court: So your motion is untimely, correct?

Mr. Dierker: I realize that.

The Court: So I am not going to hear argument on your motion today because it is untimely.

Mr. Dierker: That's fine your Honor . . .

RP 14. Moreover, Mr. West provides no legal support for his argument that Judge Wickham erred by refusing to hear the untimely motion. Since Mr. West's arguments are not well founded in fact or in law, this Court should impose sanctions under RAP 18.9.

G. Issue VII: The Court Properly Dismissed Appellant's Taxpayer Claim for Lack of Standing.

Mr. West and Mr. Dierker failed to establish standing for their taxpayer claim that the Port is "illegally and unconstitutionally" expending funds in violation of the Harbor Improvement Act. On appeal, Mr. West asks this Court to reverse Judge Wickham's determination that the claim was frivolous.

The Harbor Improvement Act, RCW chapter 53.20, does not contain an express cause of action by citizens; however, the Washington Supreme Court recognizes a taxpayer's standing to challenge government

acts under certain circumstances. *See, e.g., State ex rel. Boyles v. Whatcom County Super. Ct.*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985). To maintain an action, a taxpayer must demonstrate two jurisdictional prerequisites. The taxpayer must:

- (1) Show “a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers.”¹²
- (2) Demonstrate that he filed a request with the Attorney General, and the Attorney General refused to act.¹³

These jurisdictional prerequisites must be alleged in the complaint. *Reiter v. Wallgren*, 28 Wn.2d 872, 876-78, 184 P.2d 571 (1947). Compliance with the jurisdictional prerequisites is determined at the time the complaint is filed. *Id.* Mr. West and Mr. Dierker failed to satisfy both jurisdictional requirements.

With regard to the first prerequisite, Mr. West and Mr. Dierker alleged no unique right or interest that was violated by the City or the Port. In fact, Mr. West and Mr. Dierker did not allege a specific or identifiable harm of any kind in their Complaint. The Complaint’s only allegations of injury to Mr. West and Mr. Dierker’s interests are generic, including

¹² *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997) (internal quotation marks and citation omitted).

¹³ *Id.*

statements such as this: “They [Mr. West and Mr. Dierker] have a demonstrated connection to the immediate area of the project site, and are particularly impacted and prejudiced in their repose and enjoyment by the defendants’ action.” CP 4. Even liberally construed, generic statements of “repose and enjoyment” do not show “a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers.” *Greater Harbor 2000*, 132 Wn.2d at 281 (internal quotation marks and citation omitted). Mr. West and Mr. Dierker failed to allege the requisite “unique” injury to maintain a taxpayer claim, and their claim should be dismissed.

Second, the Complaint failed to allege the Attorney General refused to act. A plaintiff bringing a taxpayer suit must allege in the complaint that (i) the Attorney General was presented with a demand to act and (ii) the Attorney General refused to act. *Reiter*, 28 Wn.2d at 876.¹⁴ This prerequisite is not a procedural formality. It is a necessary step to prevent an “over-officious citizen” from challenging “acts of public officers without first presenting the question of the propriety of such procedure to the public officials who are charged with responsibility.” *Id.* at 877.

¹⁴ Appellant also relies on *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975) and *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983). These cases rely on *Reiter* and do not change the jurisdictional test articulated in *Reiter*.

The Complaint did not, and could not, allege the Attorney General refused to act in this instance. The Attorney General received notice of Mr. West and Mr. Dierker's grievance on the same day they filed their Complaint. Even assuming the allegations in the Complaint are true, there is no conceivable way the Attorney General could have reviewed the allegations in the letter, let alone "refused" to act on those allegations the same day notice was received. Mr. West and Mr. Dierker's decision to file a lawsuit without waiting for a response from the Attorney General is a prime example of the harm *Reiter* sought to prevent, namely the inefficiencies caused by lawsuits filed by "over-officious" citizens before public officials have the opportunity to respond. *Id.*

The "Clerical Correction" filed by Mr. West and Mr. Dierker, which purports to add an allegation that the government "refused to act," does not cure this fatal defect. Even assuming this omission of a key jurisdictional allegation was the result of a "clerical" error, the facts presented with the Complaint contradict a claim that the Attorney General refused to act. The date-stamped letter attached to the Complaint shows it was delivered to the Attorney General on the same day the Complaint was filed. CP 15.

Given this timing, it is inconceivable the Attorney General received, processed, evaluated, and subsequently refused to act on

Mr. West and Mr. Dierker's request. Mr. West and Mr. Dierker's capacity to sue is determined "at the time the complaint was prepared and the action commenced." *Reiter*, 28 Wn.2d at 878.

Allowing Mr. West and Mr. Dierker to file a letter with the Attorney General without waiting for a response renders the prerequisite of requiring notice to the Attorney General meaningless. Mr. West and Mr. Dierker's attempt to clerically "correct" this deficiency is not supported by the Attorney General's "received" date stamp on the letter. An attempt to construct a claim based on an assertion that the Attorney General refused to act is not well grounded in fact.

Mr. West also attaches to his Appellate Brief a letter from the Attorney General dated April 17, 2006. Appellant's Brief at 35. The Complaint does not refer to this letter in any way, and it is the facts alleged in the Complaint that must establish standing. Moreover, the Clerks Paper designation does not refer to this letter, and it is not possible to determine whether the letter was part of the record in the underlying case.

In essence, Mr. West asks this Court to ignore *Reiter* and apply a less rigid standing test because of the case's assumed public importance. Appellant's Brief at 35. Mr. West does not explain why a case that is

limited to the question of whether the Port may upgrade the utilities on its property is a controversy of statewide import.

There are no facts presented in the Complaint or its attachments that satisfy the jurisdictional prerequisites outlined in *Reiter*. Judge Wickham properly dismissed this claim under CR 12(b).

Finally, as briefed in Weyerhaeuser's response to Mr. West and Mr. Dierker's Motion to Abate, the long delay resulting from the detour to the Supreme Court to address the Original Petition against Judges Hicks and Pomeroy rendered the "illegal expenditure" claim moot. The Port finished all construction activities authorized by the engineering permit over a year ago. CP 451 (declaration of Jeff Lincoln explaining that all work under engineering permit is complete). The funds have been spent. There is no longer a live controversy with respect to the Port's expenditure of funds on projects covered by the engineering permit.

Judge Wickham's finding that the illegal expenditure claim was frivolous is well supported also by Mr. West and Mr. Dierker's after-the-fact filings attempting to cure the absence in the Complaint of a statement that the Attorney General had refused to act.

H. Issue VIII: The Court's Dismissal Did Not Apply LUPA in an Unconstitutional Manner.

Finally, Mr. West argues Judge Wickham applied LUPA in an unconstitutional manner because LUPA's provisions, as interpreted by the Supreme Court, allegedly denied him fair notice of the City's decision regarding the engineering permit and an opportunity to petition to redress his grievance.¹⁵ Appellant's Brief at 39-41. This claim is baseless. The City issued the engineering permit on September 5, 2007. CP 11-14. The record clearly shows that by at least October 9, 2007, the City made the permit a matter of public record, and by October 10, 2007, Mr. West had actual notice of the City's decision to issue the engineering permit. CP 5.¹⁶ The City Code requires that any permit appeal occur within 14 days of the permit decision. OMC 18.75.020. Mr. West did not file an appeal with the Hearing Examiner until October 30, 2007 and did not file his appeal to the Superior Court until October 18, 2007. Thus under any conceivable measure, Mr. West did not file an appeal of any kind with the Hearing Examiner within the 14-day period required by the City Code. Judge Wickham dismissed Mr. West's claims for failing to exhaust his

¹⁵ The standard of review in a case where the constitutionality of a statute is challenged is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *E.g.*, *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995).

¹⁶ *See also* CP 380-383 ("the evidence shows they received such notice no later than October 10, 2007").

administrative remedies by timely filing the required appeal with the Hearing Examiner. RP 23-24. The Hearing Examiner reached the exact same result, finding that even using the later October 10, 2007 actual notice date, Mr. West's appeal was still untimely. CP 380-383. Mr. West makes no showing that the 14-day deadline was unfair, or otherwise unconstitutional, or that he could not reasonably file his appeal within 14 days of receiving actual notice.

Mr. West's references to various dissenting judicial opinions, CR 2, and Article I, Section 1 of the Constitution cannot obscure the fact that under any method of calculating jurisdictional deadlines, Mr. West and Mr. Dierker did not file a timely appeal with the Hearing Examiner as required by law. That failure precluded Judge Wickham from taking jurisdiction of the case.

Judge Wickham could not create a special rule for Mr. West and Mr. Dierker and excuse them from LUPA's jurisdictional prerequisites. Judge Wickham's application of LUPA was appropriate and constitutional.

I. Weyerhaeuser Is Entitled to Fees and Costs on Appeal.

Under RAP 18.9(a), the Court may award attorney fees and costs to a party that is required to defend against a frivolous appeal. *Eugster v. City of Spokane*, 139 Wn. App. 21, 34, 156 P.3d 912 (2007). The Court

may make such an award on its own motion, or on the motion of a party. *Id.* An appeal is frivolous “if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Id.* As required by RAP 18.1(b), Weyerhaeuser respectfully requests the Court award attorney fees and costs under RAP 18.9(a) as compensation for responding to Mr. West’s frivolous appeal. If necessary, Weyerhaeuser will file a separate motion seeking sanctions under RAP 18.9(a) following this Court’s resolution of the case.

V. CONCLUSION AND RELIEF

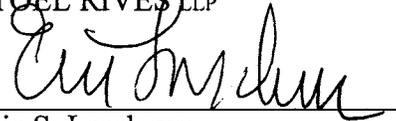
Weyerhaeuser respectfully requests the Court dismiss Mr. West’s appeal. As discussed above, Mr. West’s appeal of Judge Wickham’s Order dismissing the Complaint is without merit.

Judge Wickham did nothing more than hold Mr. West and Mr. Dierker accountable for failing to exhaust the administrative remedies available to appeal the City’s engineering permit as LUPA requires. Since LUPA provided an adequate remedy to address their grievances, other claims and bases for relief were unavailable. Mr. West received actual notice of the City’s decision to issue the engineering permit and simply failed to take appropriate action within the time allowed by law. Mr. West’s own delay in that regard does not render LUPA unconstitutional. Mr. West and Mr. Dierker failed to establish standing below for their Harbor Improvement Act claim by, again, failing to meet

simple jurisdictional prerequisites. Instead, they filed a “Clerical Correction” to the Complaint in an effort to disguise their error. Mr. West is not entitled to relief on appeal. The Court should dismiss the appeal and enter an appropriate award of costs and fees under RAP 18.1 and 18.9.

DATED: February ^{23rd} __, 2009.

STOEL RIVES LLP



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DECLARATION OF SERVICE

I, Lynn A. Stevens, certify under penalty of perjury under the laws of the State of Washington that, on February 23, 2009, I caused the foregoing document to be served on the persons listed below in the manner shown:

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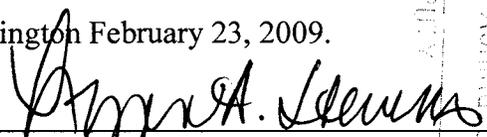
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Dated at Seattle, Washington February 23, 2009.


Lynn A. Stevens, Secretary

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