

No. 38983-5-II

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

DR. DAVID V. WILLIAMS,

Appellant,

v.

CITY OF CENTRALIA AND ARCHDIOCESAN HOUSING AUTHORITY,

Respondents.

APPELLANT'S BRIEF

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I. INTRODUCTION

The Appellant, Dr. David V. Williams, brought a Land Use Petition to appeal the City of Centralia's (City) Hearings Examiner's decision to uphold the Respondent, City of Centralia's Site Plan Review approval and Mitigated Determination of Non-significance (MDNS) allowing the Respondent, Archdiocesan Housing Authority (AHA), to fill the floodplain and floodway of Scammon Creek and the Chehalis River in order to build an apartment complex called the Lewis Family Housing Project.

The Superior Court dismissed the LUPA appeal and entered a final order on February 18, 2009. This appeal followed on March 3, 2009.

II. ASSIGNMENTS OF ERROR

1. Whether the Superior Court erred by dismissing the Land Use Petition when Dr. Williams, as a damaged adjacent property owner, had standing as an aggrieved party under RCW 36.70C.060.

2. Whether the Superior Court erred by dismissing the Land Use Petition when Dr. Williams timely filed the petition.

III. STATEMENT OF THE CASE

On October 5, 2007, AHA filed a Site Plan Review application for a 48-unit multi-family housing development to be located at 2613 Cooks Hill Road in Centralia, Washington. Ex. F. The application was deemed complete on November 2, 2007. Ex. G.

The City of Centralia acted as lead agency under the State Environmental Policy Act (SEPA) to review the environmental impacts caused by the proposal, and issued a Mitigated Determination of Nonsignificance (MDNS) on June 6, 2008. Ex. B

Dr. David V. Williams (Appellant), an adjacent property owner on Cooks Hill Road, filed an appeal of the MDNS on June 20, 2008. The appeal was timely under the 14-day appeal deadline specified in the document and under the Centralia Municipal Code (CMC) 20.02.140. The appeal raised the following issues:

1. Whether the fill and retaining walls proposed to be located within the floodplain violated the City's floodplain building regulation, since the impact of the retaining walls and fill on future flooding had not been calculated.

2. Whether the City followed FEMA's guidelines to use the most recent flood data of 2007 to calculate the effects of future flooding.

3. Whether the retaining walls and the fill would obstruct the flow of flood water along the base of the hill, resulting in increased flooding on Cooks Hill Road and surrounding properties, including Dr Williams' property.

4. Whether flood capacity would be reduced as a result of the fill placement.

5. Whether Cooks Hill Road would be made further unsafe because of the increased pedestrian traffic generated by the multi-family development.

On August 18, 2008, the Site Plan Review Committee issued its approval of the project. Ex. D.

On August 26, 2008, Dr. Williams timely filed an appeal of the August 18, 2008 Site Plan approval decision. Ex. E

On October 1, 2008, a hearing was held before the City's Hearings Examiner. Report of Proceedings (RP).

On October 21, 2009, the Hearings Examiner signed the Findings, Conclusions, and Decision. CP 144-160

On November 12, 2008, Dr. Williams brought a Land Use Petition Act (LUPA) Appeal under RCW 36.70C.060. CP 140-144

On January 2, 2009, Lewis County Superior Court entered an Order Granting Respondent AHA's Motion to Dismiss. CP 73-74

On February 18, 2009, Lewis County Superior Court entered an Order Denying the Respondent AHA's Request for Judgment on Costs which was the Final Judgment in this matter. CP 9-10

On March 3, 2009, the Appellant, Dr. Williams filed and served his Notice of Appeal. CP 1-8

IV. ARGUMENT AND AUTHORITY

A. DR. WILLIAMS HAS STANDING UNDER RCW 36.70C.060 AS A PERSON AGGRIEVED OR ADVERSELY AFFECTED BY THE LAND USE DECISION.

Dr. Williams was the Petitioner before the Hearings Examiner on both the City's Decisions under the State Environmental Policy Act (SEPA), Ch. 43.21C RCW and the Site Plan Review Approval.

RCW 36.70C.060 states in relevant part: Standing to bring a land use petition under this chapter is limited to the following persons:

(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

Our Supreme Court has interpreted these requirements to be similar to the Administrative Procedures Act standing provisions, which require an injury in fact and a zone of interest test. *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1 Wash. (2002).

The plain meaning of the LUPA standing provision is that to have standing, the local jurisdiction, must be obligated to consider the Petitioner's interests for them to have standing under LUPA. RCW 36.70C.060(2)(b).

Webster's Dictionary defines the term "require[d]" as to "impose a compulsion or command ... to do something." *Webster's Third International Dictionary 1929* (1969).

The court's inquiry, then, is not whether the City actually considered Dr. William's interests, but whether it was under an obligation to do so.

The court indicated in *Nykreim* that LUPA's language requiring the local authority to consider a petitioner's interests was not intended to be "especially demanding." *Nykreim* 146 Wash.2d at 937, 52 P.3d 1 (quoting *Seattle Bldg. & Constr. Trades Council v. State Apprenticeship & Training Council*, 129 Wash.2d 787, 797, 920 P.2d 581 (1996), *cert. denied*, 520 U.S. 1210, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997)).

As an adjacent land owner and as the Developer of the adjacent Stillwater Estates Community, Dr. Williams' property and the Stillwater Estates Development will be adversely affected by the proposed development since filling in the floodway and floodplain will cause increased flooding and erosion of his

property. Ex. Y. Such prejudice to one's property interest is sufficient for standing. See *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 494 (2002).

At the October 1, 2008 hearing, Christian Fromuth, a hydrologist, and Charles Coddington, a Professional Civil Engineer, of Agua Tierra Consultants testified that the environmental checklist failed to properly and fully disclose environmental impacts of the proposal. RP 42-89 and RP 110-111.

The errors in the checklist include:

Page 5, Section 3a, the failure to disclose that Scammon Creek runs through the property, the failure to disclose that the project would occur within 200 feet of Scammon Creek, and the failure to disclose that the wastewater was proposed to be discharged directly into Scammon Creek. The development within 200 feet of Scammon Creek requires a shoreline permit. RP 69-70

Under page 7, Section 5 for animals, the checklist failed to disclose that Scammon Creek is a salmon bearing stream.

These failures to disclose environmental impacts under the Environmental Checklist are a violation of SEPA. See *Sisley v. San Juan County*, 89 Wn.2d 78, 9

P.2d 712 (1977). “The most important aspect of SEPA is full consideration of the environment values under RCW 43.12C.030(2)(b).....” *Sisley*, 89 Wn.2d at 89.

The photographs taken by Sherry Keahey and the testimony regarding the 2007 flood by Jim Lowe show that this is an improper site for a housing development. RP 121-129. It is appropriate under SEPA for the City of Centralia to use the December 2007 flood data to determine the true environmental impact of the housing development caused by flooding. Filling in the floodway and floodplain without applying the latest data is a violation of the CMC 16.12.110(a). RP 80-82

Dr. Williams testified that he has lost 2 acres of 12 acres of his property due to erosion in the floodplain because of flooding. RP 161-165. The increased flooding caused by the construction of the retaining walls and fill for the housing project will increase flooding and erosion on his property. RP 59-82. Appellant, Dr. Williams is an aggrieved party under RCW 36.70C.060. His property has been put at risk by the City’s land-use decisions and reversal of those decisions would eliminate the increased risk of erosion from additional, future flooding caused by filling and the retaining walls.

The Superior Court erred in dismissing the LUPA Petition on the grounds of standing.

B. THE APPELLANT, DAVID WILLIAMS, FILED THE LAND USE PETITION IN A TIMELY MANNER IN ACCORDANCE WITH RCW 36.70C.040.

The relevant portion of RCW 36.70C.040 is as follows:

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

The case of *Stikes Woods v. City of Lacey*, 124 Wash.2d 459, 880 P.2d 25 (1994) is exactly on point to hold that Dr. Williams' appeal was timely. The *Stikes Woods* court held that when the final day of the 21 day filing period for the Land Use Petition Act falls on a Saturday, Sunday, or legal holiday, pursuant to RCW 1.12.040 such days are excluded from the limitation period.

In this case the decision of the Hearings Examiner was issued October 21, 2008. November 11, 2008 was the twenty-first day after October 21, 2008 and as Veterans Day, a legal holiday, it is not included in the limitation period. Filing the Petition on Wednesday, November 12, 2008, the day after the Veterans Day holiday was timely.

The Superior Court erred in dismissing Dr. Williams Land Use Petition on the basis of timeliness.

V. CONCLUSION

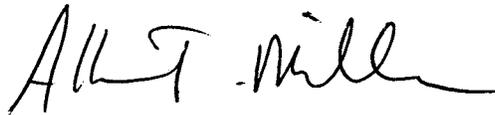
The Appellant is an adjacent property owner to the Lewis Family Housing Project proposal by the Respondent AHA. The City's decision to allow AHA to fill the floodplain and floodway, in violation of the FEMA guidelines and the City's Floodplain Building Regulations, adversely affects the Appellant by

increasing flooding and erosion on Dr. Williams' property. The Appellant is an aggrieved party and the Appellant has standing under RCW 36.70C.60.

The Appellant timely filed the Land Use Petition in compliance with RCW 36.70C.040 as the twenty-first (21st) day fell on Veterans Day, a Tuesday and a legal holiday. The Appellant's filing on Wednesday, November 12, 2008, the following court day, was timely.

The Court of Appeals should reverse the dismissal of Dr. Williams' LUPA Petition and remand for further proceedings.

DATED this 24th day of July, 2009.

A handwritten signature in black ink that reads "Allen T. Miller". The signature is written in a cursive style with a horizontal line underneath the name.

Allen T. Miller, WSBA # 12936
Attorney for David V. Williams

STATE OF WASHINGTON
COUNTY OF TACOMA

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No. 38983-5-II

STATE OF WASHINGTON
BY Cm
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Dr. DAVID V. WILLIAMS,)	
)	DECLARATION OF SERVICE
)	
Appellant,)	
)	
v.)	
)	
)	
CITY OF CENTRALIA, a municipal)	
corporation, and ARCHIDOCESAN)	
HOUSING AUTHORITY, applicant,)	
Respondents.)	

DEBBIE S. TAGUE declares:

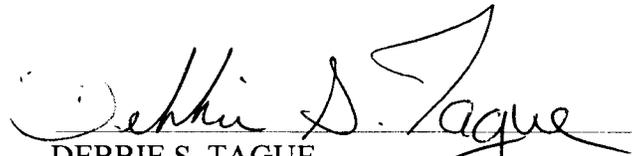
I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

That on July 24, 2009, I caused a copy of the Appellant's Brief and this Declaration of Service; to be served to David Ponzoha, Court Clerk for the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402;

Carrie Richter, 11th Floor of 121 SW Morrison St. in Portland, OR 97204-3141;
and to Dale Kamerrer of Law, Lyman, Daniel, Kamerrer & Bogdanovich at PO
Box 11880 in Olympia, WA 98508, via US Mail, Postage Prepaid.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 24th day of July, 2009.

A handwritten signature in black ink that reads "Debbie S. Tague". The signature is written in a cursive style with a large, stylized initial 'D' and 'T'.

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