

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 41361-2-II

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

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KS Tacoma Holdings, LLC,

Petitioner,

v.

Shorelines Hearings Board; David Murphy; Murphy Varey, PS; Site-4  
Foss Waterway, LLC; Hollander Investments, Inc.; and City of Tacoma,

Respondents.

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BRIEF OF RESPONDENTS HOLLANDER INVESTMENTS, INC.

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ORIGINAL

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## I. INTRODUCTION

Petitioner KS Tacoma Holdings, LLC (“KS Tacoma”), has failed to demonstrate standing to bring the instant appeal. Despite four chances<sup>1</sup> before the Shoreline Hearings Board (“SHB” or “Board”), KS Tacoma was never able to produce evidence of a specific and perceptible injury — either to itself or anyone else on which it could legally rely to establish its standing — that was caused by the subject shoreline substantial development permit revision and redressible by the Board or this Court. Consequently, Hollander requests that this Court affirm the Board’s decision dismissing KS Tacoma’s appeal for lack of standing.

This outcome is particularly appropriate because KS Tacoma’s motivation here is not protection of the shoreline. Instead, KS Tacoma’s goal is to delay as long as possible Respondent Hollander Investment, Inc.’s (“Hollander”) mixed-use hotel project, and thereby its entry into the Tacoma hotel market. KS Tacoma owns and operates the Hotel Murano in downtown Tacoma. Hollander’s proposed project will compete directly with KS Tacoma’s Hotel Murano. Merely by filing this appeal, KS Tacoma has successfully delayed Hollander’s project for 15 months – with several more to come as we await this Court’s decision. KS Tacoma has accomplished this delay without yet demonstrating that it even has the basic legal standing to initiate this appeal. The Shoreline Management

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<sup>1</sup> KS Tacoma had the opportunity to produce evidence of standing in its Petition for Review, CP 1-8, its Opposition to Motions to Dismiss, CP 140-155; its Sur-Reply on Motions to Dismiss, CP 428-439; and in its Petition for Reconsideration, CP 140-155.

Act (“SMA”) is not appropriately used as a tool to protect one hotelier from competition by another. Due to its lack of standing, Hollander requests that the Court affirm the Board’s decision dismissing KS Tacoma’s appeal.

## **II. STATEMENT OF THE CASE**

### **A. Permit History**

This appeal involves a revision to a shoreline substantial development permit issued by the City of Tacoma (“City”) to David Murphy; Murphy Varey P.S. Site-4 Foss Waterway, LLC; and Hollander for the property know as Foss Site-4 along the Thea Foss Waterway (“Waterway”) in Tacoma.

The City issued the original shoreline substantial development permit (“Original SSDP”) on February 7, 2007. The Original SSDP authorized a mixed-use project on Foss Site-4, including 100 hotel guest rooms, 22 residential units on the upper floors, and retail/commercial uses at the Dock Street and Esplanade levels. CP 231-63. Despite KS Tacoma’s allegations, nothing in the Original SSDP application or approval specifies the type or quality of the hotel.<sup>2</sup> KS Tacoma submitted no comments and did not appeal the Original SSDP.

The Original SSDP applicant and owners of Foss Site-4 subsequently applied for and received an amendment to the Original

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<sup>2</sup> Hollander acknowledges that both the Original SSDP and Hollander Revision include project plans/drawings. *See* CP 9-18, CP 231-63. None of those plans, nor the City’s written permit decisions, however, specify the type or quality of hotel product.

SSDP. Amongst other changes, that revision reduced the number of residential units from 22 to 16. That revision was not appealed. Thereafter, the owners of Foss Site-4 entered into a contract with Hollander to purchase Foss Site-4. As part of that agreement, Hollander initiated a second revision to the Original SSDP, which the City approved on December 17, 2009 (hereinafter the “Hollander Revision”).

The Hollander Revision modified the Original SSDP in several ways. It eliminated the residential units on the upper floors and increased the number of hotel rooms from 160 to 256. CP 475. It also modified the configuration of the building, substituting the single tower approved as part of the Original SSDP for two towers connected in the middle by a single story structure. CP 9. It also increased the first floor square footage by approximately 5 percent, and the total project square footage from 180,000 square feet to 213,000 square feet. CP 475.

The Hollander Revision also retained major aspects of the Original SSDP. Retail and commercial uses are included in the ground floor of both the Original SSDP and the Hollander Revision. *Id.* The building foot print and below-grade parking area remains essentially the same at approximately 60,000 square feet. Also, although the Hollander Revision changed the configuration of the building somewhat, the total height of the Hollander Revision is only one inch taller than the height approved as part of the Original SSDP. In fact, the Hollander Revision actually improved the view corridors from properties to the east, providing both wider view corridors from the public rights-of-way on the north and south ends of the

project, and creating a new substantial view corridor between the two hotel towers that had not been part of the Original SSDP. CP 475-76. Finally, the Hollander Revision did not alter access to the public Esplanade, located between Foss Site-4 and the Waterway, as compared to the Original SSDP.

### **B. KS Tacoma Appeal and Board's Decision**

On January 8, 2010, KS Tacoma filed a Petition for Review with the Board seeking review of the Hollander Revision. CP 1-8. In that Petition and subsequent pleadings, KS Tacoma alleged that the Hollander Revision would adversely affect views from its Hotel Murano; land use patterns in the surrounding area; and its guests, employees, and owners aesthetic/recreational enjoyment of the Waterway.<sup>3</sup> CP 1-8, CP 147-52, CP 432-37.

On March 10, 2010, Hollander and the City moved to dismiss KS Tacoma's Petition, arguing that KS Tacoma lacked standing to bring the appeal, and alternatively that all but one of KS Tacoma's issues on appeal were beyond the scope of WAC 173-27-100(8). CP 101-11, 115-39. At the conclusion of briefing on the motions, counsel for KS Tacoma filed a motion to intervene on behalf of Grace Pleasants, a resident and property owner in the vicinity of the Waterway. CP 449-57.

On June 10, 2010, the Board issued an Order granting Hollander's and the City's motions to dismiss KS Tacoma's Petition. CP 473-88. The

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<sup>3</sup> Notably, although KS Tacoma alleged recreational injury before the Board, KS Tacoma has not alleged any recreational injury in its Opening Brief to this Court.

Board ruled that because KS Tacoma had only appealed the Hollander Revision and not the Original SSDP, the Board, consistent with WAC 173-27-100(8), would only consider issues related to the Hollander Revision in analyzing KS Tacoma's standing to bring its appeal. CP 480-81. Further, the Board found that the injuries asserted by KS Tacoma to recreation, views, and aesthetics as a result of the Hollander Revision "are experienced by third parties, not the corporation," and that "[g]eneral standing doctrine precludes KS Tacoma from establishing standing based on injuries to third parties." CP 487. The Board also found that, even if it were to consider alleged injuries to third parties as a basis for KS Tacoma's standing, the evidence failed to establish that the Hollander Revision would cause any cognizable harm to those interests. CP 484. Finally, the Board found that "the only injury specific to KS Tacoma is the impact the corporation claims to its reputation, tenor of the community, and diminished future investment," and that "[t]hese alleged injuries are both speculative and economic and fail to form the basis for KS Tacoma's standing in this matter." CP 487. In a separate order dated June 10, 2010, the Board denied the motion to intervene filed by counsel for KS Tacoma. CP 470-72.

KS Tacoma moved for reconsideration of the Board's Order dismissing its Petition, asserting that the Board misinterpreted case law regarding corporate standing. CP 489-504. On July 26, 2010, the Board rejected each of KS Tacoma's arguments and denied the Motion for Reconsideration. CP 535-42. In its Order Denying Reconsideration, the

Board explained: “The Board is not ruling that a corporation could never assert a concrete injury within the zone of interests protected by the SMA. The Board, however, is ruling that a corporation must establish a specific injury that is related to an identifiable corporate interest or right protected by the environmental law at issue.” CP 538. The Board concluded that KS Tacoma had not made the requisite evidentiary showing. The Board also reiterated that KS Tacoma had not indentified legal authority enabling KS Tacoma to rely on the interests of third parties to establish its standing. Even if it had, the Board concluded “KS Tacoma had failed to show a concrete injury to any of those interests.” CP 539. Finally, the Board again rejected KS Tacoma’s effort to expand the standing analysis to include injuries caused by the Original SSDP, and not the Hollander Revision. CP 541.

On August 24, 2010, KS Tacoma appealed the Board’s Orders to Thurston County Superior Court.<sup>4</sup> Hollander and the City timely filed an application for direct review to the Court of Appeals pursuant to RCW 34.05.518(6). CP 545-52. The Board approved a Certificate of Appealability on October 22, 2010, and this Court accepted direct review on December 20, 2010.

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<sup>4</sup> Hollander hereinafter refers to the Board’s Order of Dismissal (June 6, 2010), CP 473-88, and its Order Denying Reconsideration (July 26, 2010), CP 535-42, collectively as the “Board’s Decision.” Notably, KS Tacoma purports to appeal the Board’s Order Denying Motion to Intervene, CP 470-72. KS Tacoma, however, makes no argument in its Opening Brief regarding this Order, and lacks standing to appeal on behalf of Grace Pleasants, who herself did not appeal the Board’s Order.

For the reasons stated herein, Hollander asks the Court to affirm the Board's Decision dismissing KS Tacoma for failure to demonstrate standing to file this appeal.

### **III. ARGUMENT**

#### **A. Standard of Review**

As an appeal of a decision by the SHB, this Court's review is bound by the standard of review set forth in the Administrative Procedures Act ("APA"), Ch. 34.05 RCW, which provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

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(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court . . . ; [or]

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(i) The order is arbitrary or capricious.

RCW 34.05.570. To prevail in this appeal, KS Tacoma must demonstrate that the Board erred under one of these standards.

These standards are well defined by Washington case law. "A board's decision is arbitrary and capricious if it is 'willful and unreasoning action in disregard of the facts and circumstances.'" *Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (citing *Skagit County v. Dept.*

*of Ecology*, 93 Wn.2d 742, 749, 613 P.2d 115 (1980)). “Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” *Jefferson County v. Seattle Yacht Club*, 73 Wn.App. 576, 588, 870 P.2d 987 (1994). On legal question regarding interpretation of the SMA or local shoreline regulations, the court applies the “error of law” standard. *Preserve Our Islands v. Shoreline Hearings Board*, 133 Wn.App.503, 515, 137 P.2d 31 (2007). “The burden of demonstrating the Board erroneously interpreted or applied the law rests with the party asserting the error.” *Id.*

Applying these standards, KS Tacoma has failed to demonstrate any grounds to reverse the Board’s Decision. KS Tacoma has not demonstrated that the Board’s Decision was arbitrary and capricious – a willful disregard of the facts. Similarly, as the Board described with some care in its Decision, KS Tacoma failed to identify facts to support its alleged injury, other than economic injuries not protected by the SMA, and speculative, non-specific injuries not sufficient to meet the evidentiary standard. Thus, the Board’s Decision is supported by evidence in the record. Because KS Tacoma fails to demonstrate any error in the Board’s Decision, the Court should affirm the Board’s Decision and dismiss KS Tacoma for lack of standing.

**B. Standard for Permit Revision**

In reviewing the Hollander Revision, the City relied on Tacoma Municipal Code §13.05.080(D), which requires the applicant to

demonstrate that the revision is “within the scope and intent of the original permit in accordance with WAC 173-27-100.” The City’s decision on the Hollander Revision walks through each of the criteria in WAC 173-27-100(2) and explains how the Hollander Revision complies with them. CP 10-11.

Pursuant to WAC 173-27-100(8), appeals of shoreline permit revisions may only be based on “contentions of noncompliance with the provisions of subsection (2) of this section” – i.e., that the revision is not within the “scope and intent of the original permit.” WAC 173-27-100(2) delimits “within the scope and intent of the original permit” as follows:

- (a) No additional over water construction is involved except that pier, dock, or float construction may be increased by five hundred square feet or ten percent from the provisions of the original permit, whichever is less;
- (b) Ground area coverage and height may be increased a maximum of ten percent from the provisions of the original permit;
- (c) The revised permit does not authorize development to exceed height, lot coverage, setback, or any other requirements of the applicable master program except as authorized under a variance granted as the original permit or a part thereof;
- (d) Additional or revised landscaping is consistent with any conditions attached to the original permit and with the applicable master program;
- (e) The use authorized pursuant to the original permit is not changed; and

(f) No adverse environmental impact will be caused by the project revision.

This WAC section does not authorize a petitioner to base its appeal on general allegations of inconsistency between the shoreline permit revision and the SMA or the local Shoreline Master Program. The Board has consistently limited its review of shoreline permit revisions to these criteria. *See, e.g., West v. Olympia*, SHB No. 08-020 2008, WL 7835862, at \*4-5 (Dec. 8, 2008) (order granting summary judgment); *Ecology v. Jefferson County*, SHB No. 99-012, 1999 WL 825754, at \*5-6 (Oct. 6, 1999) (summary judgment order); *Evergreen Islands v. City of Anacortes*, SHB No. 91-39 1992 WL 109786, at \*3-6 (Feb. 14, 1992) (order of dismissal). While KS Tacoma criticizes this approach, it has failed to identify any legal authority supporting its argument, or any case in which the Board or a court has expanded the scope of review of a shoreline permit revision beyond WAC 173-27-100(2). Opening Brief of KS Tacoma at 14-16 (“Opening Brief”).

**C. The Board Properly Dismisses KS Tacoma on Summary Judgment for Failure to Demonstrate Standing**

1. The SMA Standard for Establishing Standing

The SMA limits standing to persons “aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140.” RCW 90.58.180(1). Both the Washington courts and the Board have interpreted the term “person aggrieved” to include persons with standing to sue under existing law. *West v. City of Olympia*, SHB No. 08-013, 2008 WL 5510448, at \*5 (November 17, 2008) (order on

motions for summary judgment) (citing *Anderson v. Pierce County*, 86 Wn.App. 290, 299, 936 P.2d 432 (1997); *Alexander v. Port Angeles*, SHB No. 02-027 & No. 02-028, 2003 WL 1227960 (March 13, 2003) (summary judgment). As the Appellant, KS Tacoma bears the burden of proof to demonstrate that it has standing to bring an appeal. *In re Parentage of L.B.*, 121 Wn.App. 460, 470, 89 P.3d 271 (2004), *rev'd on other grounds*. Standing is a jurisdictional issue; neither the Board, nor a court, can hear an appeal unless the parties before it demonstrate standing to pursue their claims. *Concerned Olympia Residents for Environment v. City of Olympia*, 33 Wn.App. 677, 683, 657 P.2d 790 (1983) (“CORE”).

To establish standing an appellant must demonstrate three things: (1) “the governmental action at issue causes a specific and perceptible injury-in-fact that is immediate, concrete and specific” CP 479 (citing *Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 865-68, 576 P.2d 401 (1978)); (2) its injury is within the “zone of interest” protected by the SMA; and (3) the decisionmaker has within its legal power the ability to impose a remedy that will redress the injury. *Leider v. Point Ruston LLC.*, SHB No. 09-005, 2009 WL 2578311, at \*7 (August 18, 2009) (findings of fact, conclusions of law, and order).

In general, Hollander does not disagree with KS Tacoma’s characterization of the legal requirements for demonstrating standing. Where Hollander, the City and the Board all join in opposition to KS Tacoma, however, is in KS Tacoma’s assertion that it has demonstrated standing to bring the instant appeal.

As the Board concluded, KS Tacoma has failed as part of its appeal to allege a specific, concrete and perceptible injury to itself. KS Tacoma has alleged only a combination of economic injuries and generic and speculative injuries that are not specific to KS Tacoma as a corporation. Neither injury type is sufficient to confer standing on it. Lacking standing on its own, KS Tacoma also attempts to rely on alleged injuries to its guests, employees and owners to establish its standing. None of those individuals, however, have joined KS Tacoma in this appeal. As explained herein and in the Board's Decision, KS Tacoma does not meet the legal standards enabling it to rely on injuries to third parties to establish its standing. Even if KS Tacoma was able to rely on alleged injuries to third parties to establish its own standing, KS Tacoma failed in this case to allege any concrete and specific injuries to these third parties. Consequently, the Court should affirm the Board's Decision dismissing KS Tacoma's appeal.

2. The Board Properly Disposed of KS Tacoma's Appeal on Summary Judgment.

On summary judgment, "the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving defendant may meet the initial burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at n.1

(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986)). If, in response, the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which the party will bear the burden of proof at trial” – here, standing – then the Board (or court) should grant a motion to dismiss on summary judgment. *Id.* In making this showing, the “nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. . . . [T]he nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). *See also Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 992 P.2d 43 (1996).

“A ‘material’ fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987). Where the nonmoving party fails to “make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial,” there is no genuine issue of material fact. *Idaho Farm Bureau Fed’n v. Babbitt*, 900 F. Supp. 1349, 1353 (D.Idaho 1995) (citing *Celotex Corp.*, 477 U.S. at 322).

This standard “comports with the purpose of summary judgment: ‘to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine

issue as to a material fact exists.” *Young*, 112 Wn.2d at 226 (citing *Zobrist v. Culp*, 18 Wn.App. 622, 637, 570 P.2d 147 (1977)). Courts routinely dismiss appeals for lack of standing on the summary judgment. *See, e.g., CORE*, 33 Wn.App. at 683; *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Fleck and Assocs. v. City of Phoenix*, 471 F.3d 1100, 1106-07 (9th Cir. 2006) (citing *Hunt*, 432 U.S. at 345) (internal quotations omitted); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 811 (11th Cir. 1993).

Even taking all of KS Tacoma’s allegations in the most favorable light, KS Tacoma has not produced sufficient evidence to reach the legal threshold for standing. *See Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1268 (W.D. Wash. 2005) (“A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact-finder to find for the non-moving party.”) Because KS Tacoma failed to come forward in any of its pleadings with objective evidence of a concrete injury it had suffered as a result of Hollander’s Revision, summary judgment was properly granted.

KS Tacoma’s attempted reliance on *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn.App 305, 230 P.3d 190 (2010) does not change this outcome. There, the Court held that the City could not defeat the petitioner’s standing by arguing about the merits of the appeal. *Id.* at 312-13. Here, the Board never got to the merits of the appeal – whether the Hollander Revision was within the “scope and intent” of the Original SSDP – because KS Tacoma failed to demonstrate

any concrete and specific injury redressible by the Board, either to its own corporate interests or to the interests of third parties on which KS Tacoma can legally rely in any case. As the Board explained, “[r]ather than requiring KS Tacoma to substantiate the merits of its appeal, the Board requires the petitioner to demonstrate a concrete injury in fact as required by the test for standing.” CP 541.

Furthermore, allowing KS Tacoma to go to hearing on the issue of standing will not bring any more evidence to bear on this jurisdictional question. Per KS Tacoma’s discovery responses, KS Tacoma viewed its pleadings before the Board as its complete and final rebuttal to Hollander’s standing challenge. *See* CP 301, Ins. 9-15. The evidence presented in the pleadings to the Board is all the particularity KS Tacoma intends to provide to establish standing. *Hovson, Inc. v. Secretary of the Interior*, 519 F.Supp. 434, 439 (D.C.N.J. 1981) (summary judgment is appropriate where the nonmoving party fails to introduce any materials that would lead the court “to believe that any further fact gathering is necessary to elucidate, explain or alter the record.”) The evidence introduced is simply not adequate to get KS Tacoma over the legal threshold of a concrete and particularized injury-in-fact that is redressible by the Board. Consequently, the Board appropriately dismissed KS Tacoma’s appeal on summary judgment.

**D. KS Tacoma Has Continuously Failed to Demonstrate the Elements Required to Establish Standing.**

This Response Brief addresses the four “Issues Presented” in KS Tacoma’s Opening Brief in reverse order, starting with the question of whether KS Tacoma may assert injuries related not only to the Hollander Revision, but also to the impacts from the Original SSPD (Issue #4), and ending with consideration of whether KS Tacoma, either by itself or through its employees, guests and owners, has demonstrated an injury-in-fact (Issue #1). This organization begins with the key legal issues and ends with the fundamental conclusion: KS Tacoma has failed to allege any specific, perceptible concrete harm to itself, or anyone else that it claims to represent, sufficient to establish standing. Consequently, the Board properly dismissed its appeal. This organization also follows the Board’s Decision, which begins by establishing the appropriate scope of the analysis (limited to the Hollander Revision), then addresses the associational and corporate standing issues, and finally concludes that even if KS Tacoma could rely on injuries to third parties to establish its standing, it failed to allege a sufficient “injury-in-fact” to meet the standing threshold.

1. KS Tacoma’s Appeal is Limited to a Challenge to the Permit Revision. Thus, Its Standing Must Derive from the Hollander Revision.

KS Tacoma asserts that the Board erred by limiting its consideration of KS Tacoma’s standing to injuries derived from the Hollander Revision. According to KS Tacoma, the Board should have

considered the impacts from the Hollander Revision as compared to no project, rather than the Hollander Revision as compared to the Original SSDP. As noted above, however, KS Tacoma appealed only the Hollander Revision – *not the Original SSDP*. Consequently, KS Tacoma is limited to challenging the Hollander Revision only. As the Board has explained, it does “not have jurisdiction over the substance of the original permit when it is a revision to the permit which is under appeal.” *Guon v. City of Vancouver*, SHB 94-11, 1994 WL 905451, at \*2 (Nov. 9, 1994) (order on motion for summary judgment). This result is dictated not only by WAC 173-27-100(8), but also by two tenets of standing: (1) the alleged injury must be caused by the challenged action; and (2) the injury must be redressible through the current appeal.

First, the U.S. Supreme Court has been clear that to establish standing, the petitioner must demonstrate a causal connection between the alleged injury and the conduct complained of, i.e., the injury has to be “fairly . . . trace[able] to the challenged action of the defendant.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted). Correspondingly, the Board has required that the injury “was or will be caused by the challenged action of the opposing party to this litigation.” *Point Ruston*, 2009 WL 2578311, at \*7. Here, the challenged action is the City’s approval of Hollander Revision, not the Original SSDP. KS Tacoma had the opportunity – but did not – appeal the Original SSDP. Thus, the Board’s jurisdiction was

limited to considering those injuries that were allegedly caused by the Hollander Revision, not the entire project.

Second, the federal and state courts, as well as the Board, require that an alleged injury be “redress[able] by a favorable decision” to establish standing. *See Lujan*, 504 U.S. at 561; *Point Ruston* 2009 WL 2578311, at \*7. Here, the Board – and now the Court - lacks the legal authority to redress any of KS Tacoma’s alleged injuries stemming from the Original SSDP (as compared to the modifications approved as part of the Hollander Revision). That is because WAC 173-27-100(8) provides in relevant part: “If an appeal is successful in proving that a revision is not within the scope and intent of the original permit, the decision shall have no bearing on the original permit.” Thus, even if KS Tacoma were entirely successful in this appeal, the Original SSDP would stand.

While KS Tacoma asserts that success in this appeal will guarantee it a new full blown shoreline substantial development permit process, that will not necessarily be the outcome. Opening Brief at 33. There is nothing to prevent Hollander or another entity from constructing the building approved in the Original SSDP at Foss Site-4. *See ASARCO v. Kadish*, 490 U.S. 605, 614, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (denying standing where the question of whether the injury would be redressed by a favorable decision depends on actions outside of the court’s control). Thus, the baseline condition for the analysis of KS Tacoma’s standing to appeal the Hollander Revision must be the Original SSDP.

Further, this conclusion is supported by the doctrine of administrative finality, which precludes KS Tacoma from challenging, and the Board or this Court from reviewing, the propriety of the permitting and approval of the Original SSDP. “Once the relevant time for appeal has run, the action in question is automatically deemed valid and cannot be rescinded or challenged.” *Stafford v. City of Bainbridge Island*, SHB No. 03-010, 2003 WL 21967202, at \*3 (Aug. 13, 2003) (order on summary judgment). KS Tacoma cannot “end-run” the statute of limitations for challenging the Original SSDP by craftily asserting that it must be permitted to allege standing injuries arising out of the Original SSDP when the only decision that it challenged is the Hollander Revision. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 925-26, 52 P.3d 1 (2002); *Samuel’s Furniture v. Dept. of Ecology*, 147 Wn.2d 440, 463-64, 54 P.3d 1194 (2002); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001).

Consequently, as determined by the Board, KS Tacoma is limited to demonstrating standing based on injuries caused by the Hollander Revision – not the Original SSDP.

2. KS Tacoma Has Failed to Demonstrate Associational Standing.

KS Tacoma next attempts to rely on alleged injuries to third parties, namely its employees, guests and owners, to establish its standing. KS Tacoma, however, has failed to demonstrate associational standing (a/k/a “organizational standing”).

The injury-in-fact test requires that a plaintiff seeking review “be himself among the injured.” *Lujan*, 504 U.S. at 563. Consequently, in general, a petitioning party is not permitted to rely on injuries to third parties to establish its own standing. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804-06, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488-89 (9th Cir. 1996); *Region 8*, 993 F.2d at 809.

As identified by KS Tacoma, the Washington courts and federal courts, however, have developed an exception to this general rule where an association purports to represent the interests of its members.<sup>5</sup> See, e.g., *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Int’l Ass’n of Firefighters, Local 1789, v. Spokane Airports*, 103 Wn.App. 764, 768-69, 14 P.3d 193 (2000). The courts have developed a three part test for evaluating whether an association may rely on injuries to its members to establish its standing:

[W]e have recognized that an association has standing to bring suit on behalf of its members when (a) its members

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<sup>5</sup> The courts have also recognized other exceptions to the general rule that a petitioner may not assert the rights of a third party to establish standing. See, e.g., *Mearns v. Scharbach*, 103 Wn.App. 498, 512, 12 P.3d 1048 (2000) (“The third party standing rules requires a showing that: (1) the litigant has suffered an injury-in-fact, giving them sufficiently concrete interest in the outcome of the disputed issue, (2) the litigant has a close relationship to the third party, and (3) there exists some hindrance to the third party’s ability to protect his or her own interests.”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 810, 828 P.2d 549 (1992) (“Plaintiffs may not maintain an action on behalf of others unless they comply with CR 23 [class actions]”); *Grant Co. Fire Protection Dist. v. Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004). KS Tacoma has not, however, asserted standing under these alternative doctrines and none apply in this appeal.

would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (citing *Hunt*, 432 U.S. at 343). KS Tacoma fails to meet this standard.

As to the first element, associational standing is reserved for organizations that have members. KS Tacoma has no members. Further, associational standing is limited to groups that “express the collective views and protect the collective interests” of their members. *Fleck and Assocs.*, 471 F.3d at 1106. KS Tacoma does not allege that its customers and employees have come together to form an organization for their mutual aid and benefit.<sup>6</sup> The purpose of the “association” here – KS Tacoma – is to generate a profit. The court in *Fleck* expressly held that such interest did not establish associational standing. *Id.*

KS Tacoma also fails to demonstrate that the interests it allegedly seeks to vindicate (i.e., view, aesthetics and land use) are germane to its corporate purpose. While KS Tacoma emphasizes in its Opening Brief that the germaneness standard is “undemanding,” here KS Tacoma has provided no evidence of any connection between its corporate interest and the shoreline purposes that it purports to represent on behalf of its guests,

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<sup>6</sup> KS Tacoma has not produced any evidence that its employees or guests rely on it to assert or defend their environmental interests. Employees work at the hotel to earn a paycheck, not to protect the shorelines of the City of Tacoma. Similarly, guests come to enjoy the hotel and to sleep, not to protect the shorelines of the City of Tacoma.

employees and owners. In a similar case, *Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F.Supp.2d 744 (E.D. Va. 2002), a shopping center developer attempted to assert associational standing based on alleged safety and health risks to its employees and patrons. The court ruled that the shopping center developer could not establish “associational standing” “[b]ecause the interests at stake in this case are not at all ‘germane’ to TRG’s organizational purposes.” *Id.* at 758. The court explained:

TRG owns and operates a shopping center. TRG is not a citizens group or an association with a demonstrable interest in, or commitment to, environmental or traffic-related causes or concerns. In fact, through the operation of the Regency, TRG (and . . . Taubman) precipitates some of the very environmental and traffic-related impacts on which it seeks to fasten its standing in this action. TRG has made no showing that environmental, traffic, or general safety interests are “germane” to its organizational purposes in any judicially cognizable manner. It is the burden of TRG to make that showing and its failure to satisfy that burden is fatal to its position on standing.

*Id.* See also *Hale v. Island County*, SHB 04-022 & 04-023; 2005 WL 263716, at \*3-4. (January 27, 2005) (decision on motion to dismiss for lack of standing) (SHB dismissed union from appeal for lack of standing where union failed to submit adequate information demonstrating that its purpose was germane to its asserted interest in protecting off the job recreational interests of some of its members). KS Tacoma simply has not identified any purpose of itself as a corporate entity that relates to the alleged injuries – other than Hotel Murano’s economic bottom-line, which

is not protected by the SMA (see discussion in Section III.D.3 below).

Thus, KS Tacoma fails two of the three elements required to demonstrate associational standing.

Further, the associational standing test is inappropriate in the “for-profit” context. The U.S. Supreme Court’s decision in *Hunt v. Washington State Apple Advertising Commission* makes clear that associational standing is generally limited to voluntary membership organizations and/or typical trade associations organized to represent a particular group of individuals. 432 U.S. at 342-43. Consequently, associational standing should not even be available to KS Tacoma.

Finally, the case law cited by KS Tacoma to support its claims of associational standing is both dated and limited by later court decisions. For example, KS Tacoma substantially relies on *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287 (D.D.C. 1991). Subsequent decisions in *Taubman*, 198 F.Supp. at 758-59, and *One Thousand Friends of Iowa v. Mineta*, 250 F.Supp.2d 1064, 1069 (S.D.Iowa 2002) clarify that *Overseas Shipholding* creates a limited exception that allows employers to sue on behalf of employees for the sole purpose of challenging conduct that would make those employees’ working environment less safe.<sup>7</sup>

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<sup>7</sup> The *Taubman* court explained:

At oral argument, counsel for TRG correctly admitted that there were no decisions in which a court had found associational standing on the basis asserted here: the inchoate, generalized interest of retail employees and customers of a shopping mall in air quality and freedom from traffic congestion (and the safety consequences attendant thereto). Indeed, the only decision remotely related to the argument that TRG has proffered in support of its concept of standing is *Overseas Shipholding Group, Inc. v. Skinner*, 767 F.Supp. 287 (D.D.C. 1991). . .

The alleged injuries to KS Tacoma’s employees, guests and owners will not occur while at the Hotel Murano,<sup>8</sup> and are not related to worker or guest safety. Ultimately, because KS Tacoma’s only recognized interest is operating a hotel – not protecting the off-site aesthetic and land use interests of its employees and owners – KS Tacoma fails to meet the “germaneness” element of associational standing. For all of these reasons, KS Tacoma has failed to demonstrate associational standing.

3. KS Tacoma Has Failed to Demonstrate Any Injury to Itself As a Corporation.

KS Tacoma also fails to demonstrate any corporate interest harmed by the Hollander Revision. A corporation seeking to invoke the Board’s or court’s jurisdiction must plead that it, in and of itself, has suffered some “distinct and palpable injury” to its “cognizable corporate right.” *Fleck*, 471 F.3d at 1104, 1106. It must allege a harm to one of its own rights as a

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*Overseas Shipholding* in inapposite here. As the Federal Defendants property have recognized, the business owner in *Overseas Shipholding* was permitted to assert its employees’ interest in safe and healthy waterways because those waterways were the employees’ direct working environment. In contrast, the plaintiffs in this case seek to assert the interest of employees . . . in commuting to and from work on public roads, upon which thousands of non-employee citizens travel every day. Those circumstances are far removed from the situation before the court in *Overseas Shipholding*; and, as counsel for TRG has acknowledged, no court has stretched the concept of associational standing to the point to which it must be taken to confer standing on TRG or Taubman. To permit the plaintiffs to sue based on the types of injuries to employees that are alleged in the Amended Complaint [e.g., increased traffic and reduced air quality in the surrounding area] would necessitate a substantial leap in logic, and an unprecedented expansion in the doctrine of standing, that the Court is not prepared to make.

*Taubman*, 198 F.Supp.2d at 758-59 (emphasis added).

<sup>8</sup> As explained in Section III.D.4.c below, the Hollander Revision does not adversely impact views from the Hotel Murano.

corporate institution. *Id.* It may not rely on injuries to third parties to establish its own standing. In *Viceroy* and *Region 8*, the Ninth Circuit and Eleventh Circuit, respectively, found that corporations could not assert their employees' interests in the environment to establish standing. 75 F.3d at 488-89; 993 F.2d at 809. See also *Pacific Nw. Generating Coop. v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994). Here, KS Tacoma has failed to show how the alleged view, land use and aesthetic interests are related in any way to specific injuries to its rights as a corporate entity that are protected by the SMA.<sup>9</sup>

First, it is difficult to understand how a corporation – as compared to an individual – experiences a non-economic injury from a change in its view or surrounding developed environment. Viewing and experiencing the surrounding neighborhood are simply not activities that corporations engage in. KS Tacoma asserts “[t]he injury-in-fact requirement includes harm to recreational, aesthetic, and other benefits that individuals enjoy when they use the area that is adversely affected by the action being challenged.” Opening Brief at 19. KS Tacoma does not, however, “use the area” that it alleges has been injured by the Hollander Revision, and otherwise fails to explain how KS Tacoma experiences the alleged injuries. As the Board repeatedly found, the aesthetic and land use injuries

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<sup>9</sup> For purposes of this section, Hollander assumes, *arguendo*, that KS Tacoma has provided sufficient evidence to demonstrate a change in view, aesthetics or land use. As discussed in Section III.D.4 below, KS Tacoma has in fact failed to meet this threshold.

alleged by KS Tacoma are not injuries that can be experienced by a corporation. CP 482-87, CP 539.

As the Board recognized, the only potential connection between these interests and KS Tacoma's corporate rights is a reduction in Hotel Murano's business volumes. CP 482-87. *See also Region 8*, 993 F.2d at 809 (“[t]hese quality of life injuries are simply attenuated versions of ...economic injuries...”). Economic interests, however, are not within the zone of interests protected by the SMA. *See Alexander*, 2003 WL 1227960 at \*2 (parties cannot “assert standing based on economic losses because economic loss is not an interest protected by the Shoreline Management Act . . .”); *Deatley v. Yakima County*, SHB No. 89-3, 1989 WL 76553, at \*2 (March 30, 1989) (order granting motion to dismiss) (rejecting Deatley's claim of injury to his business through competition because business competition is not an interest protected by SMA); *Posten v. Kitsap County*, SHB No. 86-46, 1987 WL 56637, at \*6 (July 2, 1987) (order granting summary judgment) (concluding that economic impact on business is not within the scope of SMA). Consequently, KS Tacoma may not rely on economic harm – or other alleged harm that amount to proxies for economic harm – to establish its standing to bring this appeal.

In its Opening Brief, KS Tacoma cites for the first time the Court of Appeal's decision in *Biggers v. City of Bainbridge Island*, 124 Wn.App. 858, 103 P.3d 244 (2004), for the premise that the court has recognized economic interests as within the zone of interest of the SMA. Opening Brief at 23-24. As KS Tacoma acknowledges, however, the court in

*Biggers* was evaluating the petitioners' standing under the Uniform Declaratory Judgment Act statute, not the SMA. Further, the court's analysis of the standing issue did not even mention the several Board decisions concluding that economic interests are not within the zone of interests of the SMA. Consequently, it seems unlikely that the court intended to reverse more than 20 years of precedent without any substantive discussion. *Alexander*, 2003 WL 1227960, at \*2; *Deatley*, 1989 WL 76553, at \*2; *Posten*, 1987 WL 56637, at \*6. In any case, in *Biggers*, the subject petitioner, a family-owned business that "primarily constructs single-family protective bulkheads, piers, docks and other shoreline amenities," was directly and adversely affected by the moratorium on shoreline development that prevented those specific business activities. *Biggers*, 124 Wn.App. at 863 n.4. KS Tacoma suffers no comparable injury – its business is not suspended as a result of the Hollander Revision. The SMA is simply not concerned with the relative profits or competitive position of a hotelier located outside of the subject shoreline area.<sup>10</sup>

Even if aesthetic and land use impacts could be experienced by a corporation (as something more than economic injury), KS Tacoma merely asserts that it has interests in the aesthetics and land uses within its community without citation to governance documents or any other

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<sup>10</sup> Contrary to KS Tacoma's allegation, the Murano Hotel is not part of the district. CP 291-97. In fact, the elevated Interstate 705 on the west side of Foss Site-4 separates the Hotel Murano from the Waterway district.

tangible evidence. The “missing link” in KS Tacoma’s analysis is the relevance of the alleged aesthetic and land use injuries to its corporate purpose. KS Tacoma asserts: “[T]he Board erred because view, aesthetic, and land use are clearly interests within the SMA zone of interests, they are all injuries that a corporation can assert, and those injuries are directly related to the corporate purpose of KS Tacoma.” Opening Brief at 28. KS Tacoma provides absolutely no evidence to substantiate or explain this allegation.

In the absence of a risk of physical injury to the corporation or its assets, the question of standing is not just whether the alleged harm is within the zone of interest of the underlying statute, but also whether the alleged harm is within the scope of interest of the appellant. *Lujan*, 504 U.S. at 560, 561 n.1 (The injury must affect the “plaintiff in a personal and individual way.”). KS Tacoma’s position is akin to an environmental group alleging standing to appeal a decision to grant a restaurant a liquor license, or a group formed to protect voting rights alleging standing to challenge an environmental regulation. A corporation, such as KS Tacoma, formed to provide hotel services does not have a clear non-economic corporate interest in enforcing the view, aesthetic and land use provisions of the SMA.

The Ninth Circuit Court of Appeals addressed this issue in *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058. There several large direct purchasers of hydropower bought suit under the Endangered Species Act challenging the actions of several federal agencies related to

three ESA-listed salmon populations on the Snake River. *Id.* at 1061-62.

In evaluating the plaintiffs' claimed standing based on non-economic interests, the Court wrote:

To begin with the non-economic interests asserted, the Pacific Northwest Generating Cooperatives asserts its customers' aesthetic and recreational interest in the salmon. There is nothing to show that the company in making this claim is protecting an interest germane to its own purposes. The Direct Service Industries assert the interests of their employees in the salmon. Again, their employees' interests are not germane to the industries' own purpose and cannot be asserted by them. . . . None of these plaintiffs assert an environmental interest which they as businesses enjoy.

*Id.* at 1063. Not an associational standing case, this decision effectively imports the "germaneness" requirement into the analysis of corporate standing where a corporation attempts to rely on injuries to its employees and guests to establish standing.

In the several cases cited by KS Tacoma in which the corporate petitioner was deemed to have standing, the causal connection between the corporate purpose and the interest that it sought to protect was apparent. For example, in *Mobil Oil Corporation v. Federal Trade Commission*, the court held that an oil company could sue for failure to prepare an environmental impact statement ("EIS") because, by virtue of company's status as an oil company, it had "a stake in our nation's environment." 430 F.Supp. 855, 862 (S.D.N.Y. 1977). In *Pack v. Corps of Engineers*, the court held that a shrimping company had standing to challenge the adequacy of an EIS because it asserted a strong conservation interest in the

preservation of shrimp. 428 F.Supp. 460, 465 (M.D.Fla. 1977). Here, it cannot be credibly asserted that KS Tacoma has a comparable interest in preserving its hotel guests (the equivalent to shrimp in *Pack*) that is protected by the SMA. And KS Tacoma has failed to provide any evidence supporting its bald assertions of interest in the environment.

Alternatively, the petitioners in the cases cited by KS Tacoma relied on direct harm – physical and regulatory – to their corporate assets to establish standing. For example, in *Overseas Shipholding Group (“OSG”) v. Skinner*, 767 F.Supp. at 293, the district court held that OSG had standing to sue on its own behalf because the alleged increases in air and water pollution could directly harm the corporation’s vessels. Here, by comparison, KS Tacoma has not asserted that the Hollander Revision will physically damage the Hotel Murano. In *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F.Supp. 925, 946-47 (D. Del. 1973), the court held that railroad and motor carrier companies had an environmental interest in the regulations enacted to govern their operations. Here, Petitioner is challenging the land use entitlement of an economic competitor not the regulations that govern the hotel that it operates.

A final relevant point of distinction is that none of these cases address standing under Washington law, much less the SMA. To the contrary, they are all cases decided under the National Environmental Policy Act (“NEPA”) in federal district courts outside Washington. The federal courts have held that the standing requirements in NEPA appeals are somewhat relaxed because, by virtue of the government agency’s

failure to conduct the NEPA analysis as sought by the petitioners, those petitioners cannot yet know the full scope of their potential injuries. *See Ashley Creek Properties, LLC v. Timchak*, 649 F.Supp.2d 1171, 1176, 1178 (D.Idaho 2009); *Overseas*, 767 F.Supp at 293-94. Here, by comparison, the City conducted the full scope of review required by WAC 173-27-100 for shoreline permit revisions.

The case law cited by KS Tacoma supports the conclusion that a corporate petitioner can establish standing based on environmental interests *provided* it shows how those interests are connected to a particularized injury to its cognizable rights *as a corporation*. As the Board concluded, “The environmental interests that the corporations were allowed to assert in the cited National Environmental Policy Act cases were directly related to core corporate purposes or corporate interests. The interests recognized by those decisions are not similar to the business and economic interests raised by KS Tacoma as a hotel operator in this shoreline management permit appeal.” CP 576.

KS Tacoma failed to demonstrate any actual non-economic injuries to itself within the SMA’s zone of the interest, or to demonstrate any connection between itself as a corporation and its alleged interest in defending the environment. Without either, KS Tacoma fails to demonstrate standing as a corporation in this appeal.

4. KS Tacoma Has Failed to Demonstrate Any Concrete “Injury-in-Fact.”

Finally, to establish standing, KS Tacoma must allege an “injury-in-fact” cognizable under the standing doctrine. As set forth in detail in the preceding sections, KS Tacoma’s injury-in-fact must arise from the Hollander Revision, and not the Original SSDP (see Section III.D.1 above); it must be an injury-in-fact to the corporation specifically, not the general public, not third parties and not the hotel’s guests or employees (see Sections III.D.2 & III.D.3 above); and it must be within the scope of interests that are protected by the SMA, and not mere proxies for economic interests, which are not protected under the SMA (see Section III.D.3 above). As the Board concluded, KS Tacoma failed to meet this burden. Even if the Court were to accept all of KS Tacoma’s arguments regarding its right to challenge the Original SSDP and not just the Hollander Revision, and its right to achieve standing via third parties, rather than injury to the corporation, this section demonstrates that the unsupported and conclusory nature of KS Tacoma’s allegations of injury require dismissal.

a) “Injury-in-Fact” Standard.

“To show an injury in fact, the [petitioner] must allege specific and perceptible harm.” *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App. 816, 829, 965 P.2d 636 (1998). No standing is conferred to a party alleging a conjectural or hypothetical injury. *Alexander*, 2003 WL 1227960, at \*2 (citing *Snohomish County Property Rights Alliance v.*

*Snohomish County*, 76 Wn.App. 44, 53, 882 P.2d 807 (1994) (the petitioner “must present evidentiary facts that show a direct adverse effect upon it if the court does not exercise its extraordinary authority.”). “General, remote, speculative, and unsubstantiated” claims cannot support standing. *West v. Pierce County*, SHB No. 07-034, 2008 WL 5510437, at \*4 (Sept. 10, 2008) (order granting summary judgment). Further, bare allegations are not enough to establish standing. *Snohomish County Property Rights Alliance*, 76 Wn.App. at 53-54 (organization's affidavits offered only speculative conclusions regarding anticipated future effects of county-wide planning); *Trepanier v. City of Everett*, 64 Wn.App. 380, 383-84, 824 P.2d 524 (1992); *CORE*, 33 Wn.App. at 683-84 (general assertions of injury without supporting evidence demonstrating how or why the alleged injury would occur are insufficient to establish standing); *West v. Pierce County*, SHB No. 07-034, 2008 WL 5510437 at \*4 (Sept. 10, 2008) (order granting summary judgment) (holding that the bare assertion of interest in the Puget Sound cannot support standing).

Further, the alleged injury must be separable from the generalized interests of the community at large. *CORE*, 33 Wn.App. at 684 (the judicial process is not “a vehicle for the vindication of value interests of concerned bystanders”); *Point Ruston*, 2009 WL 2578311, at \*7 (allegations of generalized public harm are insufficient to confer standing). The courts do not recognize the standing of individuals or entities who merely seek to enforce the law. *Lujan*, 504 U.S. at 563, 573 (environmental statutes do not confer standing on everyone to enforce

their provisions); *Pacific Nw. Generating Coop.*, 38 F.3d at 1063 (“Not every citizen is made a monitor – only those who have a particular kind of interest in the actions of the relevant ...agency.”).

As explained herein, KS Tacoma’s allegations of injury fail to satisfy this “injury-in-fact” prong of the standing test because, irrespective of who’s injury is at issue, KS Tacoma has failed to identify evidence of a specific and concrete injury of any sort resulting from the Hollander Revision. Consequently, the Board correctly dismissed KS Tacoma’s appeal for lack of standing.

*b) KS Tacoma’s Alleged “Injuries-in-Fact” and the Board’s Review Thereof.*

KS Tacoma alleges three types of injuries as a result of the Hollander Revision: (1) adverse view impacts from the Hotel Murano; (2) adverse impacts to the aesthetics of the shoreline; and (3) adverse impacts to the land use and character of the neighborhood, including the loss of residential units. Opening Brief at 8-11, 35-42. Hollander encourages the Court to review carefully KS Tacoma’s Opening Brief and supporting evidence of alleged injury. In total, KS Tacoma’s allegations of injuries resulting from the Hollander Revision amount to:

- It is a generic, limited service branded hotel with a transitory clientele.
- It eliminates 16 residential units.
- The building will be unattractive and will interfere with the aesthetic enjoyment of the Thea Foss Waterway by Hotel

Murano owners, employees, and guests while visiting the Waterway area.

- It will change the character of development on the Thea Foss Waterway, have a negative impact on the community, and consequently will deter other investment in the area.
- It will not have any special aesthetic qualities and will not be a “world class architectural wonder[.]”
- It does not have an open space with a park-like character.

Opening Brief at 8-11, 35-42. Further, KS Tacoma asserts that because it “has an interest in the community and in the welfare of its guests” and “pride in the community,” it will be harmed by the Hollander Revision.

Opening Brief at 10-11, 41.

The Board correctly dismissed each category of injury as lacking sufficient, quantifiable and/or specific evidence necessary to meet the required standard of concrete and perceptible injury. KS Tacoma does a good job “declaring” that a characteristic of the Hollander Revision will do it harm, but it falls short in identifying evidence to support or explain the “how” or the “why” the changes in the revision will cause the asserted injury. KS Tacoma has failed to “connect the dots” between these vague and speculative assertions and any actual and immediate harm.

With regard to the alleged view impairment, the Board concluded: “The petitioner has failed to submit sufficient objective and quantifiable evidence demonstrating that the revised hotel design causes any concrete injury to views experienced by employees and patrons of the Hotel Murano.” CP 563. Regarding aesthetic impacts, the Board concluded:

“the evidence on aesthetic impacts lacks the specificity necessary to meet the required standard of concrete and perceptible injury.” CP 563-64. Finally, regarding the alleged land use impacts, the Board concluded that KS Tacoma’s claims were either entirely speculative or related only to the KS Tacoma’s economic interests, which are not protected by the SMA.<sup>11</sup> CP 563-66.

Despite numerous opportunities before the Board, KS Tacoma never demonstrated any specific, concrete and perceptible harm to itself or anyone else on whom it could legally rely to establish its standing. Similarly, KS Tacoma has failed to demonstrate the requisite injury in its argument to this Court. For that reason, the Court should affirm the Board’s Decision dismissing KS Tacoma for lack of standing.

c) *The Hollander Revision Generates No View Impacts from Hotel Murano.*

KS Tacoma alleges that the Hollander Revision will adversely impact views from the Hotel Murano. Opening Brief at 8, 35-36. The only evidence introduced on this issue, however, demonstrates that the Hollander Revision will not adversely affect views from the Hotel Murano across Foss Site-4 – and may actually improve them.

In an effort to evaluate the alleged impact from Hotel Murano, Hollander’s architect David Murphy prepared a view blockage analysis

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<sup>11</sup> In the proceeding before the Board, KS Tacoma also alleged adverse effects to recreation. KS Tacoma has not alleged recreational injuries in its Opening Brief. Still, with regard to KS Tacoma’s alleged harm to recreational interests, the Board concluded: “[N]o evidence has been presented showing that the Hollander revision would infringe in any way on recreation along the Waterway.” CP 482.

from Hotel Murano. *See* CP 279-88. This analysis simulates views to the Waterway and Foss Site-4 from the southeast and southwest corners of the Hotel Murano from the 19<sup>th</sup> and the 25<sup>th</sup> floors ( “Hotel Murano View Blockage Analysis”). CP 226, ¶ 14.

This Hotel Murano View Blockage Analysis shows that the Hotel Murano suffers no view impacts as a result of the Hollander Revision. In opposite, the Hollander Revision improves the Hotel Murano’s view of the Waterway as compared to the Original SSDP. *See* CP 213-15. Foss Site-4 represents less than two percent (2%) (or six degrees (6°)) of the views from the Hotel Murano. CP 280. Moreover, views to Foss Site-4 from the Hotel Murano’s 18<sup>th</sup> floor and below are blocked by a nine-story midrise building called the TRC Tower located between the Hotel Murano and Foss Site-4. CP 225-26, ¶ 13. As a result, Hotel Murano suffers no view impacts below the 19<sup>th</sup> floor. *Id.* Between the 19<sup>th</sup> and 25<sup>th</sup> floors, the analysis shows that the modified building approved in the SSDP Revision obstructs *less* of the Waterway view from the Hotel Murano than the Original SSDP. CP 226, ¶ 14. Based on this evidence, there is no qualitative aesthetic difference in the waterway view of Foss Site-4 under the Original SSDP as compared to the Hollander Revision except for some *reduced* massing. CP 227, ¶ 18.

KS Tacoma failed to submit any evidence contesting the Hotel Murano View Blockage Analysis. Instead, KS Tacoma argued that the View Blockage Analysis demonstrates a view impact created by the Hollander Revision as compared to no project – not as compared to the

Original SSDP. As explained above and held by the Board, that is not the relevant analysis. See Section III.D.1 above. In light of these facts, Petitioner's alleged view impacts are not adequate to establish standing.

d) *KS Tacoma Fails to Demonstrate How the Aesthetics of the Hollander Revision Will Interfere with the Use of the Thea Foss Waterway.*

KS Tacoma next alleges that the aesthetics of the Hollander Revision will interfere with its owners, employees, and guests' use of the Waterway. Opening Brief at 9-11, 36-42. Again, however, KS Tacoma provided no specific evidence regarding how the modifications approved by the City would interfere with the aesthetics of the Waterway. Neither the Original SSDP nor the Hollander Revision as modified obstruct the walkway along the shoreline adjacent to the Foss Site-4. CP 226, ¶ 16. The project as modified by the Hollander Revision will not limit Hotel Murano guests', employees' or owner's use of the waterfront for walking, running, exercise, or sightseeing. CP 227, ¶ 17.

Hollander and the City are once again left wondering how the Hollander Revision and these alleged changes to the waterfront constitute or result in actual, concrete injuries to KS Tacoma, its employees, owners or guests. Merely asserting that one visits an area does not, without further explanation, translate into a specific perceptible injury from that change. Here, KS Tacoma asserts that its owners, employees, and guests visit the Waterway, and then in a conclusory manner alleges they will be harmed by the Hollander Revision. KS Tacoma fails ever to explain how

the Hollander Revision will cause the alleged harm – what is the actual, specific, concrete and perceptible harm? As the Board found, “Even if the Board were to consider the asserted impacts on guests and employees, the evidence on aesthetic impacts lacks the specificity necessary to meet the required standard of concrete and perceptible injury.” CP 564.

Similarly, KS Tacoma fails to cite to any evidence to support its allegation that the Hollander Revision does not have open space with a park-like character. Opening Brief at 39. Further, KS Tacoma fails to explain the injury generated by such an alleged change. KS Tacoma had four opportunities<sup>12</sup> before the Board to make this showing, but continuously failed to show how aesthetic interests are specifically and perceptibly harmed by the modifications approved as part of the Hollander Revision.

KS Tacoma also asserts, without evidence, that the change in “quality” of the proposed hotel use, from a “high end mixed-use” development to a “formula, generic hotel” somehow causes aesthetic impact to KS Tacoma. This argument also was rejected by the Board, as further explained in the next section regarding alleged injury based on change in use.

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<sup>12</sup> See *supra* footnote 1.

e) *KS Tacoma Has Not Alleged Any Specific Injury Due to the Hollander Revision's Alleged Change of Use.*

KS Tacoma also asserts, without specific details or evidence, that the changes in use proposed in the Hollander Revision cause injury to KS Tacoma. Opening Brief at 10-11, 40-42. As a starting point, KS Tacoma fails to acknowledge that the Hollander Revision still includes a mix of hotel and retail uses similar to the Original SSDP. CP 9, 16.

KS Tacoma's alleged "change of use" injury is best summed up by its repeated allegations that the Hollander Revision changes what was originally intended as a "high-end mixed-use development" to a "generic," "formulaic," "branded," "low end" hotel use. *See, e.g.*, CP 41-42. KS Tacoma fails, however, to explain how the transient guest use from the Hollander hotel proposal would create any different activity or impact than the transient guests from the Original SSDP hotel proposal. Neither the SMA, nor the local shoreline plan distinguishes between "high end" hotel guests and "formulaic" or "generic" hotel guests. That is for good reason: the SMA is intended to promote shoreline access and use for all; not just for high-end users.

Further, neither the Original SSDP nor the Hollander Revision discuss the quality of the hotel product that will ultimately be constructed on Foss Site-4. Therefore, KS Tacoma's assertion that the Original SSDP was for an "upscale mixed use development" as compared to the Hollander Revision that contains "generic, limited-service formula hotels" asserts an illusory injury not supported by the permit approvals. CP 142-

43. The City's Original SSDP decision did not guarantee the development of a high-end, boutique hotel. Moreover, nothing in the City's shoreline regulations or the Waterway Design and Development Plan differentiates between a boutique hotel and a Hilton or Marriott, both internationally recognized, high quality brands. The City's codes and plans authorize hotels generally – not only “architectural wonders.” As the Board found, “the evidence fails to identify any provision of the SMA, the local master program or the Waterway Plan that specifies all uses within the area will be ‘high end’ and architecturally unique. The Waterway Plan focuses on public access, enjoyment of the shoreline and creating a lively mix of uses along the Waterway.” CP 486. Alleged injuries based on the cost or quality of a hotel use have not been demonstrated, are not within the scope of SMA protection and, therefore, are not sufficient to establish standing.

Also, KS Tacoma's asserted injury from the elimination of the residential units is not supported by the facts in the record. The Hollander Revision eliminates 16 residential units. However, Foss Site-4 is in fact flanked on the north and south by two residential buildings containing a total of more than *400 residential units*. CP 250. The Board correctly noted that this change (loss of 16 units) was inconsequential as it relates to residential character of the Waterway as a whole. CP 565.

Finally, as the Board identified, several of these allegation are mere proxies for KS Tacoma's economic interests, which are not within the zone of interest of the SMA. (*See* Section III.D.3. above). As the Board concluded, “KS Tacoma's further arguments that the Marriott and

Hilton hotels allowed by the revision would degrade the atmosphere along the Waterway and reduce pride in the community to its financial detriment are also expressions of economic interest insufficient to establish standing.” CP 566. “The only injury specific to KS Tacoma is the impact the corporation claims to its reputation, tenor of the community, and diminished future investment. These alleged injuries are both speculative and economic and fail to form the basis for KS Tacoma’s standing in this matter.” *Id.*

f) *In Total, KS Tacoma’s Evidence Fails to Demonstrate the Requisite “Injury-In-Fact”.*

Ultimately, KS Tacoma’s alleged injuries amount to either: (1) proxies for its economic interests; or (2) generalized fears that are “shared in substantially equal measure by all members of the public” or “an interest in common to anyone living or working in the affected region.” *Taubman*, 198 F.Supp.2d at 757. As explained above, and repeatedly by the Board, KS Tacoma cannot rely on economic interests to establish standing in a Shoreline appeal. And as the Board and various courts have repeatedly held, generalized fears shared by anyone living and working in an affected area cannot provide the basis for standing. *Lujan*, 504 U.S. at 562-63 (environmental statutes do not confer standing on everyone to enforce their provisions); *Pacific Nw. Generating Coop.*, 38 F.3d at 1063 (“Not every citizen is made a monitor – only those who have a particular kind of interest in the actions of the relevant ... agency.”); *Point Ruston* 2009 WL 2578311 at \*7 (allegations of generalized public harm are

insufficient to confer standing); *Snohomish County Property Rights Alliance*, 76 Wn.App. at 53-54, (organization's affidavits offered only speculative conclusions regarding anticipated future effects of county-wide planning); *West v. Pierce County*, WL 5510437, at \*4; *Trepanier*, 64 Wn.App. at 383-84 (holding that petitioner did not have standing where he offered only bare assertions that new zoning code reducing allowable densities in some parts of city would force new development into unincorporated county).

#### IV. CONCLUSION

The SMA does not confer standing on every member of the public to enforce its provisions – only those that allege a specific, concrete and non-speculative injury to themselves based on the action subject to appeal. Here, KS Tacoma has plainly failed to meet that burden. Rather than attempting to vindicate an environmental right, they are simply trying to keep their economic competitor, Hollander, out of the hotel market as long as possible. To date, they have delayed Hollander's project by 15 months. This exercise of due process has become a miscarriage of justice. Consequently, Hollander requests that the Court affirm the Board's Decision dismissing KS Tacoma for failure to demonstrate standing.

Respectfully submitted this 23<sup>rd</sup> day of March, 2011,

GORDONDERR LLP

A handwritten signature in cursive script, appearing to read "Molly", followed by a horizontal line extending to the right.

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Hollander Investments, Inc.



Pursuant to RCW 9A.72.085, I certify that on the 23rd day of March, 2011, I filed this Hollander Investment, Inc.'s Response Brief and Certificate of Service with the Court of Appeals of the State of Washington and served upon the parties herein as indicated below:

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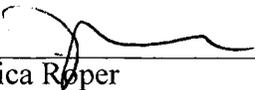
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I certify under penalty of perjury under the laws of the State of

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Dated this 23<sup>rd</sup> day of March, 2011, in Seattle, Washington.

  
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