

No. 43876-3-II

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

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ARTHUR S. WEST, et al.,

Appellants,

vs.

PORT OF OLYMPIA, et al.,

Respondents.

**OPENING BRIEF OF RESPONDENT
WEYERHAEUSER COMPANY**

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A. INTRODUCTION

This appeal flows from one of the many court challenges initiated by Appellants Arthur West and Jerry Dierker to delay or prevent construction of the Weyerhaeuser Company (“Weyerhaeuser”) log yard in Olympia, Washington. Weyerhaeuser is a Washington corporation, headquartered in Federal Way. In addition to its other business activities, Weyerhaeuser operates a log yard on 24.5 acres of real property leased from the Port of Olympia (the “Port”)¹. Weyerhaeuser completed construction of the log yard and site operations began on October 15, 2008.²

Mr. West and Mr. Dierker have pursued SEPA challenges, state and federal court cases and appeals, and Pollution Control Hearings Board appeals against the Port, Weyerhaeuser, other entities, and individuals in a concerted effort to prevent construction of the log yard. In the instant appeal, Mr. West, *inter alia*, challenged the Port’s handling of a March 17, 2007 Public Records Act (“PRA”) request and a State Environmental Policy Act (“SEPA”) review for the log yard project.

¹ In December 2008 Weyerhaeuser assigned the lease and transferred operating responsibility for the log yard to a wholly-owned subsidiary, Weyerhaeuser NR Company.

² On this basis alone, the non-PRA claims asserted by Mr. West and Mr. Dierker on appeal are essentially moot.

Later joined by Mr. Dierker, Mr. West sought Port records pertaining to the Port-Weyerhaeuser lease under the PRA and challenged the Port's SEPA review for the lease project.

Unfortunately, like many of the actions challenging construction of the Weyerhaeuser log yard project, the issues in the instant appeal have been obscured in a paper fog and the case has foundered in a factual and procedural quagmire. Weyerhaeuser has been the unlucky bystander to the proceedings as the affected Port tenant.

B. ASSIGNMENT OF ERROR

Mr. West and Mr. Dierker make several assignments of error on appeal. Specifically, Mr. West argues that the trial court erred when it dismissed his non-PRA claims for lack of standing. Mr. Dierker separately argues (1) the Superior Court erred in hearing, granting, and/or construing the granting of Respondents' Motion to Bifurcate and accompanying case scheduling order, and erred in hearing and granting both of the Port's Motions to Dismiss Appellants' bifurcated claims in this case, and (2) the Court erred in hearing, granting, and construing Weyerhaeuser's Motion for Bifurcation.

These assignments of error are misplaced. Bifurcation of the issues in the case was appropriate and was within the trial court's

discretion. Dismissal of this case by the trial court and, more particularly, dismissal of all claims asserted against Weyerhaeuser was appropriate. The trial court's decisions should be upheld.

C. STATEMENT OF THE CASE

Weyerhaeuser understands that on March 17, 2007, Mr. West submitted a PRA request to the Port. CP 1176; CP 1072. The request broadly sought all Port records since January 5, 2006 pertaining to the Weyerhaeuser lease and proposed construction activities on the property. CP 1079. As outlined in the Declaration of Jeri Sevier,³ after a lengthy dialogue with Mr. West in an effort to clarify the type of information sought, the Port produced documents that it deemed to be responsive to the request. CP 1072-1164. The documents were delivered to Mr. West between June 12, 2007 and June 20 2007. *Id.*

Mr. West filed an action in Thurston County Superior Court on June 18, 2007, alleging PRA violations and asserting several non-PRA claims against the Port, Weyerhaeuser, and other defendants.⁴ CP 7-17.

In the weeks between receipt of Mr. West's PRA request and the filing of the Thurston County Superior Court action, the Port completed its

³ Ms. Sevier was the Executive Assistant to the Port of Olympia Executive Director in 2007.

⁴ The other defendants were Edward Galligan, Bill McGregor, Robert Van Schoorl, and Paul Telford.

SEPA review for the project and issued a mitigated determination of non-significance (“MDNS”) addressing the infrastructure improvements to be constructed by the Port and tenant leasehold improvements to be constructed by Weyerhaeuser. CP 2380. On April 26, 2007, the Port issued a Staff Report offering additional background and analysis for the MDNS, extended the MDNS comment period until May 10, 2007, and extended the deadline for reconsideration of the MDNS determination to May 17, 2007. *Id.*

On or about April 25, 2007, Mr. West (later joined by Mr. Dierker) filed a reconsideration request with the Port. *Id.* The Port’s Responsible SEPA Official reviewed the reconsideration materials submitted by Mr. West and Mr. Dierker, considered the documents produced by the Port during the SEPA review process, and issued a Decision on Reconsideration on June 7, 2007. CP 2381. Mr. West and Mr. Dierker filed an administrative appeal and the matter was scheduled for reconsideration without hearing at a June 18, 2007 Port Commission meeting. CP 2381-2382. The Port Commission upheld the Decision on Reconsideration. CP 2382.

Mr. West timely challenged the Port Commission’s decision in Thurston County Superior Court. Again joined by Mr. Dierker, Mr. West filed an Amended Complaint on July 6, 2007 and a Second Amended

Complaint on July 13, 2007. In the Second Amended Complaint, Mr. West and Mr. Dierker alleged, *inter alia*, that the defendants had (1) denied access to public records contrary to the PRA; (2) violated the terms of a December 19, 2006 City of Olympia Hearings Examiner ruling addressing different aspects of the log yard project; (3) violated the Harbor Improvements Act (RCW 53.20.010); and (4) failed to comply with SEPA. CP 33-50. It is at this point that the case fell into the quagmire.

As described in detail by Messrs. West and Dierker and the Port in their opening briefs, the case was reassigned to several Thurston County Superior Court judges (*see, e.g.*, CP 1062 and CP 1070); two trial court judges recused themselves (CP 1949; CP 2117); multiple competing motions including show cause and dispositive motions were filed by the parties; and the disagreement between Mr. West and the Port regarding the adequacy of the Port's PRA response continued unabated. In an early effort to bring order to the case, Weyerhaeuser filed a Motion to Shorten Time and Bifurcate and Stay Plaintiff's Cause of Action for Alleged Violations of the Public Records Act ("Motion to Bifurcate") on August 13, 2007. CP 1386-1394. The Motion to Bifurcate was designed to separate PRA issues from non-PRA issues and to facilitate the orderly administration of the case. The trial court granted Weyerhaeuser's Motion to Bifurcate on August 24, 2007. CP 71-72. Notably, *nothing* in the

bifurcation order prevented Mr. West and Mr. Dierker's PRA case from going forward, since proposed stay language was removed from the final order. *Id.*

The case was ultimately assigned to the Hon. Chris Wickham. CP 2117. On February 28, 2008, the Port and Weyerhaeuser filed a Joint Request for Status Conference and Proposed Case Schedule ("Status Conference Request"). CP 2084-2115. A proposed order attached to the Status Conference Request recommended a schedule for administration of the pending dispositive motions, a timeline for additional substantive briefing, and if required, the timeline for a hearing on the merits. *Id.* The trial court ultimately set April 25, 2008 as the deadline for hearing the non-PRA dispositive motions. CP 2125.

On March 28, 2008, the Port filed a motion seeking to dismiss Mr. West and Mr. Dierker's SEPA claims and related claims (i.e., the non-PRA claims) ("Port Motion to Dismiss"). CP 2152-2175. The Port Motion to Dismiss replaced a motion to dismiss filed by the Port on August 30, 2007 and three dispositive briefs filed by the Port on September 14, 2007. CP 2152. The Port Motion to Dismiss asserted that Mr. West and Mr. Dierker lacked standing to pursue SEPA claims because they had failed to identify a "particularized, concrete and specific injury in fact." CP 2153. The Port also sought to dismiss the broad list of causes of

action outlined by Mr. West and Mr. Dierker in their Second Amended Complaint on the basis that (1) the PRA claim had been bifurcated; (2) the second cause of action for alleged violation of the Harbor Improvement Act had been separately briefed and was awaiting hearing, and (3) the remaining writs, declaratory judgments and “unconscionable contract” claims were subject to dismissal on the pleadings. CP 2153-2154.

Weyerhaeuser filed a Consolidated Motion to Dismiss (“Weyerhaeuser Motion to Dismiss”) pursuant to CR 12(c) on March 28, 2008. CP 2135-2150. The Weyerhaeuser Motion to Dismiss argued that Mr. West and Mr. Dierker’s SEPA challenges failed on the basis of standing, collateral estoppel, and exhaustion. CP 2136. Weyerhaeuser joined in portions the Port Motion to Dismiss and provided additional legal bases to dismiss the non-PRA claims⁵. CP 2137. Mr. West and Mr. Dierker filed responses (CP 2414-2421) and Mr. Dierker filed an Exhibit in Support of Standing of Petitioners (CP 2526-2531). Mr. West and Mr. Dierker had filed a brief addressing standing previously, in response

⁵ Weyerhaeuser’s Motion to Dismiss directly addressed or addressed by reference to previously filed pleadings, all claims asserted by Mr. West and Mr. Dierker including but not limited to their claim for alleged violations of the Harbor Improvement Act; their petition for a writ of certiorari/prohibition; their request for a declaratory judgment; their claim alleging arbitrary and capricious government action; their cause of action alleging that the Weyerhaeuser-Port lease was an “unconscionable contract,” and their appearance of fairness claims.

earlier dispositive motions filed by Weyerhaeuser and the Port. CP 1748-1762. Weyerhaeuser and the Port filed replies in accordance with the case scheduling order. CP 2431-2442; CP 2422-2430.

The trial court dismissed the case with prejudice on April 25, 2008. CP 90; CP 2554. Mr. West and Mr. Dierker filed separate motions for reconsideration challenging the April 25 dismissal order. CP 2581-2586; CP 2587-2608. Their reconsideration motions were denied.

Weyerhaeuser moved to dismiss the PRA claims as to itself on April 22, 2008, because Weyerhaeuser is not an “agency” as defined in RCW 42.50 6.010 and, as such, is not subject to the terms of PRA. CP 2509-2513. Mr. West opposed Weyerhaeuser’s motion to dismiss the PRA claims asserted against Weyerhaeuser on the basis that the motion was filed after the April 25, 2008 dispositive motion deadline in the scheduling order. CP 2563-2564. Weyerhaeuser responded that the scheduling order did not apply to the bifurcated PRA claims. CP 2565-2566. The trial court agreed and dismissed the PRA claims asserted against Weyerhaeuser on May 2, 2008. CP 91.

On May 1, 2008, Weyerhaeuser and the Port filed a CR 60(a) motion to address clerical errors identified in the April 25, 2008 Order to Dismiss. CP 2567-2578. The trial court issued a revised order to dismiss

(“Revised Order”) on May 30, 2008. CP 94-95. The Revised Order, which replaced and superseded the Order to Dismiss, stated:

All claims are dismissed with prejudice, except for the Plaintiffs’ claims under the Public Records Act which were previously bifurcated by the Court’s order on August 24, 2007. Further challenges to the proposal based on Chapter 43.21C are prohibited (emphasis added).

Id.

Mr. West and Mr. Dierker did not challenge the Revised Order or the order dismissing the PRA claims that had been asserted against Weyerhaeuser for over four years. As a result, Weyerhaeuser was not a party to any of the trial court proceedings after May 30, 2008. On September 21, 2012, Mr. West and Mr. Dierker filed amended notices of appeal with the Court of Appeals, Div. II, in which they also challenged the trial court orders that dismissed all claims asserted in against Weyerhaeuser.

C. ARGUMENT

1. The standard of review applied to trial court bifurcation decisions is “abuse of discretion.”

CR 42(b) provides, in pertinent part, that:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, *may* order a separate trial of any claim ... or of any separate issue or any number of claims or issues ... always

preserving inviolate the right of trial by jury
(emphasis added).

The plain language of CR 42(b) confers discretionary power on trial courts to bifurcate claims and/or issues in a case. The standard of review applied to bifurcation decisions is abuse of discretion. *Probert v. American Gypsum Div.*, 3 Wn. App. 112, 115, 472 P.2d 604, 606 (1970) (“This [CR 42(b)] procedure ... will not be overturned in the absence of an abuse of discretion”), *accord Slippern v. Briggs*, 66 Wn. 2d 1, 3, 394 P.2d 229, 231 (1964).

Washington courts have acknowledged that, although judicial discretion cannot be defined by “a hard and fast rule,” it is considered to be “sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law” *State ex rel. Clark v. Hogan*, 49 Wn. 2d 457, 462, 303 P.2d 290, 293 (1956). Abuse of discretion is not shown “unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable.” *State ex rel. Nielsen v. Superior Court*, 7 Wn. 2d 562, 577, 115 P.2d 142, 144 (1941), *citing State ex rel. Beffa v. Superior Court*, 3 Wn. 2d 184, 190, 100 P.2d 6, 8 (1940). On appeal, a trial court’s decision regarding bifurcation will not be reversed where it rests “on tenable bases.” *Del Rosario v. Del*

Rosario, 116 Wn. App. 886, 901, 68 P.3d 1130, 1137 (2003), *aff'd in part and rev'd in part*, 152 Wn. 2d 375, 97 P.2d 11 (2004).

2. Trial court decisions to dismiss a case pursuant to CR 12(c) are reviewed *de novo*.

A motion for judgment on the pleadings is governed by CR

12(c) which provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Washington appellate courts review *de novo* trial court orders granting motions for judgment on the pleadings. *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 752, 259 P.3d 280 284 (2011), *citing North Coast Enters., Inc. v. Factoria Partnership*, 94 Wn. App. 855, 858, 974 P.2d 1257 (1999). Similarly, when reviewing an order granting judgment on the pleadings, appellate courts “examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint which would entitle the claimant to relief.” *Id.*

The same *de novo* standard of review applies to CR 56 summary judgment orders. *Cano-Garcia v. King County*, 168 Wn. App. 223,

229, 277 P.3d 34, 39 (2012). (“On appeal of a summary judgment order, we review the decision *de novo*, performing the same inquiry as the trial court”).

3. Courts review agency SEPA actions *de novo*.

Court review of agency SEPA actions is also conducted *de novo* (“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 [SEPA] shall be *de novo*”). RCW 42.56.550(3).

4. The trial court’s decision to bifurcate PRA claims from non-PRA claims was within its discretion, did not prejudice appellants, and should be upheld.

Mr. West and Mr. Dierker do not argue on appeal that the trial court’s decision to bifurcate PRA issues from non-PRA issues constituted an abuse of discretion or violated their right to a jury trial. Rather, their argument appears to focus on the administrative difficulties that they allegedly experienced after all claims against Weyerhaeuser were dismissed.

As illustrated by the broad ranging claims asserted the Second Amended Complaint and the voluminous pleadings filed with the trial court, a strategy to bring order, efficiency and economy to case administration and, ultimately, trial was needed. Weyerhaeuser

recognized this need early on and asked the trial court to bifurcate the factually distinct PRA issues from non-PRA issues.

Washington courts have clearly articulated the criteria used to evaluate whether a trial court has abused its discretion. Simply put, a trial court decision to bifurcate will not be overturned when it rests on “tenable bases” grounds (*Del Rosario*, 116Wn. App. at 901, 68 P.3d at 1137), such that the exercise of discretion was not “manifestly unreasonable” (*State ex rel. Nielsen*, 7 Wn. 2d at 577, 462 P.2d at 293), and where the plaintiffs are not prejudiced (*Slippern*, 66 Wn. 2d at 3, 394 P.2d at 230).

The facts here do not support an allegation of abuse of discretion or prejudice. The Motion to Bifurcate in the instant case unambiguously separated the factually distinct PRA issues from non-PRA issues for purposes of trial. CP 71. The Revised Order firmly reinforced the distinction between PRA and non-PRA issues when it explicitly affirmed that “all claims are dismissed with prejudice, *except for the Plaintiffs’ claims under the Public Records Act, which were previously bifurcated* (emphasis added).” CP 95. More importantly, nothing in the Revised Order prevented either Mr. West or Mr. Dierker from actively pursuing the PRA claims against the Port.

Despite Mr. West and Mr. Dierker's assertions to the contrary, the facts and the case history simply do not support the conclusion that the trial court abused its discretion when it bifurcated the PRA claims from non-PRA claims or that Mr. West and Mr. Dierker were prejudiced by the trial court's decision when it was made. Any difficulties allegedly experienced by Mr. West and Mr. Dierker after May 30, 2008, appear to be unique to and exclusively tied to the subsequent history of the case.

5. The trial court's decision to dismiss the non-PRA claims was warranted because Mr. West and Mr. Dierker lacked standing to sue.

Mr. West and Mr. Dierker's argument that the trial court erred when it dismissed the non-PRA claims mischaracterizes the undisputed facts and misreads applicable law. Mr. West asserts that his non-PRA claims were, in effect, a SEPA challenge to the Port's MDNS decision for the log sort yard project. Mr. West correctly identifies the two-part standing test applied to challenges, namely that (1) the alleged endangered interest must fall within the zone of interest protected by SEPA, and (2) the party must allege an injury in fact. *Kucera v. Dep't of Transp.*, 140 Wn. 2d 200, 212, 995 P. 2d 3 (2000). He is also correct in noting that *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678-679,

874 P.2d 681 (1994) requires a complainant to identify “specific and perceptible harm” that is “immediate, concrete, and specific” to prevail on the issue of standing. *Id.* It is at this point that Mr. West misreads *Kucera, Leavitt, Lujan v. Defenders of Wildlife*⁶, and related cases.

Leavitt outlines the accepted principal that a plaintiff who alleges a threatened injury rather than an existing injury must demonstrate that the injury is not conjectural or hypothetical. *Leavitt*, 74 Wn. App. at 679, 875 P.2d 687, quoting *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524, 526, *review denied*, 119 Wn. 2d 1012, 833 P. 2d 386(1992). In turn, *Lujan* describes in detail the point at which a merely conjectural or hypothetical injury becomes concrete and specific. The *Lujan* plaintiffs included two individual Defenders of Wildlife members who asserted that they had engaged in protected activities including observing wildlife and participating in recreational activities within the affected project area. They supported their standing claims with affidavits. *Lujan*, 504 U.S. at 563, 112 S. Ct. at 2138.

For purposes of its review, the *Lujan* court assumed that the affidavits contained facts demonstrating that the agency activities in

⁶ 504 U.S. 555, 112 S. Ct. 2130, 111 L.Ed.2d 351 (1992).

question threatened listed species. However, even in light of that assumption, the court concluded that the affidavits did not demonstrate how the alleged harm produced imminent injury to the members in question. In doing so, the court noted:

[A]ffiants' profession of an 'inten[t]' to return to the places they visited before – where they will presumably this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such 'someday' – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require (emphasis in the original).

Id. The court went on to comment that “standing is not an ‘ingenious academic exercise in the conceivable” *Lujan*, 504 U.S. at 566, 112 S. Ct. at 2139, quoting *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 93 S. Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). It then opined:

[T]he person who observes or works with the particular animal threatened by federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible – though it goes to the outermost limit of plausibility – to think that a person who observes or works with animals of a particular species in the very area of the world where the species is threatened by federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist *It goes beyond the limit, however, and into pure speculation and fantasy, to say that everyone who observes or works with*

an endangered species, anywhere in the world, *is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection* (emphasis added).

Lujan, 504 U.S. at 567 112 S. Ct. at 2140. Mr. West assertion made by Mr. West in his Memo on Standing⁷ were no more specific or compelling than the assertions that were rejected by the U.S. Supreme Court in *Lujan*. Mr. West's Memorandum on Standing indicated that he

[Has] a connection to the project site into the animals and marine life that remains in the vicinity I also watch birds on or near the site. On infrequent occasions I observed seals and whales in the water surrounding the project site [T]he quality of my environment will be directly impacted by the increased traffic, noise, and increased ... discharge of water and air pollutants resulting from this project.

CP 1406-1407. The “some day” and “in the future” assertions offered by Mr. West do not satisfy the standard articulated in *Lujan*.

Mr. West and Mr. Dierker also failed to demonstrate standing because they failed to demonstrate anything more than the “abstract interest of the general public” in the challenged aspects of the log yard project. In his Memo on Standing, Mr. West indicated that he

⁷ CP 1395-1408

[S]pend[s] a great deal of time in downtown Olympia, and regularly walk, drive, bicycle [sic], and operate small marine craft in the vicinity of and/or upon the port of Olympia. I have an interest in preventing air, water, noise pollution that this project is certain to increase As a person who spends time in the area surrounding the project site ... I am also concerned and specifically impacted by the contamination stemming from the Cascade Pole Containment Site, which is scheduled to be disturbed and used as a log yard, with a potential for further discharge of toxic waste.

CP 1406-1407. *Lujan* rejected substantially similar offers of proof for standing. There the U.S. Supreme Court pointed out that it has consistently rejected standing for plaintiffs that raise only a “generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of ... laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large” *Lujan*, 504 U.S. at 573-574 112 S. Ct. at 2143. The *Lujan* standard, which rejected generalized, abstract claims of public interest, has been adopted in Washington. See, e.g., *Chelan Co. v. Nykrem*, 146 Wn. 2d 904, 935, 52 P.3d 1, 16 (2002) (“An interest to support standing to sue, however, must be more than simply the abstract interest of the general public in having others comply with the law”). In sum, the hypothetical future injuries claimed by Mr. West

and Mr. Dierker were not immediate, concrete, specific or particular to them.

The standing arguments made by Mr. Dierker at the trial court level are similarly unavailing. To support standing, Mr. Dierker offered a copy of a City of Olympia Hearing Examiner determination which granted standing to Mr. Dierker in a Land Use Petition Act (“LUPA”) challenge to light and glare that would allegedly be the result of lighting installed pursuant to an electrical permit issued by the city to the Weyerhaeuser log yard project. The Hearing Examiner explicitly narrowed the scope of his ruling was specific to the issue before him by cautioning:

To avoid misunderstanding, this [standing] analysis pertains only to determining the zone of interests served by one permit when issuance of another permit is expressly made a prerequisite to it and the appellants argue that the prerequisite was not meant When multiple permits are required for proposal, this decision does not import the purposes or interest served by each one into all the others. This whole thing deals only with analysing [sic] standing in the narrow situation when one permit is alleged to be expressly required to be in effect before another can be issued (emphasis added).

CP 2531. The opinion was specific to the permit in question, the issues associated with the cities issuance of the electrical permit, and the facts presented to the Hearing Examiner. Nothing indicates that the Hearing

Examiner intended his analysis in the appeal before him to convey or support standing in a different action challenging a MDNS issued by an unrelated governmental entity, for different development activities.

The trial court's determination that Mr. West and Mr. Dierker lacked standing was appropriate and should be upheld.

6. **The trial court's decision to dismiss all non-PRA claims was warranted because Mr. West and Mr. Dierker failed to produce facts in support of those claims that would entitle them to relief.**

Trial courts will dismiss a claim where it appears beyond doubt that the plaintiff cannot prove facts consistent with the complaint that would entitle it to relief. *Hoffer v. State*, 110 Wn. 2d 415, 421, 755 P.2d 781 (1988), *aff'd on reconsideration*, 113 Wn. 2d 1486, 776 P.2d 963 (1989), *citing Orwick v. City of Seattle*, 102 Wn. 2d 249, 254, 692 P. 2d 793 (1984). When evaluating whether a claim should be dismissed, Washington courts presume the plaintiff's allegations are true although they "may consider hypothetical facts that are not part of the formal record." *Id.* Motions to dismiss are granted when there is an "insuperable bar to relief" apparent on the face of the complaint. *Id.* *citing* 5 C. Wright & A. Miller *Federal Practice*, §1357, at 604.

In the instant case the insuperable bars to Mr. West and Mr. Dierker's non-PRA claims were clear, well-defined, and concrete. As

outlined in detail in the Weyerhaeuser Motion to Dismiss, and also as outlined in the Port Motion to Dismiss, Mr. West and Mr. Dierker's non-PRA claims were subject to dismissal on the following bases:

- Lack of Standing – Mr. West and Mr. Dierker failed to allege a specific and concrete injury in fact.

As discussed in detail in Section C.5. of this Opening Brief, Mr. West and Mr. Dierker lacked standing to pursue the non-PRA issues identified in the Second Amended Complaint.

- Collateral Estoppel – The asserted challenges to SEPA policy have already been litigated and lost; and the Port's SEPA Policy is sufficient as a matter of law.

Weyerhaeuser joined in the Port Motion to Dismiss with respect to this issue.

- Harbor Improvement Act – Mr. West and Mr. Dierker failed to meet the prerequisites for taxpayer suits;

Weyerhaeuser asserted, and Mr. West and Mr. Dierker or did *not* refute, the fact that they lacked standing under the Harbor Improvement Act. To prevail on a Harbor Improvement Act claim, a taxpayer must show “a unique right or interest that is being violated, in a manner special or different from the rights of other taxpayers.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn. 2d 267, 281, 937 P.2d 1082 (1997). In addition to failing to demonstrate that a unique right or interest had been violated, Mr. West and Mr. Dierker were obligated to (1) request action by the Attorney General, and (2) demonstrate that their request had refused before they can independently pursue a court action. *Id.* They failed to satisfy either requirement. CP 2139-2140.

- Writ of Certiorari or Prohibition – Mr. West and Mr. Dierker have an adequate, independent remedy at law.

Statutory writs of review and prohibition are only available where there is no adequate remedy at law. RCW 7.16.040 and 7.16.300. A writ of review is unavailable where a full and complete remedy at law exists. *Torrance v. King County*, 136 Wn. 2d 783, 794, 966 P.2d 891 (1998). SEPA provides a plain, speedy, adequate, and full remedy at law.

- Uniform Declaratory Judgment Act – There is an adequate, independent remedy at law.

Washington plaintiffs are “not entitled to relief by way of the declaratory judgment [when] there is available a completely adequate alternative.” *Grand Master Shen-Yen Lu v. King County*, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002). In the instant case, SEPA provided a full and adequate legal remedy.

- Unconscionable Contract claims – Mr. West and Mr. Dierker failed to state a claim upon which relief can be granted.

Mr. West and Mr. Dierker did not cite any authority to support of this cause of action. Washington courts do recognize a limited defense of unconscionability to contract claims where the contract terms are unconscionable or violate public policy. That was not the case here. The lease at issue was entered into between the Port and Weyerhaeuser. Neither party to the lease sought to enforce the lease making this limited defense irrelevant.

- Arbitrary and Capricious Agency Action claims – Mr. West and Mr. Dierker failed to state a claim upon which relief can be granted.

Mr. West and Mr. Dierker's arbitrary and capricious claim is not cognizable. At best, arbitrary and capricious is a standard of review applied by courts when considering a constitutional writ. See, e.g., *Torrance*, 136 Wn. 2d at 788. There is no independent cause of action available here.

- Appearance of Fairness Doctrine claims – Claims should be dismissed as a matter of law.

The appearance of fairness claims scattered throughout the Second Amended Complaint should be dismissed as a matter of law because (a) the appearance of fairness doctrine applies only to a public hearing required by statute and no such hearing was held or required in this instance; (b) the underlying actions being challenged are not considered “quasi-judicial” for appearance of fairness doctrine purposes; (c) the appearance of fairness issues were not timely raised as required by RCW 42.36.080.

CP 2135-2150. Mr. West and Mr. Dierker's responses to the motions to dismiss did not address the arguments made by Weyerhaeuser or the Port. This failure to present facts, consistent with the complaint, that Weyerhaeuser and the Port's arguments independently justify dismissal of the non-PRA claims. See *Phillips v. State*, 65 Wash.2d 199, 396 P.2d 537 (1964), suggesting that an appellate court may consider other grounds for dismissal, which though not considered by the trial court, were asserted at the trial court level in support of a motion to dismiss.

7. Dismissal of the PRA claims asserted against Weyerhaeuser was correct because Weyerhaeuser is not an “agency” subject to the Public Records Act.

Finally, dismissal of the PRA claims asserted against Weyerhaeuser was appropriate because Weyerhaeuser is not a public agency subject to the requirements of the PRA.

The Second Amended Complaint correctly identifies Weyerhaeuser is a corporation headquartered in doing business in Washington. CP 35-36. In contrast, RCW 42.56.010 defines an “agency” as including

All state agencies and local agencies. ‘State agency’ includes every state office, department division, bureau, board, commission, or other state agency. ‘Local agency’ includes every county, city, town, municipal corporation, a quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

As a publicly-held corporation regulated by the federal Securities and Exchange Commission, Weyerhaeuser clearly is not a governmental “agency” contemplated by statute. The Port is the quasi-municipal corporation charged with responding to Mr. West and Mr. Dierker’s PRA request.

Mr. West and Mr. Dierker failed to produce facts consistent with the complaint that would entitle it them to relief on this particular

issue. The trial court properly dismissed the non-PRA claims asserted against Weyerhaeuser. *Hoffer v. State*, 110 Wn. at 421.

E. CONCLUSION

For the foregoing reasons, Weyerhaeuser requests that this Court uphold the Thurston County Superior Court determinations in this matter – particularly as those determinations relate to dismissal of all claims asserted against Weyerhaeuser.

RESPECTFULLY SUBMITTED this 5th day of August, 2013.



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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that on the 5th day of August, 2013, I caused the foregoing OPENING BRIEF OF RESPONDENT WEYERHAEUSER to be filed with this Court and served on the individuals identified below in the manner indicated:

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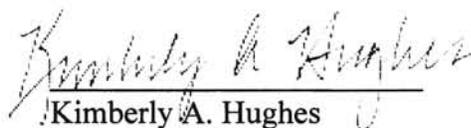
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