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STATE OF WASHINGTON
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NO. 96052-6

BEFORE THE SUPREME COURT OF THE STATE OF WASHINGTON

THE BEHIND THE BADGE FOUNDATION, ET AL.

Appellants,

v.

CITY OF OLYMPIA, ET AL,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy

BRIEF OF RESPONDENT VIEWS ON 5TH LLC

HEATHER L. BURGESS
Attorney for Respondent Views on 5th LLC

724 Columbia Street Northwest, Suite 320
Olympia, Washington 98501
(360) 742-3500

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I. INTRODUCTION

Appellants, The Behind the Badge Foundation, et al. (the "Appellants"), seek review of the Thurston County Superior Court Order Granting Respondent's Motion to Dismiss for Lack of Standing ("Order of Dismissal for Lack of Standing"). The Appellants contend that the Superior Court's decision was in error. Notably, the Superior Court dismissed Appellants' LUPA appeal for lack of standing under RCW 36.70C.060(2) without ever reaching the merits of Appellants' claims. As such, only the narrow issue of whether Appellants had standing under LUPA is before this court. The Appellants are unable to establish LUPA standing. Accordingly, Respondent, Views on 5th LLC ("Respondent")[1], respectfully requests that the Superior Court's decision be affirmed.

II. STATEMENT OF CASE

A. The Former "Capitol Center Project"

In 2010, The Views on Fifth Avenue, Ltd. ("Prior Applicant") applied to the City of Olympia ("City") for permits to convert an existing building located at 410 5th Ave. SW, Olympia, WA 98502, known as the "Capitol Center Building," from an office to a hotel (the "Capitol Center Project"). Clerk's Papers (CP) at 362.

In early 2011, the City issued a Notice of Land Use Approval and Determination of Non-significance for the Capitol Center Project. *Id.* at

[1] Capital Venture Group LLC is not a Respondent in this case. Despite Appellants' repeated inclusion of Capital Venture Group LLC as a Respondent in their filings throughout this appeal, Capital Venture Group LLC has never been served nor has that entity appeared in this matter to date. The term "Respondent" in this brief refers only to Views on 5th LLC and not Respondent City of Olympia.

357. Daniel J. Evans, Albert D. Rosellini, Booth Gardner, Ralph Munro, Norman J. Johnston, Michael S. Hamm, Robert V. Jensen, Gerald Reilly, the National Association of Olmsted Parks, the Friends of Seattle's Olmsted Parks, Friends of the Waterfront, and the Black Hills Audubon Society (the "2011 Appellants") appealed the City's approval modifying the use of the building to the City's Hearing Examiner. *Id.* at 351.

The 2011 Appellants asserted that the City erred in approving the Capitol Center Project on a variety of grounds, including alleged impacts to the view corridor of the Capitol Campus, violation of the Shoreline Management Act, Ch. 90.58 RCW (the "SMA"), violation of the Public Trust Doctrine, unlawful continuance of a nonconforming use, violation of SEPA, and violation of the City's Comprehensive Plan. *Id.* The Hearing Examiner denied the 2011 Appellants' appeal on all issues and approved the Prior Applicant's Capitol Center Project, subject to additional conditions of approval. *Id.* at 351.

Both the Prior Applicant and 2011 Appellants timely appealed the Hearing Examiner's decision to Thurston County Superior Court under LUPA. *Id.* at 388. The petitions were then consolidated under Thurston County Superior Court Cause No. 11-2-01837-4. *Id.* at 387. Following review, the Court denied the 2011 Appellants' LUPA appeal in its entirety, but granted the Prior Applicant's petition, remanding the matter back to the Hearing Examiner to revise the challenged conditions of approval. *Id.* at 390. On remand, the Hearing Examiner issued an order modifying the conditions of approval. *Id.* at 348, 393-98. The Prior

Applicant filed a second LUPA petition of the Hearing Examiner's Decision on Remand, which was assigned Thurston County Cause No. 12-2-02609-0. *Id.* at 400. The Court granted the Prior Applicant's petition, remanding to the Hearing Examiner a second time. *Id.* at 401-02. On July 18, 2013, the Hearing Examiner issued a decision on remand, imposing a revised condition of approval. *Id.* at 413. The 2011 Appellants did not prevail on any claims in any of these appeals. *See generally, id.* at 350-413.

B. The Current Project Proposal

In late 2016, the Respondent, Views on 5th LLC, purchased two of the three parcels on which the Capitol Center Project had been previously proposed (Thurston County Tax Parcel Nos. 91005502000 and 91005301000), including the parcel containing the Capitol Center Building. *Id.* at 349. Despite having similar names, the Prior Applicant (The Views on Fifth Avenue, Ltd.), and Respondent Views on 5th LLC are different legal entities and have no common members. *Id.* at 443-44.

On June 21, 2017, the Respondent applied to the City to change the use of the Capitol Center Building to multi-family residential and to re-develop the balance of the Respondent's property to create a mixed-use commercial and multi-family project called the "Views on 5th" (or, the "Project"). *Id.* at 415. The City's Responsible Official issued a SEPA Determination of Non-significance for the Project on December 4, 2017 (the "DNS"). *Id.* at 415-16.

1. Hearing Examiner Appeal

On December 26, 2017, Appellants, a collection of entities and individuals, including a majority of the 2011 Appellants, appealed the City's DNS for the Project on essentially the same grounds as the 2011 appeal of the Capitol Center Project, including allegations of violations of SEPA, the SMA, the Public Trust Doctrine, and the City's Comprehensive Plan, adverse impacts to the view corridor, and other environmental matters focused on the re-development of the existing Capitol Center Building (the "SEPA Appeal"). *Id.* at 418-19.

During a pre-hearing conference on January 4, 2018, counsel for the Respondent informed the Hearing Examiner that it intended to file a dispositive motion on the SEPA Appeal. *Id.* at 436-37. Given that anticipated filing and the significant public interest in the previously noticed land use hearing, which was also before the Hearing Examiner, the parties agreed to bifurcate the land use hearing and SEPA appeal hearings, with the latter being continued to a future date following the Hearing Examiner's review and decision on Respondent's anticipated dispositive motions. *Id.* at 437. The parties' agreement was reflected in a pre-hearing order. *Id.* Consistent with that order, the Hearing Examiner conducted an open record public hearing on the land use application on January 9, 2018, at the Olympia Center. *Id.* at 42, 78. Counsel for Appellants and several individual Appellants appeared and submitted evidence to the Hearing Examiner at this open record hearing. *Id.* at 50-51.

On January 12, 2018, Respondent moved to dismiss the entire SEPA Appeal for lack of standing, and in the alternative, for summary judgment. *Id.* at 19. The Respondent moved for summary judgment in part on *res judicata* grounds, as the majority of the issues raised in the Appellants' SEPA Appeal of the Project were identical to those raised by the 2011 Appellants. *Id.* at 21-25. In addition, the Respondent moved for summary judgment on the remaining issues based on the City's procedural and substantive compliance with SEPA. *Id.* at 25-27. City of Olympia Hearing Examiner Mark C. Scheibmeir issued an order denying the Respondent's motion to dismiss, but granting Respondent's motion for summary judgment in its entirety, dismissing the Petitioners' SEPA Appeal (hereinafter, the "SEPA Dismissal"). *Id.* at 28. In doing so, the Hearing Examiner found that the current Project was converting the "very same existing structure" and the Project site was "identical" to the Capitol Center Project. *Id.* at 22. For Issues 1 through 6 of the Petitioners' SEPA Appeal, the Examiner concluded that the 2011 and 2017 appeals were "indistinguishable," in that the same individuals and organizations brought both the appeals and raised issues that were "framed [] in an identical manner with nearly identical briefing." *Id.* at 22-23. With respect to all remaining issues, the Examiner concluded that the City had fully complied with SEPA as a matter of law. *Id.* at 25.

Subsequently, on February 5, 2018, having dismissed the Petitioners' SEPA appeal, the Hearing Examiner issued the Land Use Approval approving the Project, subject to conditions. *Id.* at 42, 78.

Appellants then timely filed two motions for reconsideration, one of the Order Granting Summary Judgment, and another of the Land Use Approval. *Id.* at 32. The Examiner denied the Appellants' request for reconsideration of the Order Granting Summary Judgment, clarifying that there was "sufficient identity of issues and of parties"—as evident from Appellants' briefing that the issues were "lifted directly from the materials they presented in the Capitol Center [Project] Appeal"—to apply *res judicata* in this case. *Id.* at 30, 33-34. The Examiner went further, finding that even if the doctrine of *res judicata* were inapplicable, the earlier decision for the Capitol Center Project would still be binding as to the disposition of Issues 1 through 6 presented in Appellants' SEPA Appeal. *Id.* at 34. The Examiner also denied the Appellants' request for reconsideration of the Land Use Approval on a variety of other grounds, including that Appellants failed to raise some issues identified during the public hearing and extended public comment period. *Id.* at 34-39.

2. LUPA Appeal

On March 19, 2018, the Appellants timely filed a LUPA petition in Thurston County Superior Court, challenging the Hearing Examiner's Decisions. *See id.* at 1, 7-11. On May 3, 2018, Respondent moved to dismiss Appellants' LUPA petition for lack of standing. *See id.* at 577-91. Respondent's motion to dismiss argued that Appellants had failed to demonstrate Appellants were "aggrieved" under LUPA because (1) the Decisions did not prejudice, and were not likely to prejudice Appellants; (2) Appellants' asserted interests were not among those that the City was

required to consider in making the Decisions; and (3) a judgment in favor of Appellants would not redress the asserted prejudice to Appellants as a result of the Decisions. *Id.* at 582-83.

On June 1, 2018, after oral argument, the Superior Court orally granted Respondent's motion and dismissed Appellants' LUPA petition, finding that Appellants had failed to demonstrate both that they were prejudiced by the Decisions and that Appellants' asserted interests were required to be considered by the City in making the Decisions. *Id.* at 640-41. On June 12, 2018, the Superior Court signed an Order Granting Respondent's Motion to Dismiss for Lack of Standing, reflecting its June 1, 2018 oral ruling. *See id.* This appeal followed.

III. ARGUMENT

A. Standard of Review

In order to establish standing under LUPA, a petitioner other than the applicant or owner of property subject to the challenged land use decision must meet all four of the specific statutory standing elements set out in RCW 36.70C.060(2), as follows:

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

> (a) The land use decision has prejudiced or is likely to prejudice that person;
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
> (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

(Emphasis added). The burden is on the petitioner to establish facts sufficient to support all elements of standing. *Lauer v. Pierce Cnty.*, 173 Wn.2d 242, 254, 267 P.3d 988 (2011).

Standing is jurisdictional. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011) (citing *Chelan Cnty. v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002)). Questions of standing and jurisdiction are reviewed de novo on appeal. *Knight*, 173 Wn.2d at 336; *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 373–74, 223 P.3d 1172 (2009); *see also Jevne v. Pass, LLC*, 3 Wn. App. 561, 565, 416 P.3d 1257 (2018) (the "issue of standing is reviewed de novo by appellate courts").

B. Appellants Are Not Prejudiced by the Challenged Land Use Decisions for the Project

The first criterion for LUPA standing requires a petitioner to establish that the challenged decision has prejudiced or is likely to prejudice them. RCW 36.70C.060(2)(a). In order to meet this requirement, the Appellants must show that they would suffer injury-in-fact as a result of the

land use decision. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681 (2016); *Chelan Cnty.*, 146 Wn.2d at 934.

As an initial matter, Appellants claim "there is no case law interpreting the 'prejudiced or likely to prejudice' requirement of LUPA," a quotation Respondent assumes is taken from *Suquamish Indian Tribe v. Kitsap Cnty.*, 92 Wn. App. 816, 828, 965 P.2d 636 (1998). Br. of Appellants, at 9. Appellants go on to improperly analogize statutory LUPA standing to the judicial doctrine of standing in the federal court system. *See* Br. of Appellants, at 9–10 (citing *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972) and others). While Appellants' assertion that no case law exists interpreting the prejudice requirement under LUPA may have been true at the time of the *Suquamish* decision—issued a mere three years after the original enactment of LUPA—in the nearly two decades since, plenty of case law has developed analyzing the required element of "prejudice" for LUPA standing. *See, e.g., Thompson*, 193 Wn. App. at 662; *Chelan Cnty.*, 146 Wn.2d at 934.

To show injury-in-fact, Appellants must demonstrate "specific and perceptible harm," and that the Appellants' injury is "immediate, concrete, and specific," and not merely conjectural or hypothetical. *Concerned Olympia Residents for Environment v. City of Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983); *see also Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992) (stating that a "conjectural or hypothetical" injury will not confer standing). Appellants cannot simply make the "bald assertion" that they have standing to challenge the subject

land use decision. *Concerned Olympia Residents for Environment*, 33 Wn. App. at 683. Rather, Appellants must support their allegations of standing with evidentiary facts sufficient to indicate injury-in-fact. *Trepanier*, 64 Wn. App. at 383. Moreover, it is not sufficient for one petitioner to simply rely on another petitioner's basis for standing in order to challenge a decision. *Id.*; *see also Concerned Olympia Residents for Environment*, 33 Wn. App. at 684 (rejecting organization's standing because it did not specifically identify its injury, but only relied on co-appellant's allegations). In addition, "community displeasure" or the "abstract interest of the general public in having others comply with the law" is insufficient to confer standing. *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 299, 936 P.2d 432, 438 (1997); *Chelan Cnty.,* 146 Wn.2d at 935 (finding no standing under LUPA where petitioners' asserted interest was to "preserve the protections of the zoning in the district in which they are located"). In the absence of established injury-in-fact, a Court must dismiss the petition for lack of standing. RCW 36.70C.060(2)(a).

1. Appellants' Allegations of Standing Fail to Establish the Specific, Perceptible, and Particularized Harm Necessary to Establish Injury-in-Fact

As a threshold matter, Appellants' allegations of standing fail to include any claims of specific, perceptible, and particularized harm. *Concerned Olympia Residents for Environment*, 33 Wn. App. at 683. Instead, Appellants collectively assert general "interests" related to the

Project, focused largely on the Project's re-use of the existing Capitol Center Building, as follows:

> For decades, Petitioners have worked for the preservation of the design of the Washington State Capitol Campus . . . The Petitioners have been actively involved in 'creating the North Capitol Campus Heritage Park through negotiations and litigation with major milestones . . . The Petitioners have interest in preserving and protecting the view corridor . . . from the Law Enforcement Memorial across Capitol Lake to Puget Sound and the Olympics. The Petitioners have an interest in ensuring that the property is developed consistent with the City's Comprehensive and Parks Plan and the State Master Plan for the State Capitol Campus. The Petitioners also have an interest in protecting against the adverse effects of building in a seismic liquefaction zone, a flood zone, and on property polluted with petroleum waste.

CP at 5-6; *see also* Br. of Appellants, at 3, 8 (asserting same general interests in preventing expansion of non-conforming use, application of SEPA, petroleum contamination issues, earthquake liquefaction dangers, sea level rise, and destruction of the Olmsted Brothers and Wilder and White view corridor).

In asserting these general development-related "interests," Appellants make no attempt to identify or describe the individual injury to each Appellant that would result from the Project's approval. *See generally* Br. of Appellants, at 16-18 (referencing no specific injuries to specific Appellants or their property); *see also* CP at 4-6 ("Facts Demonstrating that the Petitioners Have Standing to Seek Judicial Review Under RCW 3.70C.060"). Absent a showing of such specific, individual

injury, Appellants' standing to bring a LUPA petition fails. *Thompson*, 193 Wn. App. at 662; *Concerned Olympia Residents for Environment*, 33 Wn. App. at 683. While Appellants have numerous objections to the Project and clearly would prefer Respondent's property become a future public park, it is well-settled that "community displeasure" is "insufficient to confer standing." *Anderson*, 86 Wn. App. at 299. Similarly, generalized assertions that Appellants have a "history of . . . involvement with issues impacting Capitol Campus" do not amount to "immediate, concrete, and specific" injury. Br. of Appellants, at 7; *Trepanier*, 64 Wn. App. at 383. Rather, to withstand challenge, each Appellant must present evidentiary facts demonstrating that their respective individual and organizational interests are specifically and perceptibly harmed by the City's land use decision.[2] *Trepanier*, 64 Wn. App. at 383. Appellants presented no such evidence.

2. Appellants Cannot Establish Injury-in-Fact Resulting from Project Impacts to the View Corridor because the Project Will Not Impact the Existing View Corridor

Appellants' primary asserted interest is in preventing the alleged "damage to the 1928 Olmsted Brothers Plan and 1911 Wilder and White view corridor to and from Capitol Campus across Capitol Lake to Puget

[2] As a procedural matter, Respondent notes that Appellants' counsel purports to represent at least one deceased individual, John Spellman. Appellants' counsel does not represent Mr. Spellman's estate, and has not identified whether he is acting as Mr. Spellman's personal representative or a beneficiary or heir as to otherwise have legal authority to represent his interests in this lawsuit. Respondent preserves its right to present arguments regarding Appellants' failure to substitute the proper party for Mr. Spellman or provide the legal authority to continue representation of the deceased's interests. *See* RAP 3.2 (providing process for substitution for a deceased party).

Sound and the Olympic Mountains." Br. of Appellants, at 17; *see also* CP at 6. However, Appellants cannot establish that any injury-in-fact will occur to the view corridor resulting from the Project as required to confer standing under LUPA. RCW 36.70C.060(2)(a).

The Capitol Center Building was built to its current height of 100 feet in the 1960s. CP at 43, 59. Therefore, any alleged injury Appellants could assert resulting from impairment of the view corridor from the Capitol Campus has actually existed since the Capitol Center Building was constructed in the mid-1960s, and will continue to exist with or without development of the Views on 5th Project.[3]

In addition to the prior and continued existence of the Capitol Center Building precluding any injury-in-fact resulting from the Project, the Respondent presented undisputed view corridor analysis to the Examiner—analysis that the record shows was both requested and reviewed by the Washington State Department of Archaeological and Historic Preservation ("DAHP")—demonstrating the absence of impacts from the Project to a variety of views and vistas, including those from the Capitol Campus. *See id.* at 548, 550-60, 572-76; *see also id.* at 63-64 ("Reuse of the Capitol Center Building will not exacerbate the impairment of any important public view"). The Appellants cannot

[3] With respect to the claim of injury for Petitioner, The Behind the Badge Foundation, the Respondent also notes that public records indicate that the Washington State Law Enforcement Memorial ("Memorial") was built at its current location on the Capitol Campus sometime after 1995, at least thirty years after the Capitol Center Building was built. CP at 455-57. Petitioner, The Behind the Badge Foundation, was presumably aware of the existence of the Capitol Center Building at the time it developed the Memorial, as the building was then in plain sight.

allege injury-in-fact resulting from impairment to a view corridor sufficient to confer standing under LUPA if the claimed view impairment is neither created nor worsened by the Project. *See KS Tacoma Holdings, LLC, v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 138, 272 P.3d 876 (2012) (finding no injury-in-fact for construction of hotel within shoreline jurisdiction where Applicant's view analysis showed impact would slightly decrease based upon project design).

3. Appellants' Alleged Injury-in-Fact to the View Corridor is Purely Hypothetical

In reality, Appellants' alleged harm to the 1928 and 1911 Capitol Campus plans resulting from the Project is to a future hypothetical project by which Respondent's private property is presumably acquired, the existing Capitol Center Building is destroyed, the view corridor reestablished (to pre-1960s status), and a public park constructed in its place. *See* Br. of Appellants, at 6 (arguing that "[a]llowing the retention of the Capitol Center Building . . . will permanently and adversely impair the public's view") (emphasis added); *see also* CP at 603. Therefore, Appellants' alleged harm only exists if the Capitol Center Building would otherwise be destroyed and converted to a public park in order to "reestablish" the view corridor. Absent such a project,[4] there is no existing harm to the 1928 and 1911 Capitol Campus plans resulting from the Project, since the Project does not increase the legal nonconforming

[4] The City of Olympia has confirmed there is no plan or intent to acquire the Capitol Center Building, nor is the Building for sale. CP at 588-90; *see id.*, at 591, n. 5 (discussing unlawful taking of private property).

height of the existing building. *See* OMC 18.37.040 (authorizing legal nonconforming structures as long as nonconformity is not increased); *see also* Certified Appeal Board Record (AR) 421 (Exhibit C to Cultural Resources Report, Historic Viewshed Analysis); 763-767, 1038 (Comments from Department of Archaeology & Historic Preservation); 1930, 1947 (Hearing Examiner Final Decision findings and conclusion that Building does not result in further nonconformity).

Appellants' alleged "harm" to a hypothetical future project is insufficient to establish injury-in-fact and confer standing. In *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59 (2002), Division One addressed a directly analogous hypothetical injury in the context of a SEPA appeal. In that case, the City of Seattle approved a proposal to redevelop a mall complex, a portion of which was located over a drainage pipe containing Thornton Creek. *Id.* at 41. Petitioner asserted that the City of Seattle erred in failing to require an Environmental Impact Statement for the project, in part because construction of the project would make any future restoration project of the creek "difficult or impossible." *Id.* at 58. The Court of Appeals rejected this theory, holding that there is "no authority for the proposition that making a hypothetical future restoration project more difficult constitutes an adverse environmental impact under SEPA." *Id.* at 59.

Here, the fundamental premise of Appellants' claim is that the Project, even if it does not "create" the harm to the view corridor, makes

any future acquisition of the site or conversion to a public park more "difficult or impossible." *See* Br. of Appellants, at 6 (claiming allowing retention of Capitol Center will perpetuate irreparable damage). As with the hypothetical restoration project at issue in *Thornton Creek*, Appellants' alleged harm is contingent on the Project foreclosing what is an entirely hypothetical plan to acquire the Respondent's property, remove the Capitol Center Building, reestablish the view corridor, and create a public park. Foreclosing the ability to construct a purely hypothetical future project is not an adverse environmental impact under SEPA, and this Court should find it similarly insufficient to establish injury-in-fact under LUPA. *Id.*; RCW 36.70C.060(2)(a).

4. Appellants' General Interest in Having Respondent Comply with the Law Does Not Confer Standing

Appellants spend much of their brief asserting they have standing due to a general interest in having the Respondent comply with the law. *See* Br. of Appellants, at 10–14 (alleging Appellants have standing because the Project does not comply with SEPA, the SMA, and the City's non-conforming use provisions[5]); *see also* CP at 6. However, the

[5] Section E of Appellants' brief, entitled "Standing to prevent non-conforming uses," appears to only address the underlying merits of Appellants' LUPA petition, not Appellants' standing. *See* Br. of Appellants, at 11–14 (arguing that the Capitol Center Building is non-conforming under City code and should therefore not have been approved). Despite previous reprimands, Appellants continue to confuse the applicable standards of nonconforming *uses* and nonconforming *structures*. *See* AR 2087 ("The Appellants repeatedly, and continuously, misstate the City's regulations with respect to the use of a nonconforming *building* by describing the Capitol Center Building as a nonconforming *use*. It should not need to be repeated that the Capitol Center Building is a nonconforming building entitled to be 'enlarged or remodeled if such alterations do not contribute to further nonconformity.'") To the extent, however, that Appellants are asserting that a policy-based exemption to LUPA standing requirements should apply in

"abstract interest of the general public in having others comply with the law" is insufficient to confer standing under LUPA. *See Chelan Cnty.*, 146 Wn.2d at 935 (finding no standing under LUPA where petitioners' asserted interest was to "preserve the protections of the zoning in the district in which they are located"); *see also Thompson*, 193 Wn. App. at 663-64 (finding no standing under LUPA for a neighboring property owner to "enforce zoning protections" where no "immediate, concrete, and specific" injury resulting from creation of the challenged short plat would result) (citations omitted). While the Appellants may have a keen "interest" in the Project's compliance with the City's Parks Plan, the State Master Plan, SEPA, the SMA, and the City's Codes, such a generalized interest, without actual accompanying injury, does not confer standing under LUPA to challenge the Project. *Thompson,* 193 Wn. App. at 664; Br. of Appellants, at 7.

5. Appellants Cannot Establish Injury-in-Fact Resulting From Other Claimed Environmental Impacts

Finally, Appellants assert an interest in protecting against the adverse effects of building "on property with known petroleum contamination issues, earthquake liquefaction dangers, [and] sea level rise." Br. of Appellants, at 3; *see also* CP at 6. Appellants' claim of general interest as to these separate issues also fails to establish standing under LUPA in the absence of a concrete and specific injury. *Trepanier*,

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the case of challenges to alleged nonconforming uses or structures, this Court should decline to adopt such a rule. *See* Br. of Appellants, at 12:2–4 (stating "[t]his case gives the Supreme Court the opportunity to apply the non-conforming use and structure policy that has been established").

64 Wn. App. at 383. Here, it would appear from the record that one or more of the individual and organizational Appellants neither reside nor have members in the City of Olympia, much less in the immediate vicinity of the Project site. *See, e.g.*, CP at 562-64, 566-68 (Public Comment from Appellants National Association of Olmsted Parks and The Portico Group (Michael Hamm) indicating they are based in Washington D.C. and Seattle, respectively). Indeed, Appellants fail to identify a single Appellant that owns property, lives in, or works in the vicinity of the Project such that any Appellant could possibly be immediately and directly harmed from any impact related to the Project's compliance with City seismic hazard, flooding, and pollution control requirements forming the basis of several of Appellants' claimed allegations of error. *See* Br. of Appellants, at 3. To the extent Appellants intend to assert protection of the Project's residents or other property owners in the area from these alleged hazards, a party "cannot rely on injuries to third parties to establish standing." *KS Tacoma Holdings, LLC*, 166 Wn. App. at 138.

C. The Appellants' Asserted Interests were Not Among the Interests the Local Jurisdiction had to Consider

1. Appellants' Participation at Public Hearings as Members of the General Public does not Establish Appellants' Asserted Interests were Required to be Considered by the City

In order to establish standing, Appellants are also required to show their "asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision." RCW

36.70C.060(2)(b). Here, Appellants argue their asserted interests were required to be considered because public participation under SEPA is essential and that as members of the public, Appellants will be harmed by the damage to the State Capitol Campus view corridor. Br. of Appellants, at 14. However, participating in public hearings on a project does not prove one's interests were required to be considered by the local jurisdiction for purposes of establishing LUPA standing. RCW 36.70C.060(2)(b).

As applied, the Appellants' construction of LUPA's "asserted interests" requirement would mean that *any* member of the public would meet this criterion simply by participating in the public process associated with a project. Appellants point to the public notice and participation provisions of the Olympia Municipal Code ("City Code") and argue that because the "public" is harmed by the "damage to the State Capitol Campus view corridor," and because Appellants are "members of the public" that were involved in the review process, they are therefore within the "zone of interests" protected by the City Code and SEPA process and therefore have LUPA standing. *Id.* at 15-16. Appellants' expansive reading of "zone of interest" under LUPA in this manner renders this criterion equivalent to the Growth Management Act ("GMA") "participation standing" standard, which merely requires a petitioner to show that their participation before the local jurisdiction was reasonably related to their issues raised before the Board. RCW 36.70A.280(4); *see, e.g.,* Br. of Appellants, at 16 ("[I]n every step of . . . the permitting

process, the City of Olympia invited neighboring property owners and members of the public to participate in the land use review and permitting process. [Appellants] are doing exactly what they are required to do under law.") In contrast to the GMA, LUPA requires a much higher threshold to establish standing. RCW 36.70C.060(2)(b) (requiring the "[aggrieved] person's asserted interests" to be among those that the local jurisdiction was required to consider). Appellants point to no authority for the proposition that simply participating in the public process for a project is sufficient to establish a person's asserted interests to later challenge the Project under LUPA. *See generally* Br. of Appellants, at 14-16. In short, there is no such authority.

2. The City was Not Required to Consider Appellants' Asserted View Impacts

Outside of reliance on the public participation provisions of the City Code, Appellants identify no provision of City Code or state law that would have required the Hearing Examiner to consider the view impacts of the Project on the collective Appellants. Br. of Appellants, at 15; RCW 36.70C.060(2)(b); *see Asche v. Bloomquist*, 132 Wn. App. 784, 793, 133 P.3d 475 (2006) (question is whether the local decisionmaker "must be obligated" to consider petitioner's interests).

Respondent does not dispute that in some instances, a local jurisdiction must consider the impact of a permit approval on surrounding views. For instance, in *Asche*, Division Two of the Court of Appeals held that a neighbor's interest in their view of Mt. Rainier had to be considered

by the local jurisdiction during the issuance of a building permit for a home on an adjacent property. 132 Wn. App. at 793. In determining the neighbor's view interest was required to be considered, the court relied on a provision of the Kitsap County Code (KCC), which required that buildings between 28 and 35 feet in height—such as the residence at issue—"only be approved if the views of adjacent properties, such as that of the Asches, are considered." *Id.* (citing KCC 17.321C.040[6]). Thus, the Asches had standing to bring their LUPA challenge because their view interests were explicitly required to be considered by the local jurisdiction in issuing the building permit. *Id.* at 794.

In contrast, Appellants point to no provision of the City Code that required the City to consider the general view interests of non-adjacent property owners or other citizens in issuing the challenged Land Use Approval. *See generally* Br. of Appellants, at 14-16. Indeed, there are no such provisions.

3. Appellants' Interest in Delaying the Project to Provide an Opportunity for Public Acquisition of Respondent's Private

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[6] "Properties within the View Protection Overlay Zone may build as high as 35 feet under the following circumstances:

> 1. There is no existing view of downtown Seattle, the Cascade Mountains, Mt. Rainier or the Puget Sound from the subject property or any adjacent property; or
>
> 2. The owners of all adjacent properties approve the building height prior to building permit issuance; or
>
> 3. It can be explicitly shown that the structure will not cause the blockage of existing views from any of the adjacent properties."

KCC 17.321C.040.

Property is Not an Interest Required to be Considered under City Code or SEPA

Furthermore, Appellants cannot dispute that their fundamental interest in pursuing this LUPA petition is to create delay sufficient to allow the potential public acquisition of the Respondent's private property for use as a public park. *See generally*, CP at 440-41, 448-49, 451-52. This interest is not one required to be considered.

Although not stated in the LUPA petition itself, the record is replete with evidence of Appellants' desire to delay the Project. In one instance, Appellant Jacobs, months before the challenged DNS was issued, publicly stated his intent to pursue litigation and delay the Project for up to three years, presumably to facilitate a public acquisition of the site for eventual removal of the building and conversion into a park. *Id.* at 448-49. In another instance, Appellant Jensen, in written comments to the Project, stated that development of the Project would "destroy community plans to turn the Isthmus into a public park." *Id.* at 570 (comment letter submitted by Robert Jensen); *see also id.* at 598 (Gerald Reilly testimony regarding work to incorporate park plan into City plan), 598-99 (Bob Jacobs' testimony regarding compliance with City parks plans), 599 (The Behind the Badge Foundation testimony that the building should be "demolished instead of refurbished").

On February 22, 2018, after issuance of the Hearing Examiner's Land Use Approval, and while the Hearing Examiner's decision of the Appellants' motions for reconsideration were pending, Appellants'

counsel appeared in front of the Washington State House Capital Budget Committee and requested "$4 million to be matched by the City of Olympia to purchase and remove the Capitol Center Building and open up that corridor." *Id.* at 451. After learning of this request, the City Manager, Steve Hall, was forced to communicate to the City's elected state representatives that the City "has not budgeted any funds in [the] Capital Budget for this acquisition. Nor has the City Council, publically [*sic*] discussed an interest in doing so." *Id.* at 440.

In light of Appellants' many public statements, Appellants cannot deny that their true interest is to delay the Project sufficiently to allow the potential public acquisition of the Respondent's property for development of a public park. The law is clear, however, that seeking to prohibit or delay a project is not an interest intended to be protected by SEPA. *See* RCW 43.21C.010 (purposes of SEPA do not include prohibiting or delaying development that is in compliance with regulations and state law); *see also* WAC 197-11-303 (focusing core purposes of SEPA on clear and concise review process to assess environmental impacts of land use decisions). Similarly, Appellants can point to no such protected interest within City Codes governing review and approval of the Project. *See, e.g.*, OMC 18.02.040 (setting out purposes of City's Development Code); *see also* OMC 18.06.020 (addressing purposes of commercial districts).

Because Appellants' interest in delaying the Project to facilitate public acquisition of the Respondent's Property and its conversion to a

public park is not within the zone of interests protected by either SEPA or the land use codes that interest also fails to confer Appellants' standing under LUPA. RCW 36.70C.060(2)(b).

D. Judgment in Favor of Appellants Would Not Redress the Alleged Prejudice Caused by the Land Use Approval

Finally, Appellants have failed to show that a judgment in their favor would redress the alleged prejudice caused to them by the challenged land use decisions. RCW 36.70C.060(2)(c). Although the Superior Court did not issue findings on the issue of redressability,[7] an appellate court may affirm the trial court's dismissal for lack of standing "on any alternative ground that the record adequately supports." *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008); *see also Fulton v. State Dept. of Social & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012) (same). Because the record demonstrates a judgment in Appellants' favor would not remedy their alleged prejudice, this Court can also affirm the Superior Court's dismissal of Appellants' LUPA petition for lack of standing on that ground.

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[7] Specifically, in its oral ruling, the Superior Court stated:

> I will just say that the Court did address the actual prejudice and the zone of interest, and I believe that the petitioners have not met those two elements. I didn't specifically go to redress of prejudice, but in order to satisfy that requirement, I believe it relates to the first two elements. So I didn't make any specific findings with regard to redress of prejudice, and that was intentional.

Verbatim Report of Proceedings (06/01/2018) at 32.

Appellants made no attempt at the Superior Court to explain how a judgment in their favor would remedy their alleged prejudice, and also fail to do so before this Court. Even if the Court were to reverse the City's land use approval for the Project, the "integrity of the historic view corridor" as it existed prior to 1965 would not be "protect[ed]" as a result of the Court's decision. Br. of Appellants, at 6; CP at 6. Reversal of the City's land use approval would not alter the present-day view corridor, as the proposed Project is no larger than the existing Capitol Center Building, which would remain. *See* CP at 43, 59 (Capitol Center Building was built to its current height of 100 feet in the 1960s); *see also* AR 2087 ("It should not need to be repeated that the Capitol Center Building is a nonconforming building entitled to be 'enlarged or remodeled if such alterations do not contribute to further nonconformity.'"). At no point in the course of this appeal have the Appellants identified any legal authority that would allow the Court to order the partial destruction and/or removal of the existing Capitol Center Building as part of reversing a land use decision for the current Project. However, removal of the existing structure is the only remedy that could provide Appellants' requested relief in light of the building's current height and the continued legal right of the building to remain.[8] Appellants are therefore left with no remedy for their alleged prejudice.

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[8] Indeed, such an order would likely result in an unlawful taking of private property. In the 2011 Hearing Examiner decision, former City Hearing Examiner and current Court of Appeals Judge Thomas Bjorgen addressed this precise issue, pointing out that the development proposal cannot be denied simply because it would make the Capitol Center

Absent the ability for judgment to redress Appellants' alleged prejudice resulting from approval of the Project, Appellants also lack standing under LUPA, and the Court should affirm the Superior Court on that basis. RCW 36.70C.060(2)(c).

E. Request for Attorneys' Fees and Costs on Appeal Pursuant to RCW 4.84.370 and RAP 18.1

Respondent further requests that the Court award it reasonable attorneys' fees and costs incurred on appeal pursuant to RCW 4.84.370 and RAP 18.1. RCW 4.84.370 provides that:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

RCW 4.84.370(1). The provision does not require that a prevailing party prevail on the merits; procedural or jurisdictional decisions also confer

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Building's removal more likely. CP at 374-75 ("[D]enying approval to make removal of the building more likely would run close to the edge of a regulatory taking.").

prevailing party status. *See Habitat Watch v. Skagit Cnty.*, 155 Wn.2d 397, 412-14, 120 P.3d 56 (2005). The Respondent has thus far prevailed on all issues decided before both the Hearing Examiner and Superior Court. Accordingly, if Respondent prevails on this appeal, it is entitled to an award of its reasonable attorneys' fees and costs incurred. *Id.*

CONCLUSION

For all of the above reasons, Respondent respectfully requests that the Court affirm the Superior Court's decision dismissing Appellants' LUPA petition for lack of standing, and also award Respondent its reasonable attorneys' fees and costs for this appeal.

Respectfully submitted this 8th day of November 2018.

PHILLIPS BURGESS PLLC

HEATHER L. BURGESS
WSBA #28477
Attorney for Respondent Views on 5th LLC

DECLARATION OF SERVICE

I, Krista Davis, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a resident of the State of Washington, over the age of 18 years, and not a party to the within entitled cause.

I am employed by the law firm of Phillips Burgess PLLC, whose address is:

724 Columbia Street NW, Suite 320
Olympia, Washington 98501.

On the date indicated above the signature line, I sent out for service upon the below-listed parties at their addresses and in the manners described below, the following document appended hereto:

- Brief of Respondent Views on 5th LLC

Allen T. Miller Law Offices of Allen T. Miller, PLLC 1801 W Bay Dr. NW Suite 205 Olympia, WA 98502	☐	U.S. Mail, postage prepaid
	☐	Hand Delivered via Legal Messenger
	▶	Electronically via email: ***allen@atmlawoffice.com***

Dale Kamerrer Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. P.O. Box 11880 Olympia, WA 98508	☐	U.S. Mail, postage prepaid
	☐	Hand Delivered via Legal Messenger
	▶	Electronically via email: ***dkammerer@lldkb.com***

DATED at Olympia, Washington this 8th day of November, 2018.

Krista Davis

Krista Davis

PHILLIPS BURGESS PLLC

November 08, 2018 - 11:57 AM

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