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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 329071

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

ALLAN AND GINA MARGITAN,

Appellants

v.

**MARK AND JENNIFER HANNA, SPOKANE REGIONAL
HEALTH DISTRICT, SPOKANE REGIONAL HEALTH
DISTRICT BOARD OF DIRECTORS,**

Respondents

RESPONDENTS HANNAS' AMENDED BRIEF

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INTRODUCTION

Allan Margitan (“Margitan”) has four main contentions. First, that the Superior Court should have disqualified Mark and Jennifer Hanna’s (“Hannas”) attorney from representing his clients in Superior Court. Second, that Margitan was indeed injured by the decision of the Spokane Regional Health District Board of Directors (“SRHD”) and therefore he has standing to seek review. Third, the Superior Court should have allowed additional evidence to supplement the agency record regarding Margitan’s injury for standing purposes. And fourth, Margitan claims that the standing issue should have been addressed to the SRHD. Overall, Mr. Margitan misunderstands much.

As to disqualifying the Hannas’ attorney before the Superior Court Margitan does not argue that the attorney would have been called as a

witness at the Summary Judgment hearing but that the attorney was called as a witness at some other hearing, namely, the administrative hearing below. The Hannas' attorney never testified at the administrative hearing nor at the Summary Judgment hearing. As to Margitan's standing to pursue judicial review, his actual claimed injury is a lack of potable water preventing him from occupying his residence but a decision in his favor will not establish that his water is suitable for drinking. Mr. Margitan can today test his water and provide evidence to Spokane County that his water is potable but he refuses for some unfathomable reason. The Superior Court also refused to supplement the agency record because, by statute, there was no basis. And lastly, Margitan confuses standing. Standing issues can only be raised when a Petition for Judicial Review has been filed and not before. He argues that the standing issue should have been raised before the SRHD, which is at best nonsensical.

ARGUMENT

MOTION TO DISQUALIFY ATTORNEY PURSUANT TO RPC 3.7

Margitan claims that the Superior Court should have granted his Motion to Disqualify Hannas' attorney from representing them at the

Summary Judgment hearing before the Superior Court. The factual basis of the Motion to Disqualify was not what would be occurring at the Summary Judgment hearing before the Superior Court but what allegedly occurred at a hearing before the SRHD.

Margitan's Motion to Disqualify should have been denied for two reasons. First, Margitan did not make a Motion to Disqualify at the administrative hearing and second, the Motion to Disqualify was inappropriate before the Superior Court because the Hanna's attorney was not expected to testify at the Summary Judgment Hearing. In any event Margitan's Motion to Disqualify pursuant to RPC 3.7 was stale.

Margitan argues that because the Hannas' attorney was sworn at the administrative hearing he is somehow disqualified from representing the Hannas in Superior Court. Two statutes make this argument superfluous. Margitan did not make a Motion to Disqualify at the hearing before the SRHD and therefore the SRHD did not respond and did not create an "agency action". Margitan has no standing to raise the issue of disqualification, on appeal, of the Hannas' attorney because there was no "agency action" and pursuant to RCW 34.05.530 "A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action." An "agency action" is defined as: "Agency action" means licensing, the implementation or enforcement

of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 34.05.010(3). Further, pursuant to RCW 34.05.554(1) “Issues not raised before the agency may not be raised on appeal,...”. And, most importantly none of the exceptions in RCW 34.05.554 apply. The trial court nor the Court of Appeals may address the issue of a Motion to Disqualify not raised at the administrative level.

If, on the other hand, Margitan contends that a Motion to Disqualify under RPC 3.7 was appropriately before the Superior Court at a Summary Judgment hearing, that argument fails also. RCP 3.7 is the lawyer as witness rule. The rule provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, the disqualification of the lawyer would work substantial hardship on the client or the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate. It is not alleged by Margitan nor it is true that the Hannas’ lawyer was likely to be a necessary witness before the Superior Court at the Summary Judgment hearing because of RCW 34.05.554. RCW 34.05.554 does not allow issues not raised before the administrative agency to be raised on review.

And RCW 34.05.558 limits review by the Superior Court to the agency record. And, of course, there was no Motion to Disqualify made before the administrative body, the SRHD.

Lastly, the Superior Court cannot take additional evidence on the issue of a Motion to Disqualify because Margitan did not preserve that issue by making a motion pursuant to RCW 34.05.562 to add to the agency record and the Superior Court can only add to the agency record if there was an “agency action”, which there was none related to a Motion to Disqualify. A reviewing court cannot pass upon issues not actually decided by administrative agency. *Chaussee v. Snohomish County Council*, 38 Wash.App. 630, 689 P.2d 1084 (1984).

MARGITAN HAS NO STANDING TO SEEK JUDICIAL REVIEW
OF THE DECISION OF THE SPOKANE REGIONAL HEALTH
DISTRICT BOARD OF DIRECTORS

Margitan and the Hannas are neighbors in a short plat in Spokane County. (CP 28-32) Margitan complains about two issues related to the Hannas’ septic drain field installation: first, that the Hannas’ septic drain field is located within the Short Plat easement and second, that the Hannas’ septic drain field is located within ten feet of a pressurized water line. (CP 28-32) The Hannas agree that their drain field is within the Short

Plat easement but have not determined whether the pressurized water line is within ten feet of the drain field. (CP 28-32) Because the Hannas drain field is out of compliance with health regulations, insofar as the easement is concerned, the Hannas have, by contract, agreed with the SRHD to bring the septic drain field into compliance at the conclusion of litigation in Spokane County Superior Court about the legal location of other easements on the Hannas' property. (CP 17-18) The agreement with the SRHD was designed to avoid moving the drain field twice since the placement of easements on the Hannas' property is uncertain.

Judicial review of the decision of the SRHD is governed by the APA. Pursuant to the APA, “[a] person has **standing** to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action.” RCW 34.05.530. A person is “aggrieved or adversely affected” only where all of the following conditions are present: “(1) The agency action has prejudiced or is likely to prejudice that person; (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) 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 agency action.” RCW 34.05.530.

The Washington Supreme Court has noted that the first and third parts

of the APA standing test are collectively referred to as the “injury-in-fact” test. Allan v. Univ. of Wash., 140 Wash.2d 323, 327, 997 P.2d 360 (2000). In order to satisfy the prejudice requirement of the test, a person must allege facts demonstrating that he or she is “ ‘specifically and perceptibly harmed’ ” by the agency decision. Trepanier v. City of Everett, 64 Wash.App. 380, 382–83, 824 P.2d 524 (1992) When a person alleges a *threatened* injury (as Margitan has in this case), as opposed to an existing injury, the person must demonstrate an “immediate, concrete, and specific injury to him or herself.” Trepanier, at 383. ***“If the injury is merely conjectural or hypothetical, there can be no standing.”*** *Id.* In this case, the injury-in-fact test is dispositive with regard to the availability of judicial review of the SRHD’s decision and, accordingly, the Superior Court should have dismiss the Petition for Review.

Margitan only argues is that there is a technical, conjectural and hypothetical injury because of a violation by the Hannas of state septic drain field regulations. He argues that he cannot use the residence on Parcel 3 of the Short Plat because he cannot obtain a Certificate of Occupancy from Spokane County because his water is not potable.

Pursuant to RCW 19.27.097(1) each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence

may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. *Id.* In order to meet the redressability requirement of the injury-in-fact test, Margitan must also demonstrate that it is “ ‘likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’ ” *KS Tacoma Holdings*, 166 Wash.App. at 129, 272 P.3d 876 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). The person challenging an administrative decision bears the burden of establishing his or her standing to contest the decision. *See KS Tacoma Holdings*, 166 Wash.App. at 127, 272 P.3d 876. A favorable decision in favor of Margitan will not establish that the water to his parcel is potable or suitable for drinking (Potable water is suitable for drinking. *Merriam-Webster Dictionary*), as he claims is a requirement from the Spokane County. *P. 12-13 Appellant's Brief*. Margitan had at his disposal the ability to establish the requirement of potable water by testing his water and providing Spokane County with this evidence as called for in RCW 19.27.097(1). Therefore, there is again no injury-in-fact because a favorable decision will not establish that his water is suitable for drinking.

A favorable decision will not eliminate the contract between the

SRHD and the Hannas which stipulates that so long as litigation continues regarding the placement of easements in the Short Plat the Hannas are not required to move the septic drain field. The real issue is potable water to Margitan's property and this litigation will not make the water suitable for drinking. Testing will.

The record only contains some statements by Margitan that he could not obtain a Certificate of Occupancy and from these statements we are to extrapolate that there is an injury to Margitan from lack of use of his residence. A technical violation by the Hannas that their septic system lies within an easement does not establish that the water is not potable. And a possible technical violation that pressurized water line is within 5 five of a septic field does not say that the water is not potable. (CP 28-32)

THE TRIAL COURT DID NOT ERR IN DISALLOWING
ADDITIONAL EVIDENCE SUPPLEMENTING THE
ADMINISTRATIVE RECORD

The Superior Court acted properly in not allowing the new evidence that alleged a Certificate of Occupancy was not being issued because there was no potable water. The Superior Court may receive evidence in addition to that contained in the agency record for judicial

review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record. RCW 34.05.562.

Margitan does not make any arguments that the SRHD was improperly constituted, that the decision making procedure was unlawful or that there were material facts determined involving rule making or brief adjudications that were not required. Therefore, there is no basis to supplement the agency record.

**STANDING TO SEEK JUDICIAL REVIEW CAN ONLY BE
RAISED AFTER A PETITION FOR JUDICIAL REVIEW HAS
BEEN FILED**

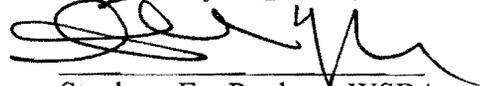
Margitan argues that the Hannas should have raised the standing issue before the SRHD. “Standing” is only related to judicial review. RCW 34.05.530. “Standing” to seek judicial review cannot be raised prior to a Petition for Review. *Id.*

ATTORNEY FEE REQUEST

Respondents Hannas request attorney fees pursuant to RCW 4.84.350. (“Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.”). The Hannas are qualified parties. The Spokane Regional Health District is a agency under RCW 4.84.340 that created an “agency action”. Because the Hannas should prevail on appeal the Court should award attorney fees and other expenses related to the Superior Court action and the proceedings before the Court of Appeals.

Dated this 24TH day of March 2015.

Respectfully submitted,



Stanley E. Perdue, WSBA
#10922
Attorney for Hannas

On the 24th day of March, 2015, I delivered by via electronic mail, a true copy of the following document: **RESPONDENTS HANNAS AMENDED BRIEF AND MOTION TO AMEND BRIEF** addressed to the following:

Michelle K. Fossum 201 W. North River Drive Suite 460 Spokane, Washington 99201	Via Electronic Mail: mfossum@fossumlegal.com
Allan Margitan P.O. Box 328 Nine Mile Fall, Washington 99026	Via Electronic Mail: MARGINEL@aol.com

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

DATED: March 24, 2015, at Galisteo, New Mexico.


Stanley Perdue