NO. 102770-2

SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS, DIVISION II: No. 57834-4)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY
Case No. 21-2-00556-14
The Honorable David Edwards

City of Aberdeen, RESPONDENT,

v.

C DAVIS, APPELLANT,

PROPOSED AMENDED PETITION FOR REVIEW

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Identity of Petitioner

C Davis is the appellant and property owner of 1119 e market street Aberdeen, Washington. And is filing this petition, Pro Se.

Citation to Court of Appeals Decision

Review is sought for the unpublished decision made by the Court of Appeals Division II on January, 3rd, 2024.The case number for the COA II is 57834-4, which was filed January 26th, 2023.

I. Introduction

When the means of accessing due process become obscured as they have with LUPA, a reasonable person doing reasonable things cannot expect fair justice.

It should be construed by the court that whether the caption to the superior court read “Notice of Appeal” or “Writ of certiorari”, the appellant's intent was an effort to seek justice against a blatant violation of due process and an unconstitutional taking.

II. ASSIGNMENTS OF ERROR

I. THE COURT FAILED TO UPHOLD DEFENDANT'S RIGHT OF PROCEDURAL DUE PROCESS. NEGLECTING DEFENDANT'S RIGHT OF NOTICE, RIGHT TO BE HEARED&THE CITY'S LACK OF JURISDICTION.

II. THE COURT FAILED TO UPHOLD THE DEFENDANT'S RIGHT OF SUBSTANTIVE DUE PROCESS. DENYING A PERSON THEIR PROPERTY, WHICH IS A FUNDAMENTAL RIGHT.

III. THE COURT FAILED TO RULE THAT DEMOLITION OF THE HOUSE CONSTITUTES AN UNCONSTITUTIONAL TAKING, BY FAILING THE HARD LOOK REQUIREMENT, BEING ARBITRARY&CAPRICIOUS,VENDICTIVE ACTION, AND IGNORING LESS RESTRICTIVE ALTERNATIVES.

IV. THE COURT FAILED TO CORRECTLY RULE THAT THE LEGISLATURE IN LUPA DOES NOT HAVE THE AUTHORITY TO OVERRULE THE COURT'S CONSTITUTIONAL MANDATE TO BE THE VENUE FOR ALL REAL ESTATE MATTERS OVER $3000, AND ABATEMENTS.

V. THE COURT FAILED TO RECOGNIZE THAT IF A PARTY HAS NOT FILED A LAND USE REQUEST WITH ANY JUSIDSICTION, THAT CODE ENFORCEMENT ACTIONS ARE NOT LAND USE DETERMINATIONS, LUPA RESTRICTIONS MUST NOT APPLY.

VI. THE COURT FAILED TO RECOGNIZE THAT DISMISSAL ON THE MATTER OF LUPA TIMELINESS MUST OCCURE AT THE FIRST HEARING.

VII. THE COURT FAILED TO APPLY THE APPEARANCE OF FAIRNESS AS TO THE FACT THAT THE PARTIES INITIATING THE ACTION FOR DEMOLITION AND THE APPEAL OF SAID ACTIONS WERE ESSENTIALY THE SAME PEOPLE.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Prior to July 21st, 2021 the City commenced an administrative action against the appellant, without notice(service). Is the City required to serve a property owner&use reasonable due diligence to affect proper service?
   When taking a person's property, does the City need
   to use in person service? Must they serve the person by the name on the county assessor records?

2. At the July 21st, 2021 hearing, the City issued an
   order of demolition of appellant's property. Can the City order the demolition of appellant's property without notice, hearing or cause?
   Can the City enter the appellant's property without a warrant?
   Is a substantial property interest subject to notice and the opportunity
   to be heard and a hard look analysis?

3. The City's decision to demolish appellant's property is an unconstitutional taking**.** Does the city's action constitute an arbitrary&capricious action by failing to use a hard look analysis? Does the demolition of the
   owner's property destroy one or more of the fundamental attributes of ownership? Does demolition reduce the value of the property to the point of total loss? Is the action a retaliatory action?
   Is demolition the least restrictive action?

4. LUPA restricts the actions available to a defendant, including non-typical

timeliness and limits superior court's ability to provide appellate review/relief. Could a reasonable person know that there was a 21-day limit? Does LUPA unfairly limit the defendant's right to review by the courts by declaring finality?

5. LUPA was adopted to promoting finality, consistency,predictability in land use determinations. Was LUPA's intent to be used to limit a defendant's rights in basic code enforcement actions?
6. LUPA provides a wavier for the 21-day timeliness, being that it must be raised at the first hearing. Did the city lose the opportunity to dismiss for lack of LUPA timeliness by not raising it in September, 2022?
7. Aberdeen's building,planning and code enforcement departments,essentially comprising the same people. Members were both part of the decision to issue the order to demolish and also on the commission of appeal.Does this show a clear conflict of interest and violate the Appearance of Fairness?

III. STATEMENT OF THE CASE

The city began an administrative action against appellant prior to July 21st, 2021. Appellant wasn't aware of these actions, due to lack of service/improper service.

After July 21st, 2021, a new employee at appellant's Private Mail Box placed a correspondence from the City, with wrong name/address, into appellant's mail box.

This correspondence stated that the City ordered the demolition of the appellant's property.

Appellant filed an administrative appeal and the city scheduled a hearing to the city Board of Appeals for September 21st, 2021.

At the hearing on September 21st, 2021, the city focused on a remodel that happened circa 2000. They made it clear that the this action was vindictive&retaliatory for the City of Aberdeen not succeeding in seizing appellant's property in the early 2000's. The ***administrative*** Appeals Board voted to demolish appellant's property.

October 20th, 2021 appellant filed a notice of appeal with the Grays Harbor Superior Court.

November 18th , 2021 appellant filed his Opening Brief.

A hearing was scheduled for September 9th, 2022, but appellant was not served with notice to appear. The docket shows a NOTICE OF HEARING service date for August 24th, 2022, but it was sent to a USPS Post Office box, not to the address of record for the appellant.

The hearing was held on September 12th, 2022 In front of Judge David

Mistachkin, to consider "the court's motion to dismiss for want of prosecution." (CP at 28). Appellant was not in appearance due to lack of service. The Judge made an order to dismiss.

The order to dismiss was dated September 21st, 2022. Appellant became aware of the hearing and the order to dismiss when he received a communication from the counsel for the city, which included a document labeled “Original” order to dismiss(unsigned).

Counsel for the City mistakenly sent documents intended for the court, to the appellant. Appellant contacted the court immediately to ascertain the case status.

The docket shows that the hearing mailed notice was returned as misaddressed on September 26th, 2022.

Finding the order to dismiss, appellant filed a motion to reconsider with the court on October 14th, 2022.

A hearing was scheduled for December 2nd, 2023 in front of Judge David L. Mistachkin. Appellant claied he had not been served. The judge noticed that the address was incorrect and granted the reconsideration and vacated the Order to Dismiss, noting that the September 12th, 2022 hearing notice was returned as undeliverable. The judge then set a hearing for January 9, 2023, to consider Davis' appeal (CP at 36).

Judge Mistachkin signed the Order to vacate the dismissal, and ordered a trial setting schedule be submitted (by January 12th, 2023), on December 8th, 2022.

December 29th, 2022, the City filed a Motion to dismiss, but this time they changed the name of the underlying action from an administrative procedure

to a LUPA and claimed that the timeliness for an appeal should have been 21 days.

This was served by mail, but an additional document was sent by email. This additional document was a “Stipulation of LUPA Action”.

The hearing happened on January 9th, 2023, in front of Judge David L. Edwards. Note that the Judge that made the original two decision was replaced by a different judge. The City claimed this was a LUPA case&should be dismissed for lack of timeliness.

On January 9th, 2023 Judge David L. Edwards granted the order to dismiss for failure of timely appeal, accepting it to be a LUPA action.

On January 12th, 2023, appellant filed a motion to vacate the motion to dismiss.

January 13th, 2023, Judge David L. Edwards, made an Order Denying Motion Petition to vacate, without comment.

January 23rd, 2023 appellant filed a notice of appeal to the Court of Appeals, District II.

On October 16th, 2023 appellant requested an opportunity to make oral arguments.

December 18th, 2023 appellant filed ADDITIONAL AUTHORITIES.

IV. ARGUEMENT

(I)

The 14th amendment of the United States Constitution states:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **SEE APENDIX-9**.

The government must follow fair procedures. Thus,it is not always enough for the government just to act in accordance with whatever law there may happen to be.

The United States and Washington State Constitutions guarantee more than simple fair process, Collins v. Harker Heights, 503 U.S. 115 (1992), they also provide for fundamental rights and liberty interests that are "deeply rooted in this nation's history and tradition".

Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting.

It is established in the Washington State Constitution, *State Constitution Art. 4 § 6 a*nd RCW 02.08.020 that: SEE **APPENDIX-5**.

The Court of Appeals unreasonably failed to consider procedural due process arguments, see **APPENDIX-I**. Even calling the appellant's arguments for due process "irrelevant". Additionally the city claims to have entered the subject property, yet there is no record of a warrant being sought or issued, and no notice

to property owner. (**APPENDIX-I p.1** ; “following an inspection report”).

Furthermore, **Goldberg.v.Kelly,397U.S.254(1970)**, affirms that an individual's interest in these benefits [property] greatly outweighs the interest of the government in summary adjudication.

Also, they provide for protection of fundamental rights&liberty interests, which are “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Washington.v.Glucksberg, 521U.S.702,720-21,117 S.Ct.2258,138L.Ed. 2D 772 (1997).

In addition, Willner.v.Committee on Character,373U.S.96(1963) held that “Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.”

In Jones.v.Flowers,547U.S.220,235(2006), the state’s certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked unclaimed; the state should have taken additional reasonable steps to notify the property owner...

SEE APPENDIX-6.

In Washington State the state is required to exercise proper due diligence in service, **RCW 04.28.080,(17),See APPENDIX-4**.

From Armstrong.v.Manzo we have:

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane.v.Central Hanover Tr.Co.,339U.S.306,@313, Armstrong.v.Manzo,380U.S.545(1965).

And:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken.v.Meyer,311U.S.457; Grannis.v.Ordean,234U.S.385;Priest.v.Las Vegas,232U.S.604;Roller.v.Holly,176U.S. 398." Id.@314.

From Manzo:

“Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. See Jones.v.Willson, 285S.W 2d877;Ex parte Payne,301S.W.2d194.

“...It is clearly established that no person can be deprived of property rights by a decree in a case in which he neither appeared nor was served or effectively made a party.” Rees.v.City of Watertown,86U.S.(19 Wall.)107(1874); Coe.v.Armour Fertilizer Works,237U.S.413,423(1915); Griffin.v.Griffin,327U.S.220(1946).

Appellant is well know to the City of Aberdeen, the building and planning department and other departments with in the city. On or around 2010, appellant provided Bill Sidor, building inspector, with his contact information, email and phone number and asked to be contacted if there were any problems. For Sidor to not exercise the information in his possession is a clear breach of diligence.

On or around 2010, the Aberdeen Police department contacted appellant

regarding vandalism at one of his properties. In addition, on April 15th, 2021 appellant contacted Renee Reynolds of the City of Aberdeen's building department, on an unrelated matter.

Appellant's name is clearly shown in the county property records, even if the city had served appellant improperly to a mailbox, appellant would have received notice. But the city did not use county property record information. (CP 5). (CP 28).

Furthermore, if the city had chosen to serve appellant's Private Mail Box (PMB) address in person they would have likely become aware that they were using the wrong name for the appellant. In this type of matter, in person service would be the minimum standard to show due diligence.

Without proper service the city's planning department doesn't even have personal jurisdiction in this matter.

There is overwhelming case law that shows time after time the courts have affirmed the importance of notice and the right to be heard. Neither notice nor the right to be heard was afforded in this matter with the fault being firmly on the shoulders of the city. Either by carelessness or by intent appellant was not served.

In **conclusion**, had the City of Aberdeen done their due diligence and executed proper service, appellant would have been able to address the issues at hand. But, as they failed in this respect the appellant was robbed of his due process rights. The court should rule that due process and statutory procedures were not adhered to.

(II)

Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property.(Erwin Chemerinsky).

Property rights has application in both procedural and substantive due process. Since the right to property occurs in the bill of rights it is a fundamental right and as such requires a strict scrutiny analysis. To pass the strict scrutiny test, a law must be narrowly tailored to serve a compelling government interest.

The Court of Appeals unreasonably failed to consider substantive due process arguments, see **APPENDIX-I**.

“Following Carolene Products, the U.S. Supreme Court has determined that fundamental rights protected by substantive due process are those deeply rooted in U.S. history and tradition..” (Cornell Law). United States.v.Carolene Products Co.,304U.S.144(1938).

Here we'll look at whether the City of Aberdeen would even have any justification for making an order to demolish a property without reasonable cause.

Does an order to demolish a property serve a compelling government interest? It might, but only if the property posed an eminent threat to public heath and safety. This is not the case with the appellant's property. Even if there were some deferred maintenance demolition is extreme and not reasonable. The subject's property does not pose any threat to public health and safety. This would have been proven

at trial, had there been a trial allowed.

Formal and impartial appraisal along with structural survey would demonstrate that the property is sound. The construction quality of the house is above all of the surrounding houses. It is one of only 3 houses in that area with a poured concrete foundation.

Ordering a demolition of appellant's property does not further a compelling government interest and is not narrowly tailored.

(III)

At issue is the taking of property without due process of law. By forcing the demolition of appellant's property a real taking will occur. The 5th amendment, bound to the states by the 14th amendment of the United States, states, “no person shall be denied life, liberty or property without due process of law.”

The Court of Appeals unreasonably failed to consider the unconstitutional takings arguments,(see **APPENDIX-I** p.3footnote).

There are three types of takings:physical, regulatory and partial regulatory. See,Penn Central Transportation Co..v. New York City,438U.S.104(1978).

Takings, see **APPENDIX-7**.

The appellant asserts that the city is committing a total regulatory **taking**, based on the calculation of the value left to the owner after demolition.

When a statute denies a property owner all value of his property we have a total taking, “denial of all economic use is a Per Se taking” and

“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good...he has suffered a taking.” , Scalia. See Lucas.v.South Carolina Coastal Council,505U.S.1003(1992). Also see Loretto.v. Teleprompter Manhattan CATV Corp.,458U.S.419(1982).

Owner has a vested right in accordance with the vested rights doctrine. “In Washington State, the vested rights doctrine refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." See Noble Manor.v. Pierce County,133Wn.2d269,133Wash.2d269,943P.2d1378(Wash.1997) .”

On or about 2001, appellant gained a permit from the City to remodel said property. This gave appellant the right to remodel and keep the property in the same use,this use has not changed.

The City has interfered with the property owner's economic interest in two ways. First, destruction of the building would cause a total loss and second, the imposition of the order makes the property unsalable.

Penn Central gives us a three part balancing test to determine the effect of a partial and a total **taking**:

1) What is the nature of the government action?
2) What are the investment backed expectations of the owner?
3) What is the level of diminished value: loss to owner, Fair Market Value (FMV) – Remaining value?

1. The City of Aberdeen stated that the purpose of ordering the demolition was due to the fact that in 2001 the appellant fought off an attempt to take the property. Most of the commissioners on the administrative appeal board expressed anger&animus about not taking the property in 2001.The commission actions were clearly retaliatory.

2. The investment expectation of the appellant was to turn the property into a rental and eventually sell it as a retirement plan.

3. The level of diminished value is based on FMV.

   The current FMV is $225,000 based on the property's current offers from online listing. The value of the property is based on the building, a 2700 sq ft 3 story duplex. Demolition would cost upwards of $50,000

leaving a $20,000 lot. Leaving a diminished value,

$225,000 + $50,000, $275,000, the value would be diminished

by that much. The owner would be left with a value of negative $55,000.

This exceeds a total loss.

Appellant has been singled out by the City, as the subject property is not significantly different than other properties in the immediate vicinity. See again, Lucas.v.South Carolina Coastal Council, 505U.S.1003(1992).

Lucas has an exception for a nuisance, but in the dissent from Lucas it is stated that there is no history and tradition in the fundamental concept for an exemption. Appellant's property does not meet the standard of a nuisance. The property is not a health,safety or fire hazard. Leppo.v.City of Petaluma, 20Cal.App.3d 711,97Cal.Rptr.840(Cal.Ct.App.1971) .

The city's action was arbitrary and capricious, (abuse of discretion,and otherwise not in accordance with law), and retaliatory.

When an agency/city takes an action, they are obligated to do a “hard look review”. This means that they must document and make available all the data that they considered to making their decision.

A hard look is more than looking at a few figures in a book. It is an intensive analysis. The City of Aberdeen admits that they just made up a few numbers, such as property values and repair costs to make their decision to demolish. The City didn't present SUBSTANTIAL EVIDENCE nor did they show any work in the matter, thus they failed to do a HARD LOOK analysis. See Motor Vehicle Mfrs. Ass'n.v.State Farm Mutual Automobile Ins.Co., 463U.S.29(1983).

Their hostile comments during the appeals commission hearing made clear that they had a grudge against the appellant.

The City also failed to take a LESS RESTRICTIVE action. If some repairs were in order, such a new roof, the city should have made an order for repair, rather than a demolition, which has been shown to be a total taking.

In conclusion, the order to demolish constitutes a total deprivation therefore it is a total regulatory taking. It is retaliatory, not a cost effective option and fails to afford appellant **LESS RESTRICTIVE** alternatives.

(IV)

LUPA imposes restrictions on the court, specifically with regard to timeliness. The act requires a 21 day filing limit, but that disadvantages the defendant. A 30 day appeal is more common, and is also listed on the court's website as the more usual timeliness for filing an appeal.

While there is ample case history of the 21 day timeliness being held, in every case the there had been a land use determination made at the request of a moving party.

The appellant had no knowledge, nor is there any reasonable expectation that he should have knowledge that his appeal was a land use matter. After the administrative appeal, the City made no statement that this was a land use matter nor a land use determination. It was made clear by the city that this was a code enforcement matter.

“[A]dministrative orders are ordinarily reviewable when ‘they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.’ ” State Dep't of Ecology.v. City of Kirkland, 84Wash.2d25,30,523P.2d1181(1974)(quoting Chicago &Southern Air Lines, Inc..v.Waterman S.S. Corp.,333U.S.103,113,68 S.Ct.431,92L.Ed.568(1948)).

“Never has expediency in judicial matters been intended to unduly burden the defendant's rights of due process over that of the plaintiff.” (citation omitted).

Yet this is precisely what happened. The first time the appellant heard that the case was to be declared a LUPA matter was December 9th, 2023. (CP 38,11-12),

(CP 39, 1-7).

How could the appellant reasonably be expected to read the mind of the city as to the application of LUPA when no warning was given? It is completely reasonable that appellant had an expectation of a 30 day time to file his appeal. Appellant did file in 29 days.

The superior court should not be restrained in hearing the case when all reasonable efforts were made to comply with the rules. Furthermore, by the Washington State Constitution, the Superior court has jurisdiction is such matters. (ARTICLE IV SECTION 6).

The superior court being restrained by the LUPA statute, is a violation of the Washington State Constitution.

The court should rule that the LUPA statute limits the court, in violation of the Constitution and rule that part of the statute is unconstitutional. Also the court should rule that the appellant in this matter did all that was reasonable to comply with all applicable rules and vacate the superior courts dismissal of appellant's appeal.

(V)

The Land Use Petition Act(LUPA,RCW 36.70C) was adopted in 1995, with the intent of promoting finality consistency, and predictability in Land Use determinations. As the Supreme Court has stated. See **APPENDIX-2**.

The act can and often is misapplied to strip property owners of their rights by favoring plaintiffs (government), over defendants.

The intent of the act was to address land use petitions, I.E. application to change how a property was used. Applying this to simple code enforcement actions is a gross misuse of the act. When the act is applied against a property owner, who has not made any application for a land use change the structure of the act serves to shorten his appeal time.

"RCW 36.70C.040 (1)
Proceedings for review under this chapter shall be commenced by *filing a land use petition in superior court*."

The appellant did NOT file a land use petition. The appellant did file a NOTICE OF APPEAL of an administrative action to the superior court. Appellant had no reasonable means of knowing there was such a thing as LUPA or that the action had anything to do with LUPA. Since LUPA starts with filing a LUPA PETITION with the Superior Court, the matter here is not a LUPA action.

LUPA imposes a 21-day appeal timing, which if you have applied for a permit or rezoning you might benefit from. But if a property owner has initiated no action, AND received no notice, how can they reasonably be expect to know there is a

21-day timeliness? Do to lack of notice that an action is taking place, the property owner may lose his access to the courts when seeking due process.

Additionally LUPA precludes the review of a land use decision by the superior court, which on it's face is in contradiction to the Washington State Constitution, Article IV, Section 6.

Since the superior court has subject matter jurisdiction per the constitution, it should not be be restrained as to ruling on matters, especially where fundamental rights are at stake.

(VI)

Timeliness for an appeal is stated on the Washington Court's website is generally 30 days. This creates a reasonable expectation by a litigant that barring some special circumstance the appropriate timeliness in 30 days.

If a party is involved in a LUPA action it is incumbent for the initial moving party to be clear that there is an atypical appeal timeliness.

A person cannot protect their RIGHT if they don't know that they have that RIGHT. Miranda.v.Arizona,384U.S.436(1966).

Bearing in mind the outcome of Miranda, the court should rule that for any jurisdiction to use LUPA or use any action that has an atypical appeal timing, that jurisdiction must be required to inform the defendant of the action and the timeliness.

(**Appendix-1 p.8**) "...after the superior court called for Davis to appear." but again they did not summons appellant to appear, as there was **no service**. Appellant repeatedly called the court for status and receive no status. After the September hearing there was a December hearing, where the city made no motion to dismiss on LUPA grounds.

(Appendix-1 p8-9) COA claims that the September 21st, 2022, hearing was not the first hearing because it wasn't noted by appellant, that the second hearing on December, 2022, was not the the first hearing because it was noted by appellant, yet the third hearing in January 9th, 2023 WAS the first hearing, even though it was not noted by appellant.

(**Appendix-l p.2.par.1**) "the superior court ultimately dismissed the appeal as

untimely under the [LUPA]."

This is a factually false statement. The first hearing of the appeal was dismissed for lack of prosecution due to not being docketed, not for untimeliness under LUPA.

(**Appendix-I p.3.1**) " following a city inspection and months of administrative proceeding..."

The city had no evidence of such proceedings. The city made a claim that they had been inside the house but there exists no warrant supporting that. The City presented no evidence of months of administrative proceedings, nor did they make any claim of doing so in the record. Without evidence, the city, again, failed the "hard look" analysis.

(**Appendix-I p.3.4**) The appeal was dismissed for "want of prosecution" not for LUPA timeliness. Appellant was not property served. Appellant did not "fail to appear", since appellant was not served.

By the LUPA statute, if the City wanted to challenge the timeliness of the appeal, they must do so at the first hearing. This would have been on July 21st, 2022, they did not raise the issue of timeliness at the second hearing on December 9th, 2022, they failed to raise timeliness until the third hearing, as such they waived their right to challenge the appeal on the basis of timeliness.

Appellant argues that by CR 40 a judge that makes a decision in a case before him, becomes assigned to the case. Judge Mistachkin ruled in a dismissal in September, 2022 and again on the motion to vacate in December of 2022. It Is further noted that the judge never signed the motion to dismiss in September, which on it's face would suggest that that dismissal is invalid.

(See **Appendix-1 p.9 last para**).

Since the city failed to comply with the statute, the court should vacate the older to dismiss on timeliness.

(VII)

Washington State has a doctrine, know as the appearance of fairness. “The Appearance of Fairness Doctrine is a rule of law requiring government decision-makers to conduct non-court hearings and proceedings in a way that is fair and unbiased in both appearance and fact.”

RCW 42.36.010,applies to:SEE **APPENDIX**-8

This makes the doctrine directly applicable to the City of Aberdeen, planning, building, code enforcement and appeals commission.

“...we hold the zoning ordinance must be set aside for the additional reason that consideration and approval of the matter was vitiated by participation of commission members whose other interests appeared to be capable of substantially influencing their judgment.” Save.v.Bothell,89Wn.2D862, 89Wash.2d 862,576P.2d401(Wash.1978). SEE **APPENDIX-10**.

“The question to be asked is this: Would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? If answered in the affirmative, such deliberations, and any course of conduct reached thereon, should be voided. SWIFT.v.Island County,SUPRA@361. We find that a disinterested observer would be justified in thinking partiality might exist.”

As such in this case where the department bring the complaints, ie building, planning and code enforcement, all being essentially the same people and those same people also sitting on the appeals commission, a disinterested party very likely would find that partiality does exist.

“In NARROWSVIEW PRESERVATION Ass'n.v.Tacoma, 84Wn.2d416,420,526P.2d897(1974) we held that participation of a planning commission member whose employer has an interest in the outcome is a violation of the appearance of fairness which vitiates the validity of the zoning ordinance. SEE Also Chicago,M.,ST. P. & P.R.R..v.State Human Rights COMM'N, 87Wn.2d802,557P.2d307(1976). [In] order to insure that an appearance of impartiality exists there must be a **separation of the people making a decision with those who are hearing the appeal** of that decision.

SAVE.v.Bothell found that having a person(s) that had both a hand in the decision&also stood to gain from that decision gave the appearance of lack of fairness.

(**Appendix-I p.3.2**) “on September 21,2021,the board denied Davis' appeal.” These were essentially the same people that made the original decision.

There is a clear violation of the appearance of fairness doctrine.

V. CONCLUSION

Considering the facts&case law appellant asks the court to: Vacate order to dismiss appeal,order to demolish,allow the appellant to make oral arguments and require jurisdictions to have a Miranda style warning for making litigants aware of LUPA actions.

Declaration

Pursuant to RAP 18.17, I hereby certify there are 4996 words in this brief as indicated by the word processing program used in preparation.

Dated this 15th day of March, 2024.

___/ss/_____
C Davis, Pro Se, Defendant

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DECLARATION OF SERVICE

I declare that I sent for service a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 15th day of March, 2024 at Olympia, Washington.

___**/ss/**_____
C Davis, Appellant

C DAVIS - FILING PRO SE

March 15, 2024 - 4:28 PM

Transmittal Information

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

C DAVIS, pro se, Appellant, v. CITY OF ABERDEEN, a municipal corp., Respondent.	No. 57834-4-II UNPUBLISHED OPINION

PRICE, J. — C Davis owns property in Aberdeen. Following an inspection report, which concluded a structure on his property was unfit for human habitation, a building official for the city of Aberdeen (City) ordered its demolition. Davis appealed the building official's order to the City's Building Code Commission Board of Appeals (Board). The Board rejected the appeal (Board's Decision). Davis appealed the Board's Decision to the superior court 29 days later. After a series of delays, the superior court ultimately dismissed the appeal as untimely under the Land Use Petition Act (LUPA).[1]

Davis appeals. He makes numerous arguments that his due process rights were violated. But he essentially contends that his appeal of the Board's Decision was timely because LUPA does not apply. Or if it does apply, the City's timeliness argument was waived.

We reject Davis' arguments and affirm.

[1] Ch. 36.70C RCW.

FACTS

In July 2021, following a City inspection and months of administrative proceedings, the City's building official issued a "Notice and Order," which ordered that Davis' premises be demolished. The Notice and Order stated that any appeal of the building official's decision would need to be filed within 30 days.

Davis proceeded pro se. Although not in our record, Davis apparently timely appealed the Notice and Order to the Board within the 30-day deadline. On September 21, 2021, the Board denied Davis' appeal.[2]

On October 20, 2021, 29 days after the Board's Decision, Davis filed a notice of appeal with the superior court. No initial hearing was set.

Nearly a year later, the superior court sent a "Notice of Hearing" to the parties, notifying them that a hearing had been set for September 12, 2022, to consider "the court's motion to dismiss appeal for failure to timely file a notice of appeal and/or for want of prosecution." Clerk's Papers (CP) at 28 (capitalization omitted). After Davis failed to appear at the hearing, the superior court dismissed Davis' appeal for want of prosecution.[3]

Davis filed a motion for reconsideration, which alleged that he did not receive notice of the September 2022 hearing. In December 2022, the superior court granted Davis' motion because the notice of the September 2022 hearing was returned as undeliverable. The superior court then

[2] The Board's Decision is not included in our record; however, the parties do not contest this fact.

[3] The superior court's September order dismissing Davis' appeal for want of prosecution is not in our record; however, our record contains an undated and unsigned proposed order. The parties do not dispute the superior court dismissed Davis' appeal in September 2022.

set a hearing for January 9, 2023, to consider Davis' appeal "including . . . any motions to dismiss." CP at 36. Thereafter, the City filed a motion to dismiss Davis' appeal as untimely under LUPA.

At the January 9 hearing, the superior court granted the City's motion to dismiss. Davis filed a motion to vacate the superior court's dismissal of his appeal. Treating it as a motion for reconsideration, the superior court, with a different judicial officer, denied the motion on January 13, 2023.

Davis appeals.

ANALYSIS

Davis argues that the superior court erred by dismissing his appeal as untimely and, even if it was untimely, the City waived the issue by failing to raise it at an initial hearing. He further argues that he was improperly served with notice of an earlier hearing and deprived of due process because a different judicial officer presided over his motion to vacate.[4]

We reject each argument, beginning with the threshold question of the timeliness of Davis' appeal of the Board's Decision.

I. TIMELINESS OF DAVIS' APPEAL OF THE BOARD'S DECISION

Davis argues that the superior court erred by deciding his appeal was governed by LUPA. According to Davis, because general administrative deadlines applied, not LUPA, his appeal was timely. He claims that he was deprived of due process as a result. We disagree.

[4] Davis also makes a passing reference to a potential claim under the takings clause of the Fifth Amendment. Br. of Appellant at 9 ("[T]he City of Aberdeen aims to undertake an unjustified taking of real property."). If Davis intended to make such an argument, he failed to adequately support it with citations to the record or authority. As such, we will not further consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

A. LEGAL PRINCIPLES

When an appellate court reviews an administrative decision, it stands in the same place as the superior court. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005). Statutory interpretation is a question of law that we review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). We also review due process challenges de novo. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

LUPA provides the exclusive means of judicial review of land use decisions. RCW 36.70C.030(1). The purpose of LUPA is to

> reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, *expedited* appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and *timely* judicial review.

RCW 36.70C.010 (emphasis added).

LUPA defines a land use decision broadly:

> [A] final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
>
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;
>
> (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
>
> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, *maintenance*, or *use of real property*. . . .

RCW 36.70C.020(2) (emphasis added).

Consistent with the purpose of LUPA to provide "expedited" procedures, the deadlines are short. An appeal (the petition) must be filed within 21 days of a land use decision. RCW 36.70C.040(3); *Habitat Watch*, 155 Wn.2d at 406, 409. "This 21-day statute of limitations is strict; the doctrine of substantial compliance does not apply." *Vogel v. City of Richland*, 161 Wn. App. 770, 777, 255 P.3d 805 (2011). Unless the land use petition is timely filed with the court and timely served, it is barred and unreviewable. RCW 36.70C.040(2); *Habitat Watch*, 155 Wn.2d at 406-07.

LUPA's 21-day deadline also applies to related due process claims. *Asche v. Bloomquist*, 132 Wn. App. 784, 798-99, 133 P.3d 475 (2006) (holding that the petitioners' due process challenge failed where they failed to appeal within 21 days of the building permit's issuance even when they complained of lack of notice under the procedural due process clause), *review denied*, 159 Wn.2d 1005 (2007); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 383, 223 P.3d 1172 (2009) ("LUPA time limits also apply to due process claims.").

Concurrently, the Aberdeen Municipal Code includes two different deadlines for appeal depending on what decision is being appealed. When a person is appealing the initial order of the *building official* to the Board, the person must file their appeal within 30 days after being served with the building official's order. AMC 15.50.080. However, if the person wants to appeal the decision of the Board to superior court, the deadline is shorter. Consistent with, and citing to, LUPA, the Aberdeen Municipal Code provides that anyone appealing a decision of the Board must do so within 21 days. AMC 15.50.110 ("Any person who has standing to file a land use petition in the Superior Court . . . may file such a petition within twenty-one (21) days of issuance of the

Board's decision . . . as provided by Section 705 of Chapter 347 of the Laws of 1995 [(the LUPA session law)].").

B. APPLICATION

Davis argues that the superior court erred by dismissing his appeal as untimely and, accordingly, depriving him of due process. He appears to argue that because the City building official's "Notice and Order" stated that he had 30 days to appeal, instead of 21, the City foreclosed the application of LUPA and, accordingly, his appeal was not untimely. Davis is incorrect.

It is undisputed that Davis appealed the Board's Decision 29 days after it was issued. Therefore, if LUPA and its 21-day deadline applied, then Davis' appeal was untimely. RCW 36.70C.040(2), (3); *Habitat Watch*, 155 Wn.2d at 406, 409.

LUPA applied. The Aberdeen Municipal Code states that the Board's decision "shall be the final decision of the City . . . ." AMC 15.50.090(E). Consequently, the Board's Decision constituted a "land use decision" under LUPA because it was a final determination by the body "with the highest level of authority to make the determination" on the "enforcement . . . of ordinances regulating" either "the . . . maintenance, or use of real property." *See* RCW 36.70C.020(2). And, as noted above, the Aberdeen Municipal Code also recognizes that the Board's decisions are appealable land use decisions under LUPA. *See* AMC 15.50.110.

Davis offers no persuasive argument to the contrary. As a result, any appeal of the Board's Decision was subject to the 21-day deadline for appeal under LUPA. RCW 36.70C.040(2), (3).

Because Davis filed his appeal of the Board's Decision more than 21 days after it was issued, Davis' appeal was untimely.[5]

Davis' belief that he should receive 30 days, not 21 days, to appeal is potentially rooted in a misunderstanding. As noted above, an appeal of the *building official's* decision is entitled to a 30-day deadline, but *not* an appeal of the *Board's* Decision. *See* AMC 15.50.080. In other words, while Davis had 30 days to appeal the building official's "Notice and Order" to demolish his property, he only had 21 days to appeal the Board's Decision. RCW 36.70C.040; AMC 15.50.080; AMC 15.50.110. Davis failed to do so. Because Davis did not timely appeal the Board's Decision within 21 days, his related due process claim also necessarily fails. *Asche*, 132 Wn. App. at 798-99.

Therefore, we hold that Davis' appeal of the Board's Decision was untimely under LUPA.

II. WAIVER OF THE TIMELINESS ISSUE

Davis argues that even if LUPA applies, the City waived its timeliness argument by not raising it before the January 2023 hearing. According to Davis, the City was required to raise the issue at the September 2022 hearing, which he characterizes as the "initial hearing" as opposed to the January 2023 hearing. Br. of Appellant at 16. We disagree.

LUPA requires that the petitioner note an "initial hearing." RCW 36.70C.080. If a defense of untimely filing is not raised at this hearing, the defense is waived. *Id.* The statute reads:

[5] Davis also claims that the City changed the classification of his claim from an "administrative procedure" to a LUPA petition and, in so doing, violated the doctrine of equitable estoppel. Br. of Appellant at 14. This claim is unpersuasive. By statute, the appeal of a land use decision is automatically governed by LUPA. RCW 36.70C.020(2), .040(2), (3); *see also* AMC 15.50.110. As a result, the City could not have changed the classification of Davis' case because it did not have the power to do so. Therefore, Davis' equitable estoppel claim fails.

> (1) [T]he petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties . . . .
>
> (2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing . . . .
>
> (3) The defenses of lack of standing, *untimely filing* or service of the petition . . . are waived if not raised by timely motion noted to be heard at *the initial hearing* . . . .

RCW 36.70C.080 (emphasis added).

Thus, in order for Davis to prevail on his waiver argument, the September 2022 hearing would have to have been the "initial hearing." It wasn't.

Here, despite being the petitioner, Davis did not note an initial hearing within 50 days of filing his petition, as the statute requires. In fact, nothing in our record shows that Davis noted an initial hearing at any point. Indeed, no action apparently took place in the case at all until the superior court, presumably sua sponte, noted a hearing for dismissal for want of prosecution.

Clearly, this September 2022 hearing was not the "initial hearing" under LUPA—the superior court scheduled the hearing based on inaction in the case for nearly a year. After the superior court called for Davis to appear, and there was no response, it dismissed Davis' appeal. But when the superior court later became aware that Davis did not receive adequate notice of the September 2022 hearing, it vacated its order and set an initial hearing for the matter on January 9, 2023, to consider, among other things, any motions to dismiss.

Although it was not noted by Davis, this January 2023 hearing clearly served as the LUPA initial hearing. And prior to this hearing, the City filed a motion to dismiss Davis' appeal based on timeliness grounds. By making its motion prior to this hearing, the City preserved, and did not

waive, its timeliness argument. Appropriately, as shown above, the superior court determined Davis' petition was, indeed, filed past the 21-day deadline and granted the motion to dismiss.

Davis' waiver claim fails.

III. DEFECTIVE NOTICE OF SEPTEMBER 2022 HEARING

Davis next argues that he was improperly served with notice of the September 2022 hearing, which violated the summons statute and his due process rights. The City concedes that its notice was defective for the September 2022 hearing, but it argues that the defect is irrelevant. We agree with the City.

When Davis failed to appear at the September 2022 hearing, the superior court dismissed his petition. However, two months later in December, when it was made aware of the defects in the notice to Davis, the superior court granted Davis' motion for reconsideration and reinstated his appeal.

Davis fails to explain how the defective notice for the September 2022 hearing has any relevance to the validity of the superior court's ultimate dismissal of his appeal in January 2023. Indeed, the improper notice was already remedied by granting Davis' motion for reconsideration. Accordingly, Davis' improper notice claim fails.

IV. PRESENCE OF DIFFERENT JUDICIAL OFFICER

Finally, Davis argues that he was deprived of due process because one judicial officer presided over the matter through the January 9 hearing but a different judicial officer denied Davis' motion to vacate on January 13 in violation of the county's local court rules. Davis argues that once a case has been heard in front of a judicial officer, the judicial officer cannot be changed. We disagree.

Grays Harbor County Local Civil Rule (LCR) 40 states in part,

> (g) Pre-assignment of Cases.
>
> (1) By the Court. The Judges may select those cases deemed appropriate for pre-assignment due to length of trial or complexity of issues. The Court shall notify the parties of any pre-assignment.
>
> (2) By Motion. The parties by stipulation may request that a case be pre-assigned, or any party may place a motion for pre-assignment upon the appropriate motion calendar.
>
> . . . .
>
> (4) All matters to be heard by pre-assigned Judge. Once a case has been pre-assigned, all subsequent matters and proceedings except settlement conferences shall be heard before the assigned judicial officer, if available.

Davis' interpretation of the local rule is plainly incorrect. The rule's prohibition on switching judicial officers only applies if the case was pre-assigned. LCR 40(g). Here, Davis does not provide any citations in the record to show that his matter was pre-assigned to the judicial officer that presided over the matter until Davis' motion to vacate. As a result, we do not further consider Davis' argument that LCR 40(g) was violated. *Cowiche,* 118 Wn.2d at 809 (arguments unsupported by references to the record are not considered). Davis' related due process claim based on different judicial officers hearing his case fails.[6]

CONCLUSION

We affirm.

[6] In his reply brief, Davis raises numerous new arguments, including that the City did not provide any option to make repairs to his property, LUPA's 21-day deadline to appeal a land use decision is unconstitutional because it violates his right to a speedy trial, the City did not make any record of the administrative hearing, the City made false allegations about the condition of the property, and officials from the City displayed bias against him. We decline to consider Davis' new arguments raised for the first time in his reply brief. RAP 10.3(c); *Cowiche*, 118 Wn.2d at 809.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

LEE, P.J.

VELJACIC, J.