FILED
August 24, 2015
Court of Appeals
Division I
State of Washington

72809-1

NO. 72809-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL THOMPSON and THEODORE MISSELWITZ,

Appellants,

vs.

CITY OF MERCER ISLAND,

Respondent,

ON THE ROCK, LLC and ANDERSON ARCHITECTURE,

Additional Parties.

BRIEF OF RESPONDENT CITY OF MERCER ISLAND

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1. INTRODUCTION

The central issue before this Court is whether or not Appellants Thompson and Misselwitz have standing under the Land Use Petition Act, chapter 36.70C RCW ("LUPA"). LUPA devotes an entire section to the standing requirement necessary to bring a land use petition. Because neither appellant can meet all requirements to be a "person aggrieved" under LUPA, neither appellant has standing to challenge the City of Mercer Island Planning Commission's decision to uphold the preliminary approval of a two-lot short subdivision.

Specifically, Appellant Misselwitz lacks standing under LUPA because he failed to exhaust all administrative remedies. Although Misselwitz participated at the open record appeal hearing as a party of record, Misselwitz himself never appealed the decision. This is fatal to his claim. As to Misselwitz, the City's decision is final.

Appellant Thompson lacks standing because he has failed to show the City's land use decision has prejudiced or is likely to prejudice him. A showing of prejudice requires more than the abstract interest in having the City or On the Rock comply with the law, which is the crux of Thompson's claim. Because Thompson has not alleged specific injuries adversely affecting him or his property and instead argues the harm stems from violation of development regulations and the City's Comprehensive

Plan, he cannot establish standing under LUPA.

Accordingly, the City respectfully asks this Court to affirm the superior court's ruling dismissing Thompson and Misselwitz's land use petition for lack of standing.

2. STATEMENT OF THE CASE

The underlying decision attacked by Thompson and Misselwitz is the City's approval of a two-lot short subdivision (or short plat) at 7254 and 7260 N. Mercer Way in Mercer Island. CP 117-138. Thompson lives at 7265 N. Mercer Way and is a neighbor. CP 4. Misselwitz lives just north of the subject property. CP 5. On June 7, 2013, On the Rock, (the property owner at the time of application) applied for a re-division of an already existing two-lot short plat, project number SUB 13-008. CP 140-41. The application sought to alter the design of the existing layout of the two lots by creating a small driveway to the two properties, described as "Tract X." CP 121; 140-41. The proposal did not change the number of existing building lots and only proposed to add Tract X to concentrate impervious surface on Tract X, thereby allowing greater impervious surface on the two building lots.

Pursuant to RCW 58.17.060, the City has adopted regulations and procedures for the "summary approval of short plats and short subdivisions." Mercer Island City Code ("MICC") Section 19.08.020(A)

provides in pertinent part that "[a]pplications for short subdivisions . . . shall be reviewed by the code official." The code official must grant preliminary approval of a short subdivision if the application is in proper form and the project complies with the design standards set forth in MICC 19.08.030, the Comprehensive Plan and other applicable development standards. See MICC 19.08.020(F)(2). City Planner Travis Saunders applied and interpreted the City's Comprehensive Plan and development regulations, determined the application complied with the requirements, and accordingly, approved the application. CP 130-31. On February 3, 2014, the City issued its notice of decision, approving the preliminary short plat proposed by On the Rock. CP 130-31.

On February 14, 2014, pursuant to MICC 19.15.020(J), Thompson filed an appeal of the short plat approval. CP 406. Thompson was the only appellant. CP 406. The MICC explicitly sets forth the appeal process and explains how to become an appellant and file a letter of appeal on a decision. First, a party of record must file a letter of appeal with the city clerk within 14 days after the notice of decision. MICC 19.15.020(J)(1). Second, the appeal must contain specific information, including: the decision being appealed, the specific reasons why the appellant believes the decision to be wrong, the desired outcome and payment of the appeal fee. MICC 19.15.020(J)(2). According to City

code, the Planning Commission hears administrative appeals of short subdivision approvals. MICC 19.15.010(E).

Thompson submitted a 37-page "Brief" as his appeal letter along with 43 exhibits. CP 347-395. In his Brief, Thompson identified four main reasons why he believes the underlying approval decision was wrong: (1) "Area"; (2) "Slope"; (3) "Easement"; and (4) "Lot Length." CP 351-57. Thompson emphasized that "the development of 7260 [N. Mercer Way] will not affect my view due to the steep slope and 25 ft. yard. The developer's intent to remove the 42" [sic] cedar despite the fact that 7260 is in a protected eagle habitat will improve my view significantly more." CP 348. Thompson summarized: "I simply believe [SUB] 13-008 is illegal under the MICC, SMA[1] and the city's comprehensive plan." CP 348.

A public open record appeal hearing was held on July 23, 2014[2] before the Planning Commission. CP 1257-1373. Thompson, as the only appellant before the Planning Commission, was allotted 25 minutes to present his argument. CP 1262:5. Pursuant to MICC 19.15.020(J)(5)(c), On the Rock, as the applicant, was apportioned equal time. CP 1262:19-

[1] Although not explicitly cited in the Brief, Thompson is likely referring to the Shoreline Management Act, chapter 90.58 RCW.

[2] An earlier open record appeal hearing was canceled on May 21, 2014. The City mailed notice of the July 23, 2014 appeal hearing to all owners of property within 300 feet and parties of record on July 7, 2014. See CP 76 n.4.

21. Misselwitz also attended the hearing and was allocated three minutes to speak. CP 1312-1314. Misselwitz did not divide his time with Thompson, nor did he designate Thompson as a spokesperson, as allowed by MICC 19.15.020(J)(5)(c). See CP 1312.

The crux of Thompson's appeal to the Planning Commission was that there was insufficient square footage to subdivide the property and that Tract X is illegal. Accordingly, the majority of Thompson's testimony before the Planning Commission consisted of questioning the square footage of the property and disputing the accuracy of the survey prepared on behalf of On the Rock as the applicant. See e.g. CP 1292-1299. Thompson devoted the remainder of his time to contesting the creation of Tract X. CP 1300-1303. Thompson never testified as to how the alleged inaccurate survey, creation of Tract X, or for that matter, approval of the subdivision, would injure him or his property. Thompson simply claimed there was not enough property to subdivide, that Tract X was illegal and the City was not following its own code. CP 1291-1303.

The Planning Commission discussed Tract X and "tracts," which are defined in MICC 19.16.010, at length. See e.g. CP 1323-25; 1343; 1348-49. City staff and Planning Commissioners addressed the question of whether or not a tract has been used before for ingress and egress to short or long subdivisions. CP 1343; 1348-49. Both City staff and

individual Planning Commissioners identified particular instances where a tract was used in both short and long subdivisions for ingress and egress. See CP 1323:10-12 (Vice Chair Weinman stated: "I don't think that this use of a tract is inappropriate or unusual in the context of subdivisions"); CP 1323:16 (City Planner Travis Saunders responded: "Again, it's a common method"); CP 1323:17-18 (Chair Friedman stated: "…I agree it's a common method…"); CP 1343:15-19; 1348:5-22; 1349:9-10 (Mr. Saunders and Development Services Director Scott Greenberg provided the Planning Commission with examples of specific subdivisions that used tracts for ingress and egress); CP 1354:21-22 (Commissioner Skone stated: "I am familiar with that tract being used in other neighborhoods and I have seen that before.")

At the conclusion of the administrative appeal hearing, the Planning Commission voted to confirm City staff's approval of SUB 13-008 and deny Thompson's appeal. CP 1371. Commissioner McCann, the newest member of the Planning Commission,[3] questioned the use of Tract X and was the sole vote against the decision. CP 1371:21-25. Several commissioners expressed a desire to update the definition of tract to resolve any ambiguity for future projects. See e.g. CP 1369-70. Following the close of the administrative appeal hearing, the Planning

[3] CP 1355:20-25.

Commission discussed revising the definition of tract in MICC Section 19.16.010 and passed a motion to "Request the City Council to direct staff to restrict the definition of tract in short plats as it relates to vehicular access." CP 1465.[4]

On July 28, 2014, the Planning Commission issued its written decision, upholding the staff's decision approving the preliminary short plat approval, without modification. CP 103-05. After reviewing the testimony and exhibits entered into the record at the administrative appeal hearing, the Planning Commission concluded that the Petitioner "did not meet his burden of proof" pursuant to MICC 19.15.020(J)(5)(d). Specifically, Thompson failed to demonstrate a substantial error in the decision; that the proceedings were materially affected by irregularities in procedure; that the decision was unsupported by material and substantial evidence in the record; or the decision was in conflict with the applicable decision criteria. CP 103-05.

Thompson and Misselwitz appealed the Planning Commission's decision in a Land Use Petition filed in King County Superior Court on August 14, 2014. CP 1-24. They alleged 11 statements of error. CP 9-24. On this same date, an Order Setting Land Use Case Schedule ("Case

[4] Thompson and Misselwitz mischaracterize the Planning Commission's motion as "pass[ing] a motion prohibiting the use of 'Tract X's' in any future subdivisions on Mercer Island." Appellant's Brief at 7-8.

Schedule Order") was issued. CP 28-30. The Case Schedule Order assigned Judge Timothy Bradshaw, set the case schedule, and provided notice to all parties specific to seeking review of a land use decision. CP 28-30. In particular, the Case Schedule Order states: "In order to comply with the Schedule, it will be necessary for attorneys and parties to pursue their appeals vigorously from the day they are filed. All events must occur promptly." CP 28. The Case Schedule Order also explicitly addresses motions on jurisdictional and procedural issues, ordering: "Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, except that the minimum notice of hearing requirement shall be 8 days." CP 29. Thompson signed the Case Schedule Order, agreeing "I understand that I am required to give a copy of these documents to all parties in this case." The superior court scheduled the initial hearing for October 31, 2014. CP 1575-78. On October 23, 2014, the City timely noted its Motion to Dismiss for October 31, 2014 and then filed and served the motion. CP 71-92. On this same date, Respondent On the Rock also timely noted, filed and served its own Motion to Dismiss. CP 52-65.

The Motions to Dismiss argued that neither Misselwitz nor Thompson had standing. CP 73. Both the City and On the Rock contended Misselwitz had failed to exhaust administrative remedies

because he did not appeal the decision before the Planning Commission. CP 82-83. The City and On the Rock both argued Thompson had no standing because he failed to articulate any real or perceptible harm or prejudice. CP 61-65; 84-91. The superior court heard oral argument on the motions on October 31, 2014. Michael Walter, counsel for the City, argued that "this particular project on its face literally creates no impacts to anyone." RP 16:7-8. This statement went unchallenged by Thompson and Misselwitz. Judge Timothy Bradshaw questioned Thompson about the alleged harm, if any. Thompson responded "This is the harm: If you violate the zoning provisions and the impervious surface deviation so you can build a much larger house than anyone else in the community, you impact all of us. This house is out of scale, it doesn't fit and they're trying to gain [sic] the system…" RP 38:23-39:4. Thompson later stated: "I'm alleging harm because they are improperly manipulating the zoning code and the building regulations and the impervious surface so they can build a house that is inappropriate for the site." RP 39:25-40:3. Thompson also claimed: "These two houses are going to be so out of scale with the neighborhood that it is going to harm." RP 42:22-24. On November 7, 2014, the superior court entered an order granting the City's and On the Rock's Motions to Dismiss, finding and concluding that:

(1) Both Petitioners lack standing to obtain relief under

> LUPA; (2) Petitioner Daniel Thompson lacks standing, absent actual harm, under, inter alia, RCW 36.70C.060(2); (3) Petitioner Theodore Misselwitz failed to exhaust required administrative remedies under the Mercer island [sic] City Code (MICC 19.15.020(J)), as required by RCW 36.70C.020(2) and RCW 36.70C.060; for the foregoing reasons the Court lacks jurisdiction under RCW 36.70C.020 to adjudicate Petitioner's claims in the LUPA petition. . .

CP 1577:15-22. The superior court subsequently denied Thompson and Misselwitz's motion for reconsideration. CP 1648. Nothing in the record or Clerk's Papers indicates that Thompson and Misselwitz asked the superior court to supplement the record with additional evidence of standing.

The City first learned of the transfer of the property from On the Rock to GIB from Appellant Daniel Thompson's June 1, 2015 e-mail. See Appellants' Brief at 1.

Since filing their Brief, Thompson and Misselwitz have filed an additional nine motions with this Court, including two motions to supplement the record. Significantly, neither motion to supplement asked this Court to consider evidence of standing outside the administrative record.

3. ARGUMENT

3.1 Standard of Review on Appeal.

Appellate review of jurisdiction is de novo. Knight v. City of

Yelm, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). Standing is jurisdictional. Id. The appellate court will not disturb the superior court's decision to dismiss absent a manifest abuse of discretion. Escude v. King County Pub. Hosp. Dist., 117 Wn. App. 183, 190, 69 P.3d 895 (2003). "Abuse occurs when the ruling is manifestly unreasonable or when discretion was exercised on untenable grounds." Id.

3.2 The Motion to Dismiss Was Timely and Did Not Prejudice Thompson or Misselwitz.

The Legislature enacted the Land Use Petition Act ("LUPA") to establish "expedited appeal procedures" and uniform criteria for reviewing land use decisions "in order to provide consistent, predictable and timely judicial review." RCW 36.70C.010 (emphasis added). To accomplish its stated purpose, LUPA contains explicit procedures and timing requirements. Specifically, an initial hearing on jurisdictional and preliminary matters must be noted within seven days of service of the petition and must be set no later than fifty days after service of the petition. RCW 36.70C.080(1). Parties must "note all motions on jurisdictional and procedural issues for resolution at the initial hearing." RCW 36.70C.080(2). Importantly, the defense of lack of standing is waived if not raised by timely motion noted to be heard at the initial hearing. RCW 36.70C.080(3) (emphasis added).

The Case Schedule Order issued by the King County Superior Court Presiding Judge reflects state law's expedited review and timely appeal provisions. CP 28-30. The Case Schedule Order specifically states: "Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, except that the minimum notice of hearing requirement shall be 8 days." CP 29 (emphasis added).

Thompson and Misselwitz ask this Court to disregard the Case Schedule Order's clear direction regarding an eight day minimum notice requirement and to instead extend the notice requirement to 28 days. Although Thompson and Misselwitz cite to numerous Court Rules and King County Local Rules, they fail to provide any legal authority in support of their position that the Case Schedule Order should be disapproved. See Appellants' Brief at 35. An issue lacking adequate argument and supported by only conclusory statements should not be considered. See Amalgamated Transit v. State, 142 Wn.2d 183, 203, 11 P.3d 762 (2000).

More importantly, their position completely ignores the Case Schedule Order, which was signed by Thompson. The Case Schedule Order instructs all attorneys and parties to "make themselves familiar with the rules of the court—especially those referred to in this Schedule. In order to comply with the Schedule, it will be necessary for attorneys and

parties to pursue their appeals vigorously from the day they are filed." CP 28. The City filed and served its Motion to Dismiss on October 23rd, exactly eight days before the October 31st initial hearing. CP 101. Thompson acknowledges he was served on the same date. Appellants' Brief at 10. The City complied with the Case Schedule Order, and its Motion to Dismiss was timely.

Even if Thompson and Misselwitz were entitled to more notice than the Case Schedule Order specifies, Thompson and Misselwitz have failed to demonstrate a showing of prejudice. "A reviewing court will not reverse a lower court's ruling on the basis of an untimely filing absent a showing of prejudice." See Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 364, 617 P.2d 704 (1980) (dealing with the time limits of CR 6(d)). When an appellant is able to present countervailing oral argument and submit case authority in response, there is no adequate showing of prejudice. Id. In response to the City's and On the Rock's Motions to Dismiss, Thompson and Misselwitz not only filed a Response, but they also included a "Motion for Attorney's Fees and Costs for Responding to Frivolous Motions." CP 1374-1389. As a result, even assuming for the sake of argument that the City's motion complying with the Case Schedule Order was untimely, Thompson and Misselwitz cannot demonstrate prejudice.

3.3 Misselwitz Has No Standing Because He Failed to Exhaust Administrative Remedies.

LUPA, chapter 36.70C RCW, is the "exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). Its purpose is to "establish 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. LUPA prescribes specific and particular procedures and requirements that must be met before a trial court's appellate jurisdiction is properly invoked. Jones v. The Town of Hunts Point, 166 Wn. App. 452, 455, 272 P.3d 853 (2011). RCW 36.70C.060 details standing requirements and limits standing to bring a land use petition to the following persons:

> (1) The applicant and the owner of property to which the land use decision is directed;
>
> (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.

RCW 36.70C.060.

The standing requirement in LUPA is jurisdictional. Knight, 173 Wn.2d at 336. "Before a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal." Id. at 337 (quoting Conom v. Snohomish County, 155 Wn.2d 154, 157, 118 P.3d 344 (2005)).

3.3.1 Misselwitz Failed to Participate in the Administrative Process to the Extent Required.

As an "aggrieved" person, and neither the property owner nor the applicant, Misselwitz must meet all four conditions enumerated in RCW 36.70C.060(2) to have standing, including exhausting administrative remedies to the extent required by law. RCW 36.70C.060(2)(d). Imposition of this standing requirement and limitation was a deliberate, logical and sensible action by the Legislature. Ward v. Board of County Comm'rs, 86 Wn. App. 266, 271, 936 P.2d 42 (1997). Because a land use petition has the potential to "aggrieve" many different people, the Legislature purposefully "confined the category of nonowners eligible to seek judicial review of such decisions to those who participated in the

administrative process to the extent allowed." Id. at 271-72 (emphasis added).

The exhaustion doctrine discourages individuals from ignoring administrative procedures and resorting to the courts prematurely. Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 375, 223 P.3d 1172 (2009). Failure to exhaust administrative remedies is fatal to a LUPA petitioner. Id. at 371 (dismissal for lack of standing upheld when Nickums filed a late appeal to the city hearing examiner); see also Ward, 86 Wn. App. at 271 ("exhaustion of administrative remedies is a necessary prerequisite . . . whether the party is an owner, applicant or other aggrieved party"); Prekeges v. King County, 98 Wn. App. 275, 284, 990 P.2d 405 (1999) (failure to file a timely administrative appeal means party had no standing under LUPA and precludes judicial review of the decision).

Misselwitz failed to exhaust his administrative remedies because he never filed a timely administrative appeal. Misselwitz only participated in the administrative appeal before the Planning Commission as a party of record; he never became an appellant. The MICC details the requirements to become an appellant and appeal a decision. MICC 19.15.020(J). The approval of a preliminary short plat is classified as an "administrative action" with the code official given the authority to grant approval. MICC

19.15.010(E). The Planning Commission hears appeals of a preliminary short plat approval. Id. Any party of record may file a letter of appeal with the city clerk within 14 days after the notice of decision. MICC 19.15.020(J)(1). The appeal must contain all of the following: (1) the decision being appealed; (2) the appellant's name and address and his/her interest in the matter; (3) the specific reasons the appellant believes the decision is wrong; (4) the desired outcome or changes to the decision; and (5) the appeal fee. MICC 19.15.020(J)(2). Misselwitz met none of these requirements. He did not file an appeal with the city clerk, he did not pay a fee, he did not give any specific reasons he believed the decision was wrong. Consequently, he failed to exhaust his administrative remedies. Misselwitz makes no argument to the contrary.

Misselwitz also did not participate at the appeal hearing before the Planning Commission to the extent allowed. The MICC specifies the rules of procedure for appeal hearings. MICC 19.15.020(J)(5). Equal time for oral argument is allotted to appellants and applicants. When there are multiple parties on either side, time may be allocated between the parties themselves or the parties may designate a spokesperson. MICC 19.15.020(J)(5)(c). Misselwitz spoke at the open record hearing and was allotted three minutes. CP 1312-14. He and Thompson did not allocate time between themselves, nor did they request coordination with the Chair

of the Planning Commission. CP 1312-14. Misselwitz simply read a letter on the record. CP 1312:10 – 1314:15. This brief participation at the open record appeal hearing before the Planning Commission did not make Misselwitz an appellant, nor can it be considered participating in the administrative process to the fullest extent allowed.

Misselwitz contends that the language on the "Planning Commission's Written Findings/Conclusions/Decisions" means Misselwitz has standing as a simple party of record. Appellants' Brief at 37. The "Planning Commission's Written Findings/Conclusions/Decisions" states: "Pursuant to MICC 19.15.020(J)(5)(g) and RCW 36.70C, an appeal to the City's final decision may be filed in King County Superior Court by a party of record with standing." CP 105 (emphasis added). RCW 36.70C is clear—a person has no standing if s/he has not exhausted all administrative remedies.

Misselwitz further claims "the notice of open record hearing states participation at the hearing confers standing." Appellants' Brief at 37. Although Misselwitz cites the City's notice of appeal form correctly, the form itself clearly contravenes LUPA requirements. Tellingly, Misselwitz focuses his entire argument on language from the City's notice of appeal form and gives only passing reference to the state law governing land use appeals. State law prevails over the City's notice form. At no time does

Misselwitz include or discuss the material portions of the actual statute at issue, RCW 36.70C.060, despite the superior court's order ruling "Petitioner Theodore Misselwitz failed to exhaust required administrative remedies under the Mercer island [sic] City Code (MICC 19.15.020(J)), as required by RCW 36.70C.020(2) and RCW 36.70C.060; for the foregoing reasons the Court lacks jurisdiction under RCW 36.70C.020 to adjudicate Petitioner's claims in the LUPA petition . . .". CP 1577 (emphasis added). Misselwitz also provides no relevant authority for his alternative arguments that as a simple party of record, he either exhausted his administrative remedies or did not need to in order to have standing. Both arguments fail based on RCW 36.70C.020.

Misselwitz also seems to argue that because LUPA does not make a distinction between an administrative appellant and a later person who intervened or joined, Misselwitz did not need to be an appellant. Appellants' Brief at 41. Thompson and Misselwitz claim *Jones v. The Town of Hunts Point*, allowed "an individual who was not the applicant nor the appellant below to substitute as the LUPA petitioner." Appellants' Brief at 41. This assertion mischaracterizes the *Jones* case. *Jones* involved an application by spouses Marianne and Patrick Jones to subdivide their lot. 166 Wn. App. at 454. The application was rejected by the town engineer because of a restriction on the face of the plat. Id.

Marianne and Patrick appealed to the Town's hearing examiner and lost. Id. Patrick alone filed a land use petition. Id. He did not name Marianne, but he included a declaration from her stating she intended to abandon her appeal and had quitclaimed her interest in the property to Patrick. Id. Hunts Point argued Patrick had failed to name Marianne as a necessary party and violated RCW 36.70C.040(b)(ii), which requires each person (if not the petitioner) identified by name and address in the local jurisdiction's written decision as an owner of the property to be served. Id. at 455. The court disagreed, ruling "there is no compelling reason to require dismissal of a lawsuit for failure to name as a party a person who no longer wishes to participate in the matter." Id. at 456. This case is inapposite and does not support Misselwitz's position.[5]

3.3.2 Misselwitz Cannot Obtain Standing Vicariously through Thompson's Exhaustion of Administrative Remedies.

Misselwitz also cannot gain standing vicariously through Thompson's exhaustion of administrative remedies. Misselwitz seems to argue that since Thompson was an appellant at the Planning Commission and exhausted administrative remedies, Misselwitz does not need to. Misselwitz provides no analysis or authority for this position. A "lack of

[5] *Jones* also does not address the issue of exhaustion of administrative remedies, and as discussed, Misselwitz's failure to exhaust administrative remedies is fatal to his alleged LUPA claims.

reasoned argument is insufficient to merit judicial consideration." Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012).

Additionally, the language of LUPA and relevant case law contradicts this position. In particular, the language used throughout the statute is specific to one person. "Another person aggrieved . . . a person is aggrieved when the decision is likely to prejudice that person . . . that person's asserted interests . . .a judgment in favor of that person . . . the petitioner has exhausted his or her administrative remedies." RCW 36.70C.060 (emphasis added). "Legislative choice of words must mean something." Shen-Yen Lu v. King County, 110 Wn. App. 92, 100, 38 P.3d 1040 (2002). Furthermore, because the "doctrine of exhaustion of administrative remedies is well established in Washington," if the Legislature intended to allow vicarious or delegated appeals by other aggrieved parties, some clear expression of the intent would have likely appeared in the statute. See Ward, 86 Wn. App. at 271. The person specific language within the LUPA statute does not support Misselwitz's argument. LUPA confined—not expanded—the category of nonowners eligible to seek judicial review. Id. Misselwitz has no standing, and as a result, the superior court's dismissal as to him should be affirmed.

3.4 Thompson Lacks Standing Because He Has Not Demonstrated He Is Prejudiced by the Land Use Decision.

3.4.1 An Injury-in-Fact Is Required to Demonstrate Prejudice.

Standing to bring a land use petition is limited to an aggrieved person. RCW 36.70C.060(2). A person is aggrieved or adversely affected only when all of the four conditions enumerated within the statute are present: (1) the land use decision has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those the City was required to consider; (3) a judgment in favor of that person would eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and (4) the petitioner exhausted his administrative remedies to the extent required by law. Id. "A LUPA petitioner must establish facts supporting standing." Lauer v. Pierce County, 173 Wn.2d 242, 254, 267 P.3d 988 (2011) (citing RCW 36.70C.070(6)).

To demonstrate prejudice, a petitioner must allege specific and perceptible harm. The prejudice requirement of the LUPA standing provision is comparable to the prejudice requirement in the Administrative Procedure Act ("APA"), chapter 34.05 RCW. Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). The APA prejudice requirement codified the basic principle of the "injury-in-fact"

requirement. Id. To establish prejudice, under the APA and under LUPA, a petitioner must show s/he "would suffer an 'injury-in-fact' as a result of the land use decision." Knight, 173 Wn.2d at 341. An injury-in-fact can be demonstrated by showing the challenged land use decision would lead to a real and direct injury and by alleging specific and perceptible harm. Id.; see also Suquamish, 92 Wn. App. at 829. If the injury is threatened, as opposed to existing, the petitioner must also show that the injury "will be immediate, concrete and specific." Suquamish, 92 Wn. App. at 829.

Although showing a particular level of injury is not required, there must be a real and direct injury. Id. at 829, 832. For example, in *Knight*, the petitioner established prejudice by presenting evidence that her senior water rights would be negatively impacted by the proposed subdivision. Knight, 173 Wn.2d at 343. In *Suquamish*, the petitioners demonstrated prejudice with evidence of a predicted large increase in traffic from the proposed 450 acre Planned Unit Development. 92 Wn. App. at 831. See also Biermann v. City of Spokane, 90 Wn. App. 816, 819, 960 P.2d 434 (1998) (neighbor had standing to complain about the absence of a valid building permit for a garage that encroached onto her property because her health, safety and comfort were directly affected by the garage); Anderson v. Pierce County, 86 Wn. App. 290, 300, 936 P.2d 432 (1997) (adjacent property owner adequately alleged an "injury-in-fact" with testimony of

damage from storm-water runoff from proposed soil bio-remediation facility).

Importantly, "a conjectural or hypothetical injury will not confer standing." Knight, 173 Wn.2d at 341 (quoting Suquamish, 92 Wn. App. at 829). A claim that a petitioner may be harmed by a future permitting decision will not satisfy the injury-in-fact test. Patterson v. Segale, 171 Wn. App. 251, 259-60, 289 P.3d 657 (2012). The claim must be more than a "bald assertion of injury"—it must also be supported by evidentiary facts. Trepanier v. Everett, 64 Wn. App. 380, 384, 824 P.2d 524 (1992) (citing Concerned Olympia Residents for Env't v. Olympia, 33 Wn. App. 677, 657 P.2d 790 (1983)).

Standing is also not conferred when the petitioner's sole interest is the abstract interest of having others comply with the law. Chelan County v. Nykriem, 146 Wn.2d 904, 935, 52 P.3d 1 (2002). In *Nykriem*, the court determined the intervenors (a small group of neighbors) lacked standing under LUPA because they alleged no specific injuries, but instead maintained their "sole interest in this matter is to preserve the protections of the zoning in the district in which they are located." Id.

3.4.2 Thompson Cannot Demonstrate He Will Suffer an Injury-in-Fact.

Thompson cannot establish the prejudice needed for standing under LUPA because he has failed to show he would suffer an injury-in-fact. Thompson's status as an adjacent landowner who merely alleges general and abstract harm does not suffice. Thompson argues *Knight* held "there is no specific quantum of harm to allege to establish standing" and that harm from a proposed subdivision is not merely abstract or theoretical. Appellants' Brief at 44, 48. Thompson mischaracterizes *Knight*, which also has distinguishable facts. In *Knight*, the petitioner owned property next to a proposed 32-acre subdivision and also owned senior water rights within the same aquifer as the subdivision's planned source of water. 173 Wn.2d at 342. Knight presented evidence of previous water deficiencies in the city dating back to 2001 and presented a hydrogeologist's report "detailing the adverse impact the subdivisions' water demand would have on her water rights." Id. at 343. The court considered what impact the proposed subdivision would have on Knight's interest, and based upon the evidence Knight presented, determined "[h]er interest is not abstract." Id. at 342. Knight demonstrated an immediate and specific injury to her water rights and accordingly established "sufficient prejudice to satisfy RCW 36.70C.060(2)." Id.

In contrast, Thompson has presented no evidence of any immediate or specific injury he will suffer as a result of the land use decision at issue. SUB 13-008 merely alters an already existing two-lot short subdivision, resulting in two building lots and one tract designated for ingress and egress (Tract X). CP 103; CP 137-38. Therefore, Thompson cannot (and has not) claimed he will suffer from recognized specific injuries like increased traffic, stormwater runoff, insufficient water supplies or impaired view. The administrative record and the LUPA petition are devoid of the necessary allegations of specific and perceptible harm. To the contrary, in Thompson's "Brief of Appellant," submitted to the Planning Commission, Thompson maintains SUB 13-008 will significantly improve his view. CP 348:17-20. In the "Petitioner's Standing" section of the LUPA petition, Thompson makes no allegations of prejudice nor mentions any specific or perceptible injury. Instead, Thompson merely paraphrases the requirements for standing listed in RCW 36.70C.060(2). CP 4:7-21. "A LUPA petitioner must establish facts supporting standing." Lauer, 173 Wn.2d at 254. Thompson has failed to show any specific injury he will suffer.

Before the superior court, when pressed to identify an injury-in-fact supporting his standing, Thompson offered only conjectural and

abstract injuries. For example, when asked by Judge Timothy Bradshaw what harm he would suffer, Thompson stated:

> This is the harm: If you violate zoning provisions and the impervious surface deviation so you can build a much larger house than anyone else in the community, you impact all of us. This house is so out of scale, it doesn't fit and they're trying to gain [sic] the system . . .

RP 38:24-39:4. Thompson now claims that the ultimate result of SUB 13-008 is "houses that are inconsistent with the zone and neighborhood, overcrowd land, negatively affects [sic] open space, air, light, comfort, esthetics, and diminishes [sic] the value of surrounding properties like Thompson's." Appellants' Brief at 49. These generalized complaints fail to establish the requisite injury-in-fact as to Thompson. First, alleging harm based upon what size Thompson speculates the houses will be is a "conjectural or hypothetical injury" and will not confer standing. See Knight, 173 Wn.2d at 341 (quoting Suquamish, 92 Wn. App. at 829). Similarly, the new laundry list of purported harms such as reduced property value and negative impacts to "air, light, comfort or esthetics" are not only speculative, but also non-specific and intangible. Second, these claims are nothing more than bald assertions of injury unsupported by evidentiary facts. See Trepanier, 64 Wn. App. at 384 (internal citations omitted). Thompson provides no evidence or analysis to support his contention that re-drawing lines on an already existing two-lot short plat

will diminish his property value or negatively impact "air, light, comfort or esthetics." Thompson has failed to demonstrate that he suffers an injury-in-fact as a result of the approval of SUB 13-008.

Most importantly, the gravamen of Thompson's argument is that the harm stems from the City's purported failure to follow the MICC and the City's Comprehensive Plan. See Appellants' Brief 44-47. Thompson insists, contrary to well-established case law, that "the quantum of harm at trial is the legality of the permit under the applicable development regulations and comprehensive plan." Appellants' Brief at 44. This echoes Thompson's arguments in superior court that the harm he alleges results from "violating the zoning provisions" and "improperly manipulating the zoning code and building regulations." RP 38:24-25; 39:25-40:2. The case law is clear: "[a]n interest sufficient to support standing to sue . . . must be more than simply the abstract interest of the general public in having others comply with the law." Nykriem, 146 Wn.2d at 935. Similar to the neighbors in *Nykriem* (and unlike the petitioner in *Knight*), Thompson's interest in this matter is to ensure On the Rock complies with the City's development regulations and Comprehensive Plan. Appellants' Brief at 44-47. The abstract interest of having others comply with the law does not satisfy LUPA's prejudice requirement. Knight, 173 Wn.2d at 342 (quoting Nykriem, 146 Wn.2d at

935). Accordingly, the superior court's ruling that Thompson lacked standing should be affirmed.

3.5 Thompson and Misselwitz Had the Opportunity to Develop a Record on the Issue of Standing.

Thompson and Misselwitz allege that it was an error of law for the superior court to dismiss their petitions without affording either an opportunity to submit evidence of standing outside of the administrative record. Appellants' Brief at 9. Despite alleging this error of law, Thompson and Misselwitz provide only a passing reference to this issue with a single block quote and no analysis. An issue supported with only conclusory statements and a single cite to a case is an inadequate argument, and this Court need not consider it. See Amalgamated Transit, 142 Wn.2d at 203.

Notwithstanding the inadequate briefing, Thompson and Misselwitz's assignment of error is not well-grounded in fact or law. Thompson and Misselwitz claim the superior court did not afford them the opportunity to submit evidence of standing outside of the administrative record. Appellants' Brief at 9. However, Thompson and Misselwitz had ample opportunity to present evidence of their standing to the superior court. The issue of standing was the only issue before the superior court. Thompson and Misselwitz briefed the question of standing in their

Response to the City and On the Rock's Motions to Dismiss, argued the issue of standing at the initial hearing and answered Judge Timothy Bradshaw's specific questions regarding standing. The record on the question of standing was also well developed. Thompson submitted 43 exhibits along with his Brief to the Planning Commission. CP 386-1197. At the administrative appeal hearing before the Planning Commission, Thompson submitted additional exhibits. CP 1198-1256. At the initial hearing before the superior court, Thompson and Misselwitz submitted 18 more exhibits. CP 1401-1518. Despite the volume of paper Thompson and Misselwitz submitted, none of it contains any evidence establishing that either of them has standing under LUPA. Moreover, notwithstanding filing a Motion for Reconsideration, Thompson and Misselwitz never asked the superior court to consider additional evidence regarding their standing.

Thompson and Misselwitz include a lengthy block quote from *Lauer v. Pierce County, supra,* in support of their contention that the superior court erred by not considering evidence outside the administrative record. Appellants' Brief at 43. Thompson and Misselwitz misconstrue *Lauer*, which supports the superior court's ruling and actions in this case. In *Lauer*, petitioners Lauer and de Tienne filed a LUPA petition challenging the approval of a variance granted to the Garrisons. 173

Wn.2d at 251. The Garrisons challenged Lauer and de Tienne's standing and argued the superior court erred in considering evidence of Lauer and de Tienne's standing that was not contained in the administrative record. Id. at 253. The supreme court disagreed, ruling when there is no opportunity to make a record on the issue of standing, the record may be supplemented. Id. at 254 (quoting RCW 36.70C.120(3)).

Lauer does not undermine the superior court's ruling. Thompson and Misselwitz did supplement the administrative record with facts relating to his standing in his Response to On the Rock's and the City's Motions to Dismiss and then in argument before the superior court. The City did not object. However, none of the evidence submitted demonstrates Thompson will suffer an injury-in-fact that is attributable to the approval of the short subdivision (SUB 13-008). Furthermore, even if Thompson and Misselwitz believed the briefing and argument before the superior court did not afford them an opportunity to develop an adequate record on standing, they have made no efforts to supplement the record with any such evidence, despite filing an Identification of Supplemental Authorities in Response to Motions to Dismiss for Lack of Standing and a Motion for Reconsideration with the superior court. CP 1562-1565; CP 1581-1612.

Thompson and Misselwitz have also never asked this Court to supplement the record with evidence of their standing, despite filing two separate motions to supplement. Neither motion to supplement attempts to provide new evidence of an injury-in-fact. Instead both motions to supplement challenge On the Rock's Motion for Substitution of Parties in an attempt to deflect and divert attention away from their inability to satisfy the LUPA standing requirements. The record of Thompson and Misselwitz's standing (or more appropriately, lack thereof) was adequately developed, and the superior court's ruling should be affirmed.

3.6 Response to Appellants' Motions for Vacation of Trial Court's Order, For Remand, and Request for Attorney's Fees and Costs.

Appellants include within their Brief a summary of their motion to vacate the superior court's order and remand based upon the ownership of the subject property. The City responded separately to this motion and relies upon its answer filed on June 26, 2015.

4. CONCLUSION

Neither Appellant can demonstrate he has fulfilled the standing requirements of the Land Use Petition Act. Appellant Misselwitz never administratively appealed the City's approval of SUB 13-008 to the Planning Commission. His mere participation as a party of record does not satisfy LUPA's requirement to exhaust administrative remedies before

seeking judicial review. Misselwitz also cannot satisfy the exhaustion requirement vicariously through Appellant Thompson's administrative appeal. Misselwitz's failure to exhaust administrative remedies to the extent required by law is fatal to his claim.

Thompson also lacks standing because he has failed to demonstrate he will be prejudiced by the land use decision. Thompson has neither alleged he will suffer specific and perceptible harm, nor has he presented any evidence of real and direct harm. Thompson's claims of conjectural injury and his abstract interest in having On the Rock and the City comply with local regulations (which they have) does not confer standing under LUPA. Accordingly, the superior court's decision to dismiss Thompson's and Misselwitz's claims for lack of standing should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of August, 2015.

OFFICE OF THE CITY ATTORNEY
CITY OF MERCER ISLAND
Kari L. Sand, City Attorney

By /s/ Electronically Filed Only
Christina M. Schuck
WSBA No. 44436
Assistant City Attorney

DECLARATION OF SERVICE

I, Christina M. Schuck, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 24th day of August, 2015, I served a true copy of the *Brief of Respondent City of Mercer Island, Office of the City Attorney,* together with a copy of this *Declaration of Service* on the following counsel of record using the method of service indicated below:

Attorney For Petitioners Thompson and MisselWitz Daniel P. Thompson Thompson & Delay, Attorneys at Law 506 Second Avenue, Suite 2500 Seattle, WA 98104 danielpthompson@hotmail.com	 ☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail:
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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 24th day of August, 2015, at Mercer Island, Washington.

/s/ Electronically Filed Only
Christina M. Schuck