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May 3, 2022

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

KURT KANAM,

Appellant,

v.

PETER KMET, CITY OF TUMWATER,

Respondents.

No. 55861-1-II

PART-PUBLISHED OPINION

WORSWICK, J. — Kurt Kanam appeals a superior court order dismissing his declaratory judgment action for lack of standing. Kanam sued the City of Tumwater and Mayor Peter Kmet (collectively the City), seeking declaratory judgment to declare invalid two City ordinances and enjoin their enforcement. The superior court dismissed Kanam’s lawsuit because he was not a resident, taxpayer, or property owner in Tumwater.

In the published portion of this opinion, we hold that (1) Kanam does not have taxpayer standing because he is not a resident or property owner in Tumwater and that the City’s growth management plan with Thurston County does not confer standing on Kanam. In the unpublished portion, we hold that (2) the City did not concede the allegations in Kanam’s complaint by filing a CR 12(b) motion instead of an answer to the complaint, and (3) the court did not display prejudice or violate the appearance of fairness doctrine by not rescheduling a hearing after he twice failed to appear. Accordingly, we affirm.

No. 55861-1-II

## FACTS

Kanam is a resident of Thurston County, but he does not live in Tumwater.<sup>1</sup> In September 2019, Kanam wrote a letter to the City stating he desired to purchase a building located at 240 Custer Way in Tumwater. Kanam requested the City confirm that the building could be used for storage. The City promptly responded by letter, stating that use of the building for storage would be a non-conforming use due to zoning changes in 2014. The City cited Tumwater Municipal Code (TMC) section 18.54.70, and said that should Kanam purchase the building and desire to seek a non-conforming use, he could apply for a conditional use permit under chapter 18.56 TMC. Kanam did not purchase the building.

In September 2020, Kanam sent a letter to the Attorney General’s Office (AGO), requesting that the office “take action to prevent any expenditure of public funds to enforce or defend the Tumwater Municipal Code 18.54.070.” Clerk’s Papers (CP) at 43. The AGO did not take action on Kanam’s request.

In December, Kanam filed a complaint for declaratory and injunctive relief. Kanam claimed he had standing as a taxpayer and as “Private Attorney General.” CP at 2. He argued

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<sup>1</sup> Kanam lists an Olympia address in his complaint and states he is a “Thurston County citizen and tax payer” in his amended complaint.

No. 55861-1-II

that TMC 18.54.070<sup>2</sup> and TMC 18.56.020<sup>3</sup> were invalid because “they conflict with the United States and Washington State Constitution, the Thurston County/Tumwater joint comprehensive plan, RCW 43.21, RCW 19.27.095, and are an illegal expenditure of public funds.”<sup>4</sup> CP at 3.

The City did not file an answer, but filed a motion to dismiss under CR 12(b), in which it argued that Kanam lacked standing to bring a taxpayer derivative action because he did not allege that he was a Tumwater taxpayer.<sup>5</sup> The City also argued that the private attorney general doctrine does not apply in Washington.

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<sup>2</sup> TMC 18.54.70 provides:

A nonconforming use shall be deemed abandoned by having been discontinued for a period of two years, unless otherwise specified in the applicable zoning district text, and any subsequent future uses of such land or building shall be a use closer in conformity to the spirit and intent of the subject zone district, or in conformity with the provisions of this title. Determination of a proposed replacement nonconforming use, closer to the spirit and intent of the subject zone district, shall be pursued by the application for a conditional use permit as set forth in TMC Chapter 18.56.

Br. of Resp’t, Appendix A.

<sup>3</sup> TMC 18.56.020 provides:

A request for a conditional use permit shall be submitted on an application form available at the Tumwater community development department. Each application shall be accompanied by a site plan, floor plan, building elevations, and a fee established by resolution of the city council to help defray the cost of handling the application, no part of which fee is refundable. Additions or deletions to the contents of the application may be made by the administrative official.

Br. of Resp’t, Appendix A.

<sup>4</sup> There is no chapter 43.21 RCW. Chapters 43.21A-43.21K RCW contain a wide breadth of various environmental statutes. RCW 19.27.095 contains requirements for building permit applications.

<sup>5</sup> The City did not specify a subsection of CR 12(b).

No. 55861-1-II

In January 2021, Kanam filed a response to the City’s motion to dismiss and moved to amend his complaint. In his response, Kanam argued that he had standing as a Thurston County taxpayer because Tumwater entered into a joint comprehensive plan with Thurston County, which made the Tumwater ordinances Thurston County processes. The City stated it would not oppose Kanam’s amendment so long as the superior court was willing to consider the City’s pending motion to dismiss, which was scheduled for April 9. In his amended complaint, Kanam reiterated his request for declaratory judgment, removed all reference to the private attorney general doctrine, and stated that he was a “Thurston County citizen and tax payer” and that he was proceeding with a taxpayer derivative lawsuit. CP at 167.

The City filed an amended motion to dismiss in March. The City argued that to have standing to bring a taxpayer derivative action, Kanam must first allege facts that he is a taxpayer. And because Kanam did not allege he was a taxpayer of Tumwater, he did not allege facts sufficient to show that he was a proper party to invoke judicial resolution of the dispute.

Kanam failed to appear for the April 9 hearing.<sup>6</sup> The court set over the hearing to April 16, when the court had scheduled a hearing on Kanam’s motion for declaratory judgment and injunctive relief. Kanam again failed to appear. The court denied Kanam’s motion for declaratory and injunctive relief, noting that Kanam failed to appear for the hearing.

The court also granted the City’s motion to dismiss. The court explained,

Review of the plaintiff’s complaint reveals that Mr. Kanam alleges standing to challenge the City of Tumwater ordinances at issue based solely upon the City of Tumwater’s refusal to permit a particular use of a building that Mr. Kanam is interested in purchasing in the City of Tumwater. Mr. Kanam does not allege any

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<sup>6</sup> The court had ordered the hearing to take place remotely via Zoom.

No. 55861-1-II

current ownership interest in the building, nor does allege that he resides in, or pays taxes to, the City of Tumwater.

CP at 230-31.

The court continued:

The Court finds: to request judicial review in this case Kanam must first request action by the attorney general and that request must be refused. . . . And while no showing of injury to the alleged taxpayer serves as an absolute bar, the law still requires a request to the attorney general first.

CP at 231.

Kanam filed a motion for reconsideration on April 27. He argued that the superior court erred because he had requested action from the attorney general before filing suit and that recent changes were made to the Thurston County/Tumwater joint comprehensive plan before the court's ruling. On March 31, the joint comprehensive plan had been updated to include a policy goal that states: "Ensure the processing of applications for development permits in a timely and fair manner, and coordinate processing between the City of Tumwater and Thurston County to enhance predictability." CP at 263. Kanam argued that this clause, added since his amended complaint, made Tumwater permit processes Thurston County processes, and that he therefore had standing as a Thurston County resident. He further argued he was not given fair notice of the hearings and learned of them only on the day they were scheduled.

The City responded that Kanam had contacted its offices two days before the April 9 hearing to inquire whether the hearing would be in person or held remotely. The City informed Kanam that the hearing would be held remotely and provided him the call-in information. The City also argued that the Thurston County/Tumwater joint comprehensive plan and its associated

No. 55861-1-II

changes did nothing to confer standing on Kanam because the joint comprehensive plan does not make him a Tumwater taxpayer. The court denied Kanam's motion for reconsideration.

Kanam appeals the order granting the City's motion to dismiss and the order denying reconsideration.

## ANALYSIS

### TAXPAYER STANDING

Kanam argues that he has taxpayer standing as a Thurston County taxpayer to challenge Tumwater City ordinances because the Thurston County/Tumwater joint comprehensive plan converted Tumwater City building permit processes into Thurston County processes. Kanam does not allege that he is a Tumwater taxpayer, resident, or property owner, or that he has any interest in the building on Custer Way, other than a speculative one. We hold that Kanam does not have taxpayer standing to sue the City.

#### A. *Legal Principles*

“Standing is a ‘party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007) (quoting BLACK’S LAW DICTIONARY (8th ed. 2004)). Taxpayer standing requires a plaintiff to be a taxpayer, in addition to making a request to the attorney general to take action, and have that request denied. *Lee v. State*, 185 Wn.2d 608, 615, 374 P.3d 157 (2016). A mere disagreement with governmental action is not enough to confer standing. *Lee*, 185 Wn.2d at 615.

In his amended complaint, Kanam requested declaratory judgment under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and alleged a taxpayer derivative lawsuit. Although Kanam purported to assert two causes of action, “a ‘taxpayer derivative suit’

No. 55861-1-II

is not a separate cause of action pursuant to which a party can seek declaratory relief.” *Pasado’s Safe Haven v. State*, 162 Wn. App. 746, 752, 259 P.3d 280 (2011). The UDJA is the sole cause of action by which a plaintiff may seek declaratory judgment. *Pasado’s Safe Haven*, 162 Wn. App. at 752. “Rather than creating a separate cause of action, taxpayer standing principles simply provide a means to establish standing to bring such a claim.” *Pasado’s Safe Haven*, 162 Wn. App. at 752-53; *see also State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 861, 329 P.2d 841 (1958). “The two means of establishing standing do not equate to there being two different causes of action.” *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 247 n. 9, 242 P.3d 891 (2010). Thus, Kanam brought only one cause of action and sought a single remedy: the invalidation of provisions of the TMC. *See Pasado’s Safe Haven*, 162 Wn. App. at 753.

B. *Motion to Dismiss*

Kanam argues that the superior court erred when it dismissed his lawsuit for lack of standing. He argues that he has standing as a taxpayer to challenge provisions of the City’s municipal code. We disagree.

We review de novo an order dismissing a case for lack of standing under CR 12(b)(6). *Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582 (2017). Dismissal under CR 12(b)(6) is proper where “it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief.” *Larson v. Snohomish County*, 20 Wn. App. 2d 243, 263, 499 P.3d 957, 970 (2021). We take the plaintiff’s allegations in the complaint as true and consider hypothetical facts outside the record. *Deegan*, 197 Wn. App. at 884. “Because de novo review is based on the complaint and



No. 55861-1-II

hypothetical facts, findings of fact by the trial court are superfluous.” *Deegan*, 197 Wn. App. at 884.

To bring a taxpayer suit, the complaint must allege both the taxpayer’s cause of action and facts supporting taxpayer status. *Friends of N. Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 122, 123-24, 336 P.3d 632 (2014); *Dick Enters., Inc. v. Metro. King County*, 83 Wn. App. 566, 572-73, 922 P.2d 184 (1996). “It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.” *Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Friends of N. Spokane County Parks*, 184 Wn. App. at 115. Where a complainant is not a taxpayer, however, any claims based on taxpayer standing must be dismissed. *See Friends of N. Spokane County Parks*, 184 Wn. App. at 123-24; *Dick Enters., Inc.*, 83 Wn. App. at 572-73.

Here, Kanam does not allege facts sufficient to demonstrate that he has standing to dispute the TMC ordinances. Kanam does not allege that he is a Tumwater taxpayer, only that he is a citizen and taxpayer of Thurston County, in which Tumwater is located. Indeed, Kanam does not even supply a Tumwater address in his court filings. Moreover, Kanam does not allege that he owns any real property in Tumwater or that his interest in the building on Custer Way is more than speculative; he has no legal interest in the building as either owner or tenant. Because Kanam is not a Tumwater taxpayer, resident, or property owner, he lacks standing to challenge TMC ordinances.

Kanam argues that he has standing under the Thurston County/Tumwater joint comprehensive plan because the agreement makes Tumwater processes Thurston County

No. 55861-1-II

processes. Kanam cites no authority to show that Thurston County adopted the Tumwater ordinances or to show that joint comprehensive plans make city municipal processes binding on counties or county residents. Nor does Kanam show that the mere existence of a city-county joint plan confers taxpayer standing on county residents to sue a city. “Where a party does not cite to such authority, we assume there is none.” *Peterson v. Dep’t of Labor & Indus.*, 17 Wn. App. 2d 208, 237, 485 P.3d 338 (2021). Instead, Kanam cites to the language of the joint comprehensive plan itself to argue it confers standing on him. Accordingly, his argument fails.

Kanam cites two of the thirteen policy goals the joint comprehensive plan puts forth to comply with the Growth Management Act, chapter 36.70A RCW:

7. Permits. Application for both State and local government permits should be processed in a timely and fair manner to ensure predictability.

....

13. Historic preservation. Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.

The City of Tumwater and Thurston County have historic preservation programs which provide processes for designation of local historic sites for protection. Similar programs are conducted at the State and national levels. The Joint Plan land use element contains goals and policies encouraging consistency with and support for these programs. (Goal #12, Policies 12.1 & 12.2).

CP at 68, 70; Br. of Appellant at 19, 21.

These statements are policy goals with no operative force. Policy declarations in statutes serve as an important guide to us, but they have no operative force. *Puget Soundkeeper All. v. Dep’t of Ecology*, 102 Wn. App. 783, 790, 9 P.3d 892 (2000). Moreover, nothing in them shows that the Tumwater ordinances, TMC 18.54.070 and TMC 18.56.020, may be enforced by the county. TMC 18.54.070 states that a nonconforming use of a building for two years may result

No. 55861-1-II

in the building being deemed abandoned. TMC 18.56.020 details the requirements for applications for a conditional use permit. The joint comprehensive plan does not adopt these requirements. Instead, the passages of the joint comprehensive plan encourage intergovernmental cooperation in urban planning.<sup>7</sup>

Kanam makes no showing that TMC 18.54.070 and TMC 18.56.020 are connected in any way to the joint plan. As stated above, nothing in the joint comprehensive plan universally adopts or even cites TMC 18.54.070 and TCM 18.56.020. The fact that there is joint planning to coordinate growth between Thurston County and Tumwater has no bearing on a non-taxpayer's standing to challenge the ordinances of a municipality that he does not inhabit. Just because the planning process is "joint" does not mean that both Thurston County and Tumwater jointly enforce Tumwater municipal ordinances. Kanam cannot show that he is affected by TMC 18.54.070 and TCM 18.56.020 in any material way.

#### CONCLUSION

Because Kanam does not allege facts sufficient to show that he is a Tumwater taxpayer, resident, or property owner, we hold that he lacks standing. We further hold that nothing in the Thurston County/Tumwater joint comprehensive plan makes Kanam a Tumwater taxpayer. We affirm.

A majority of the panel having determined that only the foregoing portion of the opinion will be printed in the Washington Appellate Reporters and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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<sup>7</sup> City and county planning is governed by the Growth Management Act. Challenges to county or city planning are properly brought before the Growth Management Hearings Board. RCW 36.70A.280.

No. 55861-1-II

UNPUBLISHED TEXT FOLLOWS

Next, Kanam argues that the superior court abused its discretion when it denied his motion for reconsideration.<sup>8</sup> Kanam also argues that the City conceded all of the issues in his complaint on the merits because it responded to his complaint with a motion to dismiss and did not file an answer. Kanam then argues that the superior court violated the appearance of fairness doctrine when it did not reschedule the hearing on his motion for declaratory judgment after he twice failed to appear for hearings on the City's motion to dismiss. Each of Kanam's arguments fail.

I. MOTION FOR RECONSIDERATION

Kanam argues that the superior court abused its discretion when it denied his motion for reconsideration. He argues that the trial court erred because he showed in his motion for reconsideration that the updated joint comprehensive plan conferred standing on him. We disagree.

We review the superior court's decision granting or denying a motion for reconsideration for abuse of discretion. *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45 (2013). A trial court abuses its discretion where its ruling is manifestly unreasonable or based on untenable grounds, which includes those that are unsupported by the record or result from applying the wrong legal standard. *Gilmore v. Jefferson County Pub. Transp. Benefit Area*,

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<sup>8</sup> Kanam also assigns error to the superior court's order denying his motion for declaratory and injunctive relief. However, he did not appeal this order, and he does not argue this issue in his brief. Thus, we do not consider the assigned error. *Greensun Grp., LLC v. City of Bellevue*, 7 Wn. App. 2d 754, 780 n. 11, 436 P.3d 397 (2019).

No. 55861-1-II

190 Wn.2d 483, 494, 415 P.3d 212 (2018). CR 59 governs motions for reconsideration and provides, in relevant part,

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial.

Kanam argues that the trial court erred when it found that he did not seek action from the AGO. The City concedes that Kanam sought action from the AGO and the AGO refused. But we need not analyze the superior court’s findings to the contrary because they are superfluous. *Deegan*, 197 Wn. App. at 884. The City argues that Kanam lacks standing, notwithstanding his request for AGO action, because Kanam did not allege sufficient facts to show he was a City taxpayer. We agree.

In his motion for reconsideration, Kanam relied on “newly discovered evidence” a policy goal from the March 2021 update to the joint comprehensive plan that stated: “Ensure the processing of applications for development permits in a timely and fair manner, and coordinate processing between the City of Tumwater and Thurston County to enhance predictability.” CP at 263. On appeal, Kanam cites a different policy goal from the updated joint comprehensive plan:

GOAL #1

Ensure that the Joint Plan Land Use Element is implementable and coordinated with all applicable City of Tumwater and Thurston County plans and regulations and the plans of other jurisdictions in the Thurston region.

CP at 262, Br. of Appellant at 17.

No. 55861-1-II

Policy goals to “coordinate” Tumwater and County plans with other jurisdictions do not join the municipal ordinances of all affected municipalities. Nothing in the language of either of these passages shows that Thurston County adopted Tumwater processes or confers standing on Kanam as a Tumwater taxpayer. Moreover, these passages are policy declarations with no operative force. *Puget Soundkeeper All.*, 102 Wn. App. at 790. Although the superior court was mistaken in finding that Kanam did not contact the AGO, that finding has no impact on his lack of standing. Accordingly, we hold that the superior court did not abuse its discretion when it denied Kanam’s motion for reconsideration because none of his “newly discovered evidence” established that he had taxpayer standing.

## II. CONCESSION ON THE MERITS

Kanam argues that the City conceded each and every issue on the merits or waived them on appeal because the City did not file an answer to his complaint. We decline to consider Kanam’s concession arguments on their merits.

Kanam argues that the City conceded all the points he raised in his complaint and amended complaint because the City filed a motion to dismiss and did not file an answer. By this logic, Kanam argues, we should hold that he prevails on the merits. But this is not the rule. Defendants are not required to file an answer if they file a motion under CR 12(b).

CR 12(a) mandates the time within which a defendant shall serve an answer on a plaintiff. However, under CR 12(a)(4):

The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court’s action.

No. 55861-1-II

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

Motions to dismiss are allowed under CR 12(b). Accordingly, the City was required to file an answer only if the court denied or postponed its motion to dismiss. *In re Marriage of Owen and Phillips*, 126 Wn. App. 487, 503, 108 P.3d 824 (2005); *Campbell v. Scannell*, 32 Wn. App. 346, 348, 647 P.2d 529 (1982). Because the superior court granted the City’s motion to dismiss, the City was not required to file an answer. Thus, we hold that the City did not concede any arguments or waive its ability to respond on appeal.

### III. FAILURE TO APPEAR

Kanam argues that the superior court was biased against him because it did not reschedule the hearing for the motion for declaratory judgment. Kanam does not argue that the court erred in entering the order dismissing his motion for declaratory judgment after he twice failed to appear, but instead argues that the superior court violated the appearance of fairness doctrine when it did not reschedule the hearing on his motion for declaratory judgment after he failed to appear.

Under RAP 2.5(a), an “appellate court may refuse to review any claim of error which was not raised in the trial court.” We generally refuse to consider appearance of fairness issues raised for the first time on appeal because it is not considered a constitutional claim of error. *Tacoma S. Hosp., LLC v. Nat’l Gen. Ins. Co.*, 19 Wn. App. 2d 210, 220 n. 2, 494 P.3d 450 (2021), *review denied*, 198 Wn.2d 1041, 502 P.3d 862 (2022); *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008).

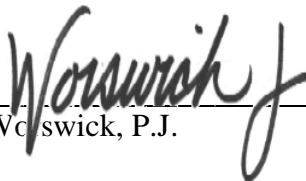
No. 55861-1-II

The superior court set a hearing date of April 9, 2021, to hear argument on the City's motion to dismiss. Kanam failed to appear. The court set over the hearing until April 16, when the court had scheduled a hearing on Kanam's motion for declaratory judgment and injunctive relief. Kanam again failed to appear. The court denied Kanam's motion for declaratory and injunctive relief, noting that Kanam failed to appear for the hearing. Kanam made no motion to reschedule the hearing and filed no affidavit of prejudice.

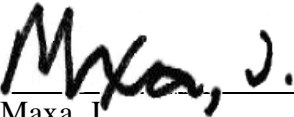
On appeal, Kanam appears to argue that the court should have known from his first failure to appear that he was not receiving proper notice of the hearings and that not setting over the hearings *a second time* demonstrates the court was biased against him. But Kanam cannot use his own failures to appear as a sword on appeal. We decline to consider this argument.

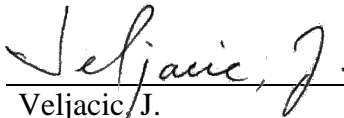
#### CONCLUSION

We do not examine Kanam's claims on their merits and hold that the City did not concede any claims. We do not reach Kanam's argument that the superior court violated the appearance of fairness doctrine because Kanam raises this argument for the first time on appeal. RAP 2.5. Accordingly, we affirm.

  
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Worswick, P.J.

We concur:

  
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Maxa, J.

  
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Veljacic, J.