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CASE NO. 66423-9-I

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

DEBORAH BUCK,

Appellant,

v.

CITY OF SHORELINE and CRISTA MINISTRIES,

Respondents.

BRIEF OF APPELLANT DEBORAH BUCK

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I. INTRODUCTION

This is a case without precedence in the entire United States judicial system. Crista Ministries (“Crista”) and the City of Shoreline (“City”), respondents, succeeded in convincing the trial court that a citizen did not exhaust administrative remedies on issues where she explicitly incorporated the objections of others by reference rather than by repeating those very same objections.

Since most municipal government agencies, and indeed courts, encourage judicial economy by discouraging repetition, this is not a trivial case. If the law adopted by the trial court is allowed to stand, efficiency in obtaining citizen comment will be a thing of the past in Washington cities, counties, hearings bodies, and perhaps even trial courts. Repetition will be required to preserve the right to judicial review, and in the case of the courts, repetition will be required to preserve the right to appeal.

II. STATEMENT OF FACTS

Petitioner Buck (“Buck”) appeals a summary judgment order entered against her. Accordingly, the facts must be interpreted in the light most favorable to her, as noted in Section IV (A), *infra*.

A. The Record Documents a Mega Complex to be Expanded in the Middle of Buck’s Single-Family Residential Neighborhood.

Respondent Crista operates a mixed use complex. Although it has a Christian religious orientation, it is not a church. Instead it has educational and senior living facilities, and administrative offices. CP 13

(City Staff Report). The campus is located within a single-family residential area and is surrounded by low-density single-family homes. *Id.*

In its application for a Master Development Plan Permit (“MDPP”), Crista has proposed a substantial expansion. CP 15-17 (City Staff Report). The City issued a Mitigated Determination of Nonsignificance (“MDNS”) and thus did not prepare an Environmental Impact Statement (“EIS”). The City approved all of the following major changes to this low-density single-family residential neighborhood without an EIS:

1. A new football field. CP 16 (City Staff Report);
2. A new independent senior housing. *Id.*;
3. A new 3,500 square foot office building. *Id.*;
4. A new addition to the existing King’s Garden Gym. *Id.*;
5. A new math/science building. *Id.*;
6. A new early childhood education center. CP 17 (City Staff Report);
7. A new elementary school. *Id.*;
8. A new performing arts building. CP 16 (City Staff Report);
9. A new skilled nursing facility. *Id.*;
10. A new greenhouse. *Id.*;
11. The destruction of portions of the historic Firlands Sanatorium. *Id.*.

Again, all of these facts, as shown in the record, must be interpreted in the light most favorable to Buck, as noted in Section IV (A), *infra*.

B. The Rationale for Not Preparing an EIS is Not Available to the Court Since There is no Record of Decision and no Findings of Fact.

The record does not reveal how the City reached its decision not to prepare an EIS. There are no findings to support the decision. CP 41 (City SEPA Threshold Determination) (stating the threshold determination as a conclusion but referencing no particular findings in support). There is no record of decision explaining the decision, as one often finds in SEPA threshold proceedings. To the best of counsel's review, no rationale for the SEPA decision is found in the City's records which are before this Court.

C. Buck's Land Use Petition Initially Set Forth Standing Facts That are Called for Under Washington Case Law.

The following are facts related to standing were set forth in Buck's LUPA petition:

- Petitioner Deborah Buck lives on the corner of North 196th Place and Greenwood Avenue North. Petitioner's residence is within a Low Density Residential area adjacent to the Crista Campus. CP 7;
- Petitioner lives adjacent to the Crista Campus and routinely drives and walks the entire area surrounding the Crista Campus. Her daily health and enjoyment of life is directly

affected by all elements of the environment that will be changed by development allowed by the MDPP. Stated another way, Petitioner will be prejudiced by the land use decision because the decision will result in major traffic, parking, and environmental impacts and will otherwise adversely affect the use and enjoyment of her property and will reduce the value of her real property. CP 5;

- Petitioner's uncle was a tuberculosis patient in Firlands Sanatorium as a youth. Petitioner and her family have always had a historic connection to Firlands. Crista owns Firlands buildings. The buildings are on the City of Shoreline Historic Inventory List. Various buildings are authorized for destruction by the MDPP without lawful processing and will be a loss to Petitioner's interests. CP 5-6;
- Petitioner's interests are among those that the local jurisdiction was required to consider when it made the land use decision because Petitioner: (1) will be adversely affected by the change in the environment occasioned by the land use decision; (2) is a member of the community in which the land use decision will be implemented; and (3) has actively participated in the local jurisdiction's land use decision, including its SEPA determination, by making comments to the local jurisdiction's officials. CP 6;

- A judgment in favor of Petitioner would substantially eliminate or redress the prejudice to Petitioner caused by the land use decision. CP 6;

Again, all of these facts, as pled, must be interpreted in the light most favorable to Buck, as discussed in Section IV (A), *infra*.

D. When Buck’s Pleadings Were Challenged, They Were Strongly Bolstered by a Declaration Setting Forth the Facts With Extensive Detail.

In opposition to the motion to dismiss for lack of standing, Buck filed a declaration which stated the following:

- “I am prejudiced by the Crista [MDPP] and the decision to not prepare an EIS because the decisions will result in major traffic, parking, and environmental impacts and will otherwise adversely affect the use and enjoyment of my property and will reduce the value of my real property.” CP 139 (Declaration of Deborah Buck);
- “As noted by the attorney for Crista Ministries, Mr. Alan Wallace, in his declaration supporting this motion, I incorporated all of the comments of my fellow residents as being relevant to me. I will be injured in the same manner as they explained.” CP 139-140 (Declaration of Deborah Buck);
- “Representative emails and letters from the record that set forth with particularity the injuries I will suffer are attached to a

declaration of Emily Rooney, which is being filed today.” CP 140
(Declaration of Deborah Buck);

- “To avoid any doubt, I once again incorporate those emails and letters as accurate statements of the injuries which will occur to me if the Crista development is approved without further environmental review and the opportunity to comment to the City to obtain environmental mitigations.” CP 140 (Declaration of Deborah Buck);
- “These injuries include impacts in the following specific areas, all of which will occur to me, in the same manner as set forth in detail in the letters and emails:
 - Storm water/ impermeable surface impacts which will result in flooding of the area and degradation of the water quality of my neighborhood;
 - Construction impacts of all kinds during the construction of this large project;
 - Traffic and parking impacts on Greenwood, but also on the other streets discussed, all of which I drive and have driven an average of three times a day for the last 20 years;
 - Impacts concerning the stream which currently runs underground;
 - Destruction of many significant trees in my neighborhood;
 - Interference with wildlife in my neighborhood and destruction to their habitat;

- Destruction of historic buildings of great importance to me, as mentioned in my petition;
- Substantial changes in the impacts from an altered playing field; and
- The cumulative impacts which are discussed in several of the comments attached to the declaration of Emily Rooney.” CP 140-41 (Declaration of Deborah Buck).

Again, all of these facts, as pled, must be interpreted in the light most favorable to Buck, as discussed in Section IV (A), *infra*.

E. Twenty-Two Citizens Asked for Environmental Review. These Citizens Were Told as Late as December 1, 2009 That There Would be a SEPA Appeal Hearing Where They Could Present Their Evidence and State Their Concerns if a Decision Was Made to Not Prepare an EIS.

Twenty-two citizens, including Petitioner, pleaded for preparation of an EIS to evaluate the addition of these substantial new facilities. CP 192-207 (Citizen SEPA comments submitted to Steve Szafran, Associate Planner for the City of Shoreline). They asked that the EIS be used to analyze impacts and to develop environmental mitigation. *Id.* Not one comment letter was found that supported the decision to not prepare an EIS.¹

The City repeatedly led its citizens to believe there would be a public hearing in which citizens could present their evidence and state

¹ Counsel for Petitioner was able to locate one comment that voiced “no concerns” with the proposal, but it did not specifically mention the City’s SEPA threshold determination. CP 300 (comment of Ronald Wastewater District manager Michael Derrick).

their concerns that an EIS should be prepared. *See, e.g.*, CP 166-67 (Email from Shoreline Senior Planner, Steve Cohn, to Wendy Zieve, sent December 1, 2009, indicating that the City would hold a public hearing for additional comment).

F. Citizens Were Not Told of the Backroom Understanding That There Would be no EIS.

It is notable that the City and the applicant had a “backroom” understanding that there would be no EIS. On May 28, 2009, the City staff apparently predetermined that it would issue a MDNS rather than prepare an EIS. *See* CP 168 (email from Steve Szafran to Kyle Roquet). The City informs Crista’s representative, but not members of the public. *Id.*

G. The City Cancelled a Promised Appeal Hearing on the Threshold Decision Just After it Was Too Late for Citizens to Make Any Further Comments.

Four business days after the close of the written comment period on the threshold decision issue, the City issued a surprise announcement cancelling the right to the administrative appeal hearing provided for in the Shorelines Municipal Code. CP 163 (decision of Joe Tovar). The chronology of events is illuminating:

1. May 28, 2009. As noted above, the City staff apparently predetermined that it would issue a MDNS rather than prepare an EIS. *See* CP 168 (email from Steve Szafran to Kyle Roquet). The City informs Crista’s representative, but not members of the public. *Id.*
2. Despite apparently predetermining that it will issue an MDNS, the City creates the guise that it is legitimately considering an

EIS. On November 19, 2009, the City staff invites written comment. *See* CP 21.

3. As late as December 1, 2009. City staff advises the public that in addition to submitting written comments, they will have the right to a SEPA appeal hearing. *See* CP 166-67 (email from Steve Cohn to Wendy Zieve).
4. December 4, 2009. Petitioner Buck submits short written comments, expecting that she could trust that the City would hold its promised SEPA threshold decision appeal hearing. *See* CP 112-13.
5. December 4, 2009. Comment period closes. CP 56 (Declaration of Steve Szafran).
6. December 8, 2009. City staff issues decision revoking right to public hearing, stating that review of the City's decision should be sought in the Courts: "the MDPP may be appealed to Superior Court after the City Council takes action." CP 21; *see also* CP 163.
7. June 1, 2010. Petitioner appeals the City's SEPA determination to King County Superior Court, relying on her letter incorporating comments by reference because she was not able to develop them further in the promised public hearing. CP 6, 8.
8. July 9, 2010. Respondent Crista Ministries moves to partially dismiss Petitioner's claim for failure to exhaust administrative remedies and lack of standing. In its statement of the issue, Respondent asks this court to dismiss all of Petitioner's claims that she "did not pursue through the City's public hearing process. . . ." CP 133.

III. STATEMENT OF ISSUES

1. Has the law of standing in Washington cases been radically altered to bar citizen access to the courts?
2. Is judicial review of a land use decision denied to a citizen based on failure to exhaust administrative remedies when that citizen

objects in depth to just one issue, and explicitly incorporates by reference the objections of her fellow 22 objecting citizens?

3. Was the exhaustion of remedies argument advanced in violation of duties under CR 11?

IV. ARGUMENT

A. Since This is an Appeal of an Adverse Summary Judgment Order, Facts Must be Interpreted in the Light Most Favorable to Buck.

It hardly needs stating that summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). This Court reviews an order granting summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

Thus, the facts here must be interpreted in the light most favorable to Buck with regard to the summary judgment order that found she had no standing and had not exhausted administrative remedies. The legal principal of ascertaining the governing facts is emphasized again, however, since the trial court may have lost sight of this maxim.

B. Buck's Facts in Opposition to a Summary Judgment Motion for Lack of Standing Meet or Exceed the Facts in Any Reported Washington Case. Her Single-Family Residence Would be in the Heart of the Proposed Mega Complex and its Alleged Mega Impacts. Her Pleadings Were Informed by Case

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Crista persuaded the trial court that Buck did not have standing.

Its motion for summary judgment made the following statement:

Petitioner has failed to assert any facts to establish standing as to all claims raised by others before the Commission. In addition, she has failed to identify any individual member or specific comment made by another person that she plans to raise on appeal. To satisfy the standing requirement of LUPA at RCW 36.70C.060, Petitioner must allege an 'injury in fact, i.e., that he or she must show they personally will be 'specifically and perceptibly harmed' by the proposed action.' *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 52 P.3d 522, review denied 149 Wn.2d 1013, 69 P.3d 875. In order to show injury in fact for the comments raised by others, Petitioner must present facts that show she will be adversely affected by the Commission's determination on the issues raised by others. '[W]hen a person alleges a threatened injury, as opposed to an existing injury, she must show an immediate, concrete, and specific injury to him or herself.' *Trepanier v. City of Everett*, 64 Wn. App. 380, 382-383, 824 P.2d 524, rev. denied, 119 Wn.2d 1012 (1992). 'If an injury is merely conjectural or hypothetical, there can be no standing.' *Id.* at 383.

Here, Petitioner has failed to assert she will be 'specifically and perceptibly harmed' as a result of any of the issues raised by others before the Planning Commission. Her bare assertions referencing the 'comments of others' have no factual support in the record and do not allege any specific facts to show that she personally would be harmed by the issues. Thus, Petitioner has failed to meet the LUPA standing requirement for those claims and should be barred from raising them before this Court.

CP 135-36 (Respondent Crista Ministries' Motion for Partial Summary Judgment for Failure to Exhaust Administrative Remedies and Lack of Standing).

As noted in the factual section above, this Court could certainly review the facts alleged by Buck and conclude that the trial court erred in its apparent agreement with Crista. In addition to the facts supporting Buck's standing, the law of standing also supports Buck's position.

A party establishes standing to challenge a land use decision under LUPA by demonstrating that they are "aggrieved or adversely affected by the land use decision." RCW 36.70C.060(2). A party is aggrieved or adversely affected if "[t]he land use decision has prejudiced or is likely to prejudice them."

Washington courts have interpreted this prejudice element to incorporate the traditional "injury in fact" requirement for standing. *See Chelan County v. Nykreim*, 146 Wash.2d 904, 934, 52 P.3d 1 (2002) (citing *Suquamish Indian Tribe*, 92 Wash. App. at 829). In the LUPA-SEPA context, "[a] sufficient injury in fact is properly pleaded when a property owner alleges immediate, concrete, and specific injury . . . even though the allegations may be speculative and undocumented." *Kucera v. State Dept. of Transp.*, 140 Wash. 2d 200, 213, 995 P.2d 63 (2000) (quoting *Leavitt v. Jefferson County*, 74 Wash. App. 668, 679, 875 P.2d 681 (Div. 2 1994)) (internal quotations omitted).

A leading case articulating the principles of standing in Washington is this Court's decision in *Suquamish Indian Tribe v. Kitsap*

County, 92 Wn. App. 816, 829-30, 965 P.2d 636 (Div. 1 1998). It has been cited 15 times.

In *Suquamish*, a citizens' group and Indian tribe each filed land use petitions challenging Kitsap County's approval of a proposed development of residential lots and a golf course. *Id.* at 820. The trial court granted summary judgment in favor of the county based on a determination that the petitioning parties lacked standing. *Id.* This Court reversed, concluding that the citizens' group and its members had established the existence of a genuine dispute of material fact as to whether they had standing to petition under LUPA. *Id.*

This Court set forth the general rule: "In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Id.* at 829-30. The Court also stated that a party need not show a particular level of injury in order to establish standing. *Id.* at 832. Individual members of the citizens' group lived adjacent to the project and had stated that there would be significant increases in traffic and that the risk in travelling would be increased as a result of the development. *Id.* at 831. Based on this, the Court concluded that the citizens' group had standing to challenge the land use decision as a whole based upon their proximity to the project site and because they had alleged specific harms that would result from that proximity. *Id.* at 831-32.

In general, it is safe to say in Washington reported cases have set a low bar to citizen access to judicial review. *See Anderson v. Pierce*

County, 86 Wash. App. 290, 300, 936 P.2d 432 (Div. 2 1997) (adjacent property owner had standing based on his own testimony that storm water runoff would damage his property); *Save A Valuable Environment v. City of Bothell*, 89 Wash.2d 862, 868, 576 P.2d 401 (1978) (citizens group including neighbors of proposed shopping center had standing based on allegations that rezone would have detrimental effects on environment and economy).

The facts set forth in Buck's LUPA petition (Section II (C), *supra*) and in her declaration resisting the motion (Section II (D), *supra*) meet the requirements of Washington law.

C. The Trial Court's Unique Rule of Exhaustion of Remedies is Unsupported by Precedent or Policy and Would Bring Havoc to Proceedings by Requiring Extensive Duplication of Every Statement Made by Every Person.

Respondents succeeded in a trial court motion precluding Buck from seeking judicial review of those issues in which she adopted the comments of others rather than repeating them. The trial court agreed with the Respondents and ruled, as a matter of law, that Buck has not exhausted her administrative remedies on any issue raised by the other 21 objectors which Buck had incorporated by explicit reference, but did not repeat.

1. The trial court's rule flies in the face of orderly hearings and "judicial-administrative" economy.

Under the trial court's new rule of law, Buck would have had to repeat the arguments of the other 21 objectors to obtain full judicial

review. If allowed to stand, this principle would mean that future objectors would each have to write voluminous, repetitive letters; each one articulating the very same objections raised by each other objector.

By logical extension, if there were a hearing rather than written comments, each person would have to make comments reflecting the points of all 21 other speakers. This endless repetition of comments could cause public hearings to run for hours upon hours.

It is not clear how this would square with the common three minute time limit local jurisdictions try to set for local government hearings. It is also not clear what this would do to society's ability to attract unpaid citizen volunteers to serve on planning commissions, city councils, county councils, boundary review boards, etc.

Indeed, if the general rule of law is that one forgoes appeal rights unless repeating arguments of other parties, then trial courts would be denied the ability to speed matters along, and instead would need to encourage litigants to repeat each and every argument of others so that a particular litigant could retain appeal rights. *See* RAP 2.5 (with limited exceptions, an appellate court may refuse to review any claimed error not first raised below).

2. Since no reported case in the United States has set forth such a rule, it is instructive to look at more general statements of access to the courts found in cases such as *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997).

No case law was cited below for the proposition that judicial review was unavailable to a petitioner who incorporates by reference the comments made by others. For example, a Westlaw, all-state search for the terms {"exhaustion" /s "incorporat! by reference"} produces 5 results, none of them dealing with this specific issue.

It is thus necessary to look at the general rules of Washington case law on standing and exhaustion. Such review reveals whether access to the courts is encouraged or discouraged.

As to the general law of exhaustion, the most helpful statement of principles comes from *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997). The Court held that just as no particular level of injury is required to establish standing, no particular level of specificity regarding issues raised is required to exhaust administrative remedies. *See Id.* at 868-70. In *Citizens for Mount Vernon*, a citizens' group filed a LUPA petition challenging the city council's approval of a commercial planned unit development. *Id.* at 865. The Washington State Supreme Court affirmed the superior court decision that held, inter alia, that the petitioners had exhausted their administrative remedies and had standing because issues of noncompliance with zoning and planning laws were adequately raised at public hearings and through written correspondence. *Id.* at 876.

In *Citizens for Mount Vernon*, the developer had argued that the petitioners could not look to the courts for a remedy because they had failed to raise the issue of the rezone and the project approval specifically

enough in the public hearing process. *Id.* at 868. The Court opined, however, that the Land Use Petition Act (“LUPA”) “states nothing of the degree of participation or the specificity with which issues must be raised to seek judicial review.” *Id.* at 868-70.

The Court stated that it had not specifically addressed how much participation at a public hearing is required to exhaust an administrative remedy, but that the petitioner had opposed the project through written correspondence to the city council and through testimony at the public hearings. *Id.* at 869-70. The Court found that the issues of zoning and compatibility were before the city council and that “[t]he record here reflects [that Petitioner] participated in all aspects of the administrative process and raised the appropriate project approval issues.” *Id.*

Holding that the petitioners exhausted their administrative remedies and had standing to seek judicial review of its land use petition, the Court explicitly rejected the argument that the petitioners’ comments were not specific enough to raise the issue before the agency. *Id.* at 870-71. The Court stated that the petitioners “did not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing.” *Id.* at 870.

3. Respondents’ request for a novel rule of law is weakened by the unique procedural posture of this case.

Exhaustion is typically invoked when petitioners’ own shortcomings underlie their failure to make an appeal or raise an issue. *See, e.g., West v. Stahley*, 155 Wn. App. 691, 229 P.3d 943 (Div. 2, 2010)

(challenger of permit issued by city for construction of utility infrastructure failed to exhaust administrative remedies before filing petition under Land Use Petition Act since challenger had failed to file administrative appeal within 14 days of decision required by city ordinance). In this case, however, it is the Co-Respondent City itself that is responsible for limiting the available administrative remedies. This occurred when the City revoked the right to an administrative hearing and instructed concerned citizens to seek a judicial remedy. *See* CP 21.

The administrative appeal process plays an important role in refining issues for judicial review. After the City elected not to allow an administrative appeal, it is disingenuous for Crista, as the permit applicant, to assert that Petitioner has failed to exhaust her remedies.

Exhaustion of remedies is not required where a petitioner has not had the full opportunity to exhaust the administrative process. *Gardner v. Pierce Cty. Bd. Of Commn'rs*, 27 Wn. App. 241, 243-44, 617 P.2d 743 (Div. 2, 1980). In *Gardner v. Pierce Cty. Bd. Of Commn'rs*, petitioner owned property adjacent to an area for which Pierce County had approved a preliminary plat. In his appeal of the County's land use decision, petitioner challenged the County's declaration of negative environmental impact. *Id.* at 242. Before addressing whether the County's declaration was clearly erroneous, the court first addressed whether it was precluded from reviewing the County's declaration on the basis that petitioner failed to exhaust his administrative remedies under a Pierce County ordinance. *Id.* at 243.

The relevant ordinance before the Court provided: “any aggrieved person may appeal the threshold determination or any other decision of the County Environmental Official by filing notice of appeal with the County Environmental Official and paying the \$75.00 appeal fee within the following time period: . . . but if notice is not provided, then said appeal may be filed any time up to ten (10) days before the county final granting authority is scheduled to commence a hearing or meeting concerning the approval of said proposal.” *Id.*

The Court found that Pierce County did not give notice of the negative declaration when it was issued on February 14, 1978, and there was nothing in the record to indicate that petitioner had notice of the declaration or an opportunity to challenge it until the May 8 Commissioners' hearing, at which time it apparently became a part of the record. *Id.* at 243. The Court stated that to require petitioner to file an appeal 10 days before the hearing under these circumstances would be unreasonable and violative of due process. *Id.*

In holding that there was no failure by petitioner to exhaust administrative remedies, the Court stated that: “[w]here one has not enjoyed a fair opportunity to exhaust the administrative process, or where resort to administrative procedures would be futile, exhaustion of administrative remedies will not be required.” *Id.* at 243-44 (citing *Craycroft v. Ferrall*, 408 F.2d 587 (9th Cir., 1969)). Here, Petitioner has had *zero* opportunity to voice her concerns through an administrative appeal.

4. These bad facts would make bad law.

This case does not have a factual pattern crying out for new law limiting citizen access to the courts. The opposite is true.

The City made it clear that there would be an opportunity to make a record during a hearing. *See* CP 166-67. Four days after there was no chance to make a further written record, the City then pulled the rug out from under its citizens. CP 163.

Petitioner was the victim of “sandbagging” that led her to not develop a more substantial record in her written comments. It does not matter whether this was an unplanned, *de facto* sandbagging, or a planned sandbagging. The result is the same. It is the action of the City that led to the unfortunate set of affairs in this case. In this regard, it is worth paying special attention to Section IV (C) (6) below.

If Petitioner Buck did not make a robust record for exhaustion purposes, this Court should look to the City’s posture in this case. Blaming sandbagged citizens does not present a sympathetic posture for asking the courts to substantially curtail citizen access to the courts.

5. The positions and utterances of Respondents would make Lewis Carroll proud.

Undersigning counsel usually refrains from hyperbole. The irony of this case, however, cannot be truly presented without identifying some of the “crazy making” positions of Respondents. The Court is urged to consider what it is like for a citizen of Shoreline to be faced with such actions and statements when seeking judicial review.

This is not a contracts case. This is a case seeking to deny a citizen her day in court. It is a serious matter. To try to block access to the courts with such “crazy making” behavior is not a trivial or humorous matter. In *Alice in Wonderland*, Lewis Carroll presented crazy making behavior as humorous. To someone who is in control it can be humorous. It is horrible, however, for a victim of “crazy making behavior” who did nothing more than try to participate in an environmental process created by the State Environmental Policy Act.

This should not be countenanced by a court. Cities should be held to a much higher standard of conduct when dealing with citizens who simply seek recourse to the courts.

The saddest *Alice In Wonderland* moment came when the City advised its citizens to seek judicial review since there would be no hearing. When the City revoked the right to an administrative hearing, it said that “the MDPP may be appealed to Superior Court after the City Council takes action.” CP 21.

Buck, of course, took the City’s advice. In lieu of the previously promised City appeal hearing, she followed the City’s dictate and went to court. Then, on July 9, 2010, Crista moved to dismiss the bulk of Petitioners’ case, arguing that she failed to exhaust administrative hearing remedies and failed to make an adequate standing argument in the local record. CP 131.

To put it plainly, the City cancelled a SEPA appeal hearing previously promised as an opportunity for citizens to have their say on the

threshold determination issue. Then the City said that the proper place for such a hearing was in court. Then the Respondents said that the court was not the correct place to obtain review. Instead, the City said that this should have been handled at the City level.

Another sad *Alice in Wonderland* moment came in the Respondents' argument to the court that Buck should have made her points in the City hearing. In Crista's motion for summary judgment, it argued: "All issues raised in Petitioner's belated attempt to litigate issues she did not raise before the administrative agency and her effort now to litigate issues raised by other participants at the City's public hearing should be dismissed . . . This Court must not allow Petitioner to sandbag the administrative process and to now litigate a wide variety of new issues under the guise of a SEPA appeal." CP 131 (Crista Summary Judgment Motion) (emphasis added).

The irony is, of course, that there was no such hearing. The issue of a lack of a hearing to make a record was so integral to the argument at the trial court that this statement is "crazy making."

6. Due to the impact of RCW 4.84.370, this appeal is serious, not humorous.

Counsel attempts to highlight the horror of municipal behavior with the *Alice in Wonderland* comparison. It is important to end with the note that this case is not a whimsical story of fiction. This case presents a nightmare.

Buck and 21 other citizens sought SEPA review of the Crista proposal. Not one person is shown in the record as supporting the decision to not conduct environmental review.² Since the City chose to not prepare an EIS, and indeed in a “backroom” decision predetermined this result long before the close of the comment period on December 4, 2009,³ it was not unreasonable for a citizen to seek review at the trial court level. This was especially true since the City revoked the appeal hearing and said to go to court for review of the threshold determination.

It is not trivial for any citizen to seek judicial review at the trial court level. At least, however, at the trial court level the American rule of each party paying his or her own attorney’s fees applies.

Under RCW 4.84.370, a one sided English rule on attorney’s fees applies. A citizen is at unusual peril if he or she needs to go to an appellate court in an attempt to seek justice. Access to an appellate court is dependent on taking the risk of paying the attorney’s fees of two other parties.

This appeal of a restrictive standing decision and an unprecedented exhaustion bar could only be brought by Buck at the risk of having to pay the attorney fees of the City and Crista.

² As noted above, Counsel for Petitioner was able to locate one comment that voiced “no concerns” with the proposal, but it did not specifically mention the City’s SEPA threshold determination. CP 300 (comment of Ronald Wastewater District manager Michael Derrick).

³ See, e.g., CP 168 (May 28, 2009 email from Kyle Roquet to Steve Szafran stating that the City planned to issue an MDNS).

No criticism of the Legislature's adoption of RCW 4.84.370 is made. The point of this discussion is to simply end with the observation that we deal with serious business when we force a citizen to risk paying attorneys fees to parties who tried (and maybe succeeded) in persuading the trial court:

- That Buck should have used the hearing to make her points, when there was no hearing.
- That it was okay to tell citizens to seek judicial review instead of city appeal hearing review and then to deny them judicial review because they did not exhaust remedies at the city level.

This is not a fairy tale. This is a serious matter of a citizen needing access to the courts.

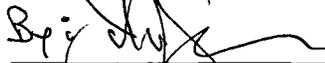
CONCLUSION

The decision below should be reversed and the matter remanded for a complete record review of all issues set forth in Buck's land use petition.

DATED this 4th day of March, 2011.

THE BUCK LAW GROUP, PLLC

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By:  WSBA # 43035

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Attorneys for Appellant Deborah
Buck

CERTIFICATE OF SERVICE

I, Sharon Kendall, am an employee of The Buck Law Group, PLLC, I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On the date indicated below, I caused a copy of the Appellant's Brief to be served on the following named person(s), *via* legal messenger.

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