

67031-0

67031-0

No. 67031-0-I

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

BRUCE BORJESSON,

Appellant,

vs.

CITY OF SEATTLE, DEPARTMENT OF PLANNING AND
DEVELOPMENT, Director, DIANE SUGIMURA, Supervisor CLAY
THOMPSON, Inspectors NAZANIN SAMIMI, TOM BRADRICK and
other anonymous parties,

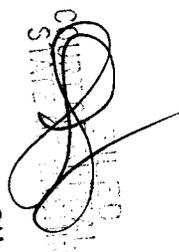
Respondents.

CITY'S RESPONSE BRIEF

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON


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I. INTRODUCTION

In 2009, the City of Seattle Department of Planning and Development (DPD) issued multiple citations to Mr. Borjesson, for violations of Title 23 (Land Use) of the Seattle Municipal Code based on his storing junk on his property and maintaining structures in required yards and setbacks. Appellant Borjesson (Borjesson) timely appealed two citations (No. 1018768-3 and No. 1018768-8) to the Seattle Hearing Examiner (Examiner). After each hearing, the Examiner issued decisions rejecting Borjesson's challenges and affirmed the two citations (Examiner's Decisions).

Borjesson attempted to obtain judicial review of the Examiner's decision issued on June 16, 2009 (No. 1018768-3) by filing a "complaint/notice of appeal" (hereafter "first appeal") with the superior court; Borjesson subsequently filed an "amended appeal" (hereafter "second appeal") attempting to appeal the Examiner's decision issued on February 19, 2010 (Citation 1018768-8) by attempting to include it as part of his original suit. In both appeals, Borjesson failed to serve the Seattle Mayor's Office or Clerk's Office, which is required to effectuate service.

The City filed a Motion to Dismiss Borjesson's suit under CR 12(b)(1) for lack of subject matter jurisdiction, and 12(b)(5) for insufficiency of service of process (City's Motion), because Borjesson

failed to properly serve the City as required by the Land Use Petition Act (LUPA). Failure to properly serve the City within the statutory appeal period prevented the superior court from obtaining jurisdiction over the “final land use decision”¹ - here, the Seattle City Hearing Examiner’s (Examiner’s) decisions affirming the two citations issued to Borjesson.²

The superior court granted the City’s motion concluding that Borjesson failed to timely serve the City as required by LUPA. This appeal by Borjesson followed.

Contrary to Mr. Borjesson’s assertions, the superior court’s dismissal was proper and the court did not err. The City respectfully asks this Court to affirm the superior court’s dismissal because Borjesson failed to meet his burden of proving the superior court erred in the current appeal.

Borjesson raised several other arguments, only one of which even qualifies for review by this Court under RAP 2.5(a) -- the argument that the superior court’s failure to enter findings of fact or conclusions of law violated his due process rights. All of the other arguments were not

¹ Once the 21-day appeal period passes, the Examiner’s Decisions become final and binding and are deemed valid and lawful. *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000).

² Clerk’s Papers (CP) at 36-38 (Examiner Decision re: Citation 1018768-3); CP at 39-42 (Examiner Decision re: Citation 1018768-8).

included in Borjesson's original appeal statement filed with this Court and should not be considered.

II. STATEMENT OF THE CASE

A. **DPD Issued Citation 1018768-3 to Borjesson in June 2009 for Code Violations Including Junk Storage and Maintaining Structures in Required Setbacks.**

The City received a complaint that Mr. Borjesson's property, located near the Crown Hill neighborhood at 9519 4th Ave NW, Seattle, WA, was in violation of the City's Land Use Code (Title 23 of the Seattle Municipal Code).³ DPD issued Mr. Borjesson a warning letter in March 2009 and a citation (No. 1018768-2) in May 2009.⁴

On June 16, 2009, following another inspection, DPD issued Citation 1018768-3 to Borjesson for continuing violations of the City's Land Use Code.⁵ Borjesson requested a hearing to contest the citation.⁶ During the hearing, Borjesson alleged that City inspectors trespassed on his property.⁷ However, the Examiner relied on photographs taken from the public right-of-way, evidencing the violations.⁸ On October 26, 2009,

³ *CP at 36* (Examiner Decision re: Citation 1018768-3), Finding of Fact (FOF) No. 3.

⁴ *Id.*

⁵ *CP at 36* (Examiner Decision re: Citation 1018768-3), *FOF No. 4.*

⁶ *See CP 36-38* (Examiner Decision re: Citation 1018768-3).

⁷ *CP at 37* (Examiner Decision re: Citation 1018768-3), *FOF 6.*

⁸ *CP at 37* (Examiner Decision re: Citation 1018768-3), Conclusions of Law (COL) No. 2 and 3.

the Examiner affirmed the citation and assessed a \$500 penalty⁹ finding that Borjesson's property was in violation of Seattle Municipal Code (SMC) 23.44.006, .014 and .040 for storing junk and maintaining structures in the required yards/setback.¹⁰ As stated at the end of the Examiner's Decision, the Seattle Municipal Code (SMC or Code) requires the Decision to be appealed to superior court within 21 days as a LUPA petition.¹¹

B. Borjesson Attempts to Appeal the Examiner's Decision Affirming Citation 1018768-3.

On November 13, 2009, Borjesson filed his Appeal of Citation 1018768-3 with the superior court¹² and delivered a copy of the document to DPD.¹³ Borjesson denies in his appeal that he has filed a LUPA¹⁴ and the superior court issued a standard case schedule, not one tailored to LUPA.¹⁵ Borjesson did not properly serve the City as required by RCW 36.70C.040; neither the Mayor's Office nor the City Clerk's Office has any record that the appeal was served on their respective offices.¹⁶ Further,

⁹ *CP at 38* (Examiner Decision re: Citation 1018768-3), first paragraph.

¹⁰ *Id.*

¹¹ *CP at 38* (Examiner Decision re: Citation 1018768-3), second to last paragraph. *See also* SMC 23.91.012.G.

¹² *CP at 96-108* (Notice of Appeal/Complaint).

¹³ *CP at 74-75* (Declaration of Diane Davis in Support of City's Motion to Dismiss (Davis Decl)).

¹⁴ *CP at 100.*

¹⁵ *CP at 111.*

¹⁶ *CP at 118-119* (Decl. of Monica Martinez Simmons) and *CP at 120-121* (Decl. of April Thomas)

Borjesson provided no proof of service. The only proof of service in the record is for a document entitled “Motion for Postponement” which was served on March 11, 2011, approximately sixteen months after the statute of limitations ran on the Examiner’s Decision for Citation 1018767-3.¹⁷ Moreover, Borjesson did not personally serve any of the four DPD employees personally named in the lawsuit¹⁸ nor did the appeal include a summons or declaration of service as required.¹⁹

C. DPD Issues Another Citation (No. 1018768-8) to Borjesson for Continued Code Violations.

On February 19, 2010, following an inspection, DPD issued Citation 1018768-8 to Borjesson for continued violations of Title 23.²⁰ Borjesson requested a contested hearing.²¹ During the hearing, Borjesson made several arguments as to why his property was not in violation of the Code;²² however, the Examiner did not agree.²³

Specifically, the Examiner found Exhibit 5, Borjesson’s document entitled “record of survey” was not sufficient to rebut DPD’s evidence that there were additions to the residence and structures located within the

¹⁷ *CP at 95.*

¹⁸ *CP at 122-123 (Decl. of James (Clay) Thompson); CP 124-125 (Decl. of, Nazanin Samimi); CP 126-127 (Decl. of Tom Bradrick) and CP 116-117 (Decl. Bonita Chinn).*

¹⁹ *See CP 96-108 and CP 1-17.*

²⁰ *CP at 40, Finding of Fact (FOF) No. 4.*

²¹ *CP at 20 (Borjesson’s appeal of Citation No. 1018768-8).*

²² *CP at 40, FOF No. 6-10.*

²³ *CP at 42 at “Decision”.*

property's required yards.²⁴ The Examiner also concluded that the 1966 and 1967 building permits offered by Borjesson did not purport to authorize structural additions that project into the property's required yards.²⁵ The Examiner concluded that there was no evidence in the record to support Borjesson's claim of selective enforcement.²⁶ The Examiner also concluded that she lacked jurisdiction to consider Borjesson's harassment and constitutional claims.²⁷

The Examiner affirmed Citation 1018768-8 and assessed the \$500 penalty on April 6, 2010.²⁸ As stated at the end of the Decision, the Code requires the Examiner's Decision be appealed to superior court within 21 days of the Decision as a LUPA petition.²⁹

D. Borjesson Serves the Appeal of Citation 1018768-8 on the Examiner.

On April 26, 2010, Borjesson filed an appeal of the Decision with the superior court and delivered a copy to the Examiner's Office.³⁰ Once again, Mr. Borjesson did not properly serve the appeal on the City as required by RCW 36.70C.040.

²⁴ *CP at 41*, COL No. 3.

²⁵ *CP at 41*, COL No. 4.

²⁶ *CP at 41*, COL No. 5.

²⁷ *CP at 41*, COL No. 6.

²⁸ *CP at 41-42*, COL No. 7. The Examiner relied on testimony of DPD Inspector Tom Bradrick and photographs taken by Mr. Bradrick in the public right-of-way and from a neighbor's property.

²⁹ *CP at 42*, second to last paragraph. *See also* SMC 23.91.012.G.

³⁰ *See CP 46-47*, No. 2 and *CP 48*, which contains Hearing Examiner's date-stamp.

First, Borjesson did not provide any proof of service. He again relies exclusively on an affidavit of service for a document entitled “Motion for Postponement” served on March 11, 2011; this certainly isn’t proof that Borjesson timely served the appeal of Citation 1018768-8 on the City Clerk or Mayor’s Office within 21 days after the April 26, 2010 issuance date. Neither the Mayor’s Office nor the City Clerk’s Office has any record that the appeal was served on either office.³¹

Borjesson admitted that his appeal is not a LUPA petition; his appeal states: “At no time has Mr. Borjesson filed any such type of land use petition.”³² Like the first appeal, the superior court clerk issued a standard case schedule, not a LUPA schedule.

E. Superior Court Dismisses Borjesson’s Appeals.

The City filed a Motion to Dismiss Borjesson’s appeal of Citations 1018768-3 and -8 on March 10, 2011.³³ The basis of the City’s Motion to Dismiss was CR 12(b)(1) (lack of subject matter jurisdiction) and CR 12(b)(5) (insufficiency of service of process) because Borjesson failed to properly serve the City as required by the Land Use Petition Act (LUPA).

Failure to properly serve the City within the statutory appeal period prevents the Court from obtaining jurisdiction over the “final land use

³¹ *CP 118-119* (Simmons Decl.) and *CP 120-121* (Thomas Decl.).

³² *CP at 99*. See also *e.g.*, *CP at 90*, last two sentences.

³³ *CP at 23-35* (City’s Motion to Dismiss)

decision”³⁴ - here, the Seattle City Hearing Examiner’s (Examiner’s) decisions affirming two citations.³⁵

During the superior court proceeding, Borjesson did not and said he could not provide receipt of service on the City in either appeal.³⁶ Borjesson also admitted that he did not personally serve any of the City defendants.³⁷

The superior court concluded that it lacked subject matter jurisdiction over Borjesson’s first and second appeals because Borjesson failed to properly serve the City under RCW 4.28.020 by failing to deliver the appeals to the Mayor or City Clerk.³⁸ The superior court dismissed all of Borjesson’s claims in his appeals because the claims arose from issuance of the citations.³⁹ The superior court granted the City’s Motion to Dismiss for all defendants including those individually-named defendants.⁴⁰ Finally, the superior court did not rule on the City’s alternative argument for dismissal under CR 12(b)(6).

Borjesson now appeals the superior court dismissal to this Court. Borjesson filed an “Appellants brief in full notice of appeal of dismissal of

³⁴ Once the 21-day appeal period passes, the Examiner’s Decisions become final and binding and are deemed valid and lawful. *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000).

³⁵ *CP at 36-38* (No. 1018768-3) and *CP 39-42* (No. 1018768-8).

³⁶ *CP at 78*, lines 18-19. *See also Report of Proceedings.*

³⁷ *CP at 79*, lines 16-17. *See also Report of Proceedings.*

³⁸ *CP at 79*, lines 1-16.

³⁹ *CP at 79*, lines 17-19.

above captioned case #209413452sea” (hereafter Borjesson Brief) and a “Motion to Vacate Dismissal of Lawsuit on above-captioned case #2-09413452sea” (hereafter Borjesson Motion). This brief serves as a response to both documents.

III. ARGUMENT

A. Standard of Review and Burden of Proof.

This Court’s review is governed by the same standard used by the superior court under CR 12(b)(1) and 12(b)(5). CR 12(b)(1) sets forth a defense for “lack of jurisdiction over the subject matter[.]” CR 12(b)(5) sets forth a defense for “insufficiency of service of process” “Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal.”⁴¹ This Court reviews de novo an order of dismissal under CR 12(b)(1).⁴² Similarly a court reviews de novo an order of dismissal under CR 12(b)(5).⁴³

When a defendant moves to dismiss based upon insufficient service of process, the plaintiff has the initial burden of making a prima facie showing of proper service.⁴⁴ A plaintiff may make this showing by

⁴⁰ CP at 79, No. 5, line 20.

⁴¹ *Ricketts v. Washington State Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (Div. 1, 2002).

⁴² *Id.*

⁴³ See e.g., *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (finding that questions of law and conclusions of law are reviewed de novo).

⁴⁴ *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005).

producing an affidavit of service that on its face shows that service was properly carried out.⁴⁵ Then the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper.⁴⁶

B. The Superior Court Properly Dismissed Borjesson's Appeals When He Failed to Timely Serve the City.

LUPA (Ch. 36.70C RCW) establishes the exclusive means of judicial review of a final land use decision. Hearing Examiner Decisions Nos. 1018768-3 and 1018768-3 are final land use decisions. Under LUPA, a "land use petition is *barred*, and the court *may not grant review*, unless the petition is timely filed with the court and timely served."⁴⁷ A LUPA petition is timely only if it is filed and *served* within 21 days of the issuance of the land use decision.⁴⁸ Service on the proper parties under LUPA is a *jurisdictional requirement* for appellate jurisdiction.⁴⁹

Service on a local jurisdiction under LUPA "must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process." RCW 4.28.080(2) provides specifically that service must be to the mayor, the mayor's agent, or the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ RCW 36.70C.040(2); *Chelan County v. Nykreim*, 146 Wn.2d 904, 932, 52 P.3d 1 (2002).

⁴⁸ RCW 36.70C.040(3); *Nykreim*, 146 Wn.2d at 932, 52 P.3d 1.

⁴⁹ *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 36, 184 P.3d 1278, review denied, 165 Wn.2d 1013, 199 P.3d 410 (2008).

city clerk.⁵⁰ Under SMC §3.42.030, the Seattle City Clerk is identified as “the agent for service of summons under RCW 4.28.080”. The service requirements are clear and unequivocal.

1. The Superior Court Properly Dismissed Borjesson’s Appeals of the Citations because Borjesson Failed to Timely Serve the Seattle City Mayor’s Office or Clerk’s Office.

Borjesson bears the burden of making a prima facie showing of adequate service of his notice of appeals. Borjesson has failed to meet this burden.⁵¹ The evidence in the record establishes that Borjesson delivered his first appeal to Diane Davis, DPD Manager of the Housing and Zoning Inspectors on November 13, 2009; and delivered his second appeal to the Hearing Examiner on April 26, 2010. There is no evidence in the record that Borjesson ever served the Mayor’s Office or the Clerk’s Office within the 21-day deadline after the Examiner affirmed the citations.⁵² Instead, Borjesson claims that an “affedavit (sic) of service” for Borjesson’s “Motion to Postpone” provides proof of proper service.⁵³ The affidavit, however, refers to a motion to postpone, not a notice of appeal, and was served on March 11, 2011, fifteen months after the LUPA deadline to

⁵⁰ RCW 4.28.080(2) provides “(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.”

⁵¹ *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005).

⁵² *CP at 36-38.*

⁵³ *CP at 95.*

effectuate service on the appeal of Citation 1018768-3 ran and ten months after the LUPA deadline to effectuate service on Citation 1018768-8.

Borjesson continues to argue that service of his first appeal on DPD Manager of the Housing and Zoning Inspectors, Ms. Diane Davis, constitutes adequate service⁵⁴ and that the superior court erred in not finding service on Ms. Davis as adequate. The superior court properly rejected Borjesson's argument. Service on Ms. Davis, an employee of DPD, is inadequate. Like in *Overhulse Neighborhood Ass'n v. Thurston County* where the court dismissed petitioner's appeal of a final land use decision⁵⁵ when the petitioner served the board of commissioners' office rather than the Auditor as required by LUPA when serving a LUPA Petition on counties⁵⁶— service of a manager at DPD isn't substantial compliance with RCW 36.70C.040 and RCW 4.28.080—which requires service on the Seattle Mayor's or Clerk's Offices. The superior court thus properly ruled that Borjesson didn't properly serve the City and thus the superior court lacked jurisdiction to hear Borjesson's appeals.

Borjesson argues in his Brief that a LUPA petition is not a lawsuit and that a LUPA petition isn't necessary when a complaint is filed with an

⁵⁴ *Borjesson's Brief at 11-12 and Motion at 8-10.*

⁵⁵ 94 Wn. App. 593, 972 P.2d 470 (1999).

⁵⁶ *Id.* at 599.

independent action for trespass, harassment and due process violations.⁵⁷ This argument is without merit, however, because Borjesson’s claims all arise from the issuance of DPD’s Citations 1018768-3 and -8 to Borjesson. In *Tent City 4*, Division One held that a failure to timely challenge a final land use decision by means of a LUPA petition not only bars the appeal of the final land use decision, but it *also bars all the associated claims arising from that decision*.⁵⁸ Similarly, *Asche v. Bloomquist*⁵⁹ held that a homeowner’s failure to timely file a LUPA petition challenging a building permit resulted in failure of their related due process and nuisance claims.⁶⁰ Like the claims dismissed in *Tent City 4* and *Asche*, all of Borjesson’s claims alleged in his appeal of Citation 1018768-3—due process, constitutional violations, trespass, harassment—arise from the City’s issuance and affirmation of the challenged land use decisions.

Borjesson now argues for the first time that the alleged “trespass” occurred before the citation was issued.⁶¹ Borjesson further argues that the alleged “trespass” wasn’t considered “in light of the fruit of the

⁵⁷ *Borjesson’s Brief* at 4-7.

⁵⁸ *Mercer Island Citizens for Fair Process v. Tent City 4 (Tent City 4)*, 156 Wn. App. 393, 404-405, 232 P.3d 1163 (2010) (claims arising from the final land use decision must be dismissed if the LUPA claim fails, including dismissal of due process and 1983 claims).

⁵⁹ 132 Wn. App. 784, 133 P.3d 475 (2006).

⁶⁰ *Id.*, 132 Wn. App. at 801.

⁶¹ *Borjesson’s Brief* at 23, No. 2.

poisonous tree”.⁶² Borjesson’s trespass argument⁶³ was considered by the Examiner;⁶⁴ however, as noted above, the Examiner only relied on evidence obtained from the City’s right-of-way during Clay Thompson’s June 29, 2009 visit, which occurred after DPD issued Citation 1018768-3 and provided evidence that the violations continued to exist.⁶⁵

Borjesson’s trespass argument was also considered by the superior court.⁶⁶ During the superior court proceeding, Borjesson represented to the court that he was seeking \$3 million dollars, which was the first time he mentioned that he was entitled to damages,⁶⁷ due to the alleged “trespass” that occurred by DPD inspectors Clay Thompson and Tom Bradrick. The record is clear that Clay Thompson inspected once — on June 29, 2009⁶⁸, after Citation 1018768-3 was issued but prior to the Examiner’s appeal hearing. The record is also clear that Tom Bradrick inspected before issuing Citation 1018768-8 to Borjesson⁶⁹ and before the

⁶² *Id.* at No. 3.

⁶³ *CP* at 37, FOF No. 6 and Conclusions No. 2.

⁶⁴ *CP* 37 at COL No. 3.

⁶⁵ *Id.*

⁶⁶ *Record of Proceedings (RP)* at 7, line 25 and 8, lines 1-13 and also *RP* at 11, lines 13 through p. 15, line 11.

⁶⁷ Such representation was the first time that Borjesson mentioned damages- which is too late. Neither his first or second appeals mention the words “damages”. Further, his basis for damages was due to alleged trespass by DPD inspectors during the course of their investigation; therefore, such a claim must also have been raised through LUPA which he failed to do.

⁶⁸ *CP* at 37, FOF No. 5.

⁶⁹ *CP* at 39, FOF No. 3 and *CP* at 40, FOF No. 4.

Examiner's appeal hearing whereby the Examiner affirmed the citation.⁷⁰ Therefore, Borjesson's trespass claim clearly arose from DPD's investigation and issuance of Citations 1018768-3 and -8 and the Examiner's affirmation of these citations.

All of Borjesson's claims in his first appeal—including his trespass claim—arose out of DPD's issuance of or the Examiner's affirmation of Citation 1018768-3.⁷¹ Therefore, like the claims dismissed in *Tent City 4*⁷² and *Asche*,⁷³ all of Borjesson's claims alleged in his appeal of Citation 1018768-3—due process, constitutional violations, trespass, harassment—were appropriately dismissed by the superior court when Borjesson failed to timely serve the City with his appeal.

Moreover, the superior court properly dismissed all of Borjesson's claims arising from the second citation⁷⁴—due process, harassment, due process—because all of Borjesson's alleged claims in his second appeal

⁷⁰ *CP at 40*, FOF No. 5 compare to *CP at 42*, when Examiner affirmed the Citation, dated April 6, 2010.

⁷¹ *Id.* See also *CP at 96-108* (first appeal) and *CP at 1-19, including 2* (Title amended to state "to include citation #1018768-8 herein appealed).

⁷² *Mercer Island Citizens for Fair Process v. Tent City 4 (Tent City 4)*, 156 Wn. App. 393, 404-405, 232 P.3d 1163 (2010) (claims arising from the final land use decision must be dismissed if the LUPA claim fails, including dismissal of due process and 1983 claims).

⁷³ *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006).

⁷⁴ *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010).

arise from either Citation 1018768-3 or -8.⁷⁵ This is consistent with the representations Borjesson made before the superior court.⁷⁶

Borjesson may not “amend” his original appeal to include new claims well after the 21-day LUPA deadline, nor may he attempt to collaterally attack either decision through an improper appeal brought pursuant to any statute other than LUPA. Thus, the superior court properly dismissed Borjesson’s first appeal in its entirety under CR 12(b)(1) and 12(b)(5) for failure to properly serve the City, because the superior court lacked subject matter jurisdiction.

2. The Superior Court Properly Dismissed Both Appeals against Individually-Named Defendants because Borjesson Failed to Provide Proof of Service.

The superior court properly dismissed Borjesson’s appeals against individual City employees because Borjesson failed to personally serve these individuals.⁷⁷ State statute requires personal service of individuals named in a lawsuit.⁷⁸ Borjesson did not personally serve any of the

⁷⁵ Including Trespassing, Harassment, Violations of Ex Post Facto, Personal use of Property vs. Land Use: False Claims and Junk, Violations of Destruction of Public Property, Breach of Contract, Outrage, Slander of Title, Breach of Fiduciary Duties, and Unknown measures of existing property lines and buildings. *See* CP 96-108 (Notice of Appeal/Complaint) and CP 1-17 (Amended Appeal).

⁷⁶ *Record of Proceedings (RP)* at 7, line 25, at 8, lines 1-13 and also RP at 11, lines 13 through p. 15, line 11.

⁷⁷ *CP* at 124-125 (Decl. of Sammimi), *CP* at 122-123 (Decl. of Thompson), *CP* at 126-127 (Decl. of Bradrick) and *CP* at 116-117 (Decl. of Chinn).

⁷⁸ RCW 4.28.080.

individuals named in either lawsuit.⁷⁹ This is also consistent with his representations to the superior court.⁸⁰ Thus, Borjesson's two appeals against these individuals were properly dismissed.

3. The Superior Court Properly Did Not Review the Examiner's Decisions or Borjesson's Claims arising from such Decisions.

Borjesson argues that the superior court erred when it failed to review the two Examiner's Decisions.⁸¹ He also argues that the Superior Court judge didn't address his constitutional issues. These constitutional "issues" include "suppression of evidence," and "unlawful search and seizure." The superior court properly did not allow Borjesson to argue the merits of his claims because the superior court did not have jurisdiction over such claims.⁸²

When Borjesson failed to timely serve the City as required by LUPA, the superior court was divested of its jurisdiction to hear an appeal of the Examiner's Decisions on Citations 1018768-3 and -8 as well as all claims arising from the citations or the Examiner's Decisions.

⁷⁹ *Id.*, all of which lack a summons and declaration of service as required.

⁸⁰ *CP* at 23, line 21 through *CP* at 24, line 21.

⁸¹ Borjesson refers to the Examiner's proceedings as "DPD hearings".

⁸² *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 36, 184 P.3d 1278, review denied, 165 Wn.2d 1013, 199 P.3d 410 (2008).

C. The Superior Court Was Not Required to Include Findings of Fact or Conclusions of Law in its Order of Dismissal under CR 12(b)(1) and CR 12(b)(5).

Borjesson alleges that the superior court committed error when it failed to make sufficient findings of fact and conclusions of law.⁸³

Superior Court Civil Rule (CR) 52(a)(5)(B) provides that findings of fact and conclusions of law are not necessary on decisions of motion under CR 12. CR 52 provides in relevant part:

CR 52 (a) Requirements.

...

5) When Unnecessary. Findings of fact and conclusions of law are not necessary:

...

(B) Decision on motions. On decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2).

Here, the superior court dismissed Borjesson's appeals based on the City's Motion to Dismiss under 12(b)(1) and 12(b)(5).⁸⁴ Therefore, inclusion of findings of fact and conclusions of law in the Order granting the City's Motion to Dismiss were not necessary. Thus, the superior court did not commit error when it did not make findings of fact or conclusions of law.

Borjesson also appears to argue that the superior court's failure to articulate findings of fact and conclusions of law violates his due process

⁸³ *Borjesson's Brief* at 6, 7, 9, 12 and *Borjesson's Motion* at 8, 9, and 12.

⁸⁴ *CP* at 78-81.

rights.⁸⁵ Borjesson fails to cite anything in the record that establishes a violation of his substantive due process rights and he also fails to cite any case law supporting his allegation that his substantive due process rights were violated; thus, Borjesson fails to carry his burden to prove a violation of his due process rights occurred.

D. Borjesson is Not Entitled to Unlimited Time to Argue before the Superior Court; His Claim that His “Free Speech” Rights were Violated is Baseless.

Borjesson argues that his First Amendment right to free speech was violated because the superior court judge blocked him from speaking during the March 18, 2011 superior court proceeding.⁸⁶ His argument is without basis in law or fact. The Ninth Circuit has concluded in *Zal v. Steppe*⁸⁷ that lawyers and others have a limited right to speak freely in the courtroom.

Traditional First Amendment analysis supports the idea that lawyers (and others) have no First Amendment right to speak freely in a courtroom: a courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985) (traditional public fora are “those places which ‘by long tradition or by government fiat have been devoted to assembly and debate’ ” (citation omitted)). Although courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines.

⁸⁵ *Borjesson Motion* at 12.

⁸⁶ *Borjesson Brief* at 3, 23, 24 and 25.

⁸⁷ 968 F.2d 924, 932, (C.A.9 (Cal.), 1992).

This is consistent with the Supreme Court's holding that attorney speech in the courtroom is afforded only limited constitutional protection due to the special requirements of maintaining an orderly judicial proceeding, citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 2742, 115 L.Ed.2d 888 (1991).⁸⁸

Here, KCSC Judge Middaugh was simply attempting to exercise reasonable control over the mode and order of argument to avoid needless consumption of time. This does not constitute a violation of Borjesson's free speech rights.

Borjesson's citation of *State v. Dahl*⁸⁹ is inapplicable here.⁹⁰ In *Dahl*, the Washington Supreme Court held that due process requires that judges articulate a factual basis during a criminal revocation proceeding.

E. Borjesson's Motion to Vacate Should be Denied.

Borjesson filed a motion to vacate with this Court, where he argues that this Court should vacate the superior court's dismissal under CR

⁸⁸ See also ER 611, which provides that "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so ...to avoid needless consumption of time" and RCW 2.28.010, which states:

Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it....

(3) To provide for the orderly conduct of proceedings before it or its officers. ...

(5) To control, in furtherance of justice, the conduct of ...all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

⁸⁹ 139 Wn.2d 678, 990 P.2d 396 (1999).

⁹⁰ *Borjesson Motion* at 12.

60(a)(b)(1)(10)(11)⁹¹ because superior court failed to correct Borjesson's affidavit of service for his "Motion for Postponement" to instead reflect service of his first and second appeals and because the superior court refused to rule on Borjesson's 12(b)(6) motion.⁹² Borjesson's motion must be denied because Borjesson did not file a motion to vacate with the superior court as required by RAP 7.2(e). RAP 7.2 (e) provides:

The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes... The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter... Except as provided in rule 2.4, a party may only obtain review of the decision on the postjudgment motion by initiating a separate review in the manner and within the time provided by these rules.

Rule 2.4 does not apply to motions to vacate. Thus, the RAP court rules do not allow for an appellate court to hear motion to vacate that are not first brought before the superior court. Because Borjesson failed to first bring a motion to vacate to the superior court and then initiating a separate review of a denial of such motion, he cannot bring such motion before this Court.

⁹¹ *Borjesson Motion* at 3.

⁹² *Borjesson Motion* at p. 3-4.

F. Borjesson Raises a Number of New Claims of Error for the First Time in His Brief. These Arguments Should Not be Considered by This Court.

Borjesson raises a number of new claimed errors that were not contained in his Notice of Appeal.⁹³ These include arguments relating to laches,⁹⁴ statute of limitations,⁹⁵ default judgments,⁹⁶ and forfeiture statutes.⁹⁷

Failure to raise an issue before the superior court precludes a party from raising it on appeal unless the issue satisfies one of the criteria in RAP 2.5(a).⁹⁸ Mr. Borjesson has failed to demonstrate how any of his new arguments satisfies any of the criteria set forth in RAP 2.5(a). Therefore, this Court should not consider any of these arguments or the associated documents Mr. Borjesson has attempted to file that were not part of the record before the superior court.⁹⁹ RAP 9.11 provides a

⁹³ Compare CR at 128-133 to Borjesson Brief and Motion.

⁹⁴ *Borjesson Brief* at 12-13

⁹⁵ *Borjesson Brief* at 14-15.

⁹⁶ *Borjesson Brief* at 26-27.

⁹⁷ *Borjesson Brief* at 26-27.

⁹⁸ RAP 2.5(a) provides the appellate court may refuse to review any claim of error which was not raised in the superior court with limited exceptions not present here. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of superior court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

⁹⁹ He attached two documents to his "Motion to Vacate" including (1) an affidavit from Gary Kaufman, dated 9-8-11 and a document entitled "record of survey". In addition, he filed a portion of his deposition taken by the City as part of the Clerk's Papers but that was not filed with or before the superior court as part of the trial proceeding on March 18, 2011.

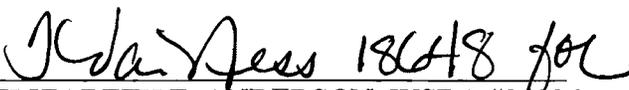
procedure for additional evidence to be taken; Borjesson did not follow this procedure.

IV. CONCLUSION

Borjesson failed to carry his burden on any one of his arguments. To the contrary, the superior court properly dismissed his appeals for failure to timely serve the City as required by LUPA. Further, the superior court did not err by limiting his presentation time during the March 18, 2011 proceeding or by signing an order granting the City's Motion to Dismiss under 12(b)(1) and (5) which did not contain findings of fact or conclusions of law. All other Borjesson's arguments were raised for the first time in his Brief and should not be considered by this Court.

DATED this 21st day November, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of November, 2011, I sent a copy of
this document to the following party in the manner indicated below:

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Seattle, WA 98117-2116
Via messenger & e-mail attachment
email at pacificresources08@yahoo.com

the foregoing being the last known address of the above-named party.


ROSIE LEE HAILEY