

original

NO. 35788-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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ROBERT BONNEVILLE aka  
WILL ELLWANGER,

Appellant,

vs.

KITSAP COUNTY,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

I. COUNTER-STATEMENT OF THE ISSUES.....1

II. COUNTER-STATEMENT OF THE FACTS.....1

A. REBUTTAL TO APPELLANTS STATEMENT OF FACTS.....1

B. COUNTER-STATEMENT OF THE FACTS.....2

III. ARGUMENT.....6

A. STANDARD OF REVIEW.....6

B. THE COURT DID NOT ABUSE ITS DISCRETION IN  
DISMISSING THE APPEAL.....6

C. EVEN IF DISMISSAL UNDER CR 41 WAS IMPROPER, THE  
APPELLANT WOULD BE PRECLUDED FROM ARGUING THE  
APPEAL.....12

    1. Failure to Pay for Administrative Record.....12

    2. The Petitioner Cannot Be Heard.....13

IV. CONCLUSION.....14

TABLE OF AUTHORITIES

**Cases**

*Apostolis v. City of Seattle*, 101 Wn.App. 300, 303, 3 P.3d 198 (2000) ..6,7

*Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 496, 933 P.2d 1036(1997)  
..... 15

*Cf Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 132, 896  
P.2d 66 (1995) ..... 10

*Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn.  
App. 461, 467, 24 P.3d 1079 (2001) ..... 13

*Conom v. Snohomish County*, 155 Wn.2d 154, 159-163, 118 P.3d 344  
(2005).....8, 11

*Overhulse Neighborhood Association v. Thurston County*, 94 Wn.App.  
593, 597, 972 P.2d 470 (1999) ..... 13

*Rivers v. Washington State Conference of Mason Contractors*, 145 Wn2d  
674, 684, 41 P.3d 1175 (2002) .....6

*Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999)  
..... 13

*Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135  
Wn.2d 542, 555, 958 P.2d 962 (1998)..... 13

**Statutes**

Revised Code of Washington 36.70C.010.....9

Revised Code of Washington 36.70C.030..... 13

Revised Code of Washington 36.70C.090.....7

Revised Code of Washington 36.70C.110..... 12

Revised Code of Washington 36.70C.120..... 13

**Rules**

Kitsap County Local Rule 40(b)(6)(B)(vii)..... 12

I. COUNTER-STATEMENT OF THE ISSUES

Whether the trial judge abused his discretion in dismissing an appeal where the Appellant willfully failed to meet any of the deadlines set forth in the scheduling order and failed to request an extension of those deadlines prior to their expiration?

II. COUNTER-STATEMENT OF THE FACTS

A. REBUTALL TO APPELLANT'S STATEMENT OF FACTS

The Appellant's statement of facts is not supported by the record, is inaccurate and is largely irrelevant to the decision being appealed. Initially, the Appellant goes into great detail about the alleged illegal searches of his property. However, the Appellant conveniently neglects to inform the Court that the U.S. District Court summarily dismissed these claims. Ex. A – Summary Judgment Order. Moreover, the claims are totally irrelevant to determining whether the trial court properly dismissed the Appeal based upon the Appellant's failure to comply with the scheduling order.

The Appellant also takes great liberty with his recitation of the facts surrounding the County's initial noting of its Motion to Dismiss. The County filed its motion to dismiss on August 28, 2006, noting the matter for September 8, 2006. CP 40. On September 8, the Court granted the County's Motion. CP 40. On November 20, 2006 the Appellant

contacted the County pointing out that he was out of town from August 14, 2006 until September 6, 2006. CP 40. Although the Appellant had informally advised the County that he would be out of town during this time-period, counsel had forgotten so when the County's brief was filed. CP 40. As such, the County stipulated to the vacation of the order of dismissal. CP 41. The County made this stipulation despite the fact that any motion to vacate would most likely have been denied as untimely. Moreover, the County prepared this Order the *day after Appellant contacted him regarding the error.*

B. COUNTER-STATEMENT OF THE FACTS

The Appellant challenges a decision of Kitsap County Superior Court Judge Spearman dismissing his LUPA petition. The Appellant had filed this action challenging a decision of the Kitsap County Hearing Examiner affirming the designation of a building located on his property as a dangerous building. On June 2, 2006, the Superior Court entered a Stipulated Scheduling Order that provided the following:

1. By July 17, 2006, Respondent Kitsap County shall submit to the Court a certified copy of the record for judicial review pursuant to RCW 36.70C.110. The Petitioner shall be responsible to reimburse the County for the costs of preparing the administrative record before the record is submitted to the Court.
2. By July 17, 2006, Petitioner Robert Bonneville shall submit to the court a verbatim transcript of the

administrative hearing. Petitioner shall provide a copy of the transcript to Respondent by July 10, 2006 for correction of errors prior to filing.

3. By August 16, 2006, the Petitioner shall serve and file his brief.

4. By September 15, 2006, the Respondent shall serve and file its brief.

5. By September 29, 2006 the Petitioner shall serve and file his reply brief.

6. The hearing on the merits shall be held on September 25, 2006.

*CP 24-26.* On July 5, 2006, Karen Aschcraft, Clerk to the Hearing Examiner, sent the Petitioner an invoice for the costs of preparing the administrative record. *CP 32; CP 36 ¶ 2.* This invoice was sent via certified mail. *CP 36 ¶ 2.* The return receipt indicated that the invoice was received on July 6, 2006. *CP 34; CP 36 ¶ 3.* By August 28, 2006, the Appellant had failed to (1) contact Ms. Ashcraft, (2) pay for the administrative record, (3) submit a hearing transcript or (4) submit a brief. *CP 38.* Therefore, on August 28, 2006, the County filed a motion requesting that the appeal be dismissed. On September 8<sup>th</sup>, the Court granted the Motion after the Appellant failed to appear at the hearing. *CP 40.*

On November 20, 2006, approximately 2.5 months after the appeal was dismissed, the Appellant contacted counsel for the County. *CP 40 ¶*

3. The Appellant reminded counsel that he had been out of town between August 14, 2006 and September 6, 2006. *Id.* The Appellant offered no explanation for failing to contact the County between September 6<sup>th</sup> and November 20<sup>th</sup> or for having failed to meet any of the scheduling order's deadlines, despite the fact that the majority of the deadlines came before the Appellant was out of town.<sup>1</sup> Despite this, the County, on November 21, 2006, stipulated to a vacation of the dismissal order and re-noted the motion for December 8, 2006. The Appellant, for the first time, began making inquiries about obtaining the administrative record and a transcript of the hearing on November 21, 2006. This was 127 days after those materials were required to be filed and 97 days after his brief was required to be filed. On December 8, 2006, the Court granted the County's Motion to Dismiss.

The Appellant has maintained his lackadaisical attitude to court imposed deadlines throughout this appellate process.<sup>2</sup> On January 5, 2007, the Appellant filed his Notice of Appeal in this matter. On January 23, 2007, the Court Clerk sent Mr. Bonneville a letter indicating that he had failed to file a proof of service and that the Court would consider

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<sup>1</sup>Appellant's brief was due on August 16, 2006 just two days after he left town.

<sup>2</sup>The Appellant also had great difficulty in complying with any of the court deadlines set in Court of Appeals Case No. 35025-4-II, which also stems from a LUPA petition filed in Kitsap County.

dismissal of the appeal if the proof of service was not filed by February 7, 2007. On February 2, 2007, the Court Clerk sent both parties a letter setting forth the filing deadlines. On February 6, 2007, the Court Clerk sent the Appellant a letter advising him that the Statement of Arrangements he filed did not comply with the Court Rules and that the Court would consider sanction if he failed to submit an amended statement within ten days. On April 10, 2007, the Court clerk sent the Appellant a letter advising him that he had failed to file his brief on time and informing him that if he did not file his brief by April 25, 2007 he would be sanctioned \$200 dollars. The letter further advised the Appellant that if he did not file his brief by April 30, 2007, the Court would consider further sanctions. On April 10, 2007, the Clerk sent the Appellant a separate letter advising him that he had failed to properly pay for the Clerks Papers, imposing \$300 in sanction if he failed to pay for them by April 25, 2007, and informing him that the Court would consider additional sanctions if they were not paid for by April 30<sup>th</sup>. On May 10, 2007, the Court Commission entered a conditional ruling of dismissal giving the Appellant until May 21, 2007, to file the clerks papers and pay any imposed sanctions.

### III. ARGUMENT

#### A. STANDARD OF REVIEW

Here, the Appellant challenges the Superior Court’s dismissal of his LUPA petition based upon his failure to comply with a scheduling order. A trial court’s dismissal under CR 41(b) is reviewed for an abuse of discretion. *Apostolis v. City of Seattle*, 101 Wn.App. 300, 303, 3 P.3d 198 (2000). “Discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn2d 674, 684, 41 P.3d 1175 (2002).

**B. THE COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE APPEAL.**

A Court properly dismisses an action under CR 41(b) “when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired. Disregard of a court order without reasonable excuse or justification is deemed willful” *Apostolis v. City of Seattle*, 101 Wn.App. 300, 304, 3 P.3d 198 (2000).

As noted by the Court at page 17-18 of the Hearing Transcript, the Appellant willfully disregarded the Court’s Scheduling Order. The only excuses offered by the Appellant for his failure to comply with the scheduling order are that he had several cases pending against the County

and that he simply let this one fall through the cracks. Clearly, the Appellant's failure to recall court deadlines that he had previously stipulated to does not constitute a reasonable excuse for failing to comply with the scheduling order.<sup>3</sup> That Order clearly and unequivocally set forth all of the dates that the Appellant was required to meet. Moreover, all of the most pertinent deadlines expired before the Appellant left town.<sup>4</sup>

Appellant's failure to comply with the scheduling order impaired the efficient administration of justice. Although the Court did not specifically use the words "administration of justice" in its oral ruling, it clearly considered this factor in reaching its decision. In dismissing the appeal, the Court specifically mentioned the purposes of the Land Use Petition Act, the importance of finality in land use decisions, as well as the length of the delays that the Appellant had caused. Hearing Transcript p. 17-18. As previously discussed, one of the express purposes of the Land Use Petition Act is to provide for expedited review of land use decisions and to provide finality to land use decisions. RCW 36.70C.090; *Apostolis v. City of Seattle*, 101 Wn.App. 300, 304, 3 P.3d 198 (2000). Here, the Appellant was challenging a land use decision that had been issued on

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<sup>3</sup> It should be noted that the first deadlines set forth in the Scheduling Order occurred just over one month after the Scheduling Order was entered.

<sup>4</sup> The Appellant's brief was actually due two days after he left town. The court record and transcripts were due well before Appellant left town.

March 14, 2006. CP 7 – CP 21. The Appellant stipulated to a scheduling order that would have allowed for a hearing on September 25, 2006. However, the Appellant failed to pay for the administrative record, failed to file a hearing transcript and failed to file a brief on appeal. Indeed, the Appellant failed to ever request more time to meet these deadlines. The Appellant did not even attempt to comply with these requirements until November 21, 2006.<sup>5</sup> If the Court had unilaterally granted the Appellant more time to meet these deadlines, although Appellant never requested such an extension, the efficient administration of justice would be severely harmed by causing additional delays of several months. The harm done to the efficient administration of justice would be that such a delay would run counter to the express purposes of the Land Use Petition Act.

The County was prejudiced by the Appellant's failure to comply with the scheduling Order. Initially, allowing the Appellant additional time to meet these deadlines (although he never even requested such an extension) would flout the purposes of the Land Use Petition Act. LUPA was written to provide for expedited review of land use decisions and to promote the finality of such decisions. *Conom v. Snohomish County*, 155

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<sup>5</sup> The Appellant may point to the vacated order of dismissal as causing part of the delays in this case. However, the Appellant claims to have first found out about the dismissal on or about that date. Therefore, if the County had not brought its motion, it is extremely unlikely that the Appellant would have taken any action until well after the date on which the Court hearing was scheduled.

Wn.2d 154, 159-163, 118 P.3d 344 (2005). Indeed, RCW 36.70C.010 specifically provides:

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for review in such decisions, in order to provide consistent, predictable and timely judicial review.

The County would be prejudiced if the Appellant were allowed to violate these purposes. Indeed it would prevent the expedited review of the land use decision in this case and work against the finality of Kitsap County's land use decisions. The Hearing Examiner's decision in this case was issued in March of 2006. Although the scheduling order would have allowed for argument in September of 2006, the Appellant's actions would likely have prevented the matter from being heard that year. As such, its decision would still have been pending nearly one year after it was issued.

The Appellant's willful disregard of the scheduling order also substantially prejudiced the County's ability to prepare for the hearing. The Appellant failed to meet his deadline for the submittal of the court record, the verbatim transcript, and his brief. Because he failed to meet these deadlines, the County moved to dismiss the appeal. This motion was originally noted for September 8, 2006 and later re-noted for December 8, 2006. At the time of making the motion, the County was substantially

prejudiced in its ability to prepare for the hearing that had been scheduled for September 25, 2006. The County was less than three weeks away from the trial date without a copy of the hearing transcript or a brief from the Appellant. Furthermore, the County would have had to argue the case before a court that had no record, no transcripts and no briefing. Therefore, the County was clearly and substantially prejudiced. In short, the County could do nothing to prepare for the hearing.

Although the Court did not specifically discuss lesser sanctions on the record it clearly considered them in reaching its decision. *Cf Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 132, 896 P.2d 66 (1995)(court does not need to expressly discuss various sanctions on the record). Initially, the Appellant specifically argued for and recommended lesser sanctions. Hearing Transcript p 14 lines 13-25. Indeed, this was really the only argument that the Appellant raised during the hearing. *Id.* In effectively recognizing that dismissal was the only proper sanction, the Court noted that if Appellant “had been 30 days, maybe 40 days, maybe even 60 days late on this, there wouldn’t be much of a question for me that I’m going to give him his day in court on this, but he has let too much time go by before correcting the errors that I’m sure he was aware of.” Hearing Transcript p. 17. The Court further recognized the importance of expedited review of land use decisions and the finality

of those land use decisions. Hearing Transcript p. 17 line 24 – p. 18 line 2. Therefore, the Court properly found that the County was prejudiced by Appellant’s violation of the scheduling order.

The Appellant’s reliance on *Conom v. Snohomish County* is misplaced. In *Conom*, the Washington State Supreme Court reversed a trial court dismissal of a LUPA petition where the petitioner failed to comply with a statutory requirement that an initial hearing be noted within seven days. In reversing dismissal despite the strong public policy in favor of finality in land use decisions, the court noted that:

The requirement that the hearing be held between 35 to 50 days of serving the petition ensures that the uniform, expedited appeal procedures of LUPA are accomplished, not the requirement that the hearing be noted in seven days. The failure to timely note the initial hearing does not preclude the initial hearing from occurring within 35 to 50 days. Thus, if a party fails to timely note the hearing, but the hearing still occurs within the requisite statutory time period the purpose of LUPA is preserved. In this case, the initial hearing was scheduled within the requisite time period under RCW 36.70C.080(1) despite the Conoms’ failure to note the hearing within seven days of serving their land use petition.

155 Wn.2d 154, 163, 118 P.3d 344 (2005). In contrast to *Conom*, the Appellant’s failings in this case run directly afoul of the Land Use Petition Act and allowing Appellant to revive his appeal after he failed to comply

with the scheduling order would directly violate the purposes of the Land Use Petition Act.

C. EVEN IF DISMISSAL UNDER CR 41 WAS IMPROPER, THE APPELLANT WOULD BE PRECLUDED FROM ARGUING THE APPEAL.

The Superior Court properly dismissed the Appellant's LUPA petition as the Appellant was precluded from arguing the case.

1. Failure to Pay for Administrative Record

RCW 36.70C.110 and Kitsap County Local Rule 40(b)(6)(B)(vii) provide that a Petitioner's "failure to pay a local jurisdiction the costs of preparing an administrative record relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition." In the present matter, the Scheduling Order required that the Appellant pay the County its costs of preparing the administrative record prior to its required submittal date on July 17, 2006. To this end, Karen Aschcraft, Clerk to the Hearing Examiner, sent Mr. Bonneville, via certified mail, an invoice for these costs. CP 32; CP 36 ¶ 2. A return receipt was received indicating that the invoice was received on July 6, 2006. CP 34; CP 36 ¶ 3. The Petitioner failed to pay these costs or submit the record until well after all of the deadlines had expired in the scheduling order. CP 36 ¶ 4; CP 41 ¶ 4. As such, dismissal was warranted under RCW 36.70C.110.

## 2. The Petitioner Cannot Be Heard.

With certain exceptions, the Land Use Petition Act (LUPA) is the exclusive means for judicial review of “land use decisions.” RCW 36.70C.030. RCW 36.70C.120 limits a Court’s review of the factual issues, and the conclusions drawn from those factual issues, to the record created by the Hearing Examiner. Review is limited to the record below, because “[a]n appeal from an administrative tribunal invokes the appellate, rather than the general jurisdiction of the superior court.” *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). All statutory procedural requirements must be met before this appellate jurisdiction is properly invoked. *Overhulse Neighborhood Association v. Thurston County*, 94 Wn.App. 593, 597, 972 P.2d 470 (1999); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 467, 24 P.3d 1079 (2001); *Skagit Surveyors*, 135 Wn.2d at 555. Because LUPA provides unequivocal directives, the doctrine of substantial compliance does not apply. *Overhulse*, 94 Wn.App. at 599. The Court may grant relief only if the Petitioner carries his or her burden of establishing that one of LUPA’s standards are met. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

Here, based upon the Appellant’s failure to comply with the scheduling order, the Court had no administrative record, no hearing

transcript and no briefing. As such, the court had no “record” from which to examine the factual issues and the legal conclusions drawn from the factual issues. In addition, as the Appellant failed to file a brief he presented no issues for review or grounds for reversal. The Appellant’s failure to meet the deadlines set forth in the scheduling order represents a failure to comply with the Civil Rules as well as a court order. Therefore, his Appeal was properly dismissed.

#### IV. CONCLUSION

The Appellant has failed to establish that the Superior Court Judge abused his discretion in dismissing this LUPA Appeal. The Appellant has provided no reasonable excuses for failing to comply with the scheduling order. In addition, his failing to comply with the scheduling order hinders the efficient administration of justice and prejudices the County by preventing the efficient review of land use decision and delaying the finality of land use decisions. Given the long delays caused the Appellant as well as the purposes behind the Land Use Petition Act, no lesser sanction is appropriate, as any such sanction would flout the purposes of LUPA. Therefore, the dismissal of Appellant’s land use petition was proper.

In considering this appeal, the Court must remain cognizant of the fact that the Appellant never filed a motion to extend the deadlines in the

scheduling order. Indeed, the Plaintiff did not even begin attempting to comply with the scheduling order until well after the deadlines had passed and, again, without gaining leave of the court to extend the deadlines. In this Appeal, the Appellant ask the Court to reverse the dismissal. Inherent in this request, is a request that a new scheduling order be entered and the Appellant be allowed to revive his appeal. “The purpose of sanctions generally are to punish, to compensate, to educate and to ensure that the wrongdoer does not profit from the wrong.” *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 496, 933 P.2d 1036(1997). Here, the Appellant effectively asks the Court of Appeals to grant him a motion to, after the fact, extend the deadlines provided in the scheduling order. The Appellant requests this despite the fact that he never brought such a motion before the Superior Court. The Appellant should not be rewarded for blatantly ignoring the court deadlines and the Superior Court’s dismissal should be affirmed.

RESPECTFULLY SUBMITTED, this 13<sup>th</sup> day of June, 2007.

RUSSELL D. HAUGE  
Kitsap County Prosecuting Attorney



PHILIP A. BAZUS, WSBA #31446  
Deputy Prosecuting Attorney  
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On June 15, 2007, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Robert Bonneville aka  
Will Ellwanger  
14820 88<sup>th</sup> Avenue NW  
Gig Harbor, WA 98329

- Via U.S. Mail
- Via Fax:
- Via Email:
- Via Personal Service/Hand Delivery

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 COURT OF APPEALS  
 DIVISION II  
 STATE OF WASHINGTON  
 BY DEPUTY

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

DATED June 15, 2007, at Port Orchard, Washington.

  
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