

COURT OF APPEALS
DIVISION II

COBEN-7 F110:49

STATE OF WASHINGTON

BY cm
DEPUTY

No. 37853-1-II

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

ARTHUR WEST

Vs.

KEITH STAHLEY, et al

**Appeal from the rulings of the Honorable
Christine Pomeroy and Christopher Wickham**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I RESPONDENTS DO NOT DENY THAT DESPITE A PREEXISTING SUIT, DISCOVERY REQUESTS, AND MOTION FOR INJUNCTION, THE SEPTEMBER 5 “AT YOUR OWN RISK” AUTHORIZATIONS WERE SECRETLY AND ISSUED AND DELIBERATELY CONCEALED

Despite all of the technical facts and legal arguments and authorities assembled by the respondents to press their case, one primary circumstance must be recognized, that if the ordinary course of law provided an adequate remedy, respondents could never have secretly acted to issue the “At your own risk” authorizations to evade judicial review in the first place.

As the record in this case demonstrates, and as the supplementary records recently released in response to legal challenge reveal, the City deliberately withheld the issue of the authorization and permits from appellant, in order to obstruct his ability to secure any effective form of judicial relief. This was a deliberate course of action taken despite a preexisting lawsuit under SEPA, discovery requests, and a pending request for an injunction, which the court had “stalled”. From their inception, Respondents’ covert September 5, 2007 authorization and permits must be viewed in the context of an attempt to secretly evade a judicial remedy that was in danger of becoming “adequate”.

II NO ADEQUATE REMEDY AT LAW EXISTED IN THE FACE OF RESPONDENTS’ TACTICS TO DENY APPELLANT ACCESS TO JUSTICE BY ANY AND ALL MEANS POSSIBLE

Respondents' continuing representations that an adequate remedy at law was available to appellant are materially contradicted by their own consistent actions to render any possible remedy inadequate and unavailing. The history of the Weyerhaeuser project and this case demonstrates incontrovertibly that at every instance appellant attempted to secure an adequate remedy, respondents were alert to thwart any possibility of justice by any means at their disposal.

This is underscored by the outrageous circumstance that when the respondents secretly issued the "At your own risk" authorization and permits, appellant West was already in the Superior Court attempting to seek the judicial remedy of an injunction in the SEPA appeal of the Ports 07-2 MDNS! (CP 469-588, Ports brief, page 4, line 17-21)

Rather than issuing a (possibly lawful) authorization under the Ports SEPA 07-2 determination, or bothering to inform appellant of the action that he was known to be interested in, (and in fact in court seeking to restrain) the City acted in secret to base their September 5, 2009 authorization upon a previously vacated land use determination that was vacated in a final LUPA determination that they themselves failed to appeal. To add injury to this insult to all principles of disclosure, despite West's pending suit, motion for an injunction, and requests for discovery, the respondents continued to conceal their action for over a month, long after any 21 day LUPA or 14 day city ordinance appeal period had passed, for the express purpose of evading any possibility of plaintiff securing an adequate judicial remedy.

Viewed in context, the respondents' actions are inconsistent with any other purpose than that of denying, by all possible means, the adequacy of any remedy in the ordinary course of the law. A brief synopsis of the history of respondents evasions is enlightening.

Thus, the respondents first unlawfully withheld records related to the Port-Weyerhaeuser project¹, (West v. Port of Olympia, 146 Wn. App. 108, (2008)) in a successful attempt to deny access to relevant evidence and obstruct environmental review of a project that was secretly designed to cut corners environmentally.

¹ West requested the Port provide him with all relevant records including "[a]n index to, and all Port records concerning, the recent repaving project and other developments required in the Port's recent contract with Weyerhaeuser, including all correspondence, written or electronic." West also requested any records relating to the Port's compliance with the State Environmental Policy Act SEPA). The Port responded by letter on November 16, 2005, declaring that there was no index of the records, no paving project, and no SEPA records associated with the lease. West, at 110.

Significantly, records concealed by the Port until late 2008 reveal a plot to evade permit requirements for the design of stormwater conveyances, contributing to continuing Clean Water Act violations and discharge of potentially harmful material into Puget Sound from the Cascade Pole MTCA site that the project, and particularly the proposed buildings, sit atop.

Next, while continuing to conceal such relevant evidence, the respondents segmented the proposed project into so many fragments that any possible coordinated review was impossible, especially in the absence of a Comprehensive Scheme of Harbor Improvements, which is not exempt from SEPA requirements², and which should have compelled one comprehensive SEPA review.

As this Court noted in *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 509 P.2d 390 (1973) in another case involving piecemealed development and a port that lacked a Comprehensive Scheme of Harbor Improvements,

To permit the piecemeal development urged upon us by the port would lower the environmental mandates of these acts to the status of mere admonitions. The result would be frustration rather than fulfillment of the legislative intent inherent in these acts. This project will have a significant effect upon the environment. It is to the public's benefit that any project significantly affecting the environment and shorelines of this state comply with the procedures established by SEPA and SMA to insure that the environmental aspects have been fully considered. Irreparable damage would flow from allowing any portion of this project to proceed without full compliance with the permit requirements of the SMA.

Just as this Court recognized in *Merkel*, the laws regarding development on the shorelines and particularly in port districts must be administered in a comprehensive manner to avoid the possible irreparable harm that would result from piecemeal permit approvals issued without full compliance with all relevant laws and regulations. The respondents fragmentation of the SEPA process was accompanied by burdensome administrative fees and procedures designed to wear down and discourage opposition. When the Appellant, (along with a number of other citizens who have long since given up out of frustration), attempted to seek review of the innumerable segments of what should have been reviewed in one proceeding, and the efforts succeeded in

² (See *In re Port of Grays Harbor*, 30 Wn. App. 855, 638 P.2d 633, (1982) citing *Lassilla v. Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978).

overturning and vacating a land use determination in a final LUPA determination, the respondents secretly adopted a new and much more ominous strategy.

In addition to their previous concerted attempts to make any possible remedy unavailing, the respondents embarked upon a retaliatory campaign of poisoning and prejudicing the courts with the intent of denying appellant any chance of a fair and unbiased hearing, and adopted tactics of litigious economic intimidation to chill and deny access to the courts for redress.

III RESPONDENT'S "SHOTGUN" REQUESTS FOR COSTS ARE THEMSELVES FRIVOLOUS AND ABUSIVE AND SHOULD BE SUMMARILY DENIED DUE TO THE DELIBERATE AND INEQUITABLE CONCEALMENT OF THE SEPTEMBER 5 AUTHORIZATION FROM APPELLANT DESPITE A PENDING APPLICATION FOR AN INJUNCTION IN A PREVIOUS CASE

Respondents' interminable requests for costs and fees under virtually every possible theory (RCW 4.84.370 RCW 4.84.185, RAP 18.1 18.9) are not only burdensome, they are an unnecessary adversarial distraction from the real issues presented in this case. While it is certainly possible that respondents may prevail upon some or all of the matters argued, there can be no reasonable argument that the circumstances of this case present a number of legitimate issues in regard to LUPA preemption and the other errors assigned that can in no way be regarded as frivolous.

LUPA, RCW 36.70(C) is a relatively new phenomenon in land use law, and the exact parameters of its proper-and hopefully constitutional- interrelation with SEPA, Extraordinary Statutory and Constitutional Writs and municipal administrative procedure are as yet unclear and subject to varying interpretation, even to the most perceptive legal minds on our Supreme Court.

In addition to the legitimate legal issues raised, there is also an equitable consideration, the uncontested fact that the respondents deliberately concealed the issuance of the "At Your Own Risk" authorization and permits, without notice to appellant, despite a previous suit for SEPA review and a motion for an injunction in that case. (see Port's brief at P.3 lines 17-21)

This deliberate policy of secrecy and obstruction of justice is outrageous and indefensible. How can any remedy be considered "adequate" if a party is free to conceal actions from its adversaries, while court proceedings are "stalled" and then attempt to seek star chamber

like sanctions and vexatious litigant orders when a party attempts to seek the relief that has been denied by the ordinary course of law?

Respondents' attempts to personalize the issues and prejudice the court in these regards by means of continuing requests for costs under every possible theory should be summarily rejected, and this Court should focus on the merits.

In regard to the LUPA issues, the fact is that in the "prior" LUPA proceeding-the one that resulted in the vacation of the land use determination that the "at your own risk" authorization was based upon-the respondents lost, and the land use approval that forms the basis for the authorization was vacated. This alone strongly militates against any award under LUPA, since the respondents were not prevailing parties.

In addition, the many-and still undetermined-aspects of LUPA preemption and the various dissenting opinions of our Supreme Court Justices, (a number of whom believe the statute to be misapplied or unconstitutional) also demonstrate that

In fact, respondents have even availed themselves of a supplementation of the record, which is limited to cases where additional evidence is necessary to fairly determine the issues on review. Such affirmative ruling collaterally and equitably bars the assertion that there are no legitimate issues to review.

Respondents' requests for a vexatious litigant order in the trial court and their improper use of CR11 to attempt to economically intimidate appellant were properly denied by the Trial Court. In the event that this court determines that the Honorable Judge Wickham was correct in his other determinations, this Court should follow his ruling on the issue of fees as well.

Under these facts and circumstances the conduct of the respondents is not equitable and invites the application of the doctrine of equitable estoppel, the requirements of which are set forth in *In re Estate of Boston*, 80 Wn.2d at 70, 76, 491 P.2d 1033 (1971). Seeking equity, the respondents did not do equity nor come into this court with clean hands. See *Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wn. App. 51, 59, 504 P.2d 324 (1972) All principles of equity and fairness require that they should not profit from their secrecy and concealment, and the deliberate and cold blooded attempt to deny any form of adequate remedy behind a front of bluster and intimidation.

The respondents continuing attempts to employ economic intimidation by means of kneejerk requests for sanctions that are, in effect, thinly veiled pretexts for counterclaims and fees shifting, See *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994), are further examples of what should have been found to have violated the SLAPP statute by the trial Court. In response to the Ports attempted triple SLAPP request, it must be noted that appellant's assignment of error concerned the failure of the Trial Court to find a SLAPP violation on reconsideration, which was set with proper notice to respondents. As such the Port's attempt at a triple SLAPP play must be rejected.

IV WHERE THE "AT YOUR OWN RISK" AUTHORIZATION AND PERMITS WERE DELIBERATELY CONCEALED TO DEPRIVE APPELLANT OF A FAIR OPPORTUNITY TO PARTICIPATE IN ADMINISTRATIVE PROCESS THE FAILURE TO EXHAUST NONEXISTENT REMEDIES SHOULD BE WAIVED

Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality. For example, if resort to the administrative procedures would be futile, exhaustion is not required. Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived. Also, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused. *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 243-44, 617 P.2d 743 (1980).

The failure to file a timely appeal of a land use decision has been excused where the lack of public notice deprived a neighboring landowner of a fair opportunity to participate in the administrative process. *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 243-44, 617 P 2d 743 (1980). In contrast to the situation in *Gardner*, *Prekeges* had actual notice of the application, and there was no flaw in public notice of the decision itself. Because *Prekeges* had a fair opportunity to participate in the administrative process, the defects in public notice of the application do not excuse his failure to file a timely administrative appeal. *Prekeges v. King County*, 95 Wn. App. 275, at 281 (1990)

In regard to the adequacy of the LUPA remedy, his case is directly on point with Larson v. Colton, where the Court determined that LUPA was not an exclusive remedy where notice was not provided and application of LUPA would implicate due process considerations

In that case, the Tiltens (like the respondents herein) argued LUPA superseded all other avenues of relief, that the Larsons' failure to comply with the Act's procedural requirements.. The short answer to this argument is that the Larsons were not required to comply with LUPA because they did not have standing to pursue its remedies.

The Larsons therefore lacked standing to appeal the issuance of the building permit under LUPA, and the superior court did not err in declining to apply its procedural requirements.

As the superior court recognized, (in Larson) applying LUPA here would raise serious due process concerns. If the Act's 21-day limitation period applies to all persons potentially affected or aggrieved by issuance of building permits, those persons would be required to regularly inspect public records for building permits that affect their interests. Failure to inspect the public records and file a petition within 21 days of issuance of a permit would bar judicial review, even though those persons previously had not been afforded an opportunity to assert their interests. See Larsen v. Town of Colton, 94 Wn. App. 383, 973 P.2d 1066, (1999)

This Court should rule in accord with Gardner, Prekeges, and Larson that the respondents deliberate concealment of their September 5 actions deprived plaintiff of a fair opportunity to participate in the administrative process and made the remedy of LUPA inadequate.

V THE TRIAL COURT'S RULING VIOLATED ARTICLE IV SECTION 6 OF THE WASHINGTON STATE CONSTITUTION WHICH VESTS SUPERIOR COURTS WITH INHERENT CONSTITUTIONAL POWERS OF REVIEW

The Trial Court erred in finding appellants application for relief under nuisance and extraordinary writs frivolous when it is clearly established that...

The superior court has inherent power provided in article IV section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts. Kreidler v. Eikenberry, 111 Wn.2d 828, 837, 766 P.2d 438 (1989); Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983); Williams v. Seattle Sch. Dist. No.

1, 97 Wn.2d 215, 221, 643 P.2d 426 (1982). *Saldin Sec. v. Snohomish County*, 134 Wn.2d 288, 949 P.2d 370, (1998)

The right to be free from such action is itself a fundamental right and hence ANY arbitrary and capricious action is subject to review. *Williams v. Seattle School District*, 97 Wn.2d 215, 221-22, 643 P.2d 426 (1982). The fundamental right to a healthful environment was recognized as just such a fundamental right in *Leschi v. Highway Commission*, 84 Wn.2d 271, 525 P.2d 774, (1974)

Under this standard, the courts always have inherent power to review agency action to the extent of assuring that it is not arbitrary and capricious...An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental. *Leonard v. Civil Service Commission*, 25 Wn. App. 699, 701-02, 611 P.2d 1290 (1980); The courts thus have inherent power to review agency action to assure its compliance with applicable rules.

The order of the Superior Court in this case therefore contravened the Washington State Constitution, which is binding upon the State under the 14th Amendment to the federal Constitution, and which provides in pertinent part as follows: The superior court shall have original jurisdiction...**of actions to prevent or abate a nuisance**;...Said courts and their judges shall have power to issue **writs of mandamus, quo warranto, review, certiorari, prohibition**...

SECTION 6 JURISDICTION OF SUPERIOR COURTS. Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law

vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [AMENDMENT 87, 1993 House Joint Resolution No. 4201, p 3063. Approved November 2, 1993.]

The Trial Court erred, and acted in an unconstitutional manner, when it ruled in a manner contrary to the Constitution of the United States and the State of Washington. The Attorney General was not required to be served since the unconstitutional nature of the Statute in this case is caused by the Court's construction of the law, and was not asserted as a matter for declaratory relief in the original action.

VI THE TRIAL COURT ERRED IN FAILING TO ACKNOWLEDGE CLEARLY ESTABLISHED PRECEDENT, RECOGNIZED BY BOTH STATE AND FEDERAL COURTS, THAT AUTHORIZES CITIZEN NUISANCE ACTIONS

While it is correct that the majority of Washington Courts that have been called interpreted RCW 7.48.210 have done so in a conclusory manner in regard to injuries greater than those suffered by the general public, (See *In Re Hanford Reservation Litigation* 760 F. Supp. 1551, E.D. Wash (1991), the federal Court recognized that "each of the [plaintiffs asserting claims of this nature have in some manner alleged at least some form of injury of a type distinguishable from the that incurred by the general population]" *Hanford*, at 1557.

This interpretation of the ability of a citizen to maintain an action for nuisance is in accord with the express language of RCW 7.48.020, which states that...Such action may be brought by any person...whose personal enjoyment is lessened by the nuisance...As an individual who frequents the areas on and around the project area, and the waters of lower Budd Inlet, plaintiff has been injured in a particular manner and had his enjoyment lessened by the Port and City's continuing discharges of potentially hazardous materials in violation of federal and state water quality standards.

Washington Courts have long held that...

A private person may maintain a civil action for a public nuisance, if it is especially injurious to himself...It is not material to the rights of respondents that the board of county Commissioners had given some sort of permit to erect the structures complained of *West v. Keith*, 154 Wash. 686, (1929), see also *Sholin v. Skamania Boom Co.* 56 Wash 303, 105 Pac. 632, 28 L.R.A. (N.S.) 1053

In light of these clearly established precedents, the trial court also abused discretion in failing to apply the correct standard of law in regard to the clearly established right to maintain a nuisance action for ongoing wrongful pollution. (see *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998) The Court clearly erred in its summary dismissal of any possibility of relief, under any circumstances whatsoever.

Additional basis for a claim of nuisance exists in the "At your own risk" nature of the authorizations issued by the respondent City, which did not comply with any ordinance or procedure known to the appellant, and which directly contributed to degradation of water and air quality in areas that particularly impacted the appellant.

VII THE COURT ERRED IN FINDING APPELLANT'S CLAIMS OF TAXPAYER STANDING FRIVOLOUS WHEN SUCH STANDING HAS BEEN CONSISTENTLY RECOGNIZED IN WASHINGTON FOR OVER 75 YEARS IN REGARD TO ILLEGAL PORT AND MUNICIPAL ACTIONS

The essence of taxpayer standing is that one's status as taxpayer is sufficient to challenge illegal government dispositions. Requiring a litigant to allege a particularized injury is no longer standing based on taxpayer status. Any taxpayer suit challenging an alleged illegal act must meet two requirements: "the complaint must allege both a taxpayer's cause of action and facts supporting taxpayer status." *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 572-73, 922 P.2d 184 (1996).

In *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931) (See Appendix 2) a taxpayer brought suit alleging that a **Port** executed a contract without requiring a bond from the other party as required by law. This court recognized taxpayer standing because "the risk of loss resulting from noncompliance or breach of the contract would fall upon the taxpaying public.

The assumption of this risk constitutes a general damage." Id. at 622. The court noted when a municipal corporation violates the law "it is a fair presumption that every taxpayer will be injured in some degree by such illegal act" even if no pecuniary harm can be shown. Id. at 623. See also *State v. Morgan*, 131 Wash. 145, 148, 229 P. 309 (1924) (illegal expenditure of state funds constitutes sufficient harm to supply taxpayer standing because he loses "the benefit which he would otherwise have received . . ."); *State ex rel. Gebhardt v. Superior Court*, Wn.2d 673, 680, 131 P.2d 943 (1942) ("[A] taxpayer may seek relief in equity against a public wrong which results in imposing an additional burden on the taxpayers.").

This Court should follow the long established precedent of this State to allow taxpayers to seek relief in matters concerning the unlawful expenditure of their funds, especially in light of the manifestly illegal any outrageous actions of the City in this Case.

VIII THE TRIAL COURT ERRED IN FILING TO RECOGNIZE THAT IN CASES OF ILLEGAL PORT OR MUNICIPAL ACTION EVERY TAXPAYER IS INJURED

The respondents' and the trial Court's confusion as to the necessary injury to a taxpayer required to establish standing may be resolved by an examination of more recent precedent, which has found that ...

A taxpayer must show special injury where he or she challenges an agency's *lawful, discretionary* act. *Am. Legion*, 116 Wn.2d at 7-8. Where a municipal corporation acts illegally, "it is a fair presumption that every taxpayer will be injured in some degree by such illegal act. *Barnett v. Lincoln*, 162 Wash. 613, 623, 299 P. 392 (1931). Here, the Taxpayers do not challenge a lawful discretionary act. Rather, they argue that the PUD lacks lawful authority to operate an appliance repair business. Thus, the Taxpayers are not required to demonstrate a unique injury. *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985).

But the PUD cites *Greater Harbor 2000 v. City of Seattle* for setting the "unifying theme on standing . . . that, for taxpayer status alone to be sufficient, there must be either some particularized injury to the taxpayer, or actual financial harm to the taxpaying public of which the plaintiff is a member." Appellant's Br. at 18. We are unable to read this theme into *Greater Harbor*. ***Kightlinger v. Pub. Util. Dist. No. 1 507, 119 Wn. App. 501 (2003)***

In Washington, the doctrine of taxpayer standing has long been recognized.

As early as 1906, the Washington Supreme Court held...

But we think the better and more reasonable rule is established by the decisions of the courts of New York, Ohio, Indiana, Illinois, and Iowa, which hold the opposite doctrine, and maintain that **when the question is one of public right, and the object of the mandamus to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result, it being sufficient if he shows that he is interested, as a citizen, in having the laws executed and the right enforced.** (People v. Collins, 19 Wend. 56; People v. Halsey, 37 N.Y. 344; State ex rel. Huston et al. v. Commissioners of Perry County, 5 Ohio 497; The County of Pike v. The State, 11 Ill. 202; City of Ottawa v. The People, 48 Id. 233; Hall ex rel. v. People, 52 Id. 307; Hamilton v. The State, 3 Ind. 452; State v. County Judge of Marshall County, 7 Iowa 186.)" **State ex rel Romano v. Yakey, 43 Wash. 15, 85 P. 990**

IX THE COURT ERRED IN DENYING STANDING WHEN PLAINTIFF MADE THE REQUISTEEQUEST FOR ACTION, WHICH WAS UNDENIED BY RESPONDENTS IN ANY RELEVANT PARTICULAR

In Washington, a taxpayer obtains standing to contest illegal actions by **a demand upon the proper officers to act** Tacoma v. O'brien, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); Reiter v. Wallgren, 28 Wn.2d 872, 876-77, 184 P.2d 571 (1947). Plaintiff's Complaint makes such an allegation, which has not been denied in respondent's submissions. As such, the standing requirement must be seen as having been met. Respondents' overly technical equivocations concerning the circumstances of the attorney General's refusal to act merely serve to underscore their dogmatic and virulent opposition to any doctrine by which a citizen can seek redress from the courts. The Attorney General, as a matter of expressed policy, refuses to intervene in the operation of municipal entities, no matter what requests are made to the office. This has been consistent for decades in regard to scores of requests filed by plaintiff and his associates.

Therefore, even in the absence of a request or action, the present Attorney General's established business practice of refusing such requests would be sufficient to demonstrate the futility of further such requests. Additionally, the Supreme Court, in Farris v. Munro, 99 Wn.2d

326, 662 P.2d 821 (1983) found a relator to have standing despite the lack of any request to the attorney general, based upon the public nature of the issues involved.

Under such circumstances, and the policy of the Courts of this state allow taxpayer suits to go forward even absent a showing that the taxpayers as a whole will face a monetary loss. (See State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 273 P.2d 464 (1954) the Thurston County Superior Court erred in refusing to consider appellant's taxpayer action In such case, the injury that must be alleged is simple-that the government is violating the law.

The Superior Court in this case clearly abused its discretion and applied an improper legal standard when it ruled, in effect, that all citizen suits were frivolous and that a citizen could be admonished for attempting to protect the taxpayers from unlawful expenditures in accord with clearly established precedent. Appellant's allegations of a lack of a proper Comprehensive Scheme of Harbor Improvements on the part of the port are also beyond dispute, due to a December 8, 2008 adoption of just such a scheme which included the Weyerhaeuser project as described in the Port's SEPA 07-2. This affirmative action equitably estopps any denial of the merits of this claim which has been implicitly admitted.

X THE COURT ERRED IN FINDING THE CITIZENRY POWERLESS TO ACT TO RESTRAIN EVEN THE MOST EVIDENT UNLAWFUL ACTS OF GOVERNMENT

As a final note in opposition to the respondents party line that no citizen, under any circumstance ever has standing to seek relief on any basis, the dissent of justice Hoyt in Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891) is illuminating...

If the contention of the majority is true, the taxpayers of the state are absolutely powerless, and must sit quietly by and see the officers of the state do things which are clearly illegal, and which may result in incalculable losses to the state...To hold that such a thing is possible under our form of government, where the courts in all matters are made the final arbiters to decide as to the legality or illegality of almost every kind of action, simply because it is possible that such courts might improperly prevent certain proposed actions on the part of such officers, seems to me entirely untenable.

To allow and encourage government to act illegally insulated from review by both the Judiciary and the Citizens in whom, presumably, under the Washington Constitution, all political power is inherent, is unreasonable and ridiculous, and would be an odd doctrine indeed.

However, this is exactly the brazen doctrine to which the respondents would sacrifice the ability of the citizen to act to restrain even the most manifestly unlawful governmental conduct.

The order entered by the Court in this case is nothing less than a complete abdication of the duty of the judiciary to enforce the law, rendering the citizen defenseless in the face of manifestly illegal and oppressive governmental conduct with the potential for clear damage to the environment and the quality of plaintiff's existence.

The failure of the court to either excuse the failure to exhaust administrative remedies due to respondents deliberate concealment of their action, or in the alternate, employ either the clearly established federal standing requirements enunciated in *Coughlin v. Seattle*, or the accepted standard and definition of "aggrieved party" established in the APA, and which has guided the courts in interpreting LUPA, was a manifest abuse of discretion which rendered the remedy of LUPA unconstitutional and inadequate.

The failure of the Court to recognize the existence of other forms of relief or clearly articulate why plaintiff lacked standing was a denial of basic due process and equal protection of law, in that nowhere has the Superior Court in a half a dozen cases, ever determined what would constitute standing. The conclusion is inevitable, that in the view of the defendants, (and the private organizations and associations that influence them *and* the Courts), citizens in the State of Washington lack even the most basic rights afforded to slaves³ under the common law to petition the government for redress. The effect of such rulings has been and continues to be to encourage further misconduct and abuses by government while insulating them from review.

Thus, the failure of the Court to recognize basic due process or the concept of taxpayer standing is an act that reconciles the citizens of the State of Washington to a status less than that of a slave under the common law. This will inevitably result in tyranny and oppression by local governments and the various private companies and associations who exert undue influence upon government in this State.

³ Every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any public Court, Council, or town-meeting, and either by speech or by writing, move any lawful, seasonable and material question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order and respective manner.

XI THE TRIAL COURT ERRED IN ALLOWING THE APPEARANCE OF FAIRNESS TO BE IMPAIRED BY ASSOCIATIONAL AND BUSINESS TIES

Whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well. . . . Just as a hearing fair in appearance but unfair in substance is no fair hearing, so neither is a hearing fair in substance but appearing to be unfair.

As SAVE and other more recent cases such as *Chrobuck v. Snohomish County*, 78 Wn.2d 858,480 P.2d 489 (1971) demonstrate, even the type of “Associational” entanglements admitted to exist in this case demonstrate a lack of an appearance of fairness, if viewed by the proper test of a reasonable doubt in the mind of an impartial observer. See also *Fleming V. Tacoma*, 81 Wn.2d 292, 502 F.2d 327

In regard to the conflict of interest issues, the appellant incorporates by reference the argument and authority in the Motion on the Merits, which is incorporated herein by reference. Based upon the cumulative impact of all of the foregoing circumstances of this case, including the judicial and administrative “stalling” of appellant’s original SEPA case, as well as the final summary and precipitous adjudication by the honorable Superior Court Justice, this Court should rule that the proceedings below lacked the appearance of fairness required by both *SAVE v. Bohell* as well as *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969).

While we as Americans are indebted to our local, and national Chambers of Commerce for a number of noteworthy and historic services⁴, maintaining the appearance of fairness in the context of land use adjudication is, unfortunately, not a function that their member are particularly well suited to fulfill.

XII CONCLUSION

By concealing the September 5, 2007 authorization and permits from appellant, despite a preexisting action and motion for injunctive relief, the respondents rendered the administration of justice in Thurston County less than swift, open, or prompt.

The facts of this case demonstrate that the respondents have contributed to a state of affairs where local Government can covertly act to evade even the possibility of a timely and

⁴ *The Tipping Point*, by Malcolm Gladwell. Little, Brown and Company NY, 2000. Paperback, Back Bay Books, NY, 2002

adequate judicial remedy and violate the law with impunity, committing even the most egregious actions, secure in the knowledge that they are immune from the prospect of ever being brought to justice by the citizens who they are purported to serve. In the interests of justice, the ruling of the trial Court should be vacated and this case remanded for further proceedings.

I certify the foregoing to be correct and true under penalty of perjury. May 5, 2009.

Arthur West
ARTHUR WEST