

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 37853-1-II

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

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Arthur West,

Appellant,

v.

Keith Stahley, et al,

Respondents.

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RESPONDENT PORT OF OLYMPIA'S BRIEF

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ORIGINAL

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## I. RESPONDENT PORT'S RESTATEMENT OF THE ISSUES

The Respondent Port of Olympia adopts the Respondent Weyerhaeuser

Company Restatement of Issues as follows:

**Issue 1:** Did Judge Wickham Misapply LUPA when he dismissed Appellant's LUPA Petition because they failed to exhaust administrative remedies?

**Issue 2:** Did *Res Judicata* or *Collateral Estoppel* preclude Judge Wickham from dismissing the Complaint when the subject matter, claims and parties to the Complaint were different from the subject matter, claims and parties in the Hearing Examiner proceeding on the 2006 Land Use Approval?

**Issue 3:** Did the Ruling in *Detray v. City of Olympia* preclude dismissing the Complaint when the Electrical Permit was a different permit, issued to a different party, for a different project than the 2006 Land Use Approval?

**Issue 4:** Did Judge Wickham abuse his discretion when he heard the case although he was a member of the Olympia Chamber of Commerce and Appellant failed to show his membership created an issue of impartiality?

**Issue 5:** Did Judge Wickham properly dismiss Appellant's declaratory judgment, writ, and nuisance claims when Appellant lacked standing to bring the claims and where Appellant's Complaint failed to allege necessary facts or when such claims were available only if no alternative remedy existed?

**Issue 6:** Did Judge Wickham properly dismiss Appellant's Harbor Improvement Act Claim, when Appellant's Complaint failed to allege the Attorney General refused to act on the claim and the Port had completed the project and spent or obligated the funds?

**Issue 7:** Did the Superior Court properly stay the proceedings when Appellant sued Judge Pomeroy and Judge Hicks and did Judge Wickham properly decline to hear Appellant's CR 11 and Anti-Slapp action motion when Petitioner Jerry Dierker conceded the motion was untimely?

**Issue 8:** Did Judge Wickham apply LUPA in a manner that denied Appellant's Constitutional rights when the City provided notice of the Engineering Permit, but Appellant still failed to timely file a notice of appeal?

Respondent Port adopts by reference the arguments of Respondent Weyerhaeuser Company as to all Issues. In this Brief, the Port supplements Respondent Weyerhaeuser's analysis as to Issues 1, 5 and 6, and adds the following two Issues:

**Issue 9.** Should the Court issue a ruling on moot issues? **NO.**

**Issue 10.** Is Port of Olympia due its attorneys' fees on appeal pursuant to RCW 4.84.370<sup>1</sup> or alternatively based on RAP 18.1, 18.9 and or RCW 4.84.185? **YES.**

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<sup>1</sup> RCW 4.84.370 Appeal of land use decisions - Fees and costs.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

## II. STATEMENT OF THE CASE

The Respondent Port of Olympia adopts the Respondent Weyerhaeuser Company's Statement of the Case, and supplements those facts briefly as follows.

### Port SEPA Review and Construction Plans

In July 2007, following the Port's completion of its administrative SEPA process, the Port filed for permits with the City of Olympia to begin construction of the Port's Peninsula infrastructure improvement project. CP 264. The Port's Peninsula infrastructure improvement project (Project) consists of:

Port: As part of the Port of Olympia's ongoing program of capital improvements and maintenance, the Port proposes to pave an unpaved portion of the existing marine terminal area on the port peninsula, install improved lighting, extend utilities including electrical, water, communications, natural gas, and sanitary sewer, and upgrade stormwater facilities. The purpose of the project is to improve existing Marine Terminal facilities and upgrade stormwater collection and treatment from cargo yard areas. Some of these improvements will primarily serve the Weyerhaeuser Company log operation yard; other improvements will serve both Weyerhaeuser and future tenants; and other improvements will exclusively serve other tenants.

Although the Port's SEPA process encompassed and reviewed both

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(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

the Port's infrastructure and the Weyerhaeuser Company log yard operations, the applied for engineering permits were confined to the Port constructed portion of the improvements. (Infrastructure improvements). CP 264-5.

**City Permits For Port Construction Not Appealed.**

On or about September 5, 2007, the City of Olympia completed their review of the Port's construction applications and issued the Port its permits. **No one timely filed an appeal of the City of Olympia permits.** CP 265.

On September 18, 2007, pursuant to the Port Commission's public action authorizing Staff to proceed with awarding the bids, the Port issued a Notice to proceed to the successful bidder contractor. The Notice to Proceed places the Port in a contractual binding relationship with the contractor, to wit, the contractor agrees to perform the work, and the Port agrees that the contractor may proceed with the work and mobilization of the project. CP 265-6.

**Plaintiffs' Prior Complaint & Motion for Injunction**

In September 2007, Plaintiff West & Dierker first filed a Motion for Injunction to halt the on-going construction as part of a SEPA judicial appeal filed under Thurston County Cause No. 07-2-01198-3. CP 469-588. That Motion for Injunction was placed on hold by the Court because

Appellants Mr. West & Mr. Dierker later filed suit in the Washington Supreme Court against two Thurston County Superior Court Judges, including the presiding Judge in that Thurston County Cause No. 07-2-01198-3, which had the effect of stalling all action in that case. CP 83.

Ultimately, the Supreme Court dismissed Appellant's actions against the two Superior Court judges, finding the action, "lacking in demonstrated factual or legal merit", with "no reasonable possibility this Court would grant petitioner's relief". CP 488-498. The Court also imposed monetary sanctions against the Appellant. Id.

#### **Appellant' Complaint In This Action**

Appellant thereafter filed his Superior Court action on or about October 18, 2007, asking the Court to "revoke an illegal "Authorization to Proceed at Own Risk authorization and related permits," claiming that the permits are "facially void". CP 3-6. Appellant also sought a "warrant to abate the public nuisance caused by construction". Id.

In their Complaint, West and Dierker alleged that the City's actions in authorizing the construction activities, and the Port's actions in proceeding with those activities provide causes of action against the City and Port for (1) an unconstitutional expenditure of funds; (2) a public and private nuisance; (3) a violation of express duty for which

mandamus/prohibition apply; (4) an unexplained SEPA/LUPA claim; (4) some sort of negligence claim; and (5) declaratory relief generally. CP 3-6. The Port is a named Defendant in the action. CP 3.

**Appellant's Tardy Administrative Appeal.**

*Subsequent* to the filing of Appellant's judicial appeal, Appellants also filed an administrative appeal to the City of Olympia Hearing Examiner (No.07-20), purporting to appeal the **same** Port engineering permit that was the subject of the judicial appeal. CP 377, 600. Ultimately, on February 11, 2008 the City of Olympia Hearing Examiner dismissed Appellants' administrative appeal because they filed it 20 days after they received actual notice of the Engineering Permit, rather than 14 days as required by OMC 18.75.020. CP 380-383. The Hearing Examiner's ruling was based on a finding that Appellants failed to timely file the administrative appeal within 14 days after they had actual notice of the Engineering Permit. Id.

By April 1, 2008, the Port completed all work that was subject of the permit issued by the City and appealed by Appellants. CP 451.

On April 4, 2008, Weyerhaeuser filed its Motion to Dismiss Appellants' Complaint. CP 109-122. The motion was noted for May 2, 2008. Id.

On April 30, 2008, three days before the hearing, Appellants untimely filed a Motion for CR 11 Sanctions and Anti-Slapp Award. CP 661-672.

On May 2, 2008, Judge Wickham heard Weyerhaeuser's motion to Dismiss. After Appellant Jerry Dierker conceded Appellants' Motion was untimely, Judge Wickham declined to hear Appellants' CR 11 and Anti-Slapp motion. Verbatim Transcript, May 2, 2008 at 14. Judge Wickham granted Weyerhaeuser's Motion to Dismiss. Verbatim Transcript and CP 129-130. The Order found the Complaint to be frivolous under CR 11. *Id.*

Appellants West & Dierker filed for Reconsideration and for CR 11 SLAPP and Cr (sic) 37 Award. CP 131-139. The Court denied Reconsideration by letter opinion May 19, 2008. CP 140-141. Appellant West timely appealed the Court's Order of Dismissal and Reconsideration.

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### **III. ARGUMENT**

#### **A. Issue 1: The Court Properly Applied LUPA by Dismissing Appellant's Complaint When Appellant Failed to Exhaust Administrative Remedies.**

##### **1. Standard of Review of Appeal.**

The trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of

law that the Court of Appeals reviews de novo. *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.* (2004) 123 Wash.App. 863, 99 P.3d 1256. A court should dismiss under this rule when it appears beyond a reasonable doubt that no facts justifying recovery exist. *San Juan County v. No New Gas Tax* 160 Wash.2d 141, 157 P.3d 831, Wash.,2007. *Bravo v. Dolsen Cos.*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995). Courts presume the allegations of the complaint to be true for the purpose of such a motion. *Grimsby v. Samson* (1975) 85 Wash.2d 52, 530 P.2d 291.

If materials outside the pleadings are considered, the CR 12(b)(6) motion is treated as a summary judgment motion under CR 56. CR 12(c). The Court may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce County* (2008) 164 Wash.2d 545, 192 P.3d 886. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.* (2006) 158 Wash.2d 603, 146 P.3d 914. All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Landberg v. Carlson* (2001) 108 Wash.App. 749, 33 P.3d 406, *review denied* 146 Wash.2d 1008, 51 P.3d 86. When reviewing an order of summary judgment, the Supreme Court engages in the same inquiry as the trial court. *Morin v. Harrell* (2007) 161 Wash.2d 226, 164 P.3d 495.

## **2. Dismissal was Proper.**

In the present case, Appellant argues Judge Wickham erroneously interpreted LUPA by dismissing Appellants' case for failure to exhaust administrative appeals of the "ministerial" engineering permit. Appellant's Brief at 20. Appellant's argument is without merit.

Appellant<sup>2</sup> failed to exhaust administrative remedies and timely appeal the permit. This omission is fatal. Appellant is barred from judicial appeal. He also cannot impermissibly attack the permitted improvements via other indirect means and or claims. *Asche v. Bloomquist* (2006) 133 P.3d 475 and see *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005). *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000).

## **3. LUPA Applies to Ministerial Engineering Permit.**

The Washington Courts have issued a long line of strongly worded post- Land Use Petition Act, Chapter 36.70C RCW (LUPA) land use permitting decisions which emphasize that the Land Use petition Act is the exclusive means to appeal land use decisions in Washington. Appellant's

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<sup>2</sup> Only Appellant Arthur West filed an Appeal Brief; therefore, the reference to arguments in the brief refers to "Appellant" while references to the Original Complaint refers to "Appellants."

contention that LUPA does not apply to the City's ministerial permit is wrong.

The City of Olympia engineering permit issued to the Port is a land use decision subject to LUPA. LUPA applies to the issuance of building and engineering permits because building permits are land use decisions. *Asche v. Bloomquist* (2006) 133 P.3d 475. Building permits are ministerial decisions subject to judicial review under Land Use Petition Act. *James v. County of Kitsap* (2005) 154 Wash.2d 574, 115 P.3d 286. The Land Use Petition Act (LUPA) is the exclusive means of judicial review of land use decisions, whether they are quasi-judicial or ministerial. *Grandmaster Sheng-Yen Lu v. King County* (2002) 110 Wash.App. 92, 38 P.3d 1040.

#### **4. LUPA is the Exclusive Means to Judicially Appeal Land Use Decisions**

Post LUPA, the Courts give strict enforcement to LUPA appeal procedures to honor strong policies favoring finality in land use decisions and security for landowners proceeding with property development. *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist* (2006) 133 P.3d 475.

**Before LUPA**, a line of Washington cases held that an improperly approved building permit is void and may be rescinded by the agency which erroneously issued it. **Post-LUPA**, approval of permits, even those of questionable legality, “become valid once the opportunity to challenge each has passed.” *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000).

Even questionable decisions under local land use codes must be challenged in a timely, appropriate manner under the Land Use Petition Act (LUPA), which is the exclusive means of judicial review of land use decisions; this includes defects in land use determinations that would have made the decision void under pre-LUPA cases. *Asche v. Bloomquist* (2006) 133 P.3d 475 and see *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005).

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner. RCW 36.70C.010. *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002). To allow even a local jurisdiction to challenge a land use decision beyond LUPA's

statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Id.

**5. LUPA Requires Exhaustion of Administrative Remedies As a condition Precedent to Judicial Appeal.**

Here Appellants seek to challenge City of Olympia engineering permits issued to the Port of Olympia. The City of Olympia has an appeal process for such permits which Appellant failed to timely pursue.<sup>3</sup>

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<sup>3</sup> The Olympia Municipal code sets up a two part appeal process. Appeals must first be filed with and heard by the City Hearing Examiner, and thereafter are appealed to the City Council. Only after the appeal is pursued through the City Council level may relief be sought in the Superior Court. See **OMC 18.75.020 - Specific appeal procedures: A. Administrative Decision.** Administrative decisions regarding the approval or denial of the following applications or determinations/interpretations may be appealed to the Hearing Examiner within fourteen (14) days, or twenty-one (21) days if issued with a SEPA threshold determination including a comment period, of the final staff decision using procedures outlined below and in OMC Chapter 18.82, Hearing Examiner (Refer to 18.72.080 for other appeal authorities).

1. All Administrative Interpretations/Determinations
2. Boundary Line Adjustments
3. Home Occupation Permits
4. Preliminary Short Plats
5. Preliminary SEPA Threshold Determination (EIS required)
6. Shoreline Exemptions and staff-level substantial development permits
7. Sign Permits
8. Variances, Administrative
- 9. Building permits**
- 10. Engineering permits**
11. Application or interpretations of the Building Code
12. Application

And see: OMC 18.75.100 - **Council action:** The action of the **Council, approving, modifying, or rejecting a decision of the Hearing Examiner** shall be conclusive, unless within twenty-one (21) calendar days from the date of the final Council action an aggrieved party or person files a

Appellant sought as part of his relief in this action to void and or "abate" the permits. Appellant's action is barred for failing to exhaust administrative remedies prior to filing suit in Superior Court. Further, because the deadline for filing such administrative permit appeals has passed, Appellant's complaints are barred.<sup>4</sup>

Judicial review of a land use decision may not be obtained under Land Use Petition Act (LUPA) unless all the administrative remedies have been exhausted. *West Coast, Inc. v. Snohomish County* (2000) 104 Wash.App. 735, 16 P.3d 30, as amended on denial of reconsideration.

Where opponent of application for conditional use permit for telecommunications monopole did not exhaust administrative remedies by filing a timely administrative appeal, there was no land use decision subject to review in a Land Use Petition Act (LUPA) petition. *Prekeges v. King County* (1999) 98 Wash.App. 275, 990 P.2d 405, reconsideration denied, review denied 140 Wash.2d 1022, 10 P.3d 404.

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land use petition with the Superior Court of Washington for Thurston County for the purpose of review of the action taken.

<sup>4</sup> Because no City of Olympia SEPA comment period is involved, the 14 day deadline applies to the City permits issued to the Port which are the subject of this suit. Plaintiffs concede the permits issued September 5, 2007. See Attachment 1 to Plaintiffs' Complaint. Therefore the administrative appeal deadline was September 19, 2007.

Here, Appellant also cannot properly claim that any defect in notice prevented a timely LUPA judicial appeal. The City of Olympia Hearing Examiner dismissed Appellants' administrative appeal. CP 380-383. The Hearing Examiner's ruling was based on a finding that Appellants failed to timely file the administrative appeal after they had *actual notice* of the Engineering Permit. Id. These facts are foursquare on point with *Prekeges*. There, the Court found defects in public notice of application for conditional use permit for telecommunications monopole, which was published in only one newspaper instead of the two called for in county code and which was posted on-site a week late, did **not** excuse opponent's failure to exhaust administrative remedies by filing timely administrative appeal of county's permit approval, where opponent had *actual notice* of the application because he saw the on-site notice before the end of the comment period and where there were no defects in the public notice of the decision itself. *Prekeges v. King County* (1999) 98 Wash.App. 275, 990 P.2d 405, *reconsideration denied, review denied* 140 Wash.2d 1022, 10 P.3d 404.

A property owners' petition under Land Use Petition Act (LUPA) was properly dismissed, given owners' failure to file with board of county commissioners timely appeal of hearing examiner's denial of their applications for variance and special use permit and to obtain board's final

determination on their applications, thereby failing to exhaust administrative remedies and obtain land use decision subject to review under LUPA. *Ward v. Board of County Com'rs, Skagit County (1997)* 86 Wash.App. 266, 936 P.2d 42.

Under *Phillips v. King County*, 87 Wash.App. 468, 479, 943 P.2d 306 (1997), *aff'd*, 136 Wash.2d 946, 968 P.2d 871 (1998), plaintiffs must exhaust their administrative remedies when an agency's rules set out a clearly defined process for resolving the aggrieved party's complaint. RCW 34.05.534; *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 866, 947 P.2d 1208 (1997). This doctrine is based on the principle that the judiciary should give proper deference to agency expertise and allow the agency to develop the necessary factual background in order to correct its own errors. *Phillips* at 479-80, 943 P.2d 306.

The court will not intervene where an exclusive administrative remedy is provided. *Id.* The exhaustion of remedies doctrine is based on a number of legal policies. It avoids premature interruption of the administrative process, provides for full development of the facts, and allows the exercise of agency expertise. *Id.* The doctrine also protects the autonomy of administrative agencies by giving them the opportunity to correct their own errors. *Id.* It discourages litigants from ignoring administrative procedures by resort to

the courts. Id. (citing *McKart v. United States*, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)). Finally, the judicial branch, essentially recognize the agency's expertise. Id.

Even where " 'a party affirmatively seeks declaratory or injunctive relief,... it must show that its remedies have been exhausted in order to show it has standing to raise even a constitutional issue.' " *Ryder v. Port of Seattle*, 50 Wash. App. 144, 152, 748 P.2d 243 (1987) (quoting *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash.2d 905, 908-09, 602 P.2d 1177 (1979)). As quoted in *Harrington v. Spokane County*, 128 Wash. App. 202, 114 P.3d 1233 Wash. App. Div. 3, 2005.

In *Peste v. Mason County*, 133 Wash.App. 456, 136 P.3d 140, Wash.App. Div. 2, (June 14, 2006) the Court upheld dismissal of Superior Court action where Plaintiff failed to exhaust administrative remedies by appealing to the Growth Management Board prior to appeal to Superior Court. ("Most importantly, however, Peste did not appeal the adoption of Mason County's CP, DRs, or any subsequent amendments made between 1996 and 2003. ...Significantly, Peste has not appealed the adoption of Mason County's CP and DRs or any amendment to the Growth Board. Thus, Peste has waived its right to argue that Mason County did not comply with the GMA's notice and public participation procedures.")

It is well settled law that a party aggrieved by governmental action must exhaust available administrative remedies before filing suit *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 177, 4 P.3d 123 (2000) (citing RCW 36.70C.060).

Here Appellant seeks to challenge City of Olympia permits issued to the Port of Olympia. The City of Olympia has an appeal process for such permits which Appellant failed to pursue. Appellant seeks as part of his relief in this action to void and or "abate" the permits. Appellant's action is barred for failing to exhaust administrative remedies prior to filing suit in Superior Court. Further, because the deadline for filing such administrative permit appeals has passed, Appellant's complaints are waived altogether. When an aggrieved person fails to seek redress using available administrative procedures before filing suit, the trial court should dismiss the claim. *Laymon*, 99 Wash.App. at 525, 994 P.2d 232 (citing *CLEAN v. City of Spokane*, 133 Wash.2d 455, 465, 947 P.2d 1169 (1997), *cert. denied*, 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998)).

**B. Issue 5: Appellant's Complaint Failed to Establish Standing and or Claims for Declaratory Relief, Harbor Improvement Act claims or a Writ of Mandamus or Prohibition, and Nuisance**

**1. Appellant Lacks Standing for Declaratory Relief or Harbor Improvement Act Claim**

The Superior Court properly dismissed Appellants' declaratory judgment, Harbor Improvement Act, writ, and nuisance claims on the pleadings. Because Appellant West lacked standing to bring these claims, the trial court did not have jurisdiction to consider them and their dismissal was appropriate.

The Washington legislature crafted the Uniform Declaratory Judgment Act (UDJA) in order "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. The UDJA thus allows a trial court to issue a declaratory judgment if "a judgment or decree will terminate [a] controversy or remove an uncertainty." RCW 7.24.050; see also RCW 7.24.010. The act does not, however, allow trial courts to issue advisory opinions except on exceptionally rare occasions where the public's interest in the resolution of an issue is overwhelming and the issue is adequately briefed and argued. See *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-17, 27 P.3d 1149 (2001) (discussing justiciability under UDJA), cert. denied, 535 U.S. 931 (2002).

As under all laws, courts lack jurisdiction to consider an action if a party does not have standing to bring the lawsuit. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Grove v. Mead Sch.*

*Dist.* 354, 753 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 826 (1985)), appeal dismissed by 479 U.S. 1073 (1987).

Standing is roughly defined as a personal stake in the challenge. See *High Tide Seafoods*, 106 Wn.2d at 701-02. A court reviews a party's standing de novo. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999). Courts review whether a party has standing to bring a particular action by applying a two-part test:

First, Courts determine whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question. Second, courts consider whether the party seeking standing has suffered from an injury in fact, economic or otherwise. Both tests must be met by the party seeking standing. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004) (citations omitted).

The only allegations relevant to standing are West's assertions that (1) he is "a resident of the City of Olympia and citizen of the state of Washington" and that "As persons who have requested action to restrain unconstitutional expenditure of funds, they have standing to maintain an action to restrain the action of the city and port taken in clear violation of the law". CP 153; and (2) "Plaintiffs West and Dierker are citizens abiding and conducting business in the City of Olympia, Thurston County in the

state of Washington. They have a demonstrated connection to the immediate area of the Project site and are particularly impacted and prejudiced in their repose and enjoyment by defendant's actions. They have standing to maintain this action in all its particulars" CP 4; (3) "prior to filing this suit, plaintiffs have requested the State Attorney general and the Thurston County Prosecutor to prevent the continuing act of unconstitutional expenditures of public funds by the Port of Olympia and the City of Olympia in relation to this void permit and in defiance of RCW Title 53.20". CP 3-4.

The Court should find that these assertions are insufficient to confer standing because they fail to show that West has "suffered from an injury in fact," a basic requirement for invoking a court's jurisdiction. *Branson*, 152 Wn.2d at 876. The assertions of standing contained in West's pleadings are addressed as follows:

First, being a citizen is insufficient to confer on a person standing. If status as a citizen or consumer were sufficient to confer standing, the entire doctrine would be superfluous. See *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). And a plaintiff's status as "conducting business" will cause a litigant to have standing only if the lawsuit involves some harm to the person's land or the owner's property

rights, thus fulfilling the "injury in fact" prong of the standing test. See, e.g., *Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985) (a landowner has standing if his property rights were allegedly infringed). West does not demonstrate how the Port's or the City's actions implicate his business or property rights and, therefore, his status as a person conducting business does not confer standing.

Nor can Appellant West legitimately suggest that he has presented a question of public interest under the Declaratory Judgment or Harbor Improvement Act statutes for which standing requirements are relaxed. In *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), the Washington Supreme Court has held that appellate courts may decide a question of public interest that has been adequately briefed and argued if doing so would benefit the public and government officers. Assuming solely for argument that the questions posed are of public interest, West's briefing make it inappropriate for the Court to attempt to address West's claims on the merits.

Last, West's reliance on taxpayer standing and his apparent reference to *Reiter v. Wallgren*, 28 Wn. 2d 872, 184 P.2d 571 (1947) is misplaced. In *Reiter*, the Washington Supreme Court held that, without statutory authorization, a taxpayer does not have standing to challenge the legality of

public officers' acts unless he first requests that a proper public official sue on behalf of all taxpayers. 28 Wn.2d at 876-77. But *Reiter's* holding does not mean, conversely, that a taxpayer has standing simply because he wrote a letter demanding that the Attorney General's Office commence litigation. Rather, to sue, "the taxpayer must show that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers." *Am. Legion Post* No. 32, 116 Wn.2d at 7. West has failed to cite any such unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers.

Absent a sufficient showing of standing, Appellant is left only to seek an advisory opinion regarding a matter for which he lacks standing, and Washington courts may not issue such advisory opinions. *To-Ro Trade Shows*, 144 Wn.2d at 416 (holding that a court may not deliver an advisory opinion under the UDJA if standing and other justiciability factors are not satisfied, barring a substantial public interest that is adequately briefed). Accordingly, this Court should find that Appellant West does not have standing to seek a declaratory judgment or to pursue Harbor Improvement Act issues and that the Court may not address his alleged public interest claims in an advisory opinion.

## **2. Court Properly Dismissed Writ for Mandamus/Prohibition Because Appellants Lacked Standing**

Before a writ will issue, the applicant must satisfy three elements: (1) the party subject to the writ has a clear duty to act; (2) the applicant has no plain, speedy, and adequate remedy in the ordinary course of the law; and (3) the applicant is beneficially interested. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027 (2004).

All three elements must be met before the court can issue the writ. Here, even assuming that Appellant had alleged a duty and demonstrated a lack of remedy, he has failed show beneficial interest and the Writ(s) were properly denied.

Whether an applicant is 'beneficially interested' is a question of standing. *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003). The applicant has standing 'if he has an interest in the action **beyond** that shared in common with other citizens.' *Retired Pub. Employees Council*, 148 Wn.2d at 616.

When the City issues a permit to the Port allowing improvements with which Appellant disagrees, that does not render the Appellant 'beneficially interested' more than the public at large. Thus, Appellant did not establish

his standing to seek the requested Writs before the Superior Court and the Court properly dismissed those actions.

**3. The Court Properly Dismissed the Write Because Appellant Had Alternative Relief.**

The Land Use Petition Act (RCW 36.70C) provides a specific process for Appellant to have obtained the relief which he impermissibly seek through a Writ. LUPA authorizes a party to seek a “stay or suspend an action by the local jurisdiction or another party to implement the decision under review”. RCW 36.70C.100. A stay is granted based on the following criteria:

- (a) The party requesting the stay is likely to prevail on the merits;
- (b) Without the stay the party requesting it will suffer irreparable harm;
- (c) The grant of a stay will not substantially harm other parties to the proceedings; and
- (d) The request for the stay is timely in light of the circumstances of the case.

Before the Superior Court, Appellant failed to address the LUPA Stay criteria in any way, and instead sought to use the Writ as an improper substitute. The LUPA Stay represented yet another “plain adequate and speedy remedy” available to the Appellant, accordingly the Writ(s) was properly denied.

#### **4. Appellant Is Barred From Bringing Nuisance Claim.**

In a case directly on point, the Washington Supreme Court ruled that LUPA, which is the exclusive means of judicial review of land use decisions, **pre-empts** a public nuisance action alleging a building permit had been improperly issued (violation of a zoning ordinance height limit). RCW 36.70C.030. *Asche v. Bloomquist*, 133 P.3d 475 Wash.App.Div.2, (2006).

In *Asche*, the Court found that homeowners' failure to comply with time requirements under the Land Use Petition Act (LUPA) for challenging building permits barred their nuisance action against neighbors and county to stop neighbors from building a house that impeded their view. The decision rested on the Court's finding that since LUPA is the exclusive means of judicial review of land use decisions, it applied to the homeowners' action since county was obligated to consider their interest in issuing permit under zoning ordinance, and LUPA could provide redress similar to injunctive relief.

The same is true here. Having failed to properly perfect his LUPA appeal by first exhausting administrative remedies, Appellant could not properly seek the same relief collaterally via a nuisance or other claim. See also *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005).

And in *Wenatchee Sportsmen*, the Washington Supreme Court held that a petitioner could not collaterally challenge a rezone decision by way of its LUPA petition that challenged a plat approval when the period for challenging the initial rezone decision had already passed. *Wenatchee Sportsmen*, 141 Wash.2d at 181, 4 P.3d 123. The rule applied in *Wenatchee Sportsmen* controls the present issue. In raising the nuisance claim, Appellant actually challenges the validity of the Port's permit. Because appeal of the permit is time barred under LUPA, Appellant cannot collaterally attack them through his nuisance challenge. The Court properly dismissed the nuisance claim.

**C. Issue 6. Claim of Unconstitutional Expenditure of Public Funds Unfounded**

Appellant West also claimed that the City and Port made unconstitutional expenditures of public funds. He provides no specific facts in support of the allegation.

It is unclear what law West relies on in bringing this claim. The Washington Constitution sets requirements for the expenditure of public funds, including (1) a prohibition on paying money out of the state treasury without an appropriation, (2) a requirement of timely payments and specific sums and objects of an appropriation, and (3) a prohibition on lending or giving public money or credit. *Wash. Ass'n of Neighborhood Stores v. State*,

149 Wn.2d 359, 365-66, 70 P.3d 920 (2003) (citing Wash. Const. art. VIII, § 4); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 652, 62 P.3d 462 (2003) (quoting Wash. Const. art. VIII, § 7). It is unclear how Appellant West's claim challenges the Port or City's compliance with these, or other, constitutional requirements. Lacking any specifics to support this allegation, Appellant does not state a claim upon which relief may be granted. The Superior Court did not err in dismissing this claim.

**D. Issue 9. The Court Should Refrain from Ruling on Moot Issues.**

**1. Courts Do Not Consider Moot Issues.**

As a general rule, appellate courts will not decide moot questions or abstract propositions. *See Housing Auth. of Everett v. Terry*, 114 Wash.2d 558, 570, 789 P.2d 745 (1990). A case is moot if a court can no longer provide effective relief. *See Orwick v. Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wash.2d 731, 733, 658 P.2d 658 (1983). "A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights. *Thomas v. Van Zandt*, 1910, 56 Wash. 595, 603, 106 P. 141.

Here, by April 1, 2008, the Port had completed all work that was subject of the permit issued by the City and appealed by Appellants. CP 451. The appeal which seeks to stop the project and invalidate the permit is moot. The

appellant court should refuse to take jurisdiction of this moot case. *Bowen v. Department of Social Security*, 1942, 14 Wash.2d 148, 153, 127 P.2d 682.

Courts may decline review of an issue if it is moot because it is unable to provide effective relief. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981); see also *To-Ro Trade Shows*, 144 Wn.2d at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

This Court cannot provide effective relief regarding the alleged permit or the requested injunctive relief because such the work subject of the permit is complete. Thus, the issue is moot and the Court should decline to review it.

## **2. Appellant's Claim of Unconstitutional Expenditure of Funds Also Moot.**

The Port finished all construction activities authorized by the engineering permit over a year ago. CP 600. The funds have been spent. There is no longer a live controversy with respect to the Port's expenditure of funds. For all the same reasons as discussed above, the Court should decline to review this moot issue.

**E. Issue 9. The Port of Olympia is due its attorneys' fees on appeal pursuant to RCW 4.84.370 or alternatively based on RAP 18.1; RCW 4.84.185.**

**1. Port of Olympia is due its attorneys' fees on appeal pursuant to RCW 4.84.370**

Respondent Port seeks an award of attorney fees under RCW 4.84.370<sup>5</sup>.

Under that provision, a party who prevails in an appeal of a land use decision at the administrative and judicial level is entitled to an award of attorney fees incurred before the Court of Appeals. RCW 4.84.370(1).

The Port is mindful that this Court has limited RCW 4.84.370 to require that the “prevailing” party prevail “on the merits” in an adversarial proceeding. *Overhulse*, 94 Wash.App. at 601, 972 P.2d 470, and see *Quality*

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<sup>5</sup> RCW 4.84.370 Appeal of land use decisions - Fees and costs.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

*Rock Products, Inc. v. Thurston County* (2005) 126 Wash.App. 250, 108 P.3d 805, and *Witt v. Port of Olympia* (2004) 124 Wash.App. 928, 103 P.3d 853, *withdrawn from bound volume, on reconsideration* 126 Wash.App. 752, 109 P.3d 489.

In *Overhulse*, the superior court dismissed a neighborhood association's land use petition for lack of jurisdiction; thus, the court did not reach the merits. *Overhulse*, 94 Wash.App. at 601, 972 P.2d 470. This Court declined to award attorney fees to the county because it had not prevailed on the merits. In *Witt*, the LUPA appeal against the Port was dismissed and upheld on appeal on the ground that challenger failed to properly serve port as required under the Land Use Petition Act (LUPA). *Witt* at 759.

This Court should instead adopt the reasoning of Division One, which disagrees with *Overhulse*. In *Prekeges v. King County*, 98 Wash.App. 275, 285, 990 P.2d 405 (1999), Division I pointed out that RCW 4.84.370 does **not** limit the award of attorney fees to cases in which the lower court decided “the merits.” Like in *Prekeges*, all of the necessary elements for an attorney fee award are met in this case.

First, assuming this Court rules in its favor, the Port would be a “prevailing party on appeal before the court of appeals.” Second, the case on appeal must be an appeal of a local land use decision. This requirement is

satisfied because in his appeal to this court, Appellant West sought to invalidate the City of Olympia's decision to issue the Port's engineering permit.

Third, the Port must show that it was the "prevailing party before the local City". Here, the Port was properly issued the permit by the City. The Port prevailed in this same Appellant's appeal of the permit brought before the City Hearing Examiner. CP 380-383. The Port also prevailed in this Appellant's appeal to Superior Court. CP 129-130.

The clear wording of the statute RCW 4.84.370 does **not** require that the party must have prevailed *on the merits*. See *San Juan Fidalgo v. Skagit County*, 87 Wash.App. 703, 943 P.2d 341 (1997), review denied, 135 Wash.2d 1008, 959 P.2d 127 (1998) (party prevailed in superior court when court dismissed opponent's LUPA petition for failure to achieve timely service); and see *Prekeges* at 285. See also *Hwang v. McMahill* (2000) 103 Wash.App. 945, 15 P.3d 172, review denied 144 Wash.2d 1011, 31 P.3d 1185, where the Court found the landlord, as the prevailing party on appeal in unlawful detainer action, was entitled to attorney fees pursuant to the terms of lease, as well as unlawful detainer statute, where landlord successfully defended against appeal of *default judgment*, and where a similarly worded statute awards fees "In any action arising out of this [RCW

59.20.110] chapter, the prevailing party shall be entitled to reasonable attorney's fees and costs”.

Because the Port has benefited from the hearing examiner's decision and the Superior Court’s ruling rejecting Appellant West’s appeals, and has incurred substantial attorney fees at tax payer costs in defending the Court’s decision in this court against Appellant’s efforts at appeal, this Court should hold the Port is the prevailing party and is entitled to fees and costs.

Finally, the Port must show that it was the prevailing party in “all prior judicial proceedings.” The only prior judicial proceeding resulted in the superior court's decision to dismiss West’s petition for judicial review and writ for failure to exhaust administrative remedies, exactly as was the case in *Prekeges*. The Port urges this Court to follow the result reached in *San Juan Fidalgo* and in *Prekeges*. Any other result allows the Appellant to continue to pursue faulty claims and to continue to drain the resources of the taxpayers of the Port without penalty.

**2. Alternatively the Court Should Award Attorney Fee Award Pursuant to RAP 18.1, RAP 18.9 and or RCW 4.84.185.**

Alternatively, the Port requests the Court order Appellant West to pay its attorney fees and costs for having to respond to this frivolous appeal. RAP 18.1, 18.9 and or RCW 4.84.185.

An appeal is frivolous if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005 (2006). An appeal is frivolous if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *State ex rel. Quick-Ruben v. Verharen*, 136 Wash.2d 888, 905, 969 P.2d 64 (1998).

The Superior Court's Order of Dismissal specifically found Appellant's Complaint to be frivolous under CR 11. See Verbatim Transcript and CP 129-130. This Court should similarly find that this appeal raises no debatable issues and is frivolous pursuant to RAP 18.1 and 18.9. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane* (2007) 139 Wash.App. 21, 156 P.3d 912.

An award for frivolous appeal is proper where, on the record before this Court, the decision to file the initial court action in this matter was unfounded. *See generally Watson v. Maier*, 64 Wash.App. 889, 891, 827 P.2d 311 (1992) quoting *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir.1983)). Here, West, after losing before the City Hearing Examiner and Superior Court, after a finding of frivolous suit by

the Superior Court, Appellant West nonetheless then filed this appeal and asserted arguments that lack any support in the record or are precluded by well-established and binding precedent that he does not distinguish.

Under RAP 18.9, the appellant rule allowing award of attorney fees and costs as sanction for filing frivolous appeal, an appeal is “frivolous” if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. State, Dept. of Transp.* (2005) 128 Wash.App. 895, 117 P.3d 1152, review denied 157 Wash.2d 1005, 136 P.3d 759. See also *Reid v. Dalton* (2004) 124 Wash.App. 113, 100 P.3d 349, review denied 155 Wash.2d 1005, 120 P.3d 578.

The Port urges the Court to award the Port its attorney fees and costs on appeal, subject to compliance with RAP 18.1(d).

#### IV. CONCLUSION AND RELIEF

Appellants’ appeal of the Superior Court’s Order dismissing Appellants’ Complaint is flatly without merit, and should be dismissed.

Appellant should be required to repay the Port’s taxpayers for the fees and costs of having to defend against this frivolous appeal.

DATED: February 13, 2009.



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Attorneys for Respondent Port of Olympia

FILED  
COURT OF APPEALS  
DIVISION II  
09 FEB 23 PM 4:00  
STATE OF WASHINGTON  
BY CA  
DEPUTY

COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

KEITH STAHLEY, SUSAN MESSENGER,  
JEFF FANT, CITY OF OLYMPIA, OLYMPIA CITY  
COUNCIL, PORT OF OLYMPIA

Respondents.

NO. 37853-1-II

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. RESPONDENT PORT OF OLYMPIA'S BRIEF

to be served on 23 February 2009, on the following parties and in the manner indicated below:

Arthur West  
120 State St. NE #1497  
Olympia, WA 98501

by United States First Class Mail  
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 by Facsimile  
 by Federal Express/Express Mail  
 by Electronic Mail

Jerry Dierker  
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by United States First Class Mail  
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 by Electronic Mail

DECLARATION OF SERVICE - 1

ORIGINAL

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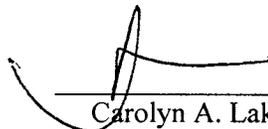
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11 [ ] by Legal Messenger  
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17 [ ] by Legal Messenger  
[ ] by Facsimile  
18 [ ] by Federal Express/Express Mail  
[ ] by Personal Delivery  
[X] Electronic Mail

19  
20 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
is true and correct.

21 Dated this 23 day of February 2009 at Tacoma, Washington.

22  
23   
24 \_\_\_\_\_  
Carolyn A. Lake