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DIVISION II

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STATE OF WASHINGTON

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DEPUTY No. 37853-1-II

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

Arthur West,

Appellant,

v.

Keith Stahley, et al,

Respondents

BRIEF OF RESPONDENT CITY OF OLYMPIA

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I. INTRODUCTION

This case frivolously asserts claims sounding in nuisance, negligence and sought the issuance of writs of mandamus and prohibition against the issuance of engineering permits by the City of Olympia to the Port of Olympia in September 2007. Because they are “land use decisions” under the Land Use Petition Act (“LUPA”), Ch. 36.70C RCW, Appellant was required to challenge these decisions by filing a Land Use Petition. As a prerequisite to filing a LUPA action, Appellant was required to timely file an administrative appeal to the City Hearing Examiner. Having failed to do so, the Superior Court correctly dismissed Appellant’s frivolous complaint.

The City joins fully in the arguments of Weyerhaeuser and the Port of Olympia, especially those concerning the inapplicability of res judicata and/or collateral estoppel to its issuance of the engineering permits. As they demonstrate, these were different permits relying on a different SEPA determination.

II. STATEMENT OF CASE

This case concerns issuance of engineering permits to the Port of Olympia for construction of infrastructure to support a proposed log yard to be leased to the Weyerhaeuser Company.

Weyerhaeuser plans to construct four buildings to serve the log yard and the Port has constructed utilities that serve the Weyerhaeuser log yard, buildings and other parts of the Marine Terminal.

In 2006, Weyerhaeuser applied to the City for a Land Use Approval for the four proposed buildings. CP5. The City issued a Mitigated Determination of Nonsignificance under the State Environmental Policy Act ("SEPA"). The City Hearing Examiner found the MDNS was insufficient because the Hearing Examiner found the environmental review should have examined Port infrastructure as well as the Weyerhaeuser buildings and operations.

In 2007, the Port issued a new MDNS based on a review of the Weyerhaeuser project and the Port's infrastructure projects. CP 325. Appellant challenged the Port's SEPA determination in Case No. 07-2-1198-3. The SEPA challenge in No. 07-2-1198-3 was assigned to Judge Richard Hicks.

On September 5, 2007, based upon the new MDNS, the City issued the Engineering Permit to allow the Port to construct its utility improvements. CP 11-14. The City informed the Port that it would proceed at its own risk in light of the challenge to the Port's SEPA determination. *Id.* The City's code did not require public

notice of the issuance of engineering permits. However, the Appellant had actual notice of the issuance of the permits by October 9, 2007. CP 5. Under the City Code, individuals wishing to challenge an Engineering Permit must appeal the permit to the City Hearing Examiner within 14 days of the final staff decision. OMC 18.75.020.

Without filing an administrative appeal with the Hearing Examiner, Appellant filed a Complaint on October 18, 2007, asking the Superior Court to require the City of Olympia to revoke the Engineering Permit. CP 3. They contended the permit was void, and the work authorized by the permit constituted a nuisance. CP 3-4.¹

In addition, the Complaint asserted claims against individual City permit staff. CP 3-8. Upon filing of the Complaint, the City wrote to Appellant and requested dismissal of these individual claims. Appellant did not bother to respond to this request, much

¹ The Complaint also alleged that the Port unconstitutionally expended funds and violated the Harbor Improvements Act. Appellant allegedly notified the Thurston County Prosecutor ("Prosecutor") and the Washington State Attorney General ("Attorney General") and requested them to restrain "the unlawful and unconstitutional expenditure of public funds by and on behalf of the Port of Olympia and the City of Olympia." CP 15. Appellant's letter was sent to the Prosecutor and Attorney General on the same day that they filed the complaint, October 18, 2007. *Id.* Appellant did not allege the Prosecutor and Attorney General refused to act on the request. CP 4.

less consider dismissal of the claims against the individual City employees. *Id.* Nowhere in the myriad pleadings filed by the Appellant is there any justification or support for filing of these claims.

On October 30, 2007, twelve days after filing the Complaint, 20 days after Appellant received notice of the Engineering Permit and 55 days after the City issued the Engineering Permit, Appellant filed an administrative appeal of the Engineering Permit with the Hearing Examiner. CP 377.

The Hearing Examiner dismissed the appeal as untimely because it was not filed within the 14 day appeal period required by the City Code. CP 380-383. The Hearing Examiner concluded that "even if the Appellants' claim were accepted that the appeal period did not start to run until they received such notice of issuance of the engineering permit . . . [their] appeal is untimely and must be dismissed." *Id.*

On October 11, 2007 Appellant filed an Original Petition with the Supreme Court alleging Judge Hicks and Judge Pomeroy had "acted unlawfully and in excess of jurisdiction" CP 469-588.

On November 2, 2007, Judge Pomeroy heard Plaintiff's Motion to Abate the nuisance and Weyerhaeuser's Motion to

Intervene. CP 29, 151. After granting Weyerhaeuser's Motion to Intervene, CP 85, Judge Pomeroy found the issues in the case were related to issues in the SEPA challenge, Case No. 07-2-01198-3, which had been stayed in light of the Supreme Court Petition. CP 84. Judge Pomeroy ordered this case stayed pending resolution of Appellant's Original Petition by the Supreme Court. Id. She further ordered that the judge hearing Case No. 07-2-01198-3 would hear the complaint in the interest of judicial economy. Id.

On February 22, 2008, the Supreme Court Deputy Commissioner dismissed the Original Petition. CP 399. The Deputy Commissioner imposed monetary sanctions on Appellant finding the petition was "lacking in demonstrated factual or legal merit, [and] that there was no reasonable possibility this court would grant petitioners relief." CP 407. The Deputy Commissioner declined to require petitioners' filings in superior court be pre-screened, concluding such orders, if found necessary, should issue from the superior court. CP 409.

On March 21, 2008, Judge Pomeroy recused herself from the case and the Superior Court assigned Case No 07-2-01198-3 and the case below to Judge Wickham. Appellant thereafter renoted his motion to abate the nuisance, prompting the Respondents to renew

their opposition. CP 367, 447. On April 4, 2008, Weyerhaeuser filed its Motion to Dismiss Appellants' Complaint. CP 109-122.

Appellant responded by filing a motion to strike on April 11, 2008.² CP 180. On April 23, 2008, Appellant filed a memorandum asserting Judge Wickham was prejudiced because he was a member of the Chamber of Commerce.³ CP 452. The Appellant's memorandum also requested reconsideration of an order entered by Judge Wickham on March 21, 2008. *Id.*

On April 25, 2008, Weyerhaeuser filed its Motion for Sanctions and Vexatious Litigant Order. CP 469-588. Appellant filed a motion to strike and seeking sanctions under the "anti-SLAPP" statute, RCW 4.24.510.⁴ CP 464, 661. The motions were noted for May 2, 2008.

Judge Wickham rejected the requests for recusal based on his membership in the Chamber of Commerce. ROP, May

² The motion to strike was filed jointly in this case, in the SEPA challenge, No. 07-2-1198-3, and a newly filed LUPA action, No. 08-2-809-3. The City of Olympia was not a party to No. 07-2-1198-3.

³ The pleading alleging prejudice was also jointly filed in Nos. 07-2-1198-3 and 08-2-809-3.

⁴ A "SLAPP" suit is an acronym for Strategic Lawsuits Against Public Participation. Appellant filed the motion seeking sanctions under this statute on April 30, 2008, just three days before the May 2, 2008 hearing date. The court declined to consider this untimely motion. Transcript, May 2, 2008 proceedings at 14.

2, 2008 at 3-4. He referenced his earlier explanation that determined his membership was "associational", and stated that the court was free from bias or prejudice. *Id.*, at 4-5. The Court also noted that Appellant had already filed an affidavit of prejudice against another judge in this matter. *Id.*, at 5.

The court granted Weyerhaeuser's Motion to Dismiss and found the Appellant's claims to be frivolous. CP 129. However, the Court exercised its discretion to deny imposition of monetary sanctions against Appellant and denied entering the Vexatious Litigant Order proposed by Weyerhaeuser. *Id.*

III. ARGUMENT

A. WEST'S CLAIMS FAILED TO STATE VALID NUISANCE CLAIM.

1. No Evidence Was Submitted That the Actions Permitted by the City Constituted a Nuisance.

a. West did not allege that activity would disturb quiet enjoyment of any property.

West brought this action, sounding in nuisance, to require the City to revoke land use permits issued to the Port of Olympia on September 5, 2007. CP 3. The complaint did not allege that the plaintiffs owned or occupied real property affected by the proposal, but only that they have a "demonstrated connection" to the immediate area of the project site. The Complaint alleged that the

defendants engaged in business in defiance of the laws regulating it, and in defiance of conditions regulating a hazardous waste site, creating both private and public nuisances. CP 7.

Plaintiff's motion to abate the alleged nuisance did not address any of the elements of a nuisance. CP 151. After the matter was stayed by Judge Pomeroy pending resolution of Appellant's Supreme Court Petition for Writs of Prohibition and Mandamus, CP 84, Appellant renewed his motion to abate.

The motion to abate did not address the elements of a nuisance as set forth in RCW 7.48. Nuisance is an injury to the quiet use and enjoyment of real property. *Wallace v. Lewis County*, 134 Wn.App. 1, 18, 137 P.3d 101 (2006). Appellant ignored this requirement of nuisance law, and did not even identify any property that they owned or which they claimed was affected by the proposed engineering permits. As such, the court correctly refused to grant their motion to abate and granted Weyerhaeuser's motion to dismiss.

b. Appellant did not allege violation of enumerated public nuisances in RCW 7.48.140

Neither Appellant's Complaint nor its Motion to Abate alleged any violation of RCW 7.48. RCW 7.48.140 enumerates

“public nuisances”. None apply to the construction of buildings and a log yard that is the subject of the engineering permits issued by the City. Thus, Appellant failed to validly allege a “public nuisance” as defined by RCW 7.48.130.

c. Appellant has no basis to sue a municipality for issuance of a permit under a nuisance theory.

Appellant fails to cite any authority showing that a government entity is liable in nuisance for activities for which it issues a permit. Such a result would be contrary to RCW 7.48.160, which holds that nothing done under the express authority of a statute can be deemed a nuisance. The City is authorized to issue building and other land use permits under Ch. 19.27 RCW and Ch. 36.70B RCW.

Moreover, Appellant had no basis for alleging a nuisance claim against the City. The mere act of issuing land use permits, even where the permitted activity constitutes a nuisance, does not support liability against the government entity. See, *Wallace v. Lewis County*, 134 Wn.App. 1, 137 P.3d 101 (2006) (County not liable for permitting private tire pile). There is no basis for Appellant to contend that the City is a possessor of land or a person who created or maintained the nuisance. *Great N. Ry. Co. v.*

Oakley, 135 Wash. 279, 287-88, 237 P. 990 (1925); see RCW 7.48.170 (property owners liable for continuing nuisances).

2. A Nuisance Claim Is Not the Proper Way to Seek Review of Land Use Decision.

Asche v. Bloomquist, 132 Wn.App. 784, 133 P.3d 475 (2006), review denied 159 Wn.2d 1005, 153 P.3d 195, holds that a nuisance action to review of the validity of land use action is barred by LUPA exclusivity provisions. In *Asche*, the court found that the neighbors' failure to timely challenge, pursuant to the Land Use Petition Act (LUPA), landowners' building permit to construct a residence barred the claim that the residence was a public nuisance. The neighbors claimed that building violated height restrictions because the county's method for calculating maximum allowable height was incorrect. The court found that this was an interpretive decision regarding the application of a zoning ordinance to the specific property, subject to review as a "land use decision" under LUPA.

Likewise, Appellant's contention that the engineering permits issued to the Port of Olympia on September 5, 2006 were invalid is a "land use decision" subject to review under LUPA. Appellant's nuisance action to revoke said permits is improper and barred by LUPA.

B. APPELLANT FAILED TO PROPERLY COMMENCE A LUPA ACTION.

1. Complaint sought for writs of mandamus and prohibition for which an adequate alternative remedy exists.

To the extent the Complaint sought relief by the extraordinary writs of mandamus and prohibition, Appellant's claims were not well taken. Such writs require a showing that there is no remedy available at law. *Mower v. King County*, 130 Wn.App. 707, 125 P.3d 148 (2005); see also, *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 38 P.3d 1040 (2002) (dismissing claims for declaratory relief due to availability of adequate remedy under LUPA).⁵

Mower identifies the standard for issuance of a writ of mandamus, which Appellant did not address in the briefing below.

CP 151-155. In *Mower*, the court stated:

At the outset, we note that mandamus is an extraordinary writ. The applicant seeking a writ of mandamus has the burden of showing that the public or body has a clear duty to act. A court may issue a writ of mandamus to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. The writ issues in

⁵ Appellant's brief, at 30, misstates the holding of *Grandmaster Sheng-Yen Lu*. The Court dismissed the declaratory judgment action because LUPA provides an adequate remedy at law to review the validity of land use decisions. 130 Wn.App. at 106 ("Because LUPA provides an adequate alternative means of review, declaratory relief is not proper.")

cases where there is not a plain, speedy or adequate remedy in the ordinary course of law. It is issued upon affidavit on an application of a party beneficially interested. Thus before a writ will issue, the applicant must satisfy those three elements.

130 Wn.App. at 718-19 (footnotes omitted).

Here, there were administrative remedies under the City codes, OMC 18.75.020, which are ultimately appealable under LUPA. Appellant did not use these remedies in a timely fashion. Moreover, the record is devoid of any affidavit supporting an application for a writ. Hence, dismissal of the writ portion of this matter was proper.

2. This Action was not a proper LUPA action because Appellant filed action without exhausting administrative remedies.

This action was not brought properly pursuant to LUPA. In order to have standing to file a LUPA action, Appellant was required to exhaust his administrative remedies. RCW 36.70C.060(2)(d). This includes an appeal to the City Hearing Examiner, which is allowed within 14 days of the issuance of permits under OMC 18.75.020.

Appellant filed an action in the Supreme Court on October 11, 2007. They commenced this action on October 26, 2007, fifteen days later. Appellant finally filed an administrative appeal on

October 30, 2007, fifty-five days after the issuance of the permits in question and twenty days after the date when their own motion conceded actual knowledge of these permits. Hence, they did not attempt to file an administrative appeal period within 14 days from the date they had knowledge of permit issuance.

Plaintiff's motion to abate conceded that they had actual knowledge of the September 5 permits as of October 10, 2007. The City of Olympia requires that administrative appeals be made within 14 days of the action. OMC 18.75.020. Appellant clearly failed to seek an available administrative remedy within the time to do so, even if the time period is calculated using the October 10 date.

It is unquestionable that the Appellant's challenge to the September 5 2007 permits was neither timely nor brought in the proper forum. The Hearing Examiner found that the administrative appeal was untimely under OMC 18.75.020 and 18.75.040, first because it was 55 days after the issuance and secondly, it was brought 20 days after they received notice.

3. The City's issuance of September 5, 2007 permits did not require notice to Appellant.

The Complaint claimed that the City failed to provide notice of the September 5, 2008 engineering permits. It did not, however,

claim that Appellant was entitled to notice of the issuance of these permits. Appellant's Brief still does not identify any provision of law that requires the City provide such notice. In fact, the Examiner correctly determined that there is no such requirement. Hearing Examiner decision at 7. CP 380-383.

4. The Trial Court did not err in considering motion to dismiss and denying the affidavit of prejudice.

Appellant's contention that the trial court erred by failing to recuse himself is a challenge based more upon disagreement with the Court's decisions than any real conflict of interest.

Appellant principally relies upon *SAVE v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978) to contend that Judge Wickham violated the appearance of fairness doctrine. Brief at 26-27. *SAVE* is clearly distinguishable on its facts. First, it involved a quasi-judicial decision by a planning commission to approve a rezone for a shopping center, whose members included the Executive Director and a Board member of the Chamber of Commerce. The Chamber Board had formally voted to approve a resolution supporting the shopping center project. 89 Wn.2d at 864.

The court focused, not on mere membership in a large civic organization, but on the "dual role" held as an executive employee

or board member of an active supporter of the project and a commission member. 89 Wn.2d at 872. The project stood to financially benefit the Chamber's members, who the commissioners served as officers of the Chamber. *Id.* Thus, these commissioners were in positions "intimately involved with the development and execution of Chamber policy." 89 Wn.2d at 873. The court found that the position of these members on the board of directors could suggest entangling influences impairing their ability to be impartial. *Id.* The appearance of fairness was violated because there was "the existence of an interest which might substantially influence the individual's judgment." *Id.*, at 874.

Here, Judge Wickham did not have similar "entangling influences" that could have affected his impartiality. He expressly disclaimed any such influence. ROP, May 2, 2008 at 3-7. Further, he is not in a policy making position with the Chamber of Commerce. He is not an employee of the Chamber, nor does he sit on its Board. There is no evidence that Judge Wickham was in a position to influence or develop the Chamber's position on this project or any other project.

Indeed, the Chamber's alleged support of the Weyerhaeuser project is not established in the record. Appellant cited to articles

by the Chamber supporting the project, but did not provide copies of the articles. CP 455. One example is an article in the local newspaper, which allegedly quotes the local Chamber's president. The attributed statement, however, is a criticism of Appellant's vexatious and repetitious litigation tactics, not a statement of support for the project itself.⁶

Moreover, as *SAVE* acknowledges, his membership in a community organization is protected by the First Amendment right of association. *See* 89 Wn.2d at 873-74. Absent a policy making or executing role in the Chamber, Judge Wickham's position in a large, community based organization does not cross the line. Appellant's unsubstantiated claims were properly rejected.

Finally, Appellant's allegations amount to nothing more than an attempt to obstruct the judicial process by filing an unfounded lawsuit against the sitting judge. Such tactics should not be countenanced.

To begin with, in considering a request for recusal, courts have established background principles of who carries the burden of

⁶ Appellant claims that a newsletter article in September 2007 supported the project. The newsletter article was not provided. Although Appellant claimed there were "numerous pro-port sentiments made by the Chamber", CP 455, no substantiation was provided. Appellant only provided an article concerning a different Chamber organization, the U.S. Chamber of Commerce. CP 458. There is no evidence Judge Wickham belongs to this organization.

proof when seeking a judge's recusal. A judge is presumed to perform his functions "regularly and properly and without bias or prejudice." *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 127, 847 P.2d 945, 951 (1993) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). Judges should only disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Model Code of Judicial Conduct Canon 3(D)(1) (1999). The party moving for recusal must demonstrate prejudice on the judge's part. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997). Recusal is within the sound discretion of the court. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 840, 14 P.3d 877 (2000); *In re Parentage of J.H.* 112 Wn.App. 486, 496, 49 P.3d 154, 159 (2002).⁷

Appellant's attempt to force recusal of Judge Wickham by filing a complaint or lawsuit against him is not grounds for recusal. In *Filan v. Martin* 38 Wn.App. 91, 95-96, 684 P.2d 769, 771 -772 (1984), the Court rejected a lawsuit against a judge as a basis for recusal, stating:

⁷ Appellant's motion relied on the Appearance of Fairness doctrine as articulated in *SAVE v. Bothell*. By statute, that doctrine is limited to quasi-judicial actions of local decision making bodies in certain land use proceedings. RCW 42.36.010. The proper question before the court is whether Judge Wickham abused his discretion by rejecting the motion for recusal under due process standards.

Of course, a judge cannot act in his own case. But neither can counsel, by filing specious pleadings, transmute a law suit between others into the judge's own case solely for the purpose of disqualifying him. We have no doubt that, under the peculiar circumstances, the judge retained his power to act.

5. The Trial Court did not err in rejecting Appellant's frivolous allegations of a SLAPP suit violation.

Aside from the Appellant's mis-citation of the "SLAPP" statute, RCW 4.24.500 - .520, Appellant's contention that the Court failed to afford proper relief is incorrect. First, this matter is not a "SLAPP" suit at all.⁸ Weyerhaeuser filed a motion for sanctions against the plaintiffs for their abusive and frivolous litigation tactics. Although the Court agreed that Appellant's action was frivolous, the Court denied the sanctions requested.

The court's denial of sanctions prima facie rebuts Appellant's contention that it did not receive a fair hearing. It further rebuts the contention that the Court did not protect Appellant from what he now contends were unfair sanctions. Appellant's contentions to the contrary are clearly and manifestly frivolous.

Finally, the record demonstrates that the request for

⁸ Appellant correctly cite the elements of a "SLAPP" lawsuit based on *Right-Price Recreation v. Connells Prairie*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002). The first such element – filing of a civil complaint or counter-claim – is absent here. The SLAPP statute does not apply to a litigant who seeks CR 11 sanctions to protect against frivolous and abusive litigation tactics. *Eugster v. City of Spokane*, 139 Wn.App. 21, 33, 156 P.3d 912 (2007).

sanctions under the SLAPP statute was not timely brought before the Court. The motion was filed with just three days notice, so it was rejected as untimely. ROP, May 2, 2008 at 2.

C. APPELLANT FAILED TO PROPERLY RAISE AND PRESERVE ALLEGATIONS THAT LUPA IS AN UNCONSTITUTIONAL STATUTE.

1. Appellant's pleadings did not properly raise issues concerning the unconstitutionality of LUPA.

Appellant claims, for the first time on appeal, that LUPA was applied in an unconstitutional manner. Appellant does not cite to any place in the record where their constitutional concerns were raised, nor did the ever do so. Having failed to raise this matter below, the Court should not consider the issue on appeal. The Complaint does not allege that LUPA is unconstitutional. CP 3-10. Indeed, Plaintiff's complaint sought to invoke LUPA if the court determined that actions taken by Respondents are subject to LUPA. CP 9.

2. Appellant did not join Attorney General's Office as required in cases alleging unconstitutionality of statute.

A plaintiff who seeks to have a statute declared unconstitutional must provide the attorney general with notice of the action. RCW 7.24.110. *Camp Finance, LLC v. Brazington*, 133

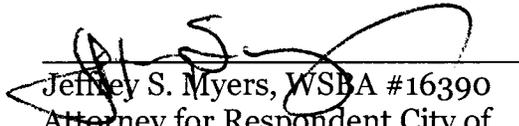
Wn.App. 156, 161, 135 P.3d 946 (2006). Service upon the Attorney General is mandatory and jurisdictional. *Id.*, at 162. This is true even where the constitutionality of the statute is raised in response to a motion for summary judgment. *Id.*, at 161-62.

Appellant's argument suffers from the same defects as in *Camp Finance*. Appellant did not plead unconstitutionality of LUPA, nor did he serve the Attorney General. In the absence of these steps, the court lacks jurisdiction to consider the constitutionality of LUPA.

V. CONCLUSION

The decision to dismiss this complaint was correct and unaffected by any judicial bias. It should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.


Jenney S. Myers, WSBA #16390
Attorney for Respondent City of
Olympia

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY Cm
DEPUTY

ARTHUR S. WEST

Appellant,
vs.
KEITH STAHLEY, ET AL.,

Respondents.

NO. 37853-1-II
CERTIFICATE OF SERVICE

I, the undersigned, hereby declare under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 23, 2009, I caused to be sent by U.S. Mail, first class, postage prepaid, a true and correct copy of the *Brief of Respondent City of Olympia* from Jeffrey S. Myers to the following:

Arthur West 120 State Avenue N.E., #1497 Olympia, WA 98501	<input checked="" type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery by:
Tom Morrill, City Attorney Darren Nienaber, Deputy City Attorney P.O. Box 1967 Olympia, WA 98507-1967	<input checked="" type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery by:

<p>Carolyn A. Lake Goodstein Law Group PLLC 1001 Pacific Avenue, Ste 400 Tacoma, WA 98402</p>	<p><input checked="" type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery by:</p>
<p>Eric S. Laschever Stoel Rives, LLP 600 University Street, Ste 3600 Seattle, WA 98101-3197</p>	<p><input checked="" type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery by:</p>

DATED this 23 rd day of February, 2009 at Tumwater, WA.



 Jo Anne Caines, Legal Assistant to
 Jeffrey S. Myers