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I. INTRODUCTION

Despite the fact that Dr. Williams owns property just downstream from the Respondent's proposed development, (see RP 59-82 and RP 161-165), the trial court held that he did not have standing under the Land Use Petition Act, Chapter 36.70C RCW (LUPA).¹

The applicable standing provision of LUPA states:

Standing to bring a land-use petition under this chapter is limited to the following persons:

(2) Another person aggrieved or adversely affected by the land-use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land-use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(A) The land-use decision has prejudiced or is likely to prejudice the person;

(B) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land-use decision;

(C) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land-use decision; and

(D) The petitioner has exhausted his or her administrative remedies to the extent required by law. RCW 36.70C.060.

¹ It appears that the Respondent has withdrawn its earlier argument that Dr. Williams untimely filed his Land Use Petition under RCW 36.70C.040, so we do not address that issue any further.

Dr. Williams owns property, immediately downstream from the Respondent's proposed development in the floodplain and floodway of the Chehalis River and Scammon Creek and the proposed development will increase flooding on his property and therefore he meets the statutory standard for standing under LUPA.

II. ARGUMENT AND ANALYSIS

A. STANDARD OF REVIEW

Whether a court may exercise jurisdiction under LUPA is a question of law subject to de novo review. Questions of statutory interpretation are questions of law also subject to de novo review. *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005).

The appellate court reviews questions of statutory construction de novo. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). The court looks to the statute's plain language in order to give effect to legislative intent. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When faced with an unambiguous statute, the court derives the legislature's intent from the plain language alone. *Waste Mgmt.*

of Seattle, Inc., v. Utils. Transp. Comm'n, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

Under this case law, the appellate court is to apply de novo review to the trial court's legal conclusion that Dr. Williams does not have standing under LUPA. Under the de novo review standard, the appellate court should reverse the dismissal and remand for further proceedings.

B. DR. WILLIAMS HAS STANDING UNDER THE LAND USE PETITION ACT AS A NEIGHBORING PROPERTY OWNER WHOSE PROPERTY WILL BE ADVERSELY AFFECTED BY INCREASED FLOODING CAUSED BY THE RESPONDENT'S DEVELOPMENT

A review of Washington land use cases analyzing the injury-in-fact requirement under LUPA reveals some general principles. One of those principles is that parties owning property nearby to a proposed project and who allege that the project will injure their property have standing. *Anderson v. Pierce County*, 86 Wn.App 290, 300, 936 P.2d 432 (1997). The *Anderson* court held there was standing where the chairman of organization testified that he owned property adjacent to the project site and that the proposed mitigation would be insufficient to control storm water runoff that would damage his property.

Our Supreme Court has interpreted these requirements to be similar to the Administrative Procedures Act standing provisions, which require an injury in fact and apply a zone-of-interest test. The zone of interest test is not intended to be especially demanding. *Chelan County v. Nykreim*, 146 Wn.2d 904, at 937, 52 P.3d 1(2002). In *Nykreim*, the court indicated that the appropriate inquiry was whether the ordinance was intended to protect the petitioner's interest. *Asche v. Bloomquist*, 132 Wn.App 784, 133 P.3d 475 (2006). Even when a showing of injury-in-fact is marginal, the courts tend to grant standing in order to address the substantive issues. *Thornton Creek Legal Defense Fund v. Seattle*, 113 Wn.App 34, 52 P.3d 522 (2002).

The courts have denied standing where the petitioner does not show that the challenged land use decision would lead to any specific injury. Standing is also lacking when it is unclear that the ultimate land use action will necessarily lead to the impacts alleged by the plaintiff. In *Trepanier v. City of Everett*, 64 Wn.App 380, 383-384, 824 P.2d 524 (1992), the court held that the petitioner did not have standing where he offered only bare assertions that an amended zoning ordinance, which would reduce allowable densities in some parts of the city, would force new development into the unincorporated county. Dr. Williams and his expert witnesses offered much more than bare assertions in this case.

The case of *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App 816, 965 P.2d 636 (1998) is especially instructive on the standing issue. There the petitioners testified regarding specific harms that would result from the proximity of their property to the property proposed to be developed with a planned unit development. The petitioners in *Suquamish* testified that the development would create an increase in traffic. The Petitioners did not rely on their location alone. Evidence of this type of injury is sufficient to establish injury-in-fact. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App 816, 965 P.2d 636 (1998).

Here, Dr. Williams and his expert witnesses, Christian Fromuth and Charles Coddington, testified that the Respondent's development would increase flooding on the downstream property owned by Dr. Williams. RP 42-89 and RP 110-111. The element that the land use decision would prejudice Dr. Williams is clearly met in this case. Dr. Williams has already lost land in prior flooding and based on the hydrologist and engineer's testimony, he will lose more land to erosion and flooding should the Respondent be allowed to build the apartment house development in the floodway or floodplain of the Chehalis River and Scammon Creek. RP 59-82 and RP 161-165. Both the SEPA decision and the approval of the site plan review prejudiced Dr. Williams by increasing the likelihood of flooding on his property. Reversal of the land use decision will

eliminate the prejudice to Dr. Williams by decreasing the height of future flooding on his property. Under these circumstances, Dr. Williams has standing under RCW 36.70C.060.

V. CONCLUSION

The Appellant Dr. Williams is a neighboring property owner to the Lewis Family Housing Project development proposed by the Respondent AHA. The City's decision to allow AHA to fill the floodplain and floodway, in violation of the FEMA guidelines and the City's floodplain building regulations, adversely affects the Appellant by increasing flooding and erosion on Dr. Williams' property. The Appellant is an aggrieved party and the Appellant has standing under RCW 36.70C.060.

The Court of Appeals should reverse the dismissal of Dr. Williams' LUPA Petition and remand for further proceedings.

DATED this 1st day of October, 2009.



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

DATED this 2nd day of October, 2009.

A handwritten signature in black ink, appearing to read 'Danielle Herrmann', written over a horizontal line.

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