

No. 38983-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DR. DAVID V. WILLIAMS,

Appellant,

v.

CITY OF CENTRALIA AND
ARCHDIOCESAN HOUSING AUTHORITY,

Respondents.

STATE OF WASHINGTON
BY [Signature]
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COURT OF APPEALS
DIVISION II

RESPONDENT ARCHDIOCESAN HOUSING AUTHORITY'S BRIEF

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I. INTRODUCTION

In October 2007, Respondent Archdiocesan Housing Authority (AHA) filed an application for a 48-unit multi-family housing development for low-income working families in the City of Centralia. Although this multi-family residential use is permitted outright in the zone, the Respondent was required to obtain review pursuant to the State Environmental Permit Act (SEPA) as well as Site Plan review from the City. City staff approved a Mitigated Determination of Non-Significance (MDNS) under SEPA as well as the site plan application.

The Appellant, Dr. David V. Williams, and others appealed the City staff approvals to a Hearings Examiner. They claimed that the proposal would negatively impact the floodplain and floodway by increasing flows on Scammon Creek, resulting in damage to property owned by persons other than Dr. Williams. They also argued that the influx of low-income working families would increase violence and crime in the area, reducing surrounding property values. After considering written and oral testimony, on October 21, 2008, the Hearings Examiner found that (1) the development was located outside the floodway and would not have a significant impact on flooding or flood capacity; and (2) property values are not within the “zone of interest” covered by SEPA.

Dr. Williams appealed this case to the Superior Court in November 2008 under the Land Use Petition Act (LUPA) within the statutory twenty-one day period. His Land Use Petition contained only conclusory allegations relating to standing. He alleged that (a) the Hearings Examiner's decision prejudiced his "health, safety, and welfare;" (b) his interests "were among those that the City of Centralia was required to consider when it made the land use decision"; (c) a reversal of the decision would eliminate the alleged harm; and (d) he had exhausted his remedies. CP 141-142.

The Superior Court concluded that these conclusory allegations were insufficient to comply with the LUPA pleading requirements that mandate that a land use petition set forth "facts demonstrating that the petitioner has standing to seek judicial review." RCW 36.70C.070(6). Because Dr. Williams fails to show that the Superior Court erred in so finding, this Court should affirm the Superior Court's dismissal of Dr. Williams's appeal. Such an affirmation is consistent with LUPA's purpose.

II. SUMMARY OF RESPONSE TO ASSIGNMENTS OF ERROR

1. Appellant failed to comply with the requirements of RCW 36.70.060 and .070, which together require that a land use petition

set forth “facts demonstrating properly that the petitioner has standing to seek judicial review.” Appellant did not properly allege standing, nor does he actually have standing to bring this appeal, as the trial court correctly concluded. Therefore, the Superior Court’s decision dismissing this case should be affirmed.

2. The Superior Court did not dismiss the Land Use Petition as untimely filed. In fact, the Court concluded that it was timely filed.

III. STATEMENT OF THE CASE¹

Dr. Williams correctly summarizes the facts relevant to this appeal, except with regard to the following:

Dr. Williams claims that he is an “adjacent land owner.” Williams Br. at 6. But the trial court found that Dr. Williams’s property is not adjacent to the subject property. VRP Jan. 2, 2009, at 10.² In fact, Dr. William’s property, 2921 Cooks Hill Road, is located .2 miles away from the subject property. VRP Jan. 2, 2009, at 8. There is an 11-acre parcel between his property and the AHA-owned parcels. Further, Dr. Williams’s property does not abut Scammon Creek, the location where

¹ For the Court’s convenience, AHA has provided in an appendix to this brief the following key documents: (a) the transcript of the January 2, 2009 hearing in Lewis County Superior Court; and (b) a printout of RCW 36.70C.060–080.

² “VRP” is used to identify the Verbatim Report of Proceedings.

“CP” is used to identify documents within the Clerk’s Papers by page numbers designated by the court.

“Ex.” is used to reference exhibits in the Administrative Record, a compilation of the record of proceedings before the City.

flooding impacts are alleged; it abuts the Chehalis River. Finally, although twelve acres of his property contains floodplain, Dr. Williams's residence is upland, located outside the floodplain. CP 80.

The Hearings Examiner entered his Findings, Conclusions and Decision denying the appeal and affirming the staff's MDNS determination and site plan approval on October 21, 2008. CP 144–160.

On November 12, 2008, Dr. Williams appealed this decision to the Lewis County Superior Court under LUPA. The section of his Land Use Petition entitled "Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060," states:

"Petitioner, Dr. David V. Williams, is a property owner and developer of Stillwater Estates in the vicinity of the proposed development and he and his neighbors are aggrieved and adversely affected since the land use decision will prejudice their health, safety and welfare. Dr. Williams and his neighbors' interests were among those that the City of Centralia was required to consider when it made the land use decision. A reversal of the land use decision would eliminate the prejudice to Dr. Williams and his neighbors. All administrative remedies provided by law have been exhausted." CP 141–142.

On December 22, 2008, AHA filed a Motion to Dismiss this appeal for lack of jurisdiction, arguing that Dr. William's petition did not state adequate facts, provide explanations or provide affidavits explaining how he is adversely affected by the approval. CP 129–137. The hearing on this motion was set for January 2, 2009. CP 138–139.

Dr. Williams failed to file his response in a timely manner, CP 125–127, and AHA did not learn of the Response until the date of the hearing.³ VRP Jan. 2, 2009, at 6:13–6:15. After hearing argument from both parties, the Court granted AHA’s motion to dismiss because Dr. Williams lacked standing.⁴ The Court found:

First, I agree with Ms. Richter that this statute is very specific and the cases require specific allegations under it. Under 36.70C.070 one of the requirements for the Land Use Petition is under number six, there are facts demonstrating that the petitioner has standing to seek judicial review under 060. And then when you look at 060, it has the requirements there that the land use decision has prejudiced or is likely to prejudice that person and the other requirements.

And so given the cases here, I think there needs to be a specific statement of facts and there is no statement. There is the conclusion that it will affect health, safety, and welfare, but with no specific allegation as to what that is. Nothing is included in the Land Use Petition that gives any indication of what those are.

In the response that was filed Wednesday, there is some information in the transcripts that were filed but there are a couple of problems. One, that [transcript] was not included in the petition. Two, it’s not timely even as a response

³ Although Appellant’s counsel asserted that the Response was faxed the afternoon of December 31, 2008, Appellant failed to produce the fax confirmation page indicating that it was actually served on that date.

⁴ In dealing with the question of filing within 21 days, the Court found: But as far as the filing of this petition within 21 days, this was filed on the 22nd day but November 11th was a legal holiday. So based on that, that meant the 21st day for purposes of computation of the time or the filing day would be allowed on November 12th. This petition was filed on November 12th, 2008, and therefore, because of the holiday I’ll find that it was timely as far as the initial filing of the Land Use Petition goes. VRP Jan. 2, 2009, at 3:2–3:10.

because that would have been required under our local rules to be filed by noon on Tuesday, two court days before today's hearing, given the intervening holiday.

But even if I were to consider it, I still agree with Ms. Richter that there was – they were the type of allegations that were not specific as to Mr. Williams because he's not an adjacent property owner, the economic issues are not in the zone of impact under SEPA as indicated. And given those failures, I'm going to find that the statute has not been complied with.

And even I had – even considering the information that was filed on the 31st, I would still make the same finding that there is not sufficient allegation here of perceptible harm to petitioner's property, no factual basis here to let me make that decision.

So based on those things, I'm going to grant the motion to dismiss the petition.

VRP Jan. 2, 2009, at 9–11.

The court entered an order dismissing the case on January 2, 2009, which served as the final disposition of the Court resolving the matter.

CP 73–74.

On February 18, 2009, the Court entered an order denying AHA's motion for costs. CP 9–10.

This appeal followed.

IV. ARGUMENT

Response to First Assignment of Error: The Superior Court Properly Dismissed the Case because Appellant (a) Failed to Properly Plead Standing in the LUPA Petition, (b) Failed to Timely File a Response to AHA's Motion to Dismiss, and (c) Failed to Identify Sufficient Evidence in the Record to Establish that the Land Use Decision Adversely Affects and Aggrieves Him.

Dr. Williams misdirects the thrust of his efforts on appeal, choosing to attempt to establish, *in this Court*, that he had standing to bring his LUPA petition in the Superior Court. He does not challenge the Superior Court's detailed findings that his petition failed to properly allege facts establishing standing.

This Court should affirm the Superior Court's decision dismissing Dr. Williams's case. Not only did the Superior Court correctly reason that Dr. Williams's petition should be dismissed for failure to sufficiently allege standing, Dr. Williams failed to challenge the Superior Court's decision in his appeal.

This Court should also reject Dr. Williams's attempt to have this Court consider the issue of standing on the merits as (a) without merit and/or (b) improperly before this Court. With respect to the merits, the Superior Court already considered the issue of standing on the merits and concluded that Dr. Williams had not established that he had standing. As a procedural matter, this Court's consideration of Dr. Williams's arguments

on the merits flies in the face of LUPA's purpose of providing "consistent, predictable, and timely judicial review." RCW 36.70C.010.

A. Standards Applicable on Review.

1. Scope of review on motion to dismiss.⁵

A Superior Court's decision when applying the local rules to grant a motion to dismiss is reviewed for abuse of discretion. *Quality Rock Prod., Inc. v. Thurston County*, 126 Wn. App. 250, 260, 108 P.3d 805 (2005). A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

As the Washington Supreme Court stated in a similar case in which it considered the deference owed to a lower court when reviewing a decision to impose sanctions for failure to comply with the local discovery rules: "[D]iscretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002) (citing *Burnet v.*

⁵ Appellant's brief fails to articulate any standard of review with which the Court must consider this case. AHA questions how Appellant can satisfy his burden of establishing standing when he failed to identify the framework by which this Court must consider the lower court's decision or to assign error to that decision.

Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) and *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962)).

2. Scope of review on land use petitions.

Jurisdictional issues and questions of statutory interpretation are questions of law subject to de novo review. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005); *Reeves v. City of Wenatchee*, 130 Wn. App. 153, 155–56, 121 P.3d 777 (2005). Thus, when reviewing a superior court's decision on a land use petition, this Court stands in the same position as the superior court. *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 893, 83 P.3d 433 (2004).

B. This Court Should Affirm Dismissal of Dr. Williams’s Petition Because the Trial Court Correctly Concluded that Dr. Williams Had Failed to Identify “Facts Demonstrating that the Petitioner has Standing.”

1. The trial court correctly concluded that Dr. Williams’s LUPA petition did not comply with the LUPA pleading requirements regarding standing.

RCW 36.70C.070 identifies “required elements” of a land use petition under LUPA. These elements must include, among other things, “facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060.” In turn, RCW 36.70C.060 requires that a person have standing or a direct stake in the controversy in order to appeal a land use decision under the LUPA. If the challenger is someone other than the applicant, as in this case, standing requires that the person

“is or would be ... aggrieved or adversely affected by the land use decision.” A person is “aggrieved or adversely affected” when the following conditions are present:

- (a) The land use decision has prejudiced or is likely to prejudice that 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.

In terms of SEPA, courts have summarized these obligations as a two-part test. First, the interest a petitioner is trying to protect must be “arguably within the zone of interests to be protected or regulated by the statute...in question.” Next, the petitioner must allege injury in fact, that she or he will be specifically and perceptibly harmed by the proposed action. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524, *rev. den.*, 119 Wn.2d 1012, 833 P.2d 386 (1992).

Dr. Williams’s petition fails to include any facts, much less those facts sufficient to demonstrate harm. He appears to concede as much in this case by relying not on his LUPA petition to establish standing in his

brief before this Court, but instead directing this Court to the evidence submitted during the proceeding before the County.

In *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 184 P.3d 1278 (2008), Division Three of this Court considered whether the appellant's failure to attach copies of the County's two land use decisions to its LUPA petition, a separate requirement of RCW 36.70C.070, divested the court of jurisdiction to consider the case. The court distinguished between (a) service and filing requirements of RCW 36.70C.070 which are jurisdictional, *see Overhulse v. Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 471 (1999), and (b) formalistic errors in petition content, *see Quality Rock Products*, 126 Wn. App. 271, and failure to schedule the initial hearing as required by RCW 36.70C.080(1), *see Conom*, 155 Wn.2d 154, 188 P.3d 344 (2005), noting that RCW 36.70C.040 provides an express bar to petitions that fail to comply with the service requirements but allows petitions with scrivener's or other technical errors in form that substantially comply with the requirements. The court in *Keep Watson Cutoff Rural* found that the failure to attach a copy of the decision to the petition did not divest the court of jurisdiction as it did not involve issues of timely or proper service. 145 Wn. App. at 39.

The present case is distinguishable from the *Keep Watson Cutoff Rural* and other petition content and form cases. LUPA, like the Administrative Procedures Act, imposes standing requirements. *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 67 P.3d 500, *rev. granted* 150 Wn.2d 1009, 79 P.3d 445, *rev. on other grounds* 155 Wn.2d, 117 P.3d 1089 (2005). Not only is an allegation of standing a requirement, it must be included as part of a LUPA petition. There is no other part of the proceeding that requires such a showing and, therefore, it will not arise again if it is not included in the LUPA petition.

Standing allegations must be included *in* LUPA petitions. RCW 36.70C.080 provides that “[t]he defense[] of lack of standing [is] waived if not raised by timely motion noted to be heard at the initial hearing.” For a respondent to be able to adequately challenge standing at the initial hearing, the standing allegations must be made in the LUPA petition. There is simply no other part of the LUPA proceeding, strictly prescribed by statute, when standing can be addressed.

2. The trial court correctly concluded that Dr. Williams’s statement of standing in his petition failed to substantially comply with RCW 36.70C.070.

Dr. Williams’s petition failed to substantially conform with RCW 36.70C.070 because it failed to allege *any facts* that relate to the standing requirements of RCW 36.70C.060.

Again, the case at bar can be distinguished from *Keep Watson Cutoff Rural*. While the *Keep Watson Cutoff Rural* Court found that the petition in question had failed to strictly comply with the applicable rule, the court excused that noncompliance, reasoning that the petition substantially conformed to the content requirement because the decision identified and summarized the two land use decisions being appealed even though copies of the decisions themselves were not attached as required by the rules. 145 Wn. App. at 39. The *Watson* court noted that even though the contents of a LUPA petition may not be jurisdictional, they are still statutory requirements. *Id.* at 39.

Unlike the petition in *Watson*, Dr. Williams's petition does not comply with the statute regarding standing in the first instance. It neither identifies any concrete or specific facts showing that he could suffer harm resulting from AHA's proposal, nor shows that his interests fall within the zone of protection provided by SEPA, as required by RCW 36.70C.060. Unlike in *Watson*, there is not even a summary of the facts necessary to show standing.

Dr. Williams cannot rely on vague conclusory statements of health, safety and welfare impacts when these allegations are not supported by *facts* contained in the petition or attached thereto. Allowing Dr. Williams to amend his petition or otherwise establish standing at this late point in

the process will result in delay that substantially prejudices AHA. This appeal has prevented AHA from completing this project during the past year while this appeal was pending even though Dr. Williams, to date, has not submitted a petition that conforms with RCW 36.70C.070.⁶ Such a result contravenes the legislative purpose of LUPA, which is to establish consistent, predictable, and *timely* review. RCW 36.70C.010.

The standing requirements of RCW 36.70C.070 and .060 are express and unambiguous. Dr. Williams's petition failed to comply with these requirements in all respects. He should not be allowed to amend or otherwise establish standing through references to extra-petition documents taken from the record to establish substantial conformity when nearly a year has passed since the LUPA petition was filed.

For these reasons, this appeal should be denied.

C. This Court Should Affirm Dismissal of Dr. Williams's Petition Because the Trial Court, Addressing the Merits, Correctly Concluded that Dr. Williams Failed to Establish Standing.

The Superior Court considered and rejected Dr. Williams's standing arguments on the merits. Although the Superior Court indicated that his tardy filing would preclude consideration of Dr. Williams's

⁶ Appellant could not amend his LUPA petition now because nothing in LUPA allows for amending a land use petition after the 21-day appeal period has expired. Court Rule 15, which is cross-referenced as providing procedural guidance in the absence of other more specific rules under RCW 36.70C.030(2), only allows for a single unilateral amendment to a pleading within 20 days after filing. The 20 days have passed in this case and there is no reason to allow amendment when the Petitioner had adequate time to identify Petitioner's standing in his original petition or by subsequent amendment.

assertions of standing, it went on to make findings in the alternative, stating that even if the late-filed materials had been considered, Dr. Williams had failed to show on the merits that he had standing. This Court should affirm that alternative holding.

As Dr. Williams correctly notes, in order to have standing under LUPA as well as the Administrative Procedures Act, the party must establish (a) an injury in fact and (b) that the interest the party is trying to protect is within the zone of interest to be protected or regulated by the statute in question.

Beyond the lack of facts on the face of Dr. Williams's land use petition, Dr. Williams's brief citing to the record below fails to indicate that he would independently suffer any specific prejudice to his own interests as a result of the subject approvals. Rather, all of the alleged harm identified in the record below would occur on property owned by others.

Dr. Williams's reference to *Chelan County v. Nykreim*, 146 Wn.2d 904, 937, 52 P.3d 1 (2002) and his assertion that LUPA's language requiring standing was not intended to be "especially demanding" is a misreading of *Nykreim*. The *Nykreim* court notes the prejudice requirement in the APA is a codification of the injury-in-fact requirement. The "not meant to be especially demanding" language, cited in

Dr. Williams's brief, refers to the "zone of interest" test, the second step after finding the injury-in-fact requirement satisfied. 146 Wn.2d at 937.

Dr. Williams relies on impacts identified by and occurring to *others*. This is insufficient as a matter of law to establish injury-in-fact. An adequate allegation of standing "requires that the party seeking review be himself among the injured." *Allan v. University of Washington*, 92 Wn. App. 31, 959 P.2d 1184 (1998) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 563 (1992). A petitioner must allege that "he or she will be specifically and perceptibly harmed by the proposed action." See *Trepanier*, 64 Wn. App. at 383, citing *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978).

A party must establish that the *party itself* owns land at or near the project site that would be adversely impacted by the proposal. For example, in *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997), the court found that owning 60 acres of property adjacent to the site and providing evidence that mitigation measures proposed in the MDNS were insufficient to prevent damage to the adjacent property was sufficient to confer standing. Here, as noted above, the trial court found that Dr. Williams's property is not even adjacent to the subject property. VRP at 10.

In *Allan v. University of Washington*, Mrs. Allan's interest in receiving her husband's salary was insufficient because she failed to establish a concrete interest of her own. The present case is most analogous to the *Allan* case.

The only statement of injury set out in Dr. Williams's brief is:

As an adjacent land owner and as the Developer of the adjacent Stillwater Estates Community, Dr. Williams' property and the Stillwater Estates Development will be adversely affected by the proposed development since filling in the floodway and floodplain will cause increased flooding and erosion of his property. Ex. Y. Such prejudice to one's property interest is sufficient for standing. See *Samuels' Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 494 (2002).

Williams Br. at 5–6.

This statement fails to identify with any specificity where in the record Dr. Williams alleged he would suffer a specific injury. His citation to the record Exhibit Y to the Hearing Examiner's record is a 120-page exhibit comprised of the 8/20/08 Agua Tierra report to Williams and attachments, plus a Vector Engineering letter of the same date with attachments of the City's Design and Development Guidelines, plus a letter from Pamela Hopwood, a real estate agent, together with comparable property valuation information, plus an 8/19/08 memo from School Superintendent, Steve Bodner, and various impact-of-multi-family-housing related documents and flooding information. Referring to it as

“Exhibit Y” in the brief is so non-specific as to be useless. Further, the materials contained in Exhibit Y do not include any statements by the Appellant regarding specific harm *to himself or to property that he owns*.

Further, unlike the *Anderson* case, Dr. Williams’s property is not adjacent; it is located .2 miles west of the subject property. His property includes twelve acres of floodplain and according to his own testimony, he has lost two acres of property due to flooding to date. Such flooding occurred before the AHA project was in place. Moreover, this evidence suggests that the floodplain is serving its purpose by accommodating the flooding that appears to occur regularly and will likely continue to occur regardless of AHA’s proposal.

According to Dr. Williams, the specific problem is that “Scammon Creek is loaded with debris...[and] needs to be cleaned out. And the problem – the dynamic problem is this pond that they proposed, the retention will have a pipe directly into the creek and it will increase the flow substantially, increase erosion.” Trans. P 163–164;⁷ CP 81–82. But Dr. Williams’s property does not abut Scammon Creek. All of the testimony below by the opponents was that flooding would occur on Scammon Creek damaging properties located *east* of the subject property.

⁷ Appellant’s brief incorrectly identifies these references by the transcript page number instead of the Clerk’s Page number. For ease of reference, AHA includes both citations.

(Dr. Williams's property, is, of course, *west* of the subject property.) Appellant makes no allegation about how the existence of debris in the creek will be altered by the proposal or how debris causes damage to his property.

Dr. Williams goes on to suggest that AHA failed to disclose environmental impacts of the proposal on the SEPA checklist with no reference to where in the record these failures could cause injury to Appellant.

Dr. Williams refers to photographs taken by others showing the general environmental impact caused by flooding - these photos do nothing to connect flooding with damage to Dr. Williams's property or to some other interest of his. His brief includes substantive arguments such as claims that the City used inappropriate flooding data or failed to require complete disclosure on the SEPA, but these arguments fail, once again, to connect the dots or to explain, based on evidence in the record, how such alleged failures impact a cognizable interest specific to Dr. Williams.

Finally, Dr. Williams reiterates that he has lost property due to flooding. Again, such a history of flooding does not establish that construction of this housing will increase the likelihood of flooding. He cites to 23 pages of the hearing transcript containing expert testimony summarizing the floods of 2007, pgs. 59-67 (CP 101-109), high water

marks on the Lowe and Hamilton structures located *east* of the subject property, the opposite direction from Appellant's property, pgs. 67–68 and 70–82 (CP 109–110, 112–124), the failure to identify Scammon Creek on the environmental checklist, p. 69 (CP 111), and claims that flooding will cause the subject property to be inundated with water, p. 70 (CP 112). Nothing in these cited pages references the Appellant, nor is specific to the Appellant's property located at 2921 Cooks Hill Road.

For these reasons, the threat to Dr. Williams from this proposal either as presented to the Superior Court or as presented in the record is neither concrete, nor personal and therefore, does not establish a sufficient injury in fact to confer standing. The Superior Court did not err by concluding that the interests identified by Appellant were not sufficiently specific to Appellant's individual interests to justify finding that Appellant had standing in this case. For the reasons stated above, this Court should affirm.

D. As a Procedural Matter Substantially Affecting LUPA Procedure, This Court Should Decline to Consider Dr. Williams's Arguments on the Merits Because to Consider His Arguments Would Be Contrary To LUPA's Purpose of Ensuring "Consistent, Predictable, and Timely Judicial Review."

The purpose of LUPA is to "provide consistent, predictable, and timely judicial review" of land use decisions. RCW 36.70C.010. To

achieve this end, LUPA imposes specific procedures, already discussed in detail above.

Dr. Williams's LUPA violations have been discussed exhaustively. But the Court should note that Dr. Williams's procedural violations are not limited to LUPA procedures - Dr. Williams has repeatedly failed to timely file pursuant to applicable court rules.

In Superior Court, Dr. Williams filed an untimely response in violation of the Lewis County Local Rules No. 5(B), which requires that responsive pleadings be filed two days before a hearing, not including weekends or holidays.

Thereafter, rather than appeal the Order Dismissing the Case entered on January 2, 2009, as a "Decision Determining Action" under RAP 2.2, Dr. Williams waited until after resolution of a motion for costs dated February 18, 2009, to seek review by this court.

Dr. Williams even failed to timely file his Opening Brief before this Court, requiring a Court Administrator to issue a letter notifying him of the deadline and sanctions that might result.

Appellant's history of failing to comply with LUPA and the rules of procedure should not be rewarded when these actions are exactly what LUPA was implemented to prevent. The Superior Court's ruling fully considered the issues as part of a procedurally sound hearing. Allowing

Dr. Williams an opportunity to re-argue standing in the first instance here not only allows him another bite at the apple, it rewards him for failing to comply with the rules in the first instance and allows him to hold his best assertions of standing until nearly a year after the City's Hearings Examiner's final decision and instead make his case before this Court.

For these reasons, notwithstanding de novo review, Dr. Williams's efforts to establish standing should not be considered in the first instance before this Court when he failed to establish standing in the first instance before the Superior Court.

E. RAP 2.5(a) Permits this Court to Disregard Dr. Williams's Arguments on the Merits.

RAP 2.5(a) provides that the appellate court may refuse to review any claim of error that was not raised in the trial court. It is possible to read the lower court's ruling as effectively purging Dr. Williams's substantive arguments regarding standing from the material before the court - the effect of this would be that Dr. Williams's substantive arguments are being raised for the first time on appeal.

Dr. Williams's defensive allegations of standing were not properly raised at the Superior Court. There is no reason that would compel this Court to give Dr. Williams a second opportunity to raise this defense in the first instance here.

Further, LUPA's RCW 36.70C.080(3) provides that defenses such as lack of standing are waived if they are not considered at the initial hearing. Appellant's failure to raise standing in defense at the initial hearing precludes raising this issue in the first instance in this case.

For these reasons, the Court should affirm the trial court's decision to dismiss Dr. Williams's petition.

Response to Second Assignment of Error – The Trial Court correctly Determined that the Appellant Filed the Land Use Petition in Accordance with RCW 36.70C.040.

Appellant misstates the Superior Court's decision in suggesting that timeliness of the filing of the petition played any role in the decision to dismiss. The Superior Court found that the Petition was timely filed and therefore, no error resulted from the motion for dismissal.

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V. CONCLUSION

For all of the reasons set out above, Appellant has failed to show compliance with RCW 36.70C.070 and .060 and does not have standing to maintain this appeal. Without further delay, this appeal should be dismissed.

Respectfully submitted,

GARVEY SCHUBERT BARER

By: 

Carrie Richter, WSBA No. 37353
Lam Nguyen-Bull, WSBA No. 34690
Of Attorneys for Respondent
Archdiocesan Housing Authority

SEA_DOCS:935238.1

Appendices

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.
2 IN AND FOR THE COUNTY OF LEWIS

3 DR. DAVID V. WILLIAMS,) No. 08-2-01452-3
4 Plaintiff,) Court of Appeals
5 vs.) No. 38983-5-II
6)
7 CITY OF CENTRALIA and)
8 ARCHDIOCESAN HOUSING)
9 AUTHORITY,)
10 Defendants.)

ORIGINAL

11 VERBATIM REPORT OF PROCEEDINGS
12 January 2, 2009
(Motion Hearing)

Received & Filed
LEWIS COUNTY, WASH
Superior Court

13 A P P E A R A N C E S

JUN 17 2009

Shirley A. Brack, Clerk

14 For the Plaintiff: ALLEN T. MILLER, Deputy
15 ATTORNEY AT LAW
16 Olympia, Washington

17 For City of Centralia: WILLIAM DALE KAMERRER
18 ATTORNEY AT LAW
19 Olympia, Washington

20 For Archdiocesan Housing Authority: CARRIE A. RICHTER
21 ATTORNEY AT LAW
22 Portland, Oregon

23 Presiding Judge: JAMES LAWLER
24 DEPARTMENT 2

25 CHERYL L. HENDRICKS, CCR NO. 2274
OFFICIAL COURT REPORTER
LEWIS COUNTY SUPERIOR COURT
CHEHALIS, WASHINGTON 98532
(360) 740-1171

BY [Signature] DEPUTY
STATE OF WASHINGTON
09 JUN -1 PM 3:13
COURT REPORTER

1 * * * * *

2
3 THE COURT: This is 8-2-1452-3, David Williams,
4 petitioner, versus City of Centralia and Archdiocesan
5 Housing Authority, respondents.

6 Parties are not present. Petitioner's represented
7 by Allen Miller, City of Centralia by William Kamerrer.

8 And you're Carrie Richter?

9 MS. RICHTER: Yes.

10 THE COURT: Yes, for the AHA.

11 All right. This comes on today. . . Go ahead and
12 be seated. And probably easier when you're talking to
13 just stay seated so the microphone picks you up.

14 This comes on the petitioner's motion for initial
15 hearing in jurisdictional matters and the respondent's
16 motion to dismiss. There are some procedural things.
17 I've reviewed all of the paperwork.

18 I guess the first thing we'll address is the
19 timeliness of the filing based on the 21-day
20 requirement. I'll just -- won't waste any time on that.

21 ~~MR. MILLER: Because of the holiday, I just~~
22 wanted to make sure. Did you receive my response
23 materials?

24 THE COURT: Some got filed this morning that I
25 saw.

1 MR. MILLER: All right.

2 THE COURT: But as far as the filing of this
3 petition within 21 days, this was filed on the 22nd day
4 but November 11th was a legal holiday. So based on
5 that, that meant the 21st day for purposes of
6 computation of the time or the filing day would be
7 allowed on November 12th. This petition was filed on
8 November 12th, 2008, and therefore, because of the
9 holiday I'll find that it was timely as far as the
10 initial filing of the Land Use Petition goes.

11 MR. MILLER: Thank you, Your Honor.

12 THE COURT: So let's deal with the next item and
13 I guess the next issue then is going to be the
14 respondent's motion to dismiss. So let's deal with that
15 one first. Mr. Kamerrer?

16 MR. KAMERRER: I have no argument. That's
17 Ms. Richter's motion.

18 THE COURT: Ms. Richter?

19 MS. RICHTER: Thank you. We believe that
20 Petitioner's Land Use Petition is defective because it
21 ~~fails to allege adequately that the petitioner is~~
22 adversely affected and aggrieved under the Land Use
23 Petition Act which is RCW 36.70C sub 060. I brought
24 copies of 36.70C and all the cases cited in my brief if
25 that would be helpful to The Court, I have them behind

1 me and I'm happy to distribute them.

2 THE COURT: I have reviewed them. I have copies
3 of the statutes in front of me.

4 MS. RICHTER: All right. In order to have
5 standing a petitioner must establish, one, they are
6 within the zone of interest to be protected by the
7 statute in question and that they will suffer injury in
8 fact.

9 And my argument is that petitioner's statement in
10 their Land Use Petition is insufficient to establish
11 standing because it is not sufficiently specific. It
12 makes two basic general statements, one, the decision
13 will prejudice their health, safety, and welfare, and,
14 two, that Dr. Williams owns or is the developer of
15 property across the street.

16 First, the prejudice to the health, safety, and
17 welfare is not specific enough to identify specifically
18 a perceptible harm as a result of this particular
19 proposal.

20 I've gone through -- I know that The Court did
21 ~~receive the transcript. I did go through that~~
22 transcript and if you -- and I will cite what the
23 petitioner's testimony was below on that point.

24 They discussed flooding impacts to Mark Hamilton's
25 land. Mark Hamilton is not the petitioner and is not in

1 any way an owner of the subject property. Petitioner's
2 house is not located in the flood plain. It's nearly
3 20 feet above the flood pain. There's no indication
4 that flooding would cause any damage. That's in the
5 transcript at 169. Claim that Scammon Creek is loaded
6 with debris. Scammon Creek does not abut the
7 petitioner's property. That's transcript 163. The
8 impacts from flooding on the church and to Dr. Hull.
9 Again, those lands have no connection to petitioner's
10 property. Petitioner made no claim that the flooding or
11 traffic would impact his property.

12 So the record does not support any allegation that
13 Dr. Williams will be harmed. And even beyond that, I
14 think that the petitioner had an obligation to make
15 those factual claims based on affidavits or some other
16 factual evidence to support an argument that he will
17 suffer some sort of health, safety, welfare injury.

18 The second component where there is a sort of
19 element of a specific fact is where Dr. Williams says
20 he's a developer of an adjacent property. The
21 ~~implication is that this project -- this proposal will~~
22 have some economic impact on Dr. Williams -- Dr.
23 Williams. And what is clear from the case of Snohomish
24 County Property Rights Alliance versus Snohomish County
25 --

1 (Interruption by the reporter.)

2 MS. RICHTER: Snohomish County Property Rights
3 Alliance versus Snohomish County, 76 Wn. App. 44 1994,
4 in that case The Court held that an economic interest is
5 not within the zone of interest that is subject to
6 protection by SEPA. SEPA is an environmental act and
7 solely economic interests such as how this particular
8 development impacted the value of his development or the
9 potential sales he may realize as a result of this
10 development is not within the zone of impact covered by
11 SEPA. And as a result Dr. Williams, does not have
12 standing to seek protection under this act.

13 Those are the arguments that I presented. I did
14 not see Mr. Miller's response. I did not receive a
15 copy.

16 THE COURT: All right.

17 MS. RICHTER: Thank you.

18 THE COURT: Mr. Miller?

19 MR. MILLER: We did fax copies to them on
20 Wednesday but I understand because of the holidays maybe
21 ~~they did not receive them. I do have extra copies.~~

22 In offense, Dr. Williams owns property next door.
23 He developed the Stillwater Estate across Cooks Hill
24 Road.

25 The record is clear Dr. Williams hired Christian

1 Fromuth, a geohydrologist, who testified at the hearing
2 regarding the flooding impacts of the AHA proposal which
3 includes fill and development in the flood plain and the
4 floodway. Based on Dr. Fromuth's testimony, we think
5 that we're not alleging any economic interest, we are
6 alleging that Dr. Williams' health, safety, and welfare
7 are at issue. The flood will be higher across Cooks --
8 right now the Cooks Hill Road will be flooded during --
9 and was flooded during the December 2007 and the 1996
10 flood. If flood waters are even worse, then -- then the
11 Cooks Hill Road will be cut off even worse.

12 I think that -- that, you know, the hearing
13 examiner didn't have any problem with Dr. Williams'
14 standing and I think that under LUPA, under the standing
15 statute 36.70C.070 that a next door neighbor who will be
16 subjected to flood impacts based on this development
17 does have standing and would ask that you deny the
18 motion to dismiss.

19 THE COURT: what about the argument that the --
20 none of the factual basis was included in the actual
21 petition?

22 MR. MILLER: well, we -- you know, we -- we
23 alleged, I think, you know, it's a notice pleading that
24 his health, safety, and welfare are at issue based on
25 flood impacts. We included that in the Land Use

1 Petition. I think that -- that is, in my experience,
2 you know, of land use petitions for many, many years,
3 that that is sufficient.

4 And we also as part of the response resupplied you
5 with portions of the transcript which directly show the
6 hydrologist's testimony and Dr. Williams' testimony and
7 that is, again, sufficient under the statute.

8 THE COURT: All right. Well, I guess two
9 issues: One is the transcript that was filed was filed
10 Wednesday. And I don't know if any of the response was
11 something. . .

12 None of the response was received by the
13 respondents; is that correct?

14 MS. RICHTER: I did not get a copy.

15 MR. KAMERRER: We received a copy on behalf of
16 the City from Mr. Miller on Wednesday.

17 THE COURT: All right. Ms. Richter, response?

18 MS. RICHTER: Quickly, petitioner's property is
19 not located adjacent to my client's property. It's
20 actually two properties away. This is not in the record
21 but we will be providing it at the hearing. Our
22 client's property is right here. Dr. Williams's
23 property is right here. It's not adjacent. And the
24 alleged impact is to Scammon Creek which runs right here
25 and does not abut Dr. Williams' property.

1 My assertion is that the Land Use Petition Act is
2 very specific about what the Land Use Petition must
3 contain and it must contain allegations of standing and
4 the standing obligations are set out very clearly in
5 36.70C.060, that you must be aggrieved or adversely
6 affected by the land use decision. And cases like Allan
7 versus University of Washington stand for the
8 proposition that you must allege specific facts.
9 General health, safety, and welfare statements are not
10 sufficient.

11 This may -- this is not simply notice pleading.
12 This is invoking the jurisdiction of this court. And in
13 order to do that the petitioner has to show that they
14 are adversely affected or aggrieved, and I do not
15 believe Dr. Williams has shown that based on his
16 petition.

17 THE COURT: All right. I'm going to grant the
18 motion to dismiss.

19 A couple of reasons: First, I agree with
20 Ms. Richter that this statute is very specific and the
21 ~~cases require specific allegations under it. Under~~
22 36.70C.070 one of the requirements for the Land Use
23 Petition is under number six, there are facts
24 demonstrating that the petitioner has standing to seek
25 judicial review under 060. And then when you look at

1 060, it has the requirements there that the land use
2 decision has prejudiced or is likely to prejudice that
3 person and the other requirements.

4 And so given the cases here, I think there needs to
5 be a specific statement of facts and there is no
6 statement. There is the conclusion that it will affect
7 health, safety, and welfare, but with no specific
8 allegation as to what that is. Nothing is included in
9 the Land Use Petition that gives any indication of what
10 those are.

11 In the response that was filed wednesday, there is
12 some information in the transcripts that were filed but
13 there are a couple of problems. One, that was not
14 included in the petition. Two, it's not timely even as
15 a response because that would have been required under
16 our local rules to be filed by noon on Tuesday, two
17 court days before today's hearing, given the intervening
18 holiday.

19 But even if I were to consider it, I still agree
20 with Ms. Richter that there was -- they were the type of
21 ~~allegations that were not specific as to Mr. Williams~~
22 because he's not an adjacent property owner, the
23 economic issues are not in the zone of impact under SEPA
24 as indicated. And given those failures, I'm going to
25 find that the statute has not been complied with.

1 And even if I had -- even considering the
2 information that was filed on the 31st, I would still
3 make the same finding that there is not sufficient
4 allegation here of perceptible harm to petitioner's
5 property, no factual basis here to let me make that
6 decision.

7 So based on those things, I'm going to grant the
8 motion to dismiss the petition.

9 MS. RICHTER: Thank you.

10 THE COURT: I don't know if you have an order
11 prepared or. . .

12 MS. RICHTER: I think we filed one along with
13 our motion.

14 THE COURT: Well, there was a proposed one.

15 MS. RICHTER: Okay. I didn't bring one. I
16 apologize. I would like to draft one consistent with
17 your order, if I could.

18 THE COURT: That's fine. There is a blank form
19 if you would do one before you leave.

20 MS. RICHTER: I will do that. Thank you.

21
22
23
24
25

[RCWs > Title 36 > Chapter 36.70C > Section 36.70C.070](#)

[36.70C.060](#) << [36.70C.070](#) >> [36.70C.080](#)

RCW 36.70C.070

Land use petition — Required elements.

A land use petition must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the local jurisdiction whose land use decision is at issue;
- (4) Identification of the decision-making body or officer, together with a duplicate copy of the decision, or, if not a written decision, a summary or brief description of it;
- (5) Identification of each person to be made a party under RCW [36.70C.040](#)(2) (b) through (d);
- (6) Facts demonstrating that the petitioner has standing to seek judicial review under RCW [36.70C.060](#);
- (7) A separate and concise statement of each error alleged to have been committed;
- (8) A concise statement of facts upon which the petitioner relies to sustain the statement of error; and
- (9) A request for relief, specifying the type and extent of relief requested.

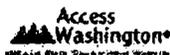
[1995 c 347 § 708.]

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[36.70C.050](#) << [36.70C.060](#) >> [36.70C.070](#)

RCW 36.70C.060 Standing.

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

- (1) The applicant and the owner of property to which the land use decision is directed;
- (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 that 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.

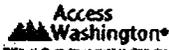
[1995 c 347 § 707.]

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[36.70C.070](#) << [36.70C.080](#) >> [36.70C.090](#)

RCW 36.70C.080 Initial hearing.

(1) Within seven days after the petition is served on the parties identified in RCW [36.70C.040\(2\)](#), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW [36.70C.040\(2\)](#).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

[1995 c 347 § 709.]

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No. 38983-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DR. DAVID V. WILLIAMS,

Appellant,

v.

CITY OF CENTRALIA AND
ARCHDIOCESAN HOUSING AUTHORITY,

Respondents.

09 AUG 26 AM 9:19
STATE OF WASHINGTON
BY *SW*
COURT OF APPEALS
DIVISION II

PROOF OF SERVICE

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PROOF OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that, on August 21, 2009, I caused the following documents to be served on the persons listed below in the manner indicated:

1. **RESPONDENT ARCHDIOCESAN HOUSING AUTHORITY'S BRIEF; and this**
2. **PROOF OF SERVICE.**

Allen T. Miller
Attorney at Law
1801 W. Bay Drive NW, Suite 205
Olympia, WA 98502-4311
Attorney for Dr. David Williams

Via USPS First-Class

William Dale Kamerrer
Law Lyman Daniel Kamerrer et al.
2674 R. W. Johnson Blvd. SW
Tumwater, WA 98512
Attorney for City of Centralia

Via email:
dkamerrer@lldkb.com

Dated at Seattle, Washington, this 21st day of August, 2009.



Dominique Barrientes

SEA_DOCS:935283.1