

FILED

FEB 25 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 329071

COURT OF APPEALS, DIVISION III OF THE
STATE OF WASHINGTON

ALLAN MARGITAN,

Appellant

v.

SPOKANE REGIONAL HEALTH DISTRICT
SPOKANE REGIONAL HEALTH DISTRICT BOARD
Respondents
MARK AND JENNIFER HANNA, Husband and Wife,
Cross Appellants

APPELLANT MARGITAN's OPENING BRIEF

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I. INTRODUCTION

With the approval of Respondent, Spokane Regional Health District (District), Cross-Appellant, Hannas (Hanna) placed their Septic System within the dedicated easement of Short Plat 1227-00. The dedicated easement was a requirement of the District and Spokane County Building and Planning for ingress, egress and utilities for the three parcels of Short Plat 1227-00. Spokane County Building and Planning will not grant a “Certificate of Occupancy” to Appellant (Margitan) for my home on

Parcel 3 of Short Plat 1227-00 due to the placement of Hanna's Septic System within the dedicated easement. Respondent, Spokane Regional Health District Board (Board), heard the case and failed to resolve the issue. The Superior Court erred when it dismissed Margitan's appeal.

II. ASSIGNMENT OF ERROR

- 1) The Superior Court should have granted Margitan's request to exclude attorneys Michelle Fossum and Stan Perdue from the proceeding.
- 2) The Superior Court erred in granting Hanna's, who are cross-appellant's, Motion To Dismiss and finding Margitan has no standing when this issue was not addressed at the Administrative Hearing.
- 3) The Superior Court should have found Margitan has suffered an Injury-in-fact due the District's decision.
- 4) The Superior Court erred in concluding Margitan is not an aggrieved party who has not been adversely affected by the District.
- 5) The Superior Court should have allowed after acquired corroborating evidence into the record.

III. ISSUES PRESENTED

First error:

When an attorney is sworn-in at an administrative hearing how can the District Board members determine what is testimony and what is argument? Margitan was prejudiced allowing these attorneys to represent the parties in the Superior Court.

Second error:

Is it proper to permit a cross-appellant to address a standing issue in the Superior Court that was not addressed in the Administrative Hearing?

Third error:

Did the court err when it found Margitan had no “injury-in-fact” when evidence of this injury was evident in the transcript of the Administrative Hearing and again addressed in the Superior Court?

Fourth error:

Did the Superior Court err in its conclusion of law that Margitan failed to show that he is aggrieved or has been adversely affected by the decision of the District?

Fifth error:

Did the Superior Court err when it failed to allow after acquired evidence into the record by taking Judicial Notice of this evidence since it was of public record?

IV. STATEMENT OF FACTS

In 2002, Short Plat 1227-00 was created. AR SEC "E" p 22 (Map of Short Plat 1227-00) The District was involved in this process. The District required that the three parcels include a forty (40) foot easement and that all parcels of the Short Plat be served with public water through this easement. AR SEC "E" p16-18 (3 pages "Spokane Regional Health District Environmental Health Division," Date February 3, 2000) In 2003, Hannas intentionally had their contractor install their Septic System within the Short Platt's dedicated easement. Hanna informed his contractor there was a twenty (20) foot easement despite his knowledge that it was a forty foot easement. AR SEC "E" p 19, 20 (2 pages Mark Hanna Deposition) The District approved Hannas Septic System. The law prohibits the installation of a Septic System within an easement. CP 17, 18 ("Agreement") Margitan's drinking water-line is placed within his 40 foot easement. ARP 3, 7, 8, 37 (Hearing) Margitan learned, through a public discloser request, that the District and Hannas entered into an agreement to permit Hanna's illegal Septic System to remain within Margitan's

easement until after the compellation of litigation in Spokane County Superior Court Case No. 12-2-04045-6. CP 17, 18 (“Agreement”) The District negotiated Margitan’s legal easement rights without notice or input from Margitan. The District admits that Margitan’s drinking water-line was not considered when the District and Hanna agreement was entered. ARP 7, 8, 37, 38 The law requires a septic system be no closer than five (5) feet from an easement. A drinking water-line can be installed no closer than ten (10) feet from a Septic System. WAC 246-272A-0210 To the present date, the District refuses to enforce these laws. Margitan testified numerous times to the Board and the District in the Administrative Hearing that Spokane County Building and Planning will not issue a “Certificate of Occupancy” for Margitan’s home on Parcel 3 because of Hanna’s Septic System which is placed within the easement. Margitan has been unable to use his home due to the District and the Board’s failure to enforce the provisions of the law the District was tasked with enforcing. ARP 3, 14, 15, 26, 39, 40, 41, 43, 44, & RP 9 - 14.

V. ARGUMENT

Issues of law are reviewed de novo. Issues of fact are reviewed under the substantial evidence test. Hilltop Terrace Homeowner's Ass'n v.

Island County, 126 Wash.2d 22, 29, 891 P.2d 29 (1995). In this case, there are only issues of law.

FIRST error of law:

At the Administrative Hearing (hearing), the District and the Board placed under oath attorney, Michelle Fossum, and attorney, Stan Purdue.

Blacks Law Dictionary defines a witness as:

“a person whose declaration under oath (or affirmation) is received as evidence for any purpose...”

The attorneys declared they would testify truthfully, pursuant to ER 603. Stan Purdue states at ARP 36 “You mean in terms of presenting testimony or something like that?” This creates a clear picture to the Board that Stan Purdue was going to present testimony. Since both Stan Purdue and Michelle Fossum failed to list any witnesses for the hearing, they were the only witnesses to testify for their clients. Margitan called only one witness, the District’s employee, Steve Holderby. The Board members hearing the appeal are not judges. They are citizens of the region. Most likely, they do not have any training as judges. This panel heard the attorneys take the oath. At that point, the board members could construe that anything said by the two attorneys was testimony. Hearsay is admissible in an Administrative Hearing. RCW 34.05.452 (3) It is conceivable that the Board members gave more weight to this testimony

provided by the attorneys only due to their status. If the court allows these attorneys to combine the role of advocate and witness, prejudice will result to Margitan. The attorneys were not advocates only commenting on the evidence produced by Margitan.

Permitting Stan Perdue and Michelle Fossum to represent their clients in Superior Court placed Margitan at a disadvantage. Margitan addressed this issue with the trial court at RP 7-9. When Michelle Fossum was leading Margitan's witness at ARP: 5-8, the District employee, there was no reason to object. She could, herself, testify to the same information. It is impossible to separate the statements of Stan Perdue and Michelle Fossum from what was testimony and what was argument.

The Trial Court even failed to separate testimony from argument. The Court held that testimony was presented which rebutted Margitan's oral assertion that he is unable to obtain the necessary permit to occupy his home. CP 112 But in fact, the District employee never testified to this. The District employee testified that Spokane Building and Planning has adopted the International Building Codes. RCW 19.27.031 & ARP 15 The International Building Codes require that legal potable water to Margitan's residence be present in order to obtain a "Certificate of Occupancy". ARP 15 & Section "D" P 15, 16, (International Residential Code for One and Two-Family Dwellings). The court may have confused

this testimony with Mr. Perdue's testimony where he stated twice: "No" in response to whether there was an official ruling by Spokane Building and Planning that the home on Parcel 3 could not be used. ARP 43, 44

In Washington, a trial court has the authority under the lawyer-witness rule, RPC 3.7, [5] to disqualify even a conflict-free lawyer who is likely to be a necessary witness. Public Utility District No. 1 of Klickitat County v. International Insurance Company, 124 Wash.2d 789, 811-12, 881 P.2d 1020 (1994).

RPC 3.7 provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.

Bottom line, the two lawyers in the Board proceeding once sworn-in gave up their right to represent their clients in any legal proceeding beyond the Board's hearing. They were not disqualified in advance of the hearing. They voluntarily took the oath of a witness. They provided testimony. They did not produce any other witnesses or evidence for their side.

The dual role as witness and advocate compromises the ethical duty to maintain the integrity of the judicial process. Kennedy v. Eldridge, 201 Cal. App. 4th 1197 (2011) Combining the roles of advocate and witness can prejudice the tribunal and the opposing party.

The court should have disqualified the attorneys, Ms. Fossum and Mr. Perdue, from acting in a representative capacity for the Board and the Hannas; otherwise, appellant is compromised.

SECOND error of law:

Margitan provided the Superior Court with evidence that the District and the Board were served with the Petition for Judicial Review other than through Michelle Fossum. Both the Board and District failed to respond to Margitan's appeal through legal counsel rather than its witness. When the party did not respond, a Dismissal is inappropriate. The case should have proceeded to hearing in the absence of the District. Argument by the District or the Cross Appellant's should not have been permitted by the Superior Court.

Hannas filed and the District joined the Hanna's Motion to Strike. RP 6 This Motion was frivolous. The parties claimed Margitan was offering new evidence when claiming that Hanna's septic system was preventing him from occupying his home on Parcel 3. The attorneys were witnesses and present at in the hearing. They heard Margitan's testimony regarding this issue. Margitan stated eleven times that he could not obtain a "Certificate of Occupancy" from Spokane Building and Planning because of Hanna's Septic System within his easement. ARP: 3, 12, 13, 14, 15, 26, 39, 40, 41, 43, 44 Margitan clarified that the Inspector

explained that an occupancy certificate would not be issued until Margitan could prove the home had legal potable water that complies with the laws. ARP 44. Margitan even offered to request this in writing from Spokane Building and Planning. ARP 44. There was no new evidence proposed by Margitan. Both attorneys violated RPC 3.3 Candor toward the Tribunal. They knowingly made a false statement of fact to the Superior Court.

The Superior Court should have granted Margitan's request for expenses and sanctions. Hanna's Motion to Strike, claiming Margitan was attempting to provide new argument and new evidence not provided at the Administrative Hearing and the District joining in this motion, was frivolous. It was advanced without reasonable cause. Sanctions, as requested by Margitan at RP 33, should be granted. RCW 4.84.185

THIRD error of law:

The Superior court committed error in finding that Margitan has suffered no injury—in-fact as a result of the Districts decision.

The Superior court mistakenly based its granting of the Motion to Dismiss on RCW 34.05.530. Under this statute, Margitan must put forth factual allegations demonstrating the following conditions:

- (1) The agency action has prejudiced or is likely to prejudice Margitan

(2) Margitan's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor Margitan would substantially eliminate or redress the prejudice to him caused or likely to be caused by the agency action.

First, the agency action has prejudiced or is likely to prejudice Margitan. The Superior Court failed to apply the evidence to the APA standing test as established by Washington case law. The first and third prongs of the APA standing test are collectively referred to as the " 'injury-in-fact' " test, and the second prong is referred to as the " 'zone of interests' " test. Allan v. Univ. of Wash., 140 Wn.2d 323, 327, 997 P.2d 360 (2000).

The Superior Court found that Margitan had no standing based upon Margitan having suffered no "injury-in-fact". CP 79

However the uncontroverted evidence presented by the District, Hannas and Margitan, clearly indicated that he has a home which is located on Parcel 3 of Short Plat 1227-00 which is serviced by public water. ARP 3, 37, 38, 39 & CP 53, The evidence further indicated that its undisputed Margitan's waterline is located within the 40 foot easement as

dedicated in Short Plat 1227-00. ARP 3, 37, 38, 39 & CP 53 & RP 16, 18, 22, 23

The Superior Court heard, as shown in the transcript of hearing, that the cross-appellants, Hannas, the owners of Parcel 2 in Short Plat 1227-00 intentionally constructed a septic system and drain field partially within the appellant's easement. CP 13, 14, 15, 17, 18 The District determined the Hanna septic system was nonconforming and in violation of Washington's Administrative Code. ARP 7 & CP 17, 18 & WAC 246-272A-0210

Mr. Margitan testified that he has suffered damages as a result of the District's acts. ARP: 3, 12, 13, 14, 15, 26, 39, 40, 41, 43, 44.& RP 10, 14 Margitan is unable to obtain an occupancy permit from Spokane County Building and Planning for his home on Parcel 3 due to the Hanna's nonconforming septic system encroaching on his public waterline. ARP: 3, 12, 13, 14, 15, 26, 39, 40, 41, 43, 44 & RP 10, 14

In Trepanier v. City of Everett, 64 Wn.App. 380, 382, 824 P.2d 524, (Wash.App. (1992) the court held:

In order to show injury in fact, Trepanier must present facts that show he will be adversely affected by Everett's decision not to prepare an EIS. His "affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an 'injury in fact' ". Concerned Olympia Residents, 33 Wash.App. at 683, 657 P.2d 790. The court in Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate,

concrete, and specific injury to him or herself. *Roshan v. Smith*, 615 F.Supp. 901, 905 (D.D.C.1985).

The only evidence before the Superior Court regarding the issue of Spokane Building and Planning's denial of an occupancy permit was the uncontroverted testimony of Margitan. ARP: 3, 12, 13, 14, 15, 26, 39, 40, 41, 43, 44. In fact, Margitan read into the record for the Superior Court portions of the Board's hearing transcript which dealt specifically with his damages. RP 9, 10, 11, 12, 13 Uncontroverted testimony of Margitan is substantial evidence of his injury. Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003). The only contested testimony was that of Mr. Purdue. He submitted nothing to contradict Margitan's statements of his damages.

The issue of injury-in-fact was addressed and clearly stated that Margitan's injury has been his inability to use his house due to his occupancy permit being withheld by Spokane Building and Planning Department. The withholding of the occupancy permit is due to the intrusion of the Hanna's septic drain field into the forty (40) foot dedicated easement for Margitan's Parcel 3 of Short Plat 1227-00. Margitan is prohibited from the legal right to use his property as intended, a violation

of both the Fifth and Fourteenth Amendments of the United States Constitution. In addition, the October 2013 District / Hanna agreement which allows an illegal septic system to remain in Margitan's easement is an intentional decision to cause a continuing and ongoing injury-in-fact and an unconstitutional taking of that easement without just compensation. Guimont v. Clarke, 121 Wash.2d 586, 594, 854 P 2d 1 (1993).

The District employee admitted that Hanna's Septic System is in Margitan's deeded easement. ARP 3, 7 An easement is a property interest that includes a right of possession and the right of alienation. Peste v. Mason, 133 Wn. App. 456 470, 136 P.3d 140 (2006) Therefore, Margitan has the legal right to place his water-line anywhere within his 40 foot easement without risk of damage or contamination by an illegally placed Septic System.

The District states that this Septic System must comply with WAC 246.272A-210. CP 17, 18 ("Agreement") WAC 246-272A-0210(5) (b) (iii) prohibits vehicle traffic over a septic system. ARP 28 Margitan's easement is intended for ingress, egress and utilities. This is the only route to Parcel 3. The District permitting and then failing to correct the Hannas illegally placed septic system requires Margitan to drive over this septic system, possibly compromising it and thereby harming Margitan's

waterline. ARP 28 Also this requires Margitan to violate WAC 246-272A-0210(5) (b) (iii) to obtain access to his Parcel 3

Margitan has suffered an injury, the loss of use and rental income of his home for over two years.

Second, Margitan's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged. In violation of WAC 246-272A-0210, it is undisputed that the Hanna's drain field is well within Margitan's utility easement. The question the District and the Superior Court have failed to ask is: "What is the purpose of WAC 246-272A-0210? To protect the septic system or to protect the public waterline it has encroached upon?" The public waterline on which the Hanna's septic system encroaches services Margitan's Parcel 3 of Short plat 1227-00. If the purpose behind WAC 246-272A-0210 is to protect the septic system then Margitan has no asserted interests among those that the agency would be required to consider. However, if the purpose of WAC 246-272A-0210 is to protect the public waterline then Margitan most certainly has an asserted interest among those that the agency was required to consider when it engaged in the agency action challenged by Margitan.

The purpose of WAC 246-272A-0210 can be found in WAC 246-272A-0001(1) (a) and (b) which reads:

(1) The purpose of this chapter is to protect the public health by minimizing:

(a) The potential for public exposure to sewage from on-site sewage systems; and

(b) Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters.

It is clear Margitan has “asserted interests” which must be considered by the District in any of its decisions regarding the Hanna’s septic encroachment.

Third, a judgment in favor Margitan would substantially eliminate or redress the prejudice to him caused or likely to be caused by the agency action. Margitan has asserted from the beginning that all he requests is the District enforce WAC 246-272A-0210 and require the Hannas to bring their onsite septic system into compliance. Once that is accomplished, Margitan will be able to obtain an occupancy permit thus resolving the issue before the District and this appeal.

FOURTH error of law:

The Superior court erred in its conclusion of law that Margitan has failed to show he is aggrieved or has been adversely affected by the decision of the District.

In KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn.App. 117, 129, 272 P.3d 876, (2012) the Appellate court held

¶ 20 To meet the injury-in-fact test, KS Tacoma must put forth material issues of fact showing that (1) the 2009 revision prejudices or is likely to prejudice it and (2) a decision revoking the 2009 revision would redress such prejudice. RCW 34.05.530; Allan, 140 Wash.2d at 327, 997 P.2d 360. The prejudice prong of the injury-in-fact test requires [272 P.3d 883] KS Tacoma to allege that it will be " ' specifically and perceptibly harmed' " by the 2009 revision. *Trepanier v. City of Everett*, 64 Wash.App. 380, 382, 824 P.2d 524 (1992), (quoting *SAVE*, 89 Wash.2d at 866, 576 P.2d 401). When a person or corporation alleges a threatened injury, as opposed to an existing injury, the person or corporation must show an immediate, concrete, and specific injury to themselves. *Trepanier*, 64 Wash.App. at 383, 824 P.2d 524 (citing *Roshan v. Smith*, 615 F.Supp. 901, 905 (D.D.C.1985)). " If the injury is merely conjectural or hypothetical, there can be no standing." *Trepanier*, 64 Wash.App. at 383, 824 P.2d 524, (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

¶ 21 The redress prong of the injury-in-fact test requires KS Tacoma to put forth material issues of fact showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."*Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan*, 504 U.S. at 560-61), 112 S.Ct. 2130.

As the KS Tacoma court recently held, the prejudice prong of the injury-in-fact test requires Margitan to allege that he will be "specifically and perceptibly harmed" by the District's delay in enforcing WAC 246-272A-0210. Margitan has so argued before the District Board and to the Superior Court during the motion to dismiss. ARP: 3, 12, 13, 14, 15, 26, 39, 40, 41, 43, 44. RP 9, 10, 11, 12, 13 As the court indicates the test requires Margitan to allege that he will be "specifically and perceptibly harmed". Margitan has met this burden.

The redress prong of the injury-in-fact test requires Margitan to put forth material issues of fact showing that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Margitan has met this prong of the test as once the Hanna's are required to be in compliance with WAC 246-272A-0210, Spokane County Building and Planning will issue an occupancy permit because Margitan's waterline will no longer be in jeopardy.

The Superior Court is in error in its conclusion of law because Margitan is in fact aggrieved or has been adversely affected.

FIFTH error of law:

As established previously, Margitan testified in the hearing and argued to the court that he cannot use his home on Parcel 3 because Spokane Building and Planning will not issue a “Certificate of Occupancy” until the Hanna’s septic system does not impact Margitan’s water-line. During the Administrative Hearing, Margitan offered to obtain this information in writing if it would assist the Board in its decision. ARP 44 After the Administrative Hearing, Spokane Building and Planning issued an “Inspection Report” which confirmed in writing what the Inspector had informed Margitan. Margitan requested the Superior Court consider this after-acquired document. The court refused. RP 14

ER 201(b) (2) allows the court to take judicial notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”. Judicial notice is mandatory under provision (d) “...if requested by a party and supplied with the necessary information”. Margitan requested that the Superior Court consider a document open to the public RP 14, “Inspection Report”, at the Spokane Building and Planning website; a source whose accuracy cannot reasonably be questioned.

VI. CONCLUSION

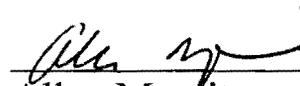
Margitan's request to prohibit the attorneys from appearing in Superior Court due to their status as witnesses should be granted. The Superior Court's Dismissal should be reversed. In consideration of efficiency of the Court and Margitan's increasing costs, in being prevented from using his home, Margitan requests the Court of Appeals enter the proposed "Finding of Fact Conclusions of Law and Order" provided to the Superior Court. CP 37, 38, 39

In the alternative, Margitan has standing to appeal the District's decision. Margitan has a protected interest in safe drinking water to Parcel 3. Margitan has the right to occupy his home. Margitan should not be required to violate WAC 246-272A-0210(5) (b) (iii) every time he uses his legal easement to his home. These rights have been adversely affected by the Superior Court's order and the District's action. The interest in occupying a home is clearly not abstract but personal. The District also has no authority to restrict Margitan's legal use of his easement. The District was created to protect the public by enforcing the law. The District and Board have caused harm to Margitan. Margitan continues to suffer an ongoing injury-in-fact. A judgment in favor of Margitan would eliminate this prejudice.

The court can take Judicial Notice of the Inspection Report issued by Spokane Building and Planning, if needed thereby providing the corroborating evidence the Superior Court claimed was not present.

Margitan hereby requests fees and sanctions as requested in Superior Court and additional fees in having to pursue this matter in this court.

February 25, 2015



Allan Margitan

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF SERVICE

I, Allan Margitan, certify under penalty of perjury that on February 25, 2015 I have served a copy of ("APPELLANT MARGITAN's OPENING BRIEF") the foregoing document to the listed parties via the means indicated

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Board of Spokane Regional Health District

Dated: February 25, 2015
Signed at Spokane, Washington on February 25, 2015



Allan Margitan