SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

SAVE OUR SEQUIM, a Washington 501(c)(4) Corporation

Petitioner,

and

CITY OF SEQUIM, a Washington Municipal Corporation, and

JAMESTOWN S'KLALLAM TRIBE,

Respondents.

NO. 20-2-00648-05

MEMORANDUM OPINION

This matter comes before the court for an initial hearing pursuant to RCW 36.70C.080. The parties will be referenced as follows:

Save Our Sequim [SOS]

City of Sequim [Sequim]

Jamestown S'Klallam Tribe [Tribe]

The law favors decisions being made based upon the substantive merits of the claims that are raised. However, as is true of every case, procedural requirements must be satisfied before a court can consider the broader substantive issues. Said another way in this case, the full review envisioned by RCW 36.70C.130 only occurs if the procedural motions on such issues as timing of the petition and standing that must be addressed pursuant to RCW 36.70C.080 do not otherwise resolve the matter.

Because of the tremendous effort that has been put into this case by the parties, it is appropriate to provide an explanation for a decision that resolves this case on procedural grounds, and as a result, leaves unanswered many substantive questions that are important to

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the participants. In doing so, the court is aware that as a result of de novo review by appellate courts, much of what is set forth in this memorandum could legitimately be labeled as "surplusage." *Leavitt v. Jefferson County,* 74 Wash.App. 668, 677 (1994). Regardless, the court finds that it is reasonable for interested parties to receive an explanation for decisions that they favor and that they disfavor.

A. SOS's CR 56 Motion for Continuance

SOS seeks a continuance for the purposes of conducting discovery. The court finds that, procedurally, this request is properly before the court. While this motion could have been brought before the "initial" hearing, the statute only provides that such a motion "may" be brought, not that it "must" or "shall" be brought before the initial hearing. RCW 36.70C.080(2). The ability to ask for leave to engage in discovery was not waived by the timing on the request.

Substantively, it is the general rule that conducting formal discovery within a LUPA petition is not favored if the parties had an opportunity to create a record before the officer making the factual determinations. RCW 36.70C.120(1). This statute sets forth exceptions to this general rule, and subsection (2) is potentially applicable. Specifically, discovery is permissible to explore "disqualification of . . . the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created." *Id.*

Here, SOS raises concerns about the Hearing Examiner's neutrality based upon his suggestion that Sequim could amend its code in order to allow him to make a final decision. This action was known to SOS at the time that the record was still being developed. SOS cannot claim that the grounds for disqualification were unknown. The record does not reveal

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that SOS made any objection to his continued involvement. Given that the basis upon which SOS now claims that the Hearing Examiner should have been disqualified were known and an opportunity to create a record existed, the court will not authorize discovery on this issue.

To the degree that SOS is concerned about the bias of other decision-makers within Sequim's permitting process, those too were clearly known, and it appears that a complete record could have been made. If this case were not being resolved on procedural grounds, the court would give further consideration to the discovery request.

That step need not be taken here because SOS has not claimed that in order to address those dispositive motions it must first be allowed to conduct its requested discovery. Rather, SOS claims that discovery is needed to address the substantive issues it wishes to raise in this LUPA petition. On this issue, the court draws further attention to the comments made under Section (B)(2) of this opinion.

B. Tribe's Motion for Summary Judgment

Motions for summary judgment are properly considered at the initial hearing. RCW 36.70C.080(2). Here, issues such as jurisdiction and standing that are raised in the summary judgment motion would be deemed waived if not raised. *Id.* (3). Sequim supports Tribe's motion for summary judgment in its own motion to dismiss. The court will not extensively address the City's independent motion to dismiss other than to note that the parties' prior litigation was dismissed without prejudice.

The court will address each claimed basis for summary judgment / dismissal independently.

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1. Untimely Filed Petition

Sequim and Tribe allege that the SOS's petition was prematurely filed in this matter.

A land use petition must be filed and served within twenty-one days of the land use decision being issued. RCW 36.70C.040(3). A land use decision is defined as being the final determination by the highest authority to make a determination. RCW 36.70C.020(2).

By letter of February 13, 2020, Sequim gave notice that SOS's and Tribe's appeals of the various determinations made by Sequim would be "heard" at the same time. On October 8, 2020, the Hearing Examiner issued an "Interlocutory Order" which disposed of the SOS appeals. That order was reaffirmed on November 6, 2020 in an order denying SOS's motion for reconsideration. At that time the only remaining issue before the hearing examiner was that raised by Tribe's appeal.

As a result, SOS faced the decision of whether to file a LUPA petition or to wait until the remaining issue raised by Tribe's challenge was decided. If the interlocutory ruling was considered a final order, it commenced the twenty-one day appeal period. RCW 36.70C.020(2)(c).[1] Failure to timely file a LUPA petition would bar further review. This determination was critical given the prohibition against using a LUPA petition filed at a later date to collaterally challenge a land use decision for which the appeal time had already run. *Habitat Watch v. Skagit County,* 155 Wash.2d 397, 410-11 (2005). In other words, if the Interlocutory Order was a final order as to SOS's appeal, SOS would not be able to contest those issues even if it filed a petition after a "final decision" was entered on Tribe's appeal.

[1] By statute, this period commences when a motion for reconsideration is decided.

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As stated, both Tribe and Sequim claim that SOS's filing of a LUPA petition in November, 2020 was premature because a final decision had not been made. For several reasons, the court finds that the LUPA petition is not premature.

First, although there was agreement that the various appeals would be consolidated for purposes of being heard together, it is not clear that being heard together meant that they are forever linked together. In fact, the record shows that the cases were essentially "unconsolidated" by the interlocutory order. Tribe's appeal was heard after a ruling on the other appeals, and that was done with no reference to those other appeals.

Second, Sequim and Tribe argue that the fact that SOS was allowed to continue to participate in the appeal, following entry of the interlocutory order, is evidence that a final decision had not been made. However, SOS's participation in that later hearing was not based upon standing to argue for or against Tribe's appeal of Sequim's order. The participation was allowed as a practical way to consolidate and address the concerns raised by a large number of individuals. Participating in that later hearing was not a challenge to the finality of the Hearing Examiner's ruling on standing. At the subsequent hearing the testimony presented related to the remaining appeal, not the appeals dismissed by the Interlocutory Order.

Third, Sequim and Tribe also argue that the Hearing Examiner repeatedly instructed the parties that the Interlocutory Order was not a final order for purposes of establishing LUPA filing deadlines, and that a final order would be issued at a later date. The Interlocutory Order contained introductory language which stated that "more details will be provided in the Final Decision issued for the appeals." In an email, the Hearing Examiner stated that the time for appeal would follow a final order.

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There has been no authority presented for the position that the Hearing Examiner's expressions about how or when a party should file a LUPA petition in superior court have any controlling authority. The deference contemplated by RCW 36.70C.130(1) does not extend to interpreting how orders will be handled under RCW 36.70C. Specifically, it is not the Hearing Examiner's role to determine whether the trial court will consider a particular decision to be a final decision, regardless of the title put at the top of the decision. While his comments were reasonable and clearly offered in an effort to be helpful, they are not legally controlling.

Fourth, there are many reasons to find that the Interlocutory Order was a final order. Those reasons include the following:

- Under the heading "Order" that is contained in that document, it states "SOS . . . appeals are dismissed for lack of standing as outlined in the legal analysis of this Order." This language conveys finality.
- Under the SMC, only "Final Decisions" are subject to the process of reconsideration utilized by the Hearing Examiner, and if the requested change within the motion for reconsideration is denied, the original decision is the final decision. SMC 20.01.210. Since reconsideration was allowed, there is reason to believe that the order was a final decision.
- Sequim's revised Pre-Hearing Order stated that it arose from the dismissal of the . . . SOS appeals.
- Although not known to SOS at the time it filed its petition in November, the final order itself has language which confirms that the Interlocutory Order was in fact a final order.

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- The "Final Order" only lists the Jamestown S'Klallam Tribe as the sole appellant.
- The order again conveys that finality was achieved through the Interlocutory Order when it states that

> "[f]our of the five appeals were dismissed by interlocutory order on October 8, 2020 due to lack of standing.[2] The remaining appeal, addressed by this Final Decision, was filed by the Tribe and Challenges the MDNS as imposing more conditions than necessary or lawful for mitigating MAT impacts."

A land use decision is final when "it leaves nothing open to further dispute and sets at rest [the] cause of action between the parties." *Durland v. San Juan County*, 174 Wash.App. 1, 13-14 (2002) (citations omitted). The court went on to note that a final land use decision should "memorialize the terms of the decision, not simply reference them . . . " *Id.* The Interlocutory Order had this result. The court finds that based upon the totality of the language used there was legitimate reason to conclude that the legal effect of the November 6, 2020 interlocutory order was that it was a final determination.

The court notes that SOS has now filed a third petition. That is not seen by the court as admission that the November petition was premature. That is seen by the court as a party recognizing that the court may interpret a statute in a particular way, and it is reasonable to address that possibility. The new petition appears to be filed within twenty-one days of the final decision being issued. Arguments related to the challenge of having to address multiple LUPA petitions could be addressed by a simple motion for consolidation of the petitions, perhaps brought by the court itself, at the trial court level.

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[2]These four appeals were actually dismissed, effective November 6, 2020, following the motion for reconsideration.

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Although not a basis for its decision, the court notes two realities. First, it is clear that SOS has no basis to object to the court finding that the petition was filed in a timely matter. For judicial economy purposes, both Tribe and Sequim ask the court to rule on the other aspects of the summary judgment motion. If the petition is premature, the court has no jurisdiction to rule on these other issues. Given that the petition was not premature, and hence not dispositive, the court can rule on the balance of the motions.

2. Lack of Standing

Procedurally, in order for a party to pursue a legal matter, it must have standing. Based upon the following analysis the court concludes that SOS does not have standing to file this LUPA petition.

The process of filing a judicial appeal of a final land use decision is governed by SMC 20.01.240(I) and by RCW 36.70C. The SMC requires that all appeals must conform to the procedures set forth in RCW 36.70C. As set forth below, whether read independently or in concert, the SMC and RCW 36.70C lead to the same conclusion.

As a 501(c)(4) corporation, SOS generally qualifies as an entity that could file a LUPA petition. RCW 36.70C.060; 36.70C.020(4). After meeting this threshold test, further standing requirements for an entity can be met in one of two ways. One way is for the entity to be the owner of the property to which the land use decision is directed. RCW 36.70C.060(1). SOS does not claim to be an owner of property.

The alternative method is for an entity to qualify as an aggrieved or adversely affected party. *Id.* at (2). There are four qualifications to be so classified, all of which must be met. For example, one qualification is that the entity's "asserted interests are among those that the local

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jurisdiction was required to consider when it made the land use decision." *Id.* Here, neither Sequim nor Tribe allege in their summary judgment motion that prong of the test could not be satisfied. However, this is just one of the four prongs that must be satisfied. Rather, the challenge is made on the basis that SOS has not shown that the first statutory qualification has been met – specifically that SOS has not shown that it "has [been] prejudiced or is likely to be prejudiced" by the decision, and hence is not an aggrieved or adversely affected party. *Id.*

SOS argues that the Sequim Municipal Code is ambiguous in this regard. The code is clear. The process of appealing to a hearing examiner is set forth in SMC 20.01.090(E). That can be done by a party of record "who may be aggrieved . . . " *Id.* This language suggests that a party need not show that it is aggrieved prior to filing an appeal to the hearing examiner. But that does not mean that a party is relieved entirely of the burden of showing that it is aggrieved or adversely affected, particularly if it wishes to pursue a judicial appeal.

Once the hearing examiner has made a final decision, judicial review of that decision is governed by SMC 20.01.240(I). That provision specifically requires that all judicial appeals "must conform with the procedures set forth in Chapter 36.70C RCW." *Id.* As stated above, this Chapter requires that a party who is not an owner of the property must be "aggrieved or adversely affected. . . " RCW 36.70C.060(2). The SMC defines an "aggrieved party" in a way consistent with the RCW 36.70C requirement to show prejudice. SMC 20.01.020(B)(1).

Standing is not created in any other way. By statutory language, standing is "limited" to specific individuals or entities. A petition must set forth the basis for standing. RCW 36.70C.070. SOS's petition and subsequent pleadings set forth its claim to standing, in part, based upon being entitled to notice or being a party of record. However, satisfying these

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factors does not mean that an entity is "prejudiced" by the decision in a way to satisfy the "aggrieved or adversely affected" requirement for standing for judicial review. The question is whether this requirement is satisfied in some other way.

Here, no individual has filed a LUPA petition. Accordingly, the court need not ask whether any individual would satisfy the "aggrieved or adversely affected" requirement. The only appellant before the court is the corporate entity, SOS.

SOS has not identified any way that the decision impacts it as a corporate entity, and there is no evidence in the court record which would support such an assertion of impact. SOS appears to be organized and funded for the sole purpose to advocate a position.

There are many instances where the courts have found that legal entities have standing under LUPA because the entity's members are harmed, and the association can represent the interests of those members. In its petition, SOS references a claim to standing on the basis that it is "supported by over 2,600 residents of the Sequim area, who will suffer prejudice and irreparable harm if the proposed facility is built in the proposed location." The Washington Supreme Court has set forth a three part test that an entity must satisfy to establish standing to sue on behalf of its members. *International Ass's of Firefighters, Local 1789 v. Spokane Airports*, 146 Wash.2d 207, (2002).

Both Tribe and Sequim assert, initially, that SOS has no members for which it can assert standing. They point to representations by SOS itself that it has no members. For example, the brief signed by SOS attorneys on November 2, 2020 asserts ". . . SOS is not a membership organization . . . " The language cited above from its petition references

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supporters, not members. The common thread in cases which discuss an organization's ability to assert standing is that the standing is exercised **on behalf of its members.**

The statement that SOS is not a membership organization should not be read in isolation. There is ample evidence in the record, when taken in the light most favorable to SOS, that in fact SOS does have "members." For example, in a declaration of Jodie Wilke filed September 2, 2020, she stated "I am a founding member of Save our Sequim." Further, it is a reasonable inference that an entity which has hired attorneys, organized itself as a legal corporation, and has solicited and received donations for the purpose of advancing a particular cause, does in fact have members. Again, there is enough evidence to survive summary judgment on the limited issue of whether SOS has members. Accordingly, it is appropriate to consider the three part test utilized by the Supreme Court to consider this issue.

In order to assert standing on behalf of its members, SOS must satisfy the following criteria:

(1) The members of the organization would otherwise have standing to sue in their own right;

(2) The interests that the organization seeks to protect are germane to its purpose; and

(3) Neither claim asserted or relief requested requires the participation of the organization's individual members.

International Ass'n of Firefighters at 213-14 (2002). Here, the court finds that the record before the Hearing Examiner fails to establish the first element of this test. Said another way, it is not that SOS does not have members. It is that none of its members have asserted him or herself in a way to create standing.

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There is no doubt that a large number of individuals in the Sequim community support and advocate for the position that Tribe's clinic should not be located as planned. They affirm that they do not oppose placement in another location, although much of the public comments as to why the current placement is inappropriate would not be alleviated by a different placement within the Sequim community.

Regardless, there is no competent evidence in the record before the hearing examiner by an individual who attests to be a member of SOS and claims some particularized prejudice which would qualify him or her to be considered an aggrieved or adversely affected party. Further, a public comment can be made by someone who is a "member" of SOS, but may not reside in the community or even own property in the community. Under CR 56, SOS may not rest upon mere allegations or denials, but must respond by affidavit or otherwise, showing that there is a genuine issue of fact for trial. Bare assertions are not sufficient – there must be actual evidence. *Trimble v. Washington State Univ.,* 140 Wash.2d 88, 93 (2000). Pursuant to RCW 36.70C.030 the superior court civil rules govern procedural matters. SOS failed to make the required showing.

The Hearing Examiner clearly ruled that no such facts existed. Upon motion for reconsideration filed by SOS, the Hearing Examiner took the extraordinary step of communicating with the parties with the following language and invitation:

> It must also be recognized that this is not a court of law and that the rules and procedures are informal by necessity in order to maximize accessibility to the public. To this end, flexibility must be extended to ensure that the informality of the proceedings doesn't also result in misunderstandings that deprive participants of a fair opportunity to be heard. For these reasons, new evidence is authorized on the standing issues in the form of declarations and other references to competent evidence as authorized by the CRs for summary judgment motions. (emphasis added).

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This invitation was particularly important given that SOS had reiterated that it had the information available. It is important in that it provided an opportunity to address any concern that SOS had not been able to present the information it felt necessary to make the correct decision. In fact, SOS has now presented declarations by members who affirm that they are members of Save of [sic] Sequim, and allege facts to suggest that they are prejudiced by the decision, and hence are aggrieved or adversely affected parties. SOS has repeatedly stated that it has not been able to create the record it feels is necessary. Yet when given the clear opportunity to do so, they did not. They did not even though other parties had submitted declarations in relation to summary judgment motions, an act which made it clear that it was an acceptable approach. They did not even when specifically invited by the Hearing Examiner to do so.

It is worth noting that CR 56(f) provides a party with an opportunity to seek a delay in a motion for summary judgment when depositions or other discovery is needed to produce the facts necessary to address the summary judgment motion. Here, SOS appealed to this civil rule as a necessary remedy to address many of its concerns. However, as described above, it did not make the appeal on the issue of standing. There would be no need for SOS to engage in any discovery as to its own members to understand why they would be aggrieved or adversely affected by the land use decision.

The courts have identified what constitutes the prejudice necessary to establish standing. The following language is instructive:

> To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. . . . To show an injury in fact, the petitioner must allege a specific and perceptible harm. . . . If the petitioner alleges a threatened

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> rather than an existing injury, he must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.

Thompson v. City of Mercer Island, 193 Wash. App. 653, 662 (2016) (internal quotation marks omitted). Litigants seeking to challenge a discretionary act as opposed to an unlawful act must show specific injury – i.e. that there is a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers. *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.,* 184 Wash.App. 105, 116 (2014). In order to have standing, a member of SOS would need to show more than an "abstract interest of the general public in having others comply with the law." *Id.* at 663. Here, those requirements were not met. Instead, SOS relies upon generalized comments made at public hearings and as reported in the newspaper. Many of the concerns relate to activities such as loitering, drug use in the area, and littering the area with feces or drug paraphernalia. Other concerns related to delayed emergency response times, congestion, and increased homelessness in the area. Regardless, none of this was presented in the form of competent evidence before the hearing examiner. Unsworn testimony in a public hearing, or arguments or statements contained in news reports, about hypothetical or conjectural harm, is not competent testimony.

In response to the motion for summary judgment filed in this court, SOS has provided new declarations under penalty of perjury where specific individuals have made factual claims that may raise genuine issues of material fact that would prevent granting of summary judgment. These declarations, for the first time in the record, affirm that the declarant "is a member of Save of [sic] Sequim." However, in these circumstances and on this issue, supplementing the record following the filing of the LUPA appeal is not permitted under RCW 36.70C.120 or 130.

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The record does not show that any member of SOS had standing to bring this petition, and therefore SOS as an entity does not have standing.

3. Appeal is Moot Because the Building Permit was not Appealed

In the midst of these appeals Sequim approved a building permit on June 29, 2020 and gave notice of that decision on June 30, 2020. The permit stated that it would "allow the construction of a 16,806 SF medical clinic that will be made up of medication assisted treatment program with offers FDA approved dosing, primary care services, consulting services, dental health services and childcare services while clients are seen." The issuance of this permit was not appealed.

SOS seems to accept that the permit authorizes construction, but disputes that authorizes the use of the building as envisioned.

The court is without sufficient information to determine whether the issuance of the permit makes the current LUPA petition moot. Regardless, given that the petition is dismissed on the basis of a lack of standing, this issue need not be resolved.

Upon presentation the court will sign orders dismissing this matter with prejudice. The court will not award attorney fees.

DATED this 10 day of February, 2021.

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