

FEB 10 2021

NIKKI BOTNEN CLERK

1 SUPERIOR COURT OF WASHINGTON
2 COUNTY OF CLALLAM

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

5 Petitioner,

6 and

7 CITY OF SEQUIM, a Washington Municipal
8 Corporation, and

9 JAMESTOWN S'KLALLAM TRIBE,

10 Respondents.

NO. 20-2-00648-05

MEMORANDUM OPINION

11 This matter comes before the court for an initial hearing pursuant to RCW 36.70C.080.

12 The parties will be referenced as follows:

13 Save Our Sequim [SOS]

14 City of Sequim [Sequim]

15 Jamestown S'Klallam Tribe [Tribe]

16 The law favors decisions being made based upon the substantive merits of the claims
17 that are raised. However, as is true of every case, procedural requirements must be satisfied
18 before a court can consider the broader substantive issues. Said another way in this case, the
19 full review envisioned by RCW 36.70C.130 only occurs if the procedural motions on such
20 issues as timing of the petition and standing that must be addressed pursuant to RCW
21 36.70C.080 do not otherwise resolve the matter.

22 Because of the tremendous effort that has been put into this case by the parties, it is
23 appropriate to provide an explanation for a decision that resolves this case on procedural
24 grounds, and as a result, leaves unanswered many substantive questions that are important to
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1 the participants. In doing so, the court is aware that as a result of de novo review by appellate
2 courts, much of what is set forth in this memorandum could legitimately be labeled as
3 “surplusage.” *Leavitt v. Jefferson County*, 74 Wash.App. 668, 677 (1994). Regardless, the
4 court finds that it is reasonable for interested parties to receive an explanation for decisions that
5 they favor and that they disfavor.

6 **A. SOS’s CR 56 Motion for Continuance**

7 SOS seeks a continuance for the purposes of conducting discovery. The court finds that,
8 procedurally, this request is properly before the court. While this motion could have been
9 brought before the “initial” hearing, the statute only provides that such a motion “may” be
10 brought, not that it “must” or “shall” be brought before the initial hearing. RCW
11 36.70C.080(2). The ability to ask for leave to engage in discovery was not waived by the
12 timing on the request.

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

19 Here, SOS raises concerns about the Hearing Examiner’s neutrality based upon his
20 suggestion that Sequim could amend its code in order to allow him to make a final decision.
21 This action was known to SOS at the time that the record was still being developed. SOS
22 cannot claim that the grounds for disqualification were unknown. The record does not reveal
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1 that SOS made any objection to his continued involvement. Given that the basis upon which
2 SOS now claims that the Hearing Examiner should have been disqualified were known and an
3 opportunity to create a record existed, the court will not authorize discovery on this issue.

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

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

15 Motions for summary judgment are properly considered at the initial hearing. RCW
16 36.70C.080(2). Here, issues such as jurisdiction and standing that are raised in the summary
17 judgment motion would be deemed waived if not raised. *Id.* (3). Sequim supports Tribe's
18 motion for summary judgment in its own motion to dismiss. The court will not extensively
19 address the City's independent motion to dismiss other than to note that the parties' prior
20 litigation was dismissed without prejudice.

21 The court will address each claimed basis for summary judgment / dismissal
22 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.

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

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

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

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18 Third, Sequim and Tribe also argue that the Hearing Examiner repeatedly instructed the
19 parties that the Interlocutory Order was not a final order for purposes of establishing LUPA
20 filing deadlines, and that a final order would be issued at a later date. The Interlocutory Order
21 contained introductory language which stated that "more details will be provided in the Final
22 Decision issued for the appeals." In an email, the Hearing Examiner stated that the time for
23 appeal would follow a final order.
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1 There has been no authority presented for the position that the Hearing Examiner's
2 expressions about how or when a party should file a LUPA petition in superior court have any
3 controlling authority. The deference contemplated by RCW 36.70C.130(1) does not extend to
4 interpreting how orders will be handled under RCW 36.70C. Specifically, it is not the Hearing
5 Examiner's role to determine whether the trial court will consider a particular decision to be a
6 final decision, regardless of the title put at the top of the decision. While his comments were
7 reasonable and clearly offered in an effort to be helpful, they are not legally controlling.

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

- 10 • Under the heading "Order" that is contained in that document, it states "SOS . . .
11 appeals are dismissed for lack of standing as outlined in the legal analysis of this
12 Order." This language conveys finality.
- 13 • Under the SMC, only "Final Decisions" are subject to the process of reconsideration
14 utilized by the Hearing Examiner, and if the requested change within the motion for
15 reconsideration is denied, the original decision is the final decision. SMC
16 20.01.210. Since reconsideration was allowed, there is reason to believe that the
17 order was a final decision.
- 18 • Sequim's revised Pre-Hearing Order stated that it arose from the dismissal of the . . .
19 SOS appeals.
- 20 • Although not known to SOS at the time it filed its petition in November, the final
21 order itself has language which confirms that the Interlocutory Order was in fact a
22 final order.
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- 1 ○ The “Final Order” only lists the Jamestown S’Klallam Tribe as the sole
2 appellant.
- 3 ○ The order again conveys that finality was achieved through the Interlocutory
4 Order when it states that

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

10 A land use decision is final when “it leaves nothing open to further dispute and sets at
11 rest [the] cause of action between the parties.” *Durland v. San Juan County*, 174 Wash.App. 1,
12 13-14 (2002) (citations omitted). The court went on to note that a final land use decision
13 should “memorialize the terms of the decision, not simply reference them . . . “ *Id.* The
14 Interlocutory Order had this result. The court finds that based upon the totality of the language
15 used there was legitimate reason to conclude that the legal effect of the November 6, 2020
16 interlocutory order was that it was a final determination.

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

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

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

7 *2. Lack of Standing*

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

11 The process of filing a judicial appeal of a final land use decision is governed by SMC
12 20.01.240(I) and by RCW 36.70C. The SMC requires that all appeals must conform to the
13 procedures set forth in RCW 36.70C. As set forth below, whether read independently or in
14 concert, the SMC and RCW 36.70C lead to the same conclusion.

15 As a 501(c)(4) corporation, SOS generally qualifies as an entity that could file a LUPA
16 petition. RCW 36.70C.060; 36.70C.020(4). After meeting this threshold test, further standing
17 requirements for an entity can be met in one of two ways. One way is for the entity to be the
18 owner of the property to which the land use decision is directed. RCW 36.70C.060(1). SOS
19 does not claim to be an owner of property.
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21 The alternative method is for an entity to qualify as an aggrieved or adversely affected
22 party. *Id.* at (2). There are four qualifications to be so classified, all of which must be met. For
23 example, one qualification is that the entity's "asserted interests are among those that the local
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1 jurisdiction was required to consider when it made the land use decision.” *Id.* Here, neither
2 Sequim nor Tribe allege in their summary judgment motion that prong of the test could not be
3 satisfied. However, this is just one of the four prongs that must be satisfied. Rather, the
4 challenge is made on the basis that SOS has not shown that the first statutory qualification has
5 been met – specifically that SOS has not shown that it “has [been] prejudiced or is likely to be
6 prejudiced” by the decision, and hence is not an aggrieved or adversely affected party. *Id.*

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

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

20 Standing is not created in any other way. By statutory language, standing is “limited”
21 to specific individuals or entities. A petition must set forth the basis for standing. RCW
22 36.70C.070. SOS’s petition and subsequent pleadings set forth its claim to standing, in part,
23 based upon being entitled to notice or being a party of record. However, satisfying these
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1 factors does not mean that an entity is “prejudiced” by the decision in a way to satisfy the
2 “aggrieved or adversely affected” requirement for standing for judicial review. The question is
3 whether this requirement is satisfied in some other way.

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

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

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

18 Both Tribe and Sequim assert, initially, that SOS has no members for which it can
19 assert standing. They point to representations by SOS itself that it has no members. For
20 example, the brief signed by SOS attorneys on November 2, 2020 asserts “. . . SOS is not a
21 membership organization . . . “ The language cited above from its petition references
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1 supporters, not members. The common thread in cases which discuss an organization's ability
2 to assert standing is that the standing is exercised **on behalf of its members.**

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

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

- 14 (1) The members of the organization would otherwise have standing to sue in their own
15 right;
16 (2) The interests that the organization seeks to protect are germane to its purpose; and
17 (3) Neither claim asserted or relief requested requires the participation of the
18 organization's individual members.
19

20 *International Ass'n of Firefighters* at 213-14 (2002). Here, the court finds that the record
21 before the Hearing Examiner fails to establish the first element of this test. Said another way, it
22 is not that SOS does not have members. It is that none of its members have asserted him or
23 herself in a way to create standing.
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1 There is no doubt that a large number of individuals in the Sequim community support
2 and advocate for the position that Tribe's clinic should not be located as planned. They affirm
3 that they do not oppose placement in another location, although much of the public comments
4 as to why the current placement is inappropriate would not be alleviated by a different
5 placement within the Sequim community.

6 Regardless, there is no competent evidence in the record before the hearing examiner by
7 an individual who attests to be a member of SOS and claims some particularized prejudice
8 which would qualify him or her to be considered an aggrieved or adversely affected party.
9 Further, a public comment can be made by someone who is a "member" of SOS, but may not
10 reside in the community or even own property in the community. Under CR 56, SOS may not
11 rest upon mere allegations or denials, but must respond by affidavit or otherwise, showing that
12 there is a genuine issue of fact for trial. Bare assertions are not sufficient – there must be actual
13 evidence. *Trimble v. Washington State Univ.*, 140 Wash.2d 88, 93 (2000). Pursuant to RCW
14 36.70C.030 the superior court civil rules govern procedural matters. SOS failed to make the
15 required showing.
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17 The Hearing Examiner clearly ruled that no such facts existed. Upon motion for
18 reconsideration filed by SOS, the Hearing Examiner took the extraordinary step of
19 communicating with the parties with the following language and invitation:

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

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

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

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

22 To satisfy the prejudice requirement, a petitioner must show that he would suffer injury
23 in fact as a result of the land use decision. . . . To show an injury in fact, the petitioner
24 must allege a specific and perceptible harm. . . . If the petitioner alleges a threatened
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1 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.

2 *Thompson v. City of Mercer Island*, 193 Wash. App. 653, 662 (2016) (internal quotation marks
3 omitted). Litigants seeking to challenge a discretionary act as opposed to an unlawful act must
4 show specific injury – i.e. that there is a unique right or interest that is being violated, in a
5 manner special and different from the rights of other taxpayers. *Friends of N. Spokane Cnty.*
6 *Parks v. Spokane Cnty.*, 184 Wash.App. 105, 116 (2014). In order to have standing, a member
7 of SOS would need to show more than an “abstract interest of the general public in having
8 others comply with the law.” *Id.* at 663. Here, those requirements were not met. Instead, SOS
9 relies upon generalized comments made at public hearings and as reported in the newspaper.
10 Many of the concerns relate to activities such as loitering, drug use in the area, and littering the
11 area with feces or drug paraphernalia. Other concerns related to delayed emergency response
12 times, congestion, and increased homelessness in the area. Regardless, none of this was
13 presented in the form of competent evidence before the hearing examiner. Unsworn testimony
14 in a public hearing, or arguments or statements contained in news reports, about hypothetical or
15 conjectural harm, is not competent testimony.
16

17 In response to the motion for summary judgment filed in this court, SOS has provided
18 new declarations under penalty of perjury where specific individuals have made factual claims
19 that may raise genuine issues of material fact that would prevent granting of summary
20 judgment. These declarations, for the first time in the record, affirm that the declarant “is a
21 member of Save of [sic] Sequim.” However, in these circumstances and on this issue,
22 supplementing the record following the filing of the LUPA appeal is not permitted under RCW
23 36.70C.120 or 130.
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1 The record does not show that any member of SOS had standing to bring this petition,
2 and therefore SOS as an entity does not have standing.

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

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

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

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

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

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18 DATED this 10 day of February, 2021.

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20 
21 BRENT BASDEN
22 JUDGE