

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

ZP#5, LLC; GERALD "JERRY" NUTTER;
and NUTTER CORPORATION,

No. 23-2-02161-06

Petitioners,

Clark County Nos. SLR-2020-00009,
WHR-2020-0040, OLR-2021-00038,
OLR-2021-00039, OLR-2021-00073,
OLR-2021-00078, OLR-2023-00077,
OLR-2023-00079, & OLR-2023-00080

vs.

CLARK COUNTY, WASHINGTON,

Respondent,

**ORDER GRANTING MOTION TO
DISMISS CASE**

and

FRIENDS OF THE COLUMBIA GORGE,
KAREN STREETER, SEAN STREETER,
JODY AKERS, PAUL AKERS, RACHEL
GRICE, and ZACHARY GRICE,

Additional Parties.

THIS MATTER, having come before the Court on the Motion of Friends of the Columbia Gorge, Jody Akers, Paul Akers, Rachel Grice, Zachary Grice, Karen Streeter, and Sean Streeter to Dismiss Case Pursuant to CR 12(b)(1) ("Motion to Dismiss"), and the Court having reviewed and considered the pleadings, records, and files herein, including the following:

1. Motion to Dismiss;
2. Declaration of Nathan J. Baker in Support of Motion to Dismiss;
3. Declaration of Bryan J. Telegin in Support of Motion to Dismiss;
4. Friends of the Columbia Gorge, Jody Akers, Paul Akers, Rachel Grice, Zachary Grice, Karen Streeter, and Sean Streeter's Reply in Support of Motion to Dismiss Case Pursuant to CR 12(b)(1) and Motion to Strike Petitioners' Response;

5. Second Declaration of Nathan J. Baker in Support of Motion to Dismiss;
6. Second Declaration of Bryan J. Telegin in Support of Motion to Dismiss;
7. _____;
8. _____;
9. _____;

and the Court being otherwise fully advised in the premises, NOW THEREFORE, IT IS
HEREBY ORDERED as follows:

1. Petitioners filed this case pursuant to the Land Use Petition Act (“LUPA”), Chapter 36.70C RCW, to challenge a final land use decision (“County Decision”) issued by the Clark County Land Use Hearing Examiner (“Hearing Examiner”). Petitioners raise four Assignments of Error (“claims”) in their Petition for Judicial Review (“Petition”).

2. Petitioners lack statutory standing to bring this action as defined by LUPA because they did not first appeal the County Decision to the Columbia River Gorge Commission (“Gorge Commission”) and thereby failed to exhaust their administrative remedies as required by RCW 36.70C.060(2)(d). Under LUPA, failure to exhaust administrative remedies is a jurisdictional bar to judicial review. This case must therefore be dismissed.

3. Because Petitioners’ first three claims are related to the implementation of the Columbia River Gorge National Scenic Area Act, the Gorge Commission has jurisdiction over these claims pursuant to 16 U.S.C. § 544m(a)(2). This Court, in turn, lacks subject matter jurisdiction over these three claims under LUPA, which excepts from this Court’s jurisdiction “[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law,” RCW 36.70C.030(1)(a)(ii), including the Gorge Commission, *Zimmerly v. Columbia River Gorge Commission*, 26 Wn. App. 2d 265, 286, 527 P.3d 84 (2023), *rev. den.*, ___ Wn.2d ___, 534 P.3d 793 (Sept. 6, 2023). The first three claims must be dismissed.

4. This Court also lacks jurisdiction over Petitioners’ fourth claim given the contingent nature of the State Environmental Policy Act (“SEPA”) findings and conclusions in the County Decision combined with Petitioners’ failure to exhaust their administrative remedies by appealing the County Decision to the Gorge Commission to challenge the Hearing Examiner’s

1 rulings that the land use application was incomplete under the National Scenic Area ("NSA")
2 rules. Other than the Hearing Examiner's holdings under National Scenic Area law reversing the
3 County Staff's SEPA Mitigated Determinations of Non-Significance, the Hearing Examiner
4 expressly made all of his SEPA findings and conclusions ineffective unless his NSA
5 incompleteness rulings are reversed on appeal. Because Petitioners failed to challenge these NSA
6 rulings by timely appealing to the Gorge Commission, the contingent SEPA findings and
7 conclusions are not in effect and are null and void by their own terms. Accordingly, Petitioners'
8 fourth claim is moot, Petitioners failed to exhaust their administrative remedies for all four claims
9 because they did not bring their first three claims to the Gorge Commission, and Petitioners
10 Gerald "Jerry" Nutter and Nutter Corporation are not prejudiced by the SEPA findings and
11 conclusions (which are not in effect) and they therefore lack statutory standing to bring the fourth
12 claim. The fourth claim must be dismissed.

13
14 5. The Court lacks statutory subject matter jurisdiction over this case because
15 Petitioners failed to timely make the Applicant, James D. Howsley, a party to the case, as required
16 by RCW 36.70C.040. Under LUPA, failure to timely name and include statutorily required
17 parties is a jurisdictional bar to judicial review. The case must be dismissed.

18 6. The Court lacks statutory subject matter jurisdiction over this case because
19 Petitioners failed to timely serve parties Jody Akers, Paul Akers, Rachel Grice, Zachary Grice,
20 Karen Streeter, and Sean Streeter (collectively, "Neighbors") by personal service, as required by
21 RCW 36.70C.040(5), CR 4(d)(2), and RCW 4.28.080(16), given that these parties did not state
22 their addresses in their SEPA administrative appeals filed to the Hearing Examiner. Under
23 LUPA, failure to timely serve all required parties is a jurisdictional bar to judicial review. The
24 case must be dismissed.

25 7. Petitioners failed to timely serve their Response and accompanying declaration on
26 counsel for Friends of the Columbia Gorge ("Friends") and Neighbors in accordance with the
27 deadline established by LCR 6(d) and CR 6(e). Accordingly, the Court hereby STRIKES
28 Petitioners' Response and the accompanying declaration.
29


9. Respondents Neighbors and Friends are the prevailing parties for purposes of an award of costs and disbursements under Chapter 4.84 RCW. Each of these prevailing parties may file a bill of costs and disbursements incurred in this action consistent with applicable rules. Petitioners shall be jointly and severally liable for any awarded costs and disbursements.

DATED this 13th day of October, 2023.


HONORABLE NANCY N. RETINAS
Clark County Superior Court


PRESENTED BY:

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