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## 124 Wn. App. 928, Witt v. Port of Olympia

[No. 31385-5-II. Division Two. December 28, 2004.]

JANET WITT , *Appellant* , v. THE PORT OF OLYMPIA , *Respondent* .

[1] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Procedural Requirements - Degree of Compliance. The procedural requirements of the Land Use Petition Act (chapter [36.70C](#) RCW) require strict compliance.

[2] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Service of Petition - Improper Service - Effect. A superior court does not have jurisdiction to review a local land use decision under the Land Use Petition Act if the party seeking review fails to timely serve a copy of the petition in accordance with the service requirements of RCW [36.70C.040](#) (5), which requires that service be effected in the manner and on the persons specified by RCW [4.28.080](#) .

[3] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Service of Petition - Improper Service - Substantial Compliance. The doctrine of substantial compliance does not apply to the unequivocal requirements of RCW [36.70C.040](#) (5) respecting the filing and service of a land use petition under the Land Use Petition Act.

[4] Process - Service - Corporation - Persons Authorized To Accept Service - Office Assistant. Under RCW [4.28.080](#) (9), which lists the persons at a company or corporation on whom process may be served, service of process is ineffective on an office assistant who is not an office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier, or managing agent.[5] Building Regulations - Land Use Regulations - Judicial Review - Appellate Review - Attorney Fees - "Prevailing" Party - Decision on Merits - Necessity. For purposes of RCW [4.84.370](#) , under which a party to a land use decision is entitled to an award of attorney fees on appeal if the party prevails or substantially prevails at the administrative, superior court, and appellate

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court levels, a party that prevails on procedural grounds, as opposed to on the merits, does not qualify as a "prevailing party."

Nature of Action: A citizen sought judicial review of a port district's issuance of a mitigated determination of nonsignificance regarding a runway relocation project at an airport. The petitioner served the port district by leaving a copy of the petition with a temporary, part-time intern who was working behind the front desk at the port district's office.

Superior Court: The Superior Court for Thurston County, No. 03-2-02288-5, Richard D. Hicks, J., on February 6, 2004, entered a judgment dismissing the action.

Court of Appeals: Holding that the petitioner's failure to properly and timely serve the land use petition on the port district deprived the superior court of jurisdiction to review the case and that the port district, having prevailed on procedural grounds only, was not entitled to an award of attorney fees on appeal as the "prevailing party," the court *affirms* the judgment and *denies* the port district's request for attorney fees.

*Barnett N. Kalikow* (of Kalikow & Gusa, P.L.L.C. ), for appellant .

*Matthew B. Edwards* (of Owens Davies, P.S. ), for respondent .

¶1 ARMSTRONG , J . - Janet Witt, a Land Use Petition Act (LUPA), chapter [36.70C](#) RCW petitioner, appeals a summary judgment in favor of the Port of Olympia (Port) in which the superior court ruled that she failed to properly serve the Port under RCW [36.70C.040](#) (5) and RCW

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[4.28.080\(9\)](#). She served her petitions on a part-time, temporary intern who was working at the Port's front desk. Because the intern was not statutorily authorized to receive service for the Port, we affirm. And because we dismiss the case for a procedural flaw rather than a decision on the merits, we decline the Port's request for attorney fees.

FACTS

¶2 Janet Witt appealed the Port of Olympia's issuance of a mitigated determination of non-significance regarding the Runway Relocation Projects at the airport. On October 13, 2003, the Port upheld its decision. Under LUPA at RCW [36.70C.040](#), Witt had 21 days to challenge the Port's final decision on her appeal.

¶3 To commence review under LUPA, Witt had to deliver "a copy of the petition to the persons identified by or pursuant to RCW [4.28.080](#) to receive service of process." RCW [36.70C.040](#) (5). RCW [4.28.080](#) authorizes service on different individuals depending on the nature of the entity being sued. *See* RCW [4.28.080](#). The statute does not explicitly describe service on ports or municipal corporations; it does, however, describe service on counties, cities, states, schools, railroads, foreign insurance companies, minors, corporations, and various other individuals and entities. If the suit is against a company or corporation other than those designated in other parts of the statute, the plaintiff must serve: "the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent." RCW [4.28.080](#) (9).

¶4 On November 14, 2003, Witt, acting pro se, petitioned the Thurston County Superior Court to challenge the Port's decision. At 5:00 P.M. that same day, Kenneth Filak hand delivered four copies of her petition to "the clerk," Nick Hollingbery, at the Port offices. Clerk's Papers (CP) at

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71-72, 236. Filak stated to him that the petitions were for the Executive Director and four named Commissioners.

¶5 Hollingbery was a 17-year-old senior at Timberland High School, working for the Port as a temporary, part-time intern. He was responsible for "working behind the front desk and answering telephone calls, greeting visitors, offering coffee to visitors, making photocopies, and performing other office tasks" as assigned to him. CP at 237. He was not "a secretary, stenographer, or office assistant to the executive director of the Port of Olympia . . . [or] authorized to receive service of process." CP at 237.

¶6 Hollingbery saw nothing significant about the delivery on November 14, and he signed the receipt. He had never been served with papers concerning a lawsuit before, and he "had no idea" he was being served on November 14. CP at 237. He says, "I was just told that the papers were for the executive director and the Commissioners and I left them for later delivery." CP at 237.

¶7 The Port moved to dismiss the appeal, arguing that Witt had not properly served the petition. The court granted the motion and dismissed the appeal for "failure of the petitioner to serve the Port . . . within the required time limit of RCW [36.70C.040](#) (3)." CP at 240.

#### ANALYSIS

¶8 Witt argues that RCW [4.28.080](#) 1 contains a catch-all provision at subsection (9) for service on all unspecified corporate entities and that the Port falls into that category as a municipal corporation otherwise unspecified in the

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statute. She reasons that because Hollingbery was an "office assistant" under subsection (9), her process server properly served the Port on November 14 under RCW [4.28.080](#) (9).

1. Statutory Construction

a. The Statutory Scheme

[1-3]¶9 The legislative directive of LUPA is clear: service of process "must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW [4.28.080](#) ." RCW [36.70C.040](#) (5). We have required strict compliance with LUPA's procedure. *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island* , [106 Wn. App. 461](#) , 467, 24 P.3d 1079 (2001). Consistent with this mandate, in *Overhulse Neighborhood Ass'n v. Thurston County* , [94 Wn. App. 593](#) , 972 P.2d 470 (1999), we emphasized that "[a] land use petition is barred, and the court may not grant review, if timely service is not completed in accordance with LUPA's procedures." *Overhulse* , [94 Wn. App. at 598](#) (citing RCW [36.70C.040](#) (2)). Further, in *Overhulse* we concluded that the "explicit statutory language [of LUPA] forecloses the possibility that the doctrine of substantial compliance applies." *Overhulse* , [94 Wn. App. at 598](#) (citing *Union Bay Pres. Coalition v. Cosmos Dev. & Admin. Corp.* , [127 Wn.2d 614](#) , 620, 902 P.2d 1247 (1995)).

b. Personal Service Under RCW [4.28.080](#) (9)

[4]¶10 The Port agrees with Witt that RCW [4.28.080](#) (9) applies to service on the Port as a municipal corporation. RCW [4.28.080](#) (9) authorizes service on the president or other head of the company or corporation. It also authorizes service on the registered agent, secretary, cashier or managing agent of the president or other head of the company or corporation. One can also serve the secretary, stenographer or office assistant of the president or other head of the company or corporation. Or one can serve the registered agent, secretary, cashier or managing agent. Witt argues

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that her service on Hollingbery was good because he was an office assistant. The Port counters that serving an office assistant is insufficient; Witt had to serve an office assistant *of the president* .

¶11 We follow the plain language of RCW [4.28.080](#) (9). Hollingbery may have qualified as an office assistant, but Witt presented no evidence that he was an office assistant of the president. Witt's service on Hollingbery did not meet the requirements of subsection (9). Accordingly, the trial court did not err in ruling that Witt failed to timely serve the Port.

## 2. Attorney Fees

[5]¶12 The Port asks for attorney fees under RCW [4.84.370](#) . Under that provision, a party who prevails in an appeal of a land use decision at the administrative and judicial level is entitled to an award of attorney fees incurred before the Court of Appeals. RCW [4.84.370](#) (1). But we have limited RCW [4.84.370](#) to require that the "prevailing" party prevail "on the merits" in an adversarial proceeding. *Overhulse* , [94 Wn. App. at 601](#) . In *Overhulse* , as here, the superior court dismissed a neighborhood association's land use petition for lack of jurisdiction; thus, the court did not reach the merits. *Overhulse* , [94 Wn. App. at 601](#) . We refused to award attorney fees to the county because it had not prevailed on the merits.

¶13 Division One has disagreed with *Overhulse* , pointing out that RCW [4.84.370](#) does not explicitly require that a party prevail on the merits. *Prekeges v. King County* , [98 Wn. App. 275](#) , 285, 990 P.2d 405 (1999).

¶14 Indeed, RCW [4.84.370](#) does not expressly limit the award of attorney fees to cases in which the lower court decided "the merits."<sup>2</sup> But the statutory language in its

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entirety supports our conclusion that the legislature intended to allow attorney fees only to a party who prevails on the merits. The statutory language limits the award of attorney fees to a "prevailing party" or a "substantially prevailing party" on appeal of " *a decision* by a county, city, or town *to issue, condition, or deny a development permit* ." RCW [4.84.370](#) (emphasis added). And RCW [4.84.370](#) (2) allows fees only if the government agency's decision is upheld by both the superior court and the Court of Appeals. Here, neither the trial court nor this court considered the Port's decision to uphold issuing a mitigated determination of non-significance. Instead, as in *Overhulse* , we have considered whether Witt properly served the Port under RCW [4.28.080](#) . Thus, the Port is not entitled to attorney fees because the superior court and the Court of Appeals have not upheld or even considered its decision.

¶15 Moreover, the statutory language "substantially prevailing" suggests that the legislature intended the fees and costs provision to apply only in cases in which the merits of a land use decision are decided. A party does not "substantially prevail" on a procedural issue. Instead, a party "substantially prevails" when a majority of its substantive issues are decided on the merits.

¶16 Affirmed.

BRIDGEWATER and VAN DEREN , JJ ., concur .

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