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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

AIRPORT COMMUNITIES COALITION;
and CITIZENS AGAINST SEA-TAC
EXPANSION,

Petitioners,

v.

STATE OF WASHINGTON,
POLLUTION CONTROL HEARINGS
BOARD; STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and PORT
OF SEATTLE, a municipal corporation of the
State of Washington,

Respondents.

No. 02-2-00029-8

**RESPONDENT PORT OF SEATTLE'S
MOTION TO DISMISS PETITION FOR
REVIEW OF AGENCY ACTION**

I. RELIEF REQUESTED

Pursuant to Civil Rule 12(b)(6), respondent Port of Seattle moves the Court for an Order dismissing Petitioners Airport Communities Coalition's and Citizens Against Sea-Tac Expansion's Petition for Review of Agency Action. Even accepting as true all of the facts alleged in the Petition for Review, there is no basis on which relief sought by the petition can be granted. Dismissal of this action is therefore appropriate.

AR 005050

1 **II. STATEMENT OF FACTS**

2 In reviewing a CR 12(b)(6) motion to dismiss, the Court must accept as true the
3 factual allegations of the complaint. *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187
4 (1977). All of the facts relevant to this motion are contained in Petitioners Airport
5 Communities Coalition’s and Citizens Against Sea-Tac Expansion’s (collectively, “ACC’s”)
6 Petition for Review of Agency Action. Those relevant facts, which the Port does not
7 challenge, are as follows:

- 8 • On August 10, 2001, the Washington Department of Ecology (“Ecology”)
9 issued an order that included a § 401 Water Quality Certification (“401
10 Certification”) for the Port of Seattle’s proposed third runway at the Seattle-
11 Tacoma International Airport. [Petition, ¶ 6.7.]
- 12 • On August 23, 2001, ACC filed its notice of appeal of the 401 Certification to
13 the Pollution Control Hearing Board (“PCHB”). [Petition, ¶ 6.7.] On
14 September 12, 2001, ACC filed its Motion to Stay the Effectiveness of the
15 Certification. [Petition, ¶ 6.8.]
- 16 • On September 21, 2001, Ecology issued a revised 401 Certification. [Petition,
17 ¶ 6.10.] ACC filed a Notice of Appeal of the revised 401 Certification on
18 October 1, 2001. [Petition, ¶ 6.11.]
- 19 • On November 26, 2001, the PCHB issued an Order on Motion to Reconsider
20 Motion to Strike, ruling that a particular document obtained by ACC through
21 the Public Disclosure Act and offered in support of ACC’s Motion for Stay
22 was privileged. [Petition, ¶ 6.12.]
- 23 • On December 17, 2001, the PCHB issued an Order on Motion to Supplement
24 the Record, denying ACC’s motion to introduce additional documents it
25 obtained through the Public Disclosure Act into the record in support of its
26 Motion for Stay. [Petition, ¶ 6.13.]

27 **AR 005051**

1 **B. Petitioners Fail to State a Claim Upon Which Relief Can Be Granted.**

2 1. ACC's Request That the Court "Affirm" the PCHB's Order on Motion for
3 Stay Fails to State a Cognizable Claim.

4 The jurisdiction of a Washington superior court to review orders by an administrative
5 agency is "vested only in the manner specified by law." *Woodard v. Department of Labor*
6 *and Industries*, 188 Wn. 93, 97, 61 P.2d 1003 (1936) (citations omitted). Under RCW
7 43.21B.320, which governs judicial review of stays ordered by the PCHB, only a party
8 "aggrieved by the grant or denial of stay" may petition for review. The PCHB granted ACC's
9 motion for stay, although the order granting the stay mentioned only three of the five grounds
10 raised in the motion. [Petition, ¶ 7.2.] ACC's Petition for Review is therefore premised on
11 the strange theory that a party granted the full measure of relief it sought through agency
12 action nonetheless qualifies as an "aggrieved" party. More specifically, ACC contends that it
13 is entitled by this action to an "affirmation" of the PCHB's favorable ruling because the Board
14 engaged in an "unlawful procedure or decision-making process" by failing to discuss two of the
15 five grounds on which the ruling was sought.

16 ACC has no such right. Washington case law establishes the fundamental—and
17 logical—principle that a party that prevails in a specific administrative action is not aggrieved.
18 *See, e.g., Woodard v. Department of Labor and Industries*, 188 Wn. 93, 61 P.2d 1003 (1936)
19 (one who successfully applies for a finding of disability and an appropriate award of benefits
20 is not "aggrieved" and can not appeal to the superior court); *Carnation Co. v. Hill*, 54 Wn.
21 App. 806, 810, 776 P.2d 158 (1989), *affirmed*, 115 Wn.2d 184, 796 P.2d 416 (1990)
22 (characterizing a successful applicant to the industrial appeals board as "not aggrieved").

23 In a longstanding decision, the Washington Supreme Court has spoken on the specific
24 issue of aggrieved parties and the right to appeal. In *Elterich v. Arndt*, 175 Wn. 562, 27 P.2d
25 1102 (1933), the Court asserted,

26 It is essential, in order that a person may appeal or sue out a
27 writ of error, that he shall be aggrieved or prejudiced by the
judgment or decree; *appeals are not allowed for the purpose of*

1 *settling abstract questions, however interesting or important to*
2 *the public generally, but only to correct errors injuriously*
3 *affecting the appellant.* The record must show that the party
4 complaining was aggrieved by the judgment, as a reviewing court
5 cannot hear evidence to determine that question. The damage or
6 grievance which entitles a party to a writ of error or an appeal
 . . . must be a direct and positive one, affected by the judgment
 concluding and acting upon his rights; and such damage must be
 by the record, and not in consequence of it.

7 Id. at 563 – 64 [emphasis supplied].

8 In short, this Court cannot hear evidence on an “abstract question” not “injuriously
9 affecting” an appellant. The stay ordered by the PCHB has not "injuriously affected" ACC,
10 which moved for precisely the relief afforded by the PCHB’s Order. ACC now seeks
11 “affirmation” of that ruling, not reversal nor any modification whatsoever. Moreover, ACC
12 expressly premises its Petition on what it alleges to be "unlawful action” by the PCHB,
13 specifically its failure to consider alternative grounds for the relief sought in ACC’s Motion
14 for Stay. Such action, unlawful or not, is certainly "abstract." Even if one were to assume
15 that the PCHB did not rule specifically on two of ACC’s grounds for a stay, the PCHB’s
16 decision to grant the relief sought on three of the five grounds raised rendered the remaining
17 grounds moot. Whether relief could or should have been granted based on those remaining
18 grounds is a purely theoretical and abstract—and unnecessary—question to answer.

19 The Washington Supreme Court’s decision in *Ohnstad v. City of Tacoma*, 64 Wn.2d
20 904, 395 P.2d 97 (1964), perhaps best reveals the flaw in ACC’s Petition for Review. In that
21 case, retired employees of a municipal transit company acquired by the City of Tacoma sued
22 the City for pension benefits. The trial court held that the City in acquiring the company had
23 succeeded to the contractual obligations owed by the company to plaintiffs, and that based on
24 the terms of the contract the City owed no further obligation to contribute to the pension
25 fund. The employees appealed. The Washington Supreme Court, relying on the terms of the
26 contract, affirmed the ruling. In so doing, the Court refused to consider the “numerous
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1 constitutional issues raised” by the City as additional arguments in defense of the appeal. The
2 Court stated:

3 With reference to the appeal of the City, it would appear that it
4 is not really aggrieved as to the result, but desires to have the
5 case disposed of in its favor on one or more of the numerous
6 constitutional issues it has raised. . . . [W]e see no reason why
7 we should extend this opinion by some 15 pages to deal with
8 the constitutional issues raised (at the expense of all of the
9 lawyers who purchase these reports), absent any necessity
10 therefore. If we dispose of this case by assuming, without
11 deciding, that the City is wrong in each of its contentions
relative to [constitutional provisions] and concerning the
unconstitutionality of any payments it might make for the
benefit of the plaintiffs, we still reach a result which negates any
present liability of the City

12 *Id.* at 906-07. Essentially, the Court ruled that the City won, and was not entitled to a bigger,
13 better win on additional grounds. It therefore refused to consider additional grounds for the
14 ruling “unless absolutely necessary to a determination of the appeal.” It held that its ruling
15 “render[ed] unnecessary a consideration” of the constitutional arguments raised. *Id.* at 907
16 [Citations omitted.]

17 The *Ohnstad* decision and the other cases discussed above confirm that it is the very
18 design of CR 12(b)(6) to reserve judicial action for legally cognizable claims and to provide
19 courts the means to conserve costs and promote judicial economy by dismissing actions
20 presenting no factual or legal basis for relief. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829
21 F.2d 729, 738 (9th Cir. 1987). One court has characterized a trial court’s failure to dismiss a
22 complaint that does not establish the requisite elements of the cause of action as an
23 “abdication of judicial responsibility” because of the wasted time and costs required for
24 discovery and trial. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir.
25 1980). This Court should not entertain ACC’s theoretical and abstract arguments to “affirm”
26 a ruling made in its favor.

1 2. ACC's Request That the Court Set Aside the PCHB's Order on Motion to
2 Reconsider Motion to Strike and Order on Motion to Supplement the Record
3 Fails to State a Cognizable Claim.

4 In its Petition for Review, ACC alleges, albeit wrongly, that RCW 43.21B.320 entitles
5 it to judicial review of the PCHB's Order Granting Stay. The Petition fails, however, to offer
6 any factual or legal support for its claim that this Court's review of the PCHB's November
7 26, 2001, Order on Motion to Reconsider Motion to Strike and December 17, 2001, Order on
8 Motion to Supplement the Record is proper. [See Petition, Section VI "Facts Entitling
9 Petitioners to Judicial Review, and Section VII "Reasons Relief Should Be Granted."] ACC's
10 failure to even assert in its Petition a recognized legal basis for review of itself warrants
11 dismissal of these components of the Petition and this action under CR 12(b)(6). Further, a
12 simple evaluation of those motions leads to the inescapable conclusion that review of these
13 agency rulings is neither justified nor necessary.

14 In its Motion to Reconsider Motion to Strike, ACC asked the PCHB to consider a
15 memo obtained through the Public Disclosure Act in conjunction with the board's evaluation
16 of its Motion for Stay. The PCHB ruled that the document was privileged and therefore
17 denied the motion. [Petition, ¶ 6.12.] In its Motion to Supplement the Record, ACC asked
18 the PCHB to consider additional documents pertaining to the Port's low stream flow analysis
19 and mitigation proposal in conjunction with the board's evaluation of its Motion for Stay.
20 The PCHB determined that "[r]eopening the record would not have provided the Board new
21 information" and therefore denied the motion. [Petition, ¶ 6.13; Order on Motion to
22 Supplement the Record, attached as Exhibit C to ACC's Petition.] As discussed above, after
23 issuing its ruling on these motions, the PCHB entered its Order Granting Stay.

24 The critical fact is that both evidentiary Orders on which ACC now seeks this Court's
25 review asked the PCHB to consider factual information *supporting* ACC's Motion for Stay.
26 Because the PCHB granted the stay motion, whether the additional information would have
27 further supported the ruling is a theoretical and abstract question improper for review by this
28 Court. See Section III(B)(1), *supra*. The documents ACC sought unsuccessfully to introduce

1 in support of its Motion for Stay are no different than the additional grounds for relief raised
2 by ACC but not reached by the board. Just as those additional grounds for stay provide no
3 basis for judicial review, the PCHB's rulings on evidence considered in granting the stay
4 provide no such basis.

5 **IV. CONCLUSION**

6 Because the PCHB's Order Granting Stay afforded ACC the full measure of relief it
7 sought, ACC does not qualify as an "aggrieved" party under Washington law and is therefore
8 not entitled to judicial review under RCW 43.21B.320. The Court should dismiss this action
9 with prejudice on the grounds that ACC's request for an "affirmation" of the PCHB's Order
10 Granting Stay, and its request to set aside two evidentiary orders, fail to state a cognizable
11 claim.

12 Respectfully submitted this 16 day of January, 2002.

13 **PORT OF SEATTLE**

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