IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SCOTT C. HOPPER,	)	
	)	No. 66325-9-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
SNOHOMISH COUNTY,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: December 19, 2011

Spearman, J. — Scott Hopper, a developer, seeks reversal of summary judgment granted in favor of Snohomish County (the County) so that he may pursue his lawsuit below, in which he alleged that the fees he was charged under the County's development permit fee schedule were unlawful. The trial court dismissed the lawsuit, concluding that Hopper lacked standing because the County refunded his permit fees and that his claims became moot when his fee dispute was granted by the County's Department of Planning and Development Services (PDS). On appeal, Hopper asserts three main arguments: (1) the County impermissibly refunded his permit fees; (2) his claims were not moot; (3) even if his claims were moot, the public interest exception to the mootness doctrine applied. We reject his arguments as to why the County could not refund his permit fees; conclude that he lacked standing and his claims were

moot; and conclude that the public interest exception to the mootness doctrine does not apply. We affirm.[1]

FACTS

Hopper is a developer and builder of residential homes. On May 26, 2010, he submitted to PDS a grading permit application (GPA) for real property located in unincorporated Snohomish County. When he submitted the GPA, he was informed by PDS that his documentation was not complete because a "critical area study" of the property was needed. Hopper insisted that PDS accept the GPA notwithstanding the lack of a critical area study. PDS accepted Hopper's GPA and assessed him $459.24 in permit application fees. Hopper paid the fees with a check on which he wrote "paid under protest."

On June 1, 2010, Hopper sent a letter to PDS addressed to "Heather Coleman, Acting Director," invoking the administrative permit fee appeal procedures of Snohomish County Code (SCC) Section 30.86.011.[2] The letter was the first time anyone had invoked the fee dispute procedure of SCC 30.86.011. At the time PDS received Hopper's letter, the acting director of PDS

[1] We express no opinion on the merits of Hopper's lawsuit that certain fees charged under the County's development fee schedule violate RCW 82.02.020.

[2] SCC 30.86.011, which took effect on January 1, 2009, provides:

> Fees are due and payable at the time services are requested unless otherwise specified in this chapter or state law. Any dispute involving fees shall be resolved by the director. A written request to resolve a fee dispute shall be submitted within 30 days of the fee payment. For the purpose of computing elapsed calendar days, the day after the fee payment date shall be counted as day one. The director shall issue a written determination within 30 days of receipt of the request. The director's decision shall be final. Permit review shall be stayed during the pendency of the dispute resolution.

was in fact Larry Adamson. The letter claimed that the fees Hopper had been assessed were excessive and included fees not authorized under RCW 82.02.020. He requested a refund of any "unauthorized" fees and the 3 per cent technology surcharge. The facts from this point forward are summarized chronologically:

> June 9, 2010: PDS notified Hopper by letter that he needed to submit a critical area study for PDS to continue processing his permit application. He was notified that he had to pay approximately $720 in additional permit application review fees in connection with the critical area study.
>
> June 2010: Larry Adamson, acting director of PDS, retired without responding to Hopper's June 1, 2010 letter.
>
> July 1, 2010: Barbara Mock temporarily assumed the position of acting director of PDS. She failed to respond to Hopper's June 1 letter within 30 days.
>
> July 7, 2010: Hopper filed (1) an "Appeal of PDS Director's Final Decision – SCC 30.86.011" with the Office of the Snohomish County Hearing Examiner and (2) a class-action "LUPA Appeal and Complaint for Declaratory and Writ Relief and Just Compensation Including Disgorgement" in Snohomish County Superior Court.[3] In both of these filings he alleged that the GPA permit fees he had paid were excessive, unconstitutional, and violated RCW 82.02.020. He paid a $500 filing fee to the County for his appeal to the hearing examiner. His appeal filing stated that he did not believe the hearing examiner had jurisdiction to hear the appeal but that he was filing it to exhaust his administrative remedies. He requested the hearing examiner to dismiss his appeal.
>
> July 13, 2010: Mock acknowledged by letter that PDS had failed to respond to Hopper's June 1 letter within 30 days, granted Hopper's "administrative appeal," and enclosed a check refunding the entire amount of fees he had paid on May 26, 2010.

[3] King County Superior Court Case No. 10-2-24746-7 SEA.

July 16, 2010: Hopper responded by letter to Mock's July 13 letter, refusing to accept the refunded fees and enclosing the refund check. He stated that while Mock's letter purported to grant his "appeal," he had not made an appeal to PDS. He wrote, "Because refunding my grading permit fee charge does not address the relief I requested in my June 1, 2010 letter, I am returning the check and will pursue my court action to obtain the relief to which the putative class and I are entitled."

July 19, 2010: Hopper's attorney, Bill Williamson, attempted to file a second administrative appeal with the hearing examiner, challenging Mock's granting of his appeal and refund of the fees. PDS refused to accept the documents and filing fee on the ground that the county code does not provide for an appeal to the hearing examiner of a decision issued under SCC 30.86.011.

July 19, 2010: PDS offered Williamson the $459.24 refund check for the permit fee that Hopper had returned to Mock. Williamson refused to accept it. The County subsequently deposited $459.24 into the registry of King County Superior Court.

July 15, 2010 and July 21, 2010: By substantially identical orders with these dates, the hearing examiner dismissed Hopper's "Appeal of PDS Director's Final Decision – SCC 30.86.011" pursuant to SCC 30.71.060.[4] The orders noted that the acting director of PDS granted Hopper's appeal on July 13, 2010 and returned the permit fees: "Accordingly, there is no dispute for this office to review and we are closing this matter . . . ."

July 23, 2010: PDS mailed Hopper a refund of the $500 fee that he paid to file his appeal with the hearing examiner.

July 23, 2010: The County filed a motion in superior court to dismiss Hopper's lawsuit, citing lack of standing and mootness and claiming that the full refund of fees accompanying the July 13, 2010 decision letter required dismissal under Orwick v. Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984).

July 28, 2010: PDS's refund check for the $500 filing fee sent July 23 was cashed.

[4] It is unclear why two orders exist. Although the formatting of the text differs, the two orders are identical in substance. The July 15 order contains an electronic signature, while the July 21 order contains the physical signature of the hearing examiner. The County claims that the date on the July 15 order was the result of clerical error and that Mock actually signed the order on July 21.

July 29, 2010: Under a separate cause number,[5] Hopper filed a second LUPA appeal and class-action complaint for declaratory and writ relief of the examiner's order in superior court. The filing challenged PDS's refusal to accept his second administrative appeal.

August 16, 2010: The trial court granted the parties' joint motion to consolidate both cause numbers and dismiss the LUPA appeals.

September 1, 2010: Clay White became the permanent director of PDS, replacing acting director Mock.

September 24, 2010: The County filed a motion to dismiss the consolidated case, again citing lack of standing and mootness.

October 7, 2010: Hopper filed the critical area study application and paid $741.60, which included a technology surcharge fee of $21.60. He paid the $720 critical areas review fees by check, but noted on the check, "C.A.R. Fee Paid under Protest." He paid the technology surcharge in cash.

October 13, 2010: Hopper filed a motion for class certification.

October 18, 2010: Hopper filed a response to the County's motion to dismiss.

October 20, 2010: White notified Hopper that his appeal regarding the GPA fees had been granted by Mock on July 13, 2010; observed that Hopper had recently submitted a critical areas study as part of the GPA and paid $741.60, most of it "under protest" as noted on the check; and noted that "pursuant to Ms. Mock's July 13, 2010 decision, it appears PDS should not have required you to pay any additional permit fees related to your Grading Permit Application." The letter cited SCC 30.86.015(5) as authorizing the refund of any permit application fees collected in error and refunded $741.60 to Hopper.

October 20, 2010: The same day, the County filed its reply brief. This reply was supported by a Supplemental Declaration of Prosecuting Attorney Robert Tad Seder. CP 960-72. Seder's declaration included the October 20, 2010 letter from White to Hopper.

[5] King County Superior Court Case No. 10-2-27596-7SEA.

> October 22, 2010: A hearing on the County's motion to dismiss was held. The trial court stated it was considering the motion as a summary judgment motion, not a motion to dismiss.[6] Hopper stated that he had not had an opportunity to conduct discovery regarding the issues raised in the County's motion. The trial court agreed to delay its ruling until after Hopper conducted a deposition of Mock. This discovery was to involve issues of standing and mootness.
>
> November 3, 2010: Hopper conducted a deposition of Mock.

On November 5, 2010, the trial court made an oral ruling on the motion for summary judgment. It concluded that SCC 30.86.011 contained mandatory language requiring the County to respond to Hopper within 30 days and that the County acted within its rights in giving Hopper a complete refund after failing to do so. It ruled that the lawsuit could not proceed with all of Hopper's fees being refunded, which made the case moot, and dismissed the lawsuit. It also ruled that Orwick was inapposite because that case discussed an exception to the mootness doctrine where there had been a full adjudication on the merits but the case had become moot. The court rejected Hopper's argument that the case was capable of repetition yet evading review, stating that there was no evidence that this was the case. A written order was entered, incorporating the court's oral ruling by reference. Hopper moved for reconsideration. The trial court denied his motion. This appeal followed.

DISCUSSION

This court reviews an order granting summary judgment de novo,

[6] While the County's motion was originally brought as a CR 12(b) motion to dismiss, it included attachments. Accordingly, the motion was considered by the court as a CR 56 motion for summary judgment.

engaging in the same inquiry as the trial court. Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Standing and mootness are issues of law that we review de novo. Wolstein v. Yorkshire Ins. Co. Ltd., 97 Wn. App. 201, 206, 985 P.2d 400 (1999); Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 29, 891 P.2d 29 (1995).

Hopper makes three main arguments on appeal: (1) the County impermissibly refunded his permit fees; (2) he did not lack standing and his claims were not moot; and (3) even if his claims were moot, the public interest exception applied.[7] We address these arguments in turn and conclude the trial court did not err in dismissing Hopper's claims due to lack of standing and mootness.

County's Refund of Fees

The trial court's ruling on standing and mootness relied on the fact that Hopper ultimately paid none of the permit fees because they were refunded by PDS. Hopper claims that the refund was a "mootness device" that the County

[7] As a preliminary matter, Hopper filed a motion to strike portions of the County's designation of supplemental clerk's papers, specifically a letter dated January 13, 2011 from the County to Hopper denying his grading permit application for failure to comply with the critical areas provisions of the SCC. The County had e-filed this document in superior court in March 2011, months after summary judgment was granted in its favor. The County filed a motion to this court to accept additional evidence, relating to the same document. We grant Hopper's motion to strike and deny the County's motion to accept additional evidence. The County filed this evidence with the trial court months after the court's decision in this matter and thus, it was not considered by the court in reaching its decision.

was not permitted to give because: (1) SCC 30.86.011 was preempted by RCW 82.02.020; (2) SCC 30.86.011 itself did not permit the refund; (3) the County's actions violated procedural safeguards; and (4) the refund was ultra vires and a private gift of public funds. We reject Hopper's arguments and conclude that the County's refund of his fees was not prohibited.

First, Hopper argues that the County's actions and the dispute provisions of SCC 30.86.011 were preempted by RCW 82.02.020. He cites Home Builders Ass'n of Kitsap County v. City of Bainbridge Island, 137 Wn. App. 338, 153 P.3d 231 (2007) and Cobb v. Snohomish County, 64 Wn. App. 451, 829 P.2d 169 (1992). RCW 82.02.020 does not preempt SCC 30.86.011. RCW 82.02.020 states that, with exceptions not relevant here, the state preempts the field of imposing certain taxes. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 753, 49 P.3d 867 (2002). It goes on to provide:

> Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW, including reasonable fees that are consistent with RCW 43.21C.420(6).

RCW 82.02.020. The statute does not prohibit a local government from implementing procedures for fee dispute resolution. Indeed, as it expressly permits a county to charge certain "reasonable fees," a county that chooses to charge fees must enact a procedure for doing so, and that may include

procedures for dealing with fee disputes that arise. "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. Home Builders and Cobb do not support Hopper's position. Those cases address whether certain taxes or fees fell within the exceptions to the taxes preempted under RCW 82.02.020.

Hopper next argues that SCC 30.86.011 did not authorize the fee refund. App. Brief at 21-22. While SCC 30.86.011 is silent about the consequences should PDS fail to respond within 30 days, PDS's decision to issue a full fee refund is a reasonable interpretation. "It is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement." Mall. Inc. v. City of Seattle, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) (citations omitted). Hopper was the first person to invoke the provision's fee dispute procedure, and there is no evidence in the record that PDS applied SCC 30.86.011 inconsistently: that another individual contested the permit fees and PDS missed the 30-day deadline, but PDS did not return the fees.

Hopper also claims the County's actions violated procedural due process, appearance of fairness,[8] the ex-parte prohibitions of RCW 42.36.060, and local

[8] This claim relates to the two hearing examiner orders dated July 15, 2010 and July 21, 2010. Hopper claims the hearing examiner must have received knowledge of Mock's letter between July 13 and July 15 through ex parte contact with PDS to rule that there was no dispute to review. He contends he did not receive a copy of the July 15 order. The County asserted that the duplicate orders issued by the hearing examiner were the result of clerical error and were identical except for formatting and dates. It claims that the July 15 order, which was attached to the County's motion to dismiss, was generated by PDS staff and contained an electronic

hearing requirements. He contends SCC 2.02.125(7) required that any challenge to his appeal before the hearing examiner based on standing or mootness, as alleged by the County in its motion to dismiss, be preceded by a hearing. We reject these claims, which we presume Hopper raises because the hearing examiner ultimately closed his appeal. Initially, SCC 2.02.125(7) permits the hearing examiner to summarily dismiss an appeal if, among other reasons, it is "without merit on its face, frivolous, [or] beyond the scope of the examiner's jurisdiction. . . ." Here, the hearing examiner's order was based on there being no dispute to review, which was equivalent to determining that the appeal was without merit on its face. SCC 2.02.125(7) was not violated.

Hopper does not argue that SCC 2.02.125(7) itself provides insufficient process. Even assuming he had the right to a hearing, he does not explain how that affected the substance of the hearing examiner's order, which was based on Hopper's appeal to PDS being granted and his fees being refunded. Moreover, he sought the very outcome with which he now appears to take issue. In his July 7 appeal letter, he wrote that he did not believe the hearing examiner had jurisdiction to hear the appeal and that he was only filing it to exhaust his administrative remedies.

Finally, to the extent that Hopper claims these alleged procedural defects

---

signature, and that Barbara Dykes, the hearing examiner, actually signed the order on July 21. Hopper received the July 21 order the next day, July 22. It is impossible to determine from the record why there were two orders dated July 15 and July 21, whether there was any ex-parte contact, or whether the earlier order was due to clerical error. The trial court did not make any findings as to this issue.

affected the trial court's ruling on summary judgment, we note that the court's ruling did not rely on the hearing examiner's order closing the appeal. Rather, it was based on these reasons: (1) SCC 30.86.011 required the PDS director to respond within 30 days; (2) the director did not; (3) and PDS therefore refunded his permit fees. The trial court concluded that the director acted within her rights and that because all of the fees had been refunded, the case was moot.

Finally, Hopper argues the fee refund was ultra vires and a private gift of public funds in violation of article VIII, section 7 of the Washington State Constitution.[9] He also contends that SCC 30.86.015(5)(b) prohibits full refunds where services have been commenced and points out that PDS services were incurred visiting his property. But Hopper does not support his argument that the County's refund was ultra vires and a gift of public monies with clear authority. "A use of public funds is presumed constitutional, and the burden of overcoming that presumption lies with the individual making the challenge." Hudson v. City of Wenatchee, 94 Wn. App. 990, 995, 974 P.2d 342 (1999). SCC 30.86.011 does not on its face purport to make an expenditure of public funds, and moreover it is unclear how a refund of monies that the County had no statutory obligation to collect in the first place is a gift. We also disagree that SCC 30.86.015(5)

[9] Article VIII, section 7 of the Washington State Constitution provides:

> **Credit not to be loaned**. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

prohibited the refund.[10] While it states that the director may authorize certain refunds, it does not prohibit refunds for other, non-enumerated reasons.

Standing and Mootness

The trial court concluded that Hopper lacked standing and his claims were moot after PDS granted his fee dispute and refunded all of the fees. Hopper contends the refund did not make his claims moot because he will face ongoing permit fees with his current projects and future developments. He contends the trial court could have provided effective declaratory, injunctive, and writ relief.

We agree with the trial court. Hopper lacked standing to challenge the County's permit fee schedule because he has not been adversely affected by it.[11] "Standing is a 'party's right to make a legal claim or seek judicial enforcement of a duty or right.'" State v. Link, 136 Wn. App. 685, 692, 150 P.3d 610 (2007) (quoting Black's Law Dictionary 1442 (8th ed. 2004)). Under the standing doctrine, "'one who is not adversely affected by a statute may not question its validity.'" Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267,

[10] SCC 30.86.015(5) states:

> The director may authorize the following refunds:
> (a) 100 percent of fees collected by error of the department;
> (b) Fee refunds for permit applications or services requested before the commencement of services or 60-days, whichever occurs first;
> (c) Fees collected for the DOT and Health Department;
> (d) SEPA environmental impact statement (EIS) refunds pursuant to SCC 30.86.500(6)(c); and
> (e) Appeal related refunds pursuant to SCC 30.71.050(4), SCC 30.72.070(5) and SCC 30.86.610(1).

[11] We note that Hopper did not allege taxpayer standing below. And although he moved for class-action certification, the issue was not ruled upon before his lawsuit was dismissed.

281, 937 P.2d 1082 (1997); Walker v. Monro, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). To maintain a cause of action to enforce private rights, a plaintiff must show that he or she has a real, present, and substantial interest in the cause of action, not a mere expectancy or a future, contingent interest. CR 17; State ex rel. Hays v. Wilson, 17 Wn.2d 670, 672, 137 P.2d 105 (1943). The plaintiff must also show that he or she will be benefited by the relief granted. Id. at 672.

Here, Hopper disputed certain fees he paid in association with the GPA. PDS concluded that in handling the dispute, it had violated its own rules and therefore refunded all of his fees. The hearing examiner dismissed his appeal, and PDS returned the filing fee with respect to that appeal. Hopper ultimately paid none of the fees he seeks to challenge and has suffered no injury in fact. He claims he will be subject to the challenged fees in present and future permit applications. But there is no evidence in the record that he paid or will have to pay any fees for any present applications, and fees for future applications involve a contingent, hypothetical interest. While Hopper did seek declaratory relief, a party must have standing to seek a declaratory judgment under the Uniform Declaratory Judgments Act, (UDJA), chapter 7.24 RCW. Although Hopper disputes the County's contention that the proper avenue for him to obtain standing is via a taxpayer derivative suit, he does not otherwise explain on what basis he has standing in this case.[12] He also argues that the trial court

[12] In addition, before a court's jurisdiction may be invoked under the UDJA, a justiciable controversy must exist. To be justiciable, a claim must involve: "'(1) . . . an actual, present and

could have ordered injunctive relief, but one seeking relief by a temporary or permanent injunction must show a clear, legal or equitable right and a well grounded fear of immediate invasion of that right. Hays, 17 Wn.2d at 673. Hopper does not explain how he has made this showing.

We also conclude that Hopper's claims became moot when the director of PDS granted his fee dispute and refunded the fees he had paid, within a month after he filed his first complaint with the trial court. A case is moot "if it is deprived of its practical significance or becomes purely academic." In re Marriage of Irwin, 64 Wn. App. 38, 59, 822 P.2d 797 (1992). After Hopper's fee dispute was granted, his challenge to the fee schedule was deprived of its practical significance.

Public Interest Exception to Mootness Doctrine

Hopper contends that even if the trial court was correct in ruling that his claim was moot, the court erred when it failed to apply the public interest exception and permit his claim to proceed to trial. Hopper cites Hart v. Dep't of Soc. and Health Servs., 111 Wn.2d 445, 759 P.2d 1206 (1988) and its three-factor analysis for determining whether the public interest exception is met. The factors are: "(1) whether the issue is of a public or private nature; (2) whether an

existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.'" Pasado's Safe Haven v. State, 162 Wn. App. 746, 761, 259 P.3d 280 (2011) (quoting DiNino v. State,102 Wn.2d 327, 330-31, 684 P.2d 1297 (1984)). Hopper does not explain, nor can we discern, how the four-part test is met in this case.

authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." Id. at 448 (citations and quotation marks omitted).

However, this test does not apply at the time a trial court dismisses a case for mootness. A trial court cannot provide an "authoritative determination" that will "provide future guidance to public officers." Rather, the public interest exception applies when a case becomes moot after a trial court has reached part or all of

the merits of a case.[13] Then, an appellate court may, nonetheless, retain and decide the appeal to provide guidance to future courts. Westerman v. Cary, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994). Hopper cites no authority for the proposition that a trial court may, under some circumstances, try a moot case. The public interest exception did not apply here.[14]

Attorney Fees on Appeal

The County requests costs and attorney fees under RAP 18.1, RCW 4.84.010, and RCW 4.84.080. It makes no substantive argument in support of its request and it is denied.

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Becker, J.

[13] The Washington Supreme Court has stated:

> [T]he moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim. In those cases, the facts and legal issues had been fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.
>
> In this case, however, petitioners' claim for declaratory and injunctive relief became moot before trial. Dismissal of their claim will not involve a waste of judicial resources and will avoid the danger of allowing petitioners to litigate a claim in which they no longer have an existing interest.

Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (internal citations omitted).

[14] Hopper also argues that the issue is capable of repetition yet evading review. But the "capable of repetition yet evading review" is a federal exception to the mootness doctrine, and the Washington Supreme Court has not yet adopted it. Hart v. Dep't of Social and Health Services, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988). We therefore decline to address this argument.