

63524-7

63524-7

No. 63524-7-I

(Snohomish County Superior Court No. 08-2-08223-5)

---

WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

---

DONNA and FRED BRESKE, wife and husband and the marital  
community composed thereof,

Petitioners/Appellants,

vs.

CITY OF EDMONDS, a Washington municipal corporation,

Respondent.

---

**APPELLANTS' REPLY BRIEF**

---

Charles A. Klinge, WSBA No. 26093  
Samuel A. Rodabough, WSBA No. 35347  
GROEN STEPHENS & KLINGE LLP  
11100 NE 8th Street, Suite 750  
Bellevue, WA 98004

Telephone: (425) 453-6206

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 JUN 23 AM 10:36

ORIGINAL

**Table of Contents**

**I. INTRODUCTION.....1**

**II. ARGUMENT.....3**

    A. The City’s Argument that this Court Cannot Review the Superior Court’s Final Order is Baseless.....3

    B. The Superior Court Improperly Interpreted the Plat Language.....9

    C. The Trial Court Erred In Ruling on Breskes’ Takings Claim.....13

    D. This Court Should Deny the Request for Attorney Fees.....16

        1. The City is Not Entitled to Fees Under the Statute Because The Administrative Decision Did Not Deny a Permit, and Because the Breskes are Not Challenging the Administrative Decision In this Appeal.....16

        2. The Attorney Fees Provision Is Unconstitutional.....18

**III. CONCLUSION.....22**

## Table of Authorities

### WASHINGTON CASES

<i>Burton v. Clark County</i> , 91 Wn. App. 505 (1998).....	14
<i>Conom v. Snohomish County</i> , 155 Wn.2d 154 (2005).....	4, 7, 8
<i>Crosby v. County of Spokane</i> , 137 Wn.2d 296 (1999).....	5
<i>Gig Harbor Marina, Inc. v. City of Gig Harbor</i> , 94 Wn. App. 789 (1999).....	19, 20
<i>Habitat Watch v. Skagit County</i> , 155 Wn. 2d 397 (2005).....	18, 19, 20
<i>Holder v. City of Vancouver</i> , 136 Wn. App. 104 (2006).....	7
<i>Hunter v. North Mason High School</i> , 85 Wn.2d 810 (1975).....	20
<i>J.L. Storedahl &amp; Sons, Inc. v. Cowlitz County</i> , 125 Wn. App. 1 (2004).....	6
<i>Nickum v. City of Bainbridge Island</i> , 153 Wn. App. 366 (2009).....	5
<i>Wellington River Hollow, LLC v. King County</i> , , 121 Wn. App. 224 (2002).....	6

### FEDERAL CASES

<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972).....	20
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	21
<i>Harrison v. Springdale Water &amp; Sewer Commission</i> , 780 F.2d 1422 (8th Cir. 1986).....	21
<i>In re Primus</i> , 436 U.S. 412 (1978).....	20

<i>In re Workers' Compensation Refund,</i> 46 F.3d 813 (8th Cir. 1995) .....	21
<i>Silver v. Cormier,</i> 529 F.2d 161 (10th Cir. 1976) .....	21

STATUTES

RCW 4.84.370 .....	16, 19, 20, 21
RCW 4.84.370(1).....	16, 18
RCW 4.84.370(2).....	17
RCW 36.70C.040(1).....	8
RCW 36.70C.080(1).....	4
RCW 36.70C.090.....	8
RCW 36.70C.120.....	7
RCW 36.70C.140.....	3, 4, 7, 23

## I.

### INTRODUCTION

Appellants Donna and Fred Breske (the “Breskes”) submit this Reply Brief in response to Brief of Respondent City of Edmonds (“City Brief”). The City Brief reduces the conflict in the parties’ positions. The City agrees with the Breskes that the City’s position has not been that the plat language creates a “permanent servitude” on Lot 1 for City stormwater that would preclude all development. The City also agrees with the Breskes that the City Code contains a variance option that would make any claim of taking based on denial of all use as unripe.

This case narrows down to whether the trial court went too far in making declaratory rulings, and if it did not go too far, whether those rulings were correct. As explained in its Oral Ruling, the trial court appears to have taken a position that clearly exceeded even the City’s own position (*i.e.*, no permanent servitude): “This is a case where there is language in the plat which dedicates and **gives the county a right to have this property.**” VRP 64 (emphasis added). However, the plat language simply doesn’t go that far, and states in relevant part:

The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public road rights of way,

nor shall it be blocked from draining along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

CP 213 (plat). The meaning of this standard plat dedication provision is not complicated. The County, and its successor, the City, can continue natural drainage of the roads “over and across” the lots, but land owners at their expense can enclose “drainage waters in culverts or drains” for the purpose of “rerouting across lots.” Yet, the trial court’s Final Order seems to turn this carefully balanced provision into an exclusive right owned by the City: “This language dedicates and gives the county a right to have this property for stormwater drainage.” App. B, at 2; CP 10 (Final Order, attached hereto as Appendix B); see also Paragraphs 1-5, 8-10, and 12.

The trial court Final Order goes too far and will severely impact the Breskes’ right to develop the property in the future. The trial court erred in going beyond the City’s own position and beyond what was required to affirm the Hearing Examiner decision. *The Breskes are not challenging the Hearing Examiner decision, so this case can be resolved by reversing the trial court and requiring a new order limited to upholding the Hearing Examiner decision.*

## II.

### ARGUMENT

#### A. **The City's Argument that this Court Cannot Review the Superior Court's Final Order Is Baseless**

The Breskes stated a clear and unmistakable Issue for this Court's review:

Whether the trial court erred in making declarations of rights rather than confining its ruling to an affirmance of the Hearing Examiner decision pursuant to RCW 36.70C.140?

Brief of Appellants at 3. The City's response is radical and illogical. Essentially, the City argues that this Court has no power to review whether the trial court exceeded its statutory authority in ruling on the Land Use Petition Act ("LUPA") claim. The city claims that because the Breskes are no longer challenging the Hearing Examiner decision, this Court cannot review the trial court's actions. City Brief at 13. The cases cited by the City fail to address the real issue and other cases clearly reject such a narrow, radical view of the power of this Court.

LUPA provides the authority for Superior Court determination in RCW 36.70C.140 which states:

The Court may **affirm or reverse** the land use decision under review **or remand it** for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties

and the public, pending further proceedings or action by the local jurisdiction.

The first issue presented for review by the Breskes asks whether the trial court properly exercised its authority under the statute. This is hardly a remarkable proposition for the appellate courts, even in the context of LUPA.

The premise of the City's argument is that when a LUPA matter goes on appeal, the appellate court must ignore what the Superior Court did and focus only on the underlying administrative decision. A quick look at one Supreme Court decision belies this radical assertion. The Supreme Court reviewed an order by the Superior Court in a LUPA case in *Conom v. Snohomish County*, 155 Wn.2d 154 (2005). The issue presented to the Supreme Court was whether the trial court acted properly under RCW 36.70C.080(1) in rejecting the land use petition and dismissing the case. Of course, the appellate court had authority to consider whether the trial court followed the statute. The same is true here.

*Conom* applies in this case. The issue presented is whether the trial court acted properly under RCW 36.70C.140. This Court has authority to decide whether the trial court properly followed a statutory provision in LUPA just as the Supreme Court reviewed a similar issue in

*Conom* under a different LUPA statute. *See also Nickum v. City of Bainbridge Island*, 153 Wn. App. 366 (2009) (reviewing trial court decision on timeliness and equitable tolling—issues that were not part of the underlying administrative decision).<sup>1</sup>

The cases cited by the City are not to the contrary. First of all, one premise of the City’s argument is that the Final Order is the same as Findings and Conclusions. The Breskes do not concede that premise. The order at issue is entitled Final Order, and not Findings and Conclusions or Findings of Fact and Conclusions of Law. The operative language at the beginning of the Final Order states: “IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS.” App. B, at 1; CP 9. The words “Finding” or “Findings of Fact” are never used. The word “conclusion” is part of two paragraphs. Regardless, the Final Order contains statements that appear to decide an issue (*i.e.*, the meaning of the plat language) in a manner that not even the City had argued and was beyond the issues decided by the Hearing Examiner.

The often recited standard of review for appeals of LUPA cases simply is not applicable when the issue is whether the trial court complied

---

<sup>1</sup> Similar cases reviewing the trial court order (as opposed to the underlying administrative decision) predate LUPA, such as *Crosby v. County of Spokane*, 137 Wn.2d 296 (1999) (superior court acted improperly in dismissing writ of certiorari challenging preliminary plat

with LUPA statutes. The City Brief cites the basic rules that the appellate courts “stands in the same shoes” as the Superior Court and reviews the administrative decision based on “the record of the administrative tribunal.” City Brief at 13 (citing *J.L. Stordahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1 (2004) and other cases).<sup>2</sup> The first issue presented to this Court does not relate to the record before the administrative tribunal, here the Hearing Examiner, rather it relates to a legal question related to the Superior Court actions in complying with the statutory limitations of LUPA.

Similarly, the City Brief goes on and cites the additional rule that the appellate court “disregards [trial court] findings and conclusions as surplusage.” City Brief at 14 (citing *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224 (2002)). This rule follows standard administrative law that the trial court is acting in its appellate capacity, and so the appellate court is directly reviewing the administrative decision. However, as already noted, the Final Order is not in the form of Findings and Conclusions. Further, the City’s assertion that the Final Order should be “ignored” and considered “surplusage” is belied by the City’s other

---

approval).

<sup>2</sup> Even this formulation of the rule is incomplete inasmuch as LUPA authorizes the trial court to allow supplementation of the record under certain circumstances in both quasi-judicial and non-quasi-judicial

argument that, “the potential future application of claim and/or issue preclusion arising from the trial court’s order are irrelevant to the Court of Appeals’ review.” City Brief at 16. By this contention, the City assumes that the Final Order **could have preclusive effect in the future**, yet the City wants this Court to ignore the Final Order as unimportant and ineffective “surplusage.” The City can’t have it both ways.

Another case cited by the City is easily distinguishable. The City cites to *Holder v. City of Vancouver*, 136 Wn. App. 104 (2006), but in that case, the petitioners abandoned their LUPA appeal at the trial court prior to final decision. City Brief at 14. For that reason, the *Holder* court stated that LUPA arguments were not properly before the Court of Appeals, and that it was inappropriate to resurrect those claims through discretionary review. Here, the Breskes pursued the LUPA claim in trial court to a final decision, the Final Order, to which the Breskes can appeal as a matter of right. RAP 2.2(a)(1), (3), 6.1. This case is like *Conom v. Snohomish County*, and not like *Holder*.

The City continues the same arguments by arguing that the only relief allowed by the appellate court is to follow RCW 36.70C.140, and affirm, reverse or remand the challenged land use decision. City Brief at 15-16. That is incorrect—Chapter 36.70C applies to review in the

---

administrative matters. *See* RCW 36.70C.120.

Superior Court, not appellate courts. RCW 36.70C.040(1), .090. Further, this contention is belied by the Supreme Court's decision in the appeal of a LUPA case in *Conom v. Snohomish County*. The Supreme Court in *Conom* did not even address the underlying land use decision and instead reversed the trial court based on the trial court's action.

The City then makes another extraordinary argument by asserting that this Court should not review the Superior Court's Final Order because claim or issue preclusion occurs in the future and not now. City Brief at 16-17. Of course, preclusion of claims or issues would occur in a later proceeding, but the basis would be the Final Order **in this proceeding**, including the trial court's declaration of rights regarding the plat language itself. It seems fairly apparent that the trial court was intending to rule on that meaning: "This is a case where there is language in the plat which dedicates and gives the county a right to have this property." VRP 64. The City directly argues that, since there is **only** a "**potential** impact on future permit applications," this Court should not address the issue. City Brief at 18. The City's admission of potential impact destroys its argument. The Breskes' position is that precisely because the Final Order admittedly has a "potential impact on future permit applications," this Court must review the Final Order on this issue.

This Court must reject the City's baseless assertions. This Court

clearly has authority to rule on the issues presented to this Court. The Court should rule that the Final Order goes beyond affirming the Hearing Examiner decision, and instead independently decides an issue that was unnecessary, and should not have decided the issue, especially in a manner not even requested by the City.

**B. The Superior Court Improperly Interpreted the Plat Language**

The Opening Brief of the Breskes thoroughly explains the trial court's mistakes in reviewing the plat language at pages 14-19. The City Brief seeks more to obfuscate, rather than address these contentions.

The Final Order read as a whole interprets the plat language as affording the City a permanent right to use Lot 1 for drainage of the plat, **without regard to the qualifying language** of the dedication that the land owner could reroute the storm drainage across the lot in culverts or drains (*i.e.* pipes). App. B, at 2; CP 10. The Final Order starts in paragraph 1 by quoting the plat language and then states: "This language [of the plat] dedicates and gives the county a right to have this property for stormwater drainage." App. B, at 2; CP 10. The other paragraphs in the Final Order make it clear what the trial court intended. Paragraph 2 states: "This is not a case where a landowner is being required to make a dedication or easement on behalf of another group of property owners." App. B, at 2; CP 10. In other words, the property owner made a voluntary dedication.

Paragraph 3 says that the County, the City, and the former property owner, “all acted in accordance with the assumption” that Lot 1, “had been designated as the stormwater repository for the surrounding plat.” App. B, at 2; CP 10. Paragraph 5 states that, “Lot 1 was **dedicated** to serve as the drainage system of the Plat,” and that:

This conclusion is not dependent exclusively on topography of the underlying property and the language on the face of the plat itself. It is confirmed by correspondence within the administrative record, the installation of drainage infrastructure within the plat, and the historical pattern of behavior by and between the relevant parties. There is no legal requirement that Lot 1 must be specifically identified and/or **dedicated** on the face of the plat for this purpose.

App. B, at 3; CP 11. The problem is that the Final Order uses the word “dedicated” in the context of discussing the plat dedication, which then is furthering the paragraph 1 statement that the plat language, “dedicates and gives the county a right to have this property for stormwater drainage.”

The Final Order removes all limitations on the dedication of Lot 1 for City stormwater drainage purposes, and specifically fails to address the clear limitation in the plat language that affords the property owner the right to pipe the stormwater across the property. Paragraph 8 makes it clear that the trial court completely missed this critical limitation by saying that the, “plat language **unequivocally** reserves the right to drain over time,” yet the plat language includes limitations to this statement.

App. B, at 3; CP 11. The Final Order ignores any limitation and improperly declares Lot 1 as land dedicated to City stormwater purposes.

The City Brief responds to these points at pages 18-21 by trying to ignore the plain language of the Final Order, and the potentially crippling impact on the Breskes in the future. First, the City makes the nonsensical argument that the paragraph 1 statement that the plat language (“dedicates and gives the county **a right to have this property for stormwater drainage**”) does not mean that “have” intends City ownership of Lot 1 because the next sentence refers to “Petitioner’s property.” City Brief at 18. The City cites this as an important point, but the logic is missing.

The City then moves to proclaiming that the City is not asserting, “an outright ownership interest in the subject property by virtue of the plat language,” and that the City has never contended, “that the Breskes’ property is burdened by a ‘permanent servitude’ and thus incapable of private development.” *Id.* at 19. That has a ring of reasonableness.

Unfortunately, the statements in the Final Order go beyond the City’s stated position in a manner that could severely handicap the Breskes’ future development of Lot 1. The Final Order is strongly, though not exclusively, based on the plat language in stating that the City has a perpetual right to use Lot 1 for storm drainage—a perpetual right without limitation. Thus, the Final Order declares that the plat language puts the

Breskes at the mercy of the City—that it essentially becomes pure City discretion as to whether it wants to allow development of Lot 1. Yet, the plat language cannot be fairly or reasonably interpreted in that way, since the property owner is given the corresponding right to pipe the stormwater across Lot 1. **The City Brief in its three pages on this topic never even discusses the corresponding right to pipe the stormwater—never mentions the Breskes’ argument at all.**

The explanation of what happened below is straight forward. The City took a careful position in the administrative process and before the trial court. Namely, the City did not take the position that Lot 1 was exclusively dedicated to City stormwater purposes and did not take the position that Lot 1 was unbuildable. The Breskes’ Opening Brief at pages 15 to 16 recites the clear statements to this effect, and the City confirms those points in its Brief by stating that the City does not contend that Lot 1 is subject to a permanent servitude. But, the trial court did not stick to the City’s limited position and decided to take the plat language further. The trial court judge expressed his understanding clearly in his Oral Ruling: “This is a case where there is language in the plat which dedicates and gives the county a right to have this property.” VRP 64. The trial court erred in this regard because this interpretation of the plat language fails to respect the limitation and corresponding right of the property owner to

pipe the stormwater across the property. The trial court's error permeates the Final Order.

**C. The Trial Court Erred In Ruling on Breskes' Takings Claim**

The City Brief misunderstands the Breskes' argument in regard to the takings claim. The Breskes' argument is that the Final Order goes beyond affirming the Hearing Examiner decision and declares essentially that the plat dedication language precludes a takings claim as follows:

10. The Petitioners have not demonstrated that the City has inversely condemned their property. There would be inverse condemnation **but for the plat language.**

App. B, CP 11; *see also* paragraph 9. The trial court is tying the no taking conclusion to the plat language, which in paragraph 1 holds that the City has a right to Lot 1 for storm drainage. Here in paragraph 10, the trial court seems to be accepting that the City has ownership or control of Lot 1 for storm drainage, but holds that no taking has occurred because the plat language gives the City that right. It is not perfectly clear what is meant by the trial court with this statement, but the concern is the future preclusive effect if read in this manner.

The City's response is that this result was self-created by the Breskes. City Brief at 22-23. The City argues that the Breskes should not have brought up a taking claim at all, but because it did, this Court should

reject the Breskes' appeal on this issue. *Id.* The City's response misses the whole point.<sup>3</sup>

The Breskes raised the taking issue in the context of unconstitutional conditions, citing *Burton v. Clark County*, 91 Wn. App. 505 (1998), and argued that the Hearing Examiner decision must be reversed as failing the twin tests of nexus and rough proportionality. CP 90. The Final Order appears to go beyond that argument, and at paragraph 10, ties the no taking holding to the plat language, which as argued above, was improperly construed by the trial court. The Breskes' argument here is that the trial court's improper reliance on the plat language cannot support the trial court's conclusion of no taking, and in doing so, the Final Order goes too far.

As explained above, the Final Order as a whole sets forth an erroneous position that the City has unfettered authority to control Lot 1 for storm drainage. That position reads the limitation of the plat language out of the equation—that the property owner has the corresponding right to reroute the drainage in pipes. Similarly, the Final Order might be understood to mean that the plat language limitation, and the property owner's right to build on the Lot 1, have been wiped out. The City never asked for that

---

<sup>3</sup> Besides missing the point, the City's argument that raising constitutional claims in a LUPA proceeding is "discretionary" fails to mention the effects of not raising those issues, namely claim and/or issue preclusion.

result, and so any such statement in the Final Order goes beyond the issues presented to the trial court.

The remainder of the City's arguments can be disposed of quickly because the City's contentions go beyond the Issues Presented as raised in the Breskes' Opening Brief. City Brief at 23-29. First, the City argues that the trial court properly determined that the takings claim was not ripe. On the one hand, the Breskes agree that a takings claim based on denial of all economic use is **not ripe** because a variance procedure is available (Opening Brief at 21), but that was not even the basis of the takings claim below. On the other hand, the Breskes' argued below that the takings claim based on nexus and rough proportionality **was ripe** to challenge the Hearing Examiner decision. However, since the Breskes no longer are pursuing that challenge here, whether the nexus and rough proportionality claim was ripe or not is not at issue here—so the City argument on that point matters little. City Brief at 23-25.

Next, the City argues three points: (1) there is no inconsistency in declaring a takings claim not ripe and declaring no taking; (2) that the City has not precluded all economical use of Lot 1; and, (3) the Hearing Examiner decision results in compliance with nexus and rough proportionality. City Brief at 25-29. Point 1 is answered by the last paragraph *supra*. As noted, the Breskes agree with point 2 that a variance procedure exists so whether all

use has been destroyed is not ripe. Regarding point 3, the Breskes are not arguing the merits of the Hearing Examiner decision here.

**D. This Court Should Deny the Request for Attorney Fees**

Assuming the Breskes' arguments above are not accepted by this Court, then this case presents a novel question under the attorney fees statute RCW 4.84.370 that applies to appeals of land use decisions. Also, the Breskes must of necessity challenge the attorney fees statute because it penalizes the appellant for appealing since the appellant is excluded from being awarded attorney fees.

**1. The City is Not Entitled to Fees Under the Statute Because The Administrative Decision Did Not Deny a Permit, and Because the Breskes are Not Challenging the Administrative Decision in this Appeal**

The statute does not automatically award attorney fees in every LUPA case. Rather, the statute provides for attorney fees when certain "land use decisions" are appealed. The statute states in part:

Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party **on appeal** before the court of appeals or the supreme court **of a decision** by a county, city, or town **to issue, condition, or deny a development permit** involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370(1) (emphasis added).

First, the City action in this case was not to “issue, condition, or deny a development permit.” Rather, the Breskes never obtained a final decision of any kind on their permit (*i.e.* whether approved, condition, or denied) because of the dispute over the meaning of City Code. CP 534. *See also* CP 873, at ¶ 17. The dispute with the City regarding the interpretation of the Code became the subject of the appeal, and not any permit decision.

Second, the Breskes specifically limited this appeal to the Court of Appeals by not appealing the City’s administrative decision by the Hearing Examiner. Rather, the appeal here is only of the excessive parts of the trial court Final Order. Indeed, the Breskes did this in part to avoid attorney fees. That is, the Breskes, though disagreeing with the trial court’s affirming of the Hearing Examiner decision, chose not to challenge that decision in this appeal due to the potential penalty of being forced to pay the City attorney’s fees while not being able to collect attorney fees for winning—the one way nature of the provision. The second part of the statute also supports this conclusion:

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party **if its decision is upheld at superior court and on appeal.**

RCW 4.84.370(2). It would take a contortion of the statute’s language to say that this appeal could “uphold” the City’s administrative decision when the

Breskes are not challenging that decision here. The case law supports the Breskes' position. The Supreme Court explains the statute as follows:

Under this statute, parties are entitled to attorney fees only if a county, city, or town's decision is rendered in their favor **and at least two courts affirm that decision**. The possibility of attorney fees does not arise **until a land use decision has been appealed at least twice**: before the superior court **and before the Court of Appeals** and/or the Supreme Court. RCW 4.84.370(1). Thus, parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful before the superior court.

*Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 413 (2005) (emphasis added). Here, this court will not be affirming the land use decision because the Breskes have not appealed the land use decision “at least twice” and do not challenge it “before the Court of Appeals.”

This Court must apply the statute as written, and that means the City is not eligible for attorney fees because of the limited nature of this appeal. Having waived their right to challenge the Hearing Examiner decision in this appeal, it would be a severe penalty to impose attorney fees against the Breskes based on a statute that imposes attorney fees for challenging such a decision.

## **2. The Attorney Fees Provision Is Unconstitutional**

If the Court decides that the City is not entitled to attorney fees on statutory grounds, then the Court need not reach the constitutional issues.

For the record, the Breskes contend that this lopsided attorney fees statute, RCW 4.84.370, is unconstitutional as a violation of the equal protection and due process clauses and the First Amendment right to petition for redress of grievances. Division II of the Court of Appeals rejected these arguments in *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 799 (1999). The Supreme Court rejected a portion of these arguments *Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 412-416 (2005). Namely, the Supreme Court rejected the argument that the statute discriminated against private parties. *Id.* at 416. However, in *Habitat Watch*, the Supreme Court did not address any other challenges to the statute finding them inadequately briefed. *Id.* Thus, the Breskes maintain a challenge to the statute for the reasons rejected by the majority in *Habitat Watch* solely as a technical matter, in the event of future action in federal court either by certiorari to the United States Supreme Court or otherwise. But, the decision in *Habitat Watch* leaves open a challenge that the statute impermissibly favors local government and chills the right to appeal.

This Court apparently has not decided these issues in a reported decision. *But see Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789. Under the statute, local government never has to pay attorney fees: “The government can never be required to pay attorney fees, unlike parties that challenge local government land use decisions.” *Habitat Watch*,

155 Wn. 2d at 426 (dissent of Sanders, J.). The favoritism of local governments in awarding attorney fees violates equal protection. The basis for this argument is fully discussed and briefed by Justice Sanders in dissent in *Habitat Watch* and that rationale is relied upon here. *Id.* at 424-430 (dissent of Sanders, J.). Namely, no rational basis exists to favor local government and the statute is unconstitutional as a violation of equal protection and due process. *Hunter v. North Mason High School*, 85 Wn.2d 810, 817-19 (1975).

In addition, the statute impermissibly chills the exercise of the right to appeal. This argument was rejected in *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. at 799-800. The Breskes cite the arguments rejected by that court. Namely, the First Amendment protects the right to petition government for redress of grievances. U.S. Constitution, Amendment I. Under this amendment, lawsuits against the government are provided significant constitutional protection. The right of access to courts is but one aspect of the right to petition government, and of free speech generally. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Litigation is protected speech under the First Amendment. *In re Primus*, 436 U.S. 412, 426, (1978). In the present case, RCW 4.84.370 imposes a penalty against those who unsuccessfully seek judicial review of local government land use

decisions. That penalty—of paying the government’s attorneys’ fees—is imposed without any finding that their appeal or any position taken in the appeal is either malicious, frivolous, or even unreasonable. Most significantly, the penalty is imposed solely on a selected type of appellant. The Breskes’ contention is well stated as follows:

[O]fficials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future.

*Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422, 1428 (8th Cir. 1986) (local government's counterclaim infringed right of access to the courts) (citing *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976)); *see also In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995) (paying cost of litigation, including attorneys’ fees, for any action to review the validity or enforcement of a state law violated the First Amendment right to petition courts). The United States Supreme Court ruled that imposing substantial fines as a cost of seeking judicial review unsuccessfully was unconstitutional in *Ex parte Young*, 209 U.S. 123, 148 (1908). In the same manner, under RCW 4.84.370, the penalty for filing a land use appeal which turns out to be unsuccessful is financial—paying the government’s attorneys’ fees, which in every case will be thousands of dollars and in some cases will be tens of thousands of dollars.

### III.

#### CONCLUSION

The Breskes filed this limited appeal to protect their rights to develop Lot 1 in the future. The City claims that it has never intended to take a position that the City has any ownership right or permanent servitude in Lot 1. Yet, the Breskes are stuck with the language of the Final Order implementing the strong words of the trial court judge.

The Breskes have decided that continuing a challenge to the Hearing Examiner decision is too expensive, would likely result in a remand and more expense, and would expose them to attorney fees on appeal. But, the Breskes still own Lot 1 and some day want to build a house there. The Final Order creates a cloud on that ownership, and that is the purpose of this appeal—to remove that cloud. The Breskes understand the desire of a trial court judge to attempt to explain a ruling, but here the explanation threatens to go beyond even what the City had requested and threatens to upset the balance between the City and the Breskes that the plat language calls for.

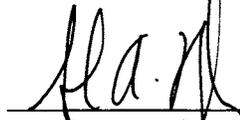
With this limited appeal, this Court need only issue a limited decision. Namely, this Court can rule that, based on the facts of this case and based on the potential future impact of the words in the Final Order, the trial court went a bit too far and exceeded the authority given by RCW

36.70C.140. This Court need not even decide Issues Presented 2 and 3. This Court should reverse the trial court, order the Final Order to be vacated, and direct that a new order be entered—namely affirming the Hearing Examiner decision without comment. The Breskes respectfully request that this Court grant this relief to ensure that fairness and justice prevail, and that the City’s request for attorney fees be denied.

RESPECTFULLY submitted this 21<sup>st</sup> day of June, 2010.

GROEN STEPHENS & KLINGE LLP

By:



Charles A. Klinge, WSBA No. No. 26093  
Samuel A. Rocabough, WSBA No. 35347  
11100 NE 8th Street, Suite 750  
Bellevue, WA 98004  
(425) 453-6206

**DECLARATION OF SERVICE**

I, Samuel A. Rodabough, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP.

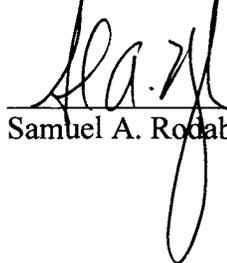
On June 21, 2010, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Joseph Zachary Lell  
Ogden Murphy Wallace PLLC  
1601 5th Ave Ste 2100  
Seattle, WA 98101-1686

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 21st day of June, 2010 at Bellevue, Washington.




---

Samuel A. Rodabough

FILED  
 COURT OF APPEALS DIV. #1  
 STATE OF WASHINGTON  
 2010 JUN 23 AM 10:37

# **APPENDIX B**

**CERTIFIED  
COPY**

**FILED**  
2009 APR 23 PM 3: 29  
SONYA KRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH



CL13834152

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY

DONNA and FRED BRESKE, wife and husband,  
and the marital community composed thereof,

Petitioners,

v.

CITY OF EDMONDS, a Washington municipal  
corporation,

Respondent.

NO. 08-2-08223-5

~~PROPOSED~~ FINAL ORDER



THIS MATTER came before the Court on the Petitioners' Land Use Petition Act appeal of the August 26, 2008 Findings, Conclusions and Decision of the City of Edmonds Hearing Examiner, as modified by the Hearing Examiner's Decision on Reconsideration dated September 26, 2008. The Court, having reviewed and considered the pleadings, briefing and administrative record admitted herein, as well as the oral arguments of the parties, and being fully advised and informed; NOW, THEREFORE,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

I. The dedication on the face of the Plat of Preview Homes Westgate Village provides in relevant part as follows:

FINAL ORDER - 1

21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Know all men by these presents, that we, the undersigned owners in fee simple, do hereby declare this plat and dedicate to the use of the public forever all roads and ways shown thereon, with the right to make necessary slopes for cuts or fills and install necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon. The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public road rights of way, nor shall it be blocked from drainage along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

This language dedicates and gives the county a right to have this property for stormwater drainage. The language does not specifically identify a particular lot within the plat, but the operative part of the language is precise: it refers to "lot or lots", and it then provides that both right-of-way waters and waters that drain according to the normal course would be allowed to divert to such lot or lots. This language is legally binding on the Petitioners' property.

2. This is not a case where a landowner is being required to make a dedication or easement on behalf of another group of property owners. The arguments that would flow from that scenario are inapplicable here.

3. Throughout the relevant historical period, Snohomish County, the City of Edmonds and the Petitioners' predecessors in title all acted in accordance with the assumption that Petitioners' property, Lot 1 of the Plat of Preview Homes Westgate Village, had been designated as the stormwater repository for the surrounding plat. Written correspondence to and from the original subdivider further confirms this assumption and pattern of behavior. The Petitioners' predecessor(s) in title also received a tax benefit from valuation and assessment of Lot 1 by Snohomish County at one thousand dollars.

4. The Petitioners were informed by City staff about the historical drainage function of Lot 1 before they purchased the property, and were likewise made aware of the requirements

1 imposed by the City's stormwater regulations at that time.

2       5. Substantial evidence supports the conclusion that Lot 1 was dedicated to serve as  
3 the drainage system of the Plat of Preview Homes Westgate Village. This conclusion is not  
4 dependent exclusively on topography of the underlying property and the language on the face of  
5 the plat itself. It is confirmed by correspondence within the administrative record, the  
6 installation of drainage infrastructure within the plat, and the historical pattern of behavior by and  
7 between the relevant parties. There is no legal requirement that Lot 1 must be specifically  
8 identified and/or dedicated on the face of the plat for this purpose.

9       6. The specific stormwater runoff standard governing the proposed development of  
10 Lot 1 is ECDC 18.30.060(A)(1)(a). This ordinance provision is unambiguous, and it prohibits  
11 the post-development rate of storm runoff from exceeding the predevelopment rate. The Hearing  
12 Examiner accurately characterized this requirement as a "no net increase" standard.

13       7. The court affirms the legality of the City's stormwater regulations and the manner  
14 in which they were applied in this case. It is lawful for the City to make a stormwater  
15 management plan a condition of building permit issuance.

16       8. With respect to grandfathering, the City's regulations do not relate back in time,  
17 but the plat language unequivocally reserves the right to drain over time. This reservation of  
18 right is not altered by a change in landowners or plans.

19       9. Because of the historic use of Lot 1 as a drainage facility for at least 40 years,  
20 there is no unconstitutional taking. Moreover, because the Petitioners have not exhausted their  
21 administrative remedies, their takings claim is not ripe.

22       10. The Petitioners have not demonstrated that the City has inversely condemned their  
23 property. There would be inverse condemnation under these circumstances but for the plat  
24 language.

25       11. The Petitioners have not demonstrated that the City violated their right to  
26 substantive due process.

1 12. Neither Lot 1 itself nor the larger drainage system of the Westgate Village plat is a  
2 "pre-existing deficiency". The function of Lot 1 as a drainage facility is a historical use.

3 13. The Court gives no credence to the Shell Creek Sub-Basin Analysis prepared by  
4 Petitioner Donna Breske. Because this study was authored by Ms. Breske rather than by a  
5 neutral, independent professional, the analysis is presumptively self-interested.

6 14. Substantial evidence in the record supports the conclusion that Lot 1 must  
7 continue to detain stormwater for the Westgate Village plat.

8 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

9 15. The Hearing Examiner's decision is supported by substantial evidence and is not  
10 clearly erroneous.

11 16. The Petitioners have not satisfied their burden of demonstrating that the Hearing  
12 Examiner's decision meets one or more of the standards for relief set forth at RCW 36.70C.130.  
13 The Petitioners' land use petition is accordingly DENIED.

14 DONE IN OPEN COURT this <sup>23<sup>RD</sup></sup> day of April, 2009.

15   
16 JUDGE ERIC Z. LUCAS

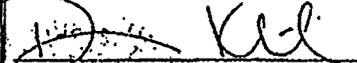
17 Presented By:

18 OGDEN MURPHY WALLACE, P.L.L.C.

19   
20 J. Zachary Lell, WSBA #28744  
21 Attorneys for Respondent  
City of Edmonds

22 Approved as to Form Only;  
23 Notice of Presentation Waived:

24 JOHNS MONROE MITSUNAGA, PLLC

25   
26 Daria F. Kolbjuskova, WSBA #27532  
Attorneys for Petitioners Breske

FINAL ORDER - 4