

COUNT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 38581-3-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

JZ Knight,

Petitioner / Appellee,

v.

**CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSACK;
WINDSHADOW II TOWNHOMES, LLC; RICHARD E.
SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA
ENGINEERING, LLC; SAMANTHA MEADOWS, LLC; TTPH 3-8,
LLC,**

Respondents / Appellants.

APPELLANT TTPH 3-8, LLC'S REPLY BRIEF

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ORIGINAL

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SUMMARY OF REPLY

Knight's position in this land use dispute is ever changing. But one thing is undisputed before this Court: the Hearing Examiner's conditional approval of Tahoma Terra's preliminary plat application is justified. This Court need only decide if that result takes the form of an affirmance, as Tahoma Terra urges based on the meaning of the condition in the context of the Hearing Examiner's entire decision, or a reversal, as Knight argues based on the "/or" appearing in the condition and disregarding other parts of the decision. This Court should affirm.

In her response brief, Knight again changes her prior position in two important ways. First, she concedes that what must be shown at final plat approval to constitute an adequate provision of potable water is not ripe. *Amended Brief of Respondent ("Resp. Brief")*, pp. 3, 43-44. Before the Hearing Examiner ("Examiner"), Knight argued that appropriate provisions for potable water must be conclusively shown at the time of preliminary plat approval. AR: 8/10/07 Letter from Moxon to Examiner. When Appellants presented contrary authority, Knight changed her position and argued that at the preliminary plat phase, an applicant must show that it *will have* adequate and available water, in the form of Ecology-approved water rights, by the time of *final* plat approval. CP 9-28. Before the superior court, Knight insisted upon conditioning the

preliminary plat approval on a showing of Ecology-approved water rights at the time of final plat approval. Now, Knight about-faces and concedes that the determination of adequate water will be made at final plat approval, and that the appropriate standards for deciding what that means are not ripe and need not be decided in this appeal. *Resp. Brief*, pp. 43-44. Even in the face of this concession, Knight inconceivably assigns error to two findings of the Examiner regarding adequate water supply and appropriate provisions for water (*see Resp. Brief*, p. 4, at Assignments of Error 3 and 4), even though she purportedly does not intend for this Court to reach such assignments. *Id.*, pp. 43-44. *See also id.* at p. 6, Issue #7 (asking whether the Court should decline to reach Assignments of Error 3 and 4).

The second important change in Knight's position is her new view that Conclusion of Law #5, which she specifically proposed for inclusion in the superior court's order over the vehement opposition of Appellants, is meaningless. *Id.*, p. 42, note 13 ("The court's language is expressly conditional and makes clear that it is not resolving the issue."). Conclusion of Law #5 states the superior court's view of what constitutes appropriate provisions for potable water supply at final plat approval. *See* CP 1641. Knight's new position that this Conclusion is meaningless mirrors the position consistently taken on this issue by Tahoma Terra – *i.e.*

that the Conclusion is a prohibited advisory opinion. *See Opening Brief*, pp. 42-45; VR 11/7/2008, p. 11, lines 8-20, p. 20, line 21 to p. 21, line 10.

Tahoma Terra did not bring this appeal because the superior court remanded the approval of Tahoma Terra's preliminary plat to address the meaning of the "and/or" language in the Examiner's condition. Tahoma Terra did not object to changing the language of the condition from "and/or" to simply "and," but Tahoma Terra does not, and never has, conceded that the condition as originally drafted by the Examiner was an erroneous interpretation of the law. Knight's assertions to the contrary are flat wrong and a blatant mischaracterization of Tahoma Terra's position. Tahoma Terra takes the position, as evidenced by the transcriptions of the hearings below, that a remand was unnecessary because "and" is exactly what the Examiner meant when he drafted the condition, as made clear by the Examiner's additional findings. To that end, Tahoma Terra does not, and never has, waived its right to assert that the superior court's remand on the basis of *an erroneous interpretation of law* was incorrect.

However, the resolution of the language of the condition did not drive this appeal. This appeal is brought because Knight attempted to re-write State and municipal requirements for subdivision approval with her proposed findings and conclusions, and the superior court improperly adopted her vision. Now, in response to Tahoma Terra's appeal, Knight

rejects the very relief she explicitly solicited from the superior court. For this and the reasons set forth below, Knight's LUPA petition should be dismissed and Tahoma Terra should be awarded its attorneys' fees in this appeal.

REPLY

I. This Court should dismiss Knight's LUPA Petition for Knight's failure to assign error in her Petition to the determinative finding by the City that she lacked standing under the YMC.

Tahoma Terra moved this Court for dismissal of Knight's LUPA appeal on the basis that she failed to assign error to the decision by the City that she lacked standing under the YMC to appeal the preliminary plat approvals. *Opening Brief*, p. 20. The LUPA requires that a LUPA petition contain, "A separate and concise statement of each error alleged to have been committed." RCW 36.70C.070(7). Tahoma Terra argued that dismissal is required because failure to assign error to the City's decision left the conclusion unchallenged on appeal, fatally undermining her LUPA petition. *Opening Brief*, pp. 21-22. Knight argues that her failure did not divest the superior court of jurisdiction, that only substantial compliance is required, and that she substantially complied with this requirement. *Resp. Brief*, pp. 15-21. Whether Knight's failure defeated jurisdiction entirely or just leaves in place the dispositive decision of the City, this Court should

dismiss the appeal. Even if only substantial compliance is required, Knight failed to substantially comply.

A. *Keep Watson* is not controlling.

First, the new Division III decision *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 184 P.3d 1278 (2008), is not controlling. *Keep Watson*, and the other cases cited by Knight including *Quality Rock v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005), and *Conom v. Snohomish County*, 155 Wn.2d 154, 161-62, 118 P.3d 344 (2005),¹ do not address failure under RCW 36.70C.070(7) to assign error to the local jurisdiction's legal conclusions. *Keep Watson* addressed RCW 36.70C.070(4), and held that the requirement that an appealing party attach a copy of the decision to their petition is not jurisdictional. *Id.* at 39 (“[Petitioner’s] failure to attach copies of the land use decisions to its petition does not divest the superior court of jurisdiction to hear the petition.”). That is not the issue in this appeal.

Moreover, Division III’s *Keep Watson* decision is not binding on this Court. This Court should reach the same result as its decision in *Overhulse Neighborhood Ass’n v. Thurston County*, 94 Wn. App. 593,

¹ *Quality Rock* and *Conom* determined that service pursuant to CR 10 and the noting of a hearing pursuant to RCW 36.70C.080(1), respectively, were not jurisdictional requirements of LUPA and required substantial compliance. These cases then found substantial compliance. In contrast, Knight did not substantially comply with .070(7), as Tahoma Terra discusses below.

597, 972 P.2d 470 (1999), and find that the requirement to assign error to a dispositive conclusion is jurisdictional. In *Overhulse*, this Court recognized that all parts of the LUPA should be enforced as written, rejecting substantial compliance because it would render portions of the LUPA meaningless:

Such a reading would violate a fundamental principle of statutory construction. *Cox v. Helenius*, 103 Wn. 2d 383, 387-88, 693 P.2d 683 (1985) (the court is required to give effect to “every word, clause and sentence of a statute No part should be deemed inoperative or superfluous unless the result of obvious mistake or error.”) (citations omitted).

Overhulse, 94 Wn. App. at 599. This Court should hold that the requirement of .070(7) is jurisdictional, at least regarding any decision to which error is not assigned. This Court only has jurisdiction to consider issues to which error was assigned.

B. Dismissal is proper even applying *Keep Watson* because the conclusion to which Knight did not assign error, and to which she is therefore not entitled to review, is determinative.

Even if this Court accepted the rationale of *Keep Watson* and agreed that failure to comply with any requirement of .070 is not fatal to the court’s jurisdiction of the case, it should still dismiss Knight’s petition based on Knight’s failure to assign error to the City’s standing determination. Under this analysis, while Knight’s entire LUPA petition may not be dismissed for her failure to comply with the requirement of

.070(7), her appeal as to the specific error she failed to assign should be refused. Tahoma Terra has argued that neither the superior court nor this Court should review the City Council's legal conclusion on standing under the YMC to which Knight failed to assign error. *Opening Brief*, p. 22; CP 443-446; 221-236. This concerns a different analysis than that undertaken in *Keep Watson* because it uniquely concerns the ramification of failure to assign error in a LUPA petition. Because Knight failed to assign error to the conclusion that she lacked standing below, that single issue is not a part of her LUPA appeal, even if the superior court could proceed with the issues to which she did assign error.

Principles of appellate law support this result. A fundamental precept of appellate law is that the aggrieved party must assign error to those parts of the decision below for which they seek review, or lose the right to challenge that part of the decision. RAP 10.3(a) (requiring assignments of error). *See Nishikawa v. U.S. Eagle High, L.L.C.*, 138 Wn. App. 841, 853, 158 P.3d 1265 (2007) (Court does not address issue on the merits because the “the issue is not properly before us” where appealing party failed to assign error to a particular trial court decision). As this Court has said, “We do not consider assertions of error made for the first time in a reply brief.” *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008), citing *State v. White*, 123 Wn. App. 106, 115 n.1, 97

P.3d 34 (2004) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). The precedential holding from *Cowiche Canyon* concerned the issue of standing when the plaintiff presented an argument to support standing for the first time in reply. *Cowiche Canyon*, 118 Wn.2d at 809. The Supreme Court found this was too late. *Id.* The Court also noted, “That the issue existed earlier is obvious from finding of fact 22.” *Id.* Similarly, the issue of the City Council’s standing determination was obvious in its decision. Knight’s appeal was over before it began because the lack of standing conclusion is determinative.

The *Keep Watson* court affirmed the result it reached on policy grounds, stating that the LUPA’s purpose is to create “consistent, predictable, and timely review.” *Keep Watson*, 145 Wn. App. at 38. By holding that failure to assign error to a legal conclusion of the local jurisdiction prevents that issue from being examined by the superior court, this Court would be furthering these policies and providing consistent and predictable results in appellate proceedings.

C. Contrary to her argument, Knight did not substantially comply with RCW 36.70C.070(7).

Knight relies on *Keep Watson* to argue that substantial compliance would be sufficient to keep her appeal alive. *See Resp. Brief*, pp. 16-21.

But the facts show that Knight did *not* substantially comply with the requirement of RCW 36.70C.070(7).

This Court should reject out of hand Knight's argument that a party automatically assigns error to all legal conclusions in a decision by challenging the entire "decision." *See Resp. Brief*, p. 16 ("The Petition states that it is brought to 'challenge the City of Yelm's decision.' . . . As such it appeals the entire decision.") (emphasis in original). Such an argument renders useless .070(7)'s requirement to make specific assignments of error. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (courts must give effect to the plain meaning and should assume the legislators meant exactly what it said). The Legislature has clearly rejected such an argument by including .070(7) in the LUPA.

Knight's argument is also contrary to appellate jurisprudence, where specific assignments of error are required. RAP 10.3(a)(4).² Here, Knight's appeal of the entire "decision" does not constitute assignment of

² *See also State v. DiLuzio*, 121 Wn. App. 822, 90 P.3d 1141 (2004) (without the proper assignment of error, the issue was not properly before the appellate court); *M/V La Conte, Inc. v. Leisure*, 55 Wn. App. 396, 777 P.2d 1061 (1989) (Appellant's failure to identify challenged findings violates the Rules of Appellate Procedure and alone justifies refusal to consider the assignment of error), *citing In re J.K.*, 49 Wn. App. 670, 676, 745 P.2d 1304 (1987); *Golberg v. Sanglier*, 27 Wn. App. 179, 190, 616 P.2d 1239 (1980) (appellate courts follow the "law of the case" doctrine whereby trial court conclusions which were not challenged on appeal become the established law of the case), *rev'd on other grounds*, 96 Wn.2d 874, 639 P.2d 1347 (1982).

error to the City's conclusion that Knight lacked standing under the YMC. Any argument to the contrary is nonsensical and an affront to long-standing appellate practice.

This Court should also reject Knight's argument that she addressed the City's dispositive conclusion on standing under the YMC by reciting facts allegedly supporting her LUPA standing in her petition. The latter is not a substitute for the former. Knight made no mention in her LUPA Petition of the City's standing determination or the YMC requirements for standing. The organization and content of her petition rebut her argument. Knight attempts to rely on section 6 of her Petition, titled "Facts Demonstrating that the Petitioner Has Standing to Seek Judicial Review Under RCW 36.70C.060." (emphasis added). *See* CP 11-13. By its title and allegations, that section relates to standing under the LUPA, not the YMC. In the next section, section 7, Knight listed "A Separate and Concise Statement of Each Error Alleged to Have Been Committed." CP 13-16. A reasonable person would expect to find an assignment of error to the City's standing determination in this section. There is nothing. In fact, Knight lists ten separate assignments of error that allege the preliminary plat approvals are erroneous, but never once mentioned the City's standing decision. Next, in section 8, Knight alleges "A Concise Statement of Facts Upon Which Petitioner Relies to Sustain the

Statements of Error.” CP 16-23. Nowhere in these facts does Knight address facts related to standing. She only addressed facts related to standing in the previous section 6 that was explicitly and exclusively related to standing under the LUPA.

Knight’s argument rings hollow that “no reasonable person reading the Petition and attached City decision (CP 9-28) could fail to understand that Knight challenged the conclusion that she lacked standing,” *Resp. Brief*, p. 17. The opposite is true. No reasonable person would discern a challenge to the City’s decision on standing under the YMC from Knight’s petition.³ Knight failed to strictly or substantially comply with the LUPA by failing to assign error to the City’s standing decision.

II. This Court should dismiss Knight’s LUPA Petition because she failed to meet her burden to establish standing, especially in light of her concession that adequacy of water is not ripe at this preliminary platting stage.

The facts submitted by Knight are insufficient to establish standing under the YMC or LUPA. Tahoma Terra moved for dismissal of Knight’s appeal on the basis that she lacks standing under the LUPA. *Opening Brief*, pp. 22-32. The basic deficiency is that Knight cannot show that the preliminary plat approval of the Tahoma Terra Subdivision has or likely

³ By contrast, Knight included the previously missing assignment of error in her Assignments of Error to the City Decision in her brief to this Court. *See Resp. Brief*, p. 4, Assignment of Error #2.

will prejudice her. This deficiency is even more glaring in light of Knight's new concession that the proper standard to judge adequate provision for potable water does not apply at the preliminary plat approval stage. *See Resp. Brief*, pp. 43-44. Her entire theory of injury is built upon application of that standard. She argued that "the City decision approving large subdivisions without proof of adequate water" will harm her because "any increase in groundwater withdrawal will adversely impact Knight's ability to utilize her water rights." *See Resp. Brief*, pp. 25-26. Her concession that adequacy of water is not ripe at this preliminary platting stage necessarily eliminates any glimmer of standing.

Additionally, the record shows that Tahoma Terra transferred water rights to the City sufficient to meet the demand of its subdivision and well beyond. (*See infra* section III.B.). The Tahoma Terra subdivision will not result in any increase in groundwater withdrawal. Thus, Knight's argument for standing falls flat as to Tahoma Terra's subdivision. The Tahoma Terra subdivision relies on preexisting water rights that it transferred to serve its development. Tahoma Terra's subdivision cannot harm Knight on these facts as a matter of law.

III. This Court should affirm the conditional preliminary plat approvals because Knight demonstrates no grounds for reversal under the LUPA.

The Hearing Examiner did not err, as Tahoma Terra argued in its Opening Brief, pp. 34-36. Tahoma Terra is not judicially estopped from defending the Examiner's condition, despite the fact that Tahoma Terra was amenable to a *clarification* of the condition. Knight substantiates no grounds for reversal of Tahoma Terra's preliminary plat approval. In fact, she asks this Court for no relief other than clarification of the condition. *Resp. Brief*, pp. 3-4, at Assignment of Error #1, and pp. 4-5 at Issue #1. She asks the Court *not* to reach her Assignments of Error #3 and #4. *See id.*, pp. 6, 43-44. Her only remaining Assignment of Error, #2, relates to her lack of standing. This Court should affirm, interpreting the condition as Tahoma Terra urges, which is consistent with the meaning that Knight wants.

A. Knight demonstrates no error in the condition imposed by the Hearing Examiner: Knight does not show that the Hearing Examiner intended a meaning different from what Knight wants.

All parties agree that the law requires that by *final* plat approval *and* prior to the issuance of any building permit, an applicant must provide evidence of a potable water supply adequate to serve its development. *See Opening Brief*, pp. 34-36; *City's Opening Brief*, p. 36; *Resp. Brief*, pp. 29-30. The Appellants contend, and argued below and to this Court, that this

is how the Examiner's condition should be construed. The only issue for this Court concerns technical affirmance or reversal based on whether the Examiner's decision embraced this law or not.

Knight failed in response to address whether the context of the Examiner's entire decision demonstrates that the Examiner imposed the condition that Knight wanted. Knight expressly notes that the Examiner acknowledged this law, *Resp. Brief*, p. 30, but makes no mention how that should affect construction of the condition. Knight instead focuses exclusively on the "and/or" in one part of the decision. In the context of the entire decision, the construction urged by the Appellants is correct. Indeed, the law requires nothing less than consideration of the entire record and decision. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006) (holding that a finding or conclusion is only clearly erroneous if, even though there is some evidence to support it, a court is left with a definite and firm conviction that a mistake has been committed *after looking at the entire record*) (emphasis added). This Court should affirm.

Knight argues "the only possible interpretation" is to make the requirement disjunctive, *Resp. Brief*, p. 31, suggesting that such a result is error. The City, however, explained to the superior court when the

disjunctive would makes sense, *i.e.*, in certain situations when building permits might be required before final plat approval. The City stated:

In light of the examiner's new finding before that, he expressly said it's required before final plat approval and building permit approval. That was his new finding two. This next paragraph is this new condition, and he said this condition is totally unnecessary, because it's already required before final plat and building permit approval . . . I think as I mentioned in the brief, the only reason it probably was here is this hearing examiner, Steven Causseaux, is a very cautious, careful guy, and he recognizes that sometimes building permits are required without a final plat approval.

VR 10/1/2008, p. 31, line 24 to p. 32, line 17 (emphasis added). The Appellants continued their insistence that the Examiner did not err and that the condition meant exactly what Knight wanted at the presentation of the judgment, stating:

CITY OF YELM ATTORNEY (Schneider): . . . No. 3 finds, at the conclusion of it, finds that the hearing examiner's position is an erroneous interpretation of the law. I don't believe the Court found that. The hearing examiner, himself, clearly said that the sufficient provision of water availability was required at both the preliminary and final plat stage. He specifically said state law would require that even if he didn't. My understanding of what the Court did is simply say that the language he chose to express his intent, which he clearly stated, was ambiguous, so the Court is requiring that language be clarified. I think the clarification to have the language say what the hearing examiner said he intended it to say is hardly a reversal based on an erroneous interpretation of the law. It is a clarification, nothing more. So, again, I think this is highly misleading as to what the Court did in this case.

VR 11/7/2008, p. 18, lines 4-21 (emphasis added). The superior court, however, rejected the Appellants' position and entered Knight's urged order over the Appellants' objections. *Id.*, p. 18, line 22 to p. 19, line 4. Instead of making the single, small correction to which the Appellants, including Tahoma Terra, were receptive, the superior court entered a three-page long order accompanied by seven pages of Findings and Conclusions to which Appellants were in complete opposition, as the transcripts also show. VR 10/1/2008, pp. 31-32, 71 to 87; VR 11/7/2008, p. 10, line 18 to p. 11, line 11, p. 18. The Appellants defended the Examiner, persisted in maintaining that the Examiner committed no error, and agreed only that the language could be modified to reflect the Examiner's intent. Judicial estoppel does not apply because the Appellants have always maintained that the Examiner did not err.

B. Tahoma Terra—the only applicant below to bring sufficient water rights to serve its proposed subdivision—is entitled to affirmance because Knight acknowledged below and on appeal Tahoma Terra's water right conveyances that are sufficient to meet the demand of its development.

Tahoma Terra argued to this Court that its preliminary plat application should be approved because substantial evidence in the record shows ample provision of “potable water supply adequate to serve the development” based on Tahoma Terra's transfers of water rights to the

City. *Opening Brief*, pp. 45-46. Tahoma Terra asserted that the water rights it transferred to the City will serve the full build-out of all approved development in its master planned community, including the subdivision at issue. *Id.* The documented transfer of water rights to the City was substantial evidence to meet Tahoma Terra's burden before the Examiner to show "appropriate provision for potable water." *See id.*, pp. 7-10 ("Water rights provided by Tahoma Terra to the City of Yelm that provide more than ample water to serve the subdivision."); *id.* at footnotes 5, 6, 7 containing citation to the Administrative Record for transferred water rights.

While Knight assigned error to the findings of the Examiner that support Tahoma Terra on these points (Respondent's Assignments of Error #3 and #4), she goes on to argue that the error is not ripe for review and that this Court should not address her assignments of error. If this Court does address these findings, affirmance is proper. Knight also persists in requesting reversal of Tahoma Terra's preliminary plat approval, but the factual record overwhelmingly supports affirmance.

On the merits, Tahoma Terra demonstrated by substantial evidence that it made appropriate provision for potable water. Knight makes only one contrary argument: that Ecology had to approve *all* transfers before the Examiner could find appropriate provision for potable water. *Resp.*

Brief, pp. 49-50. Knight argues that while the transferred water rights, including the Golf Course water rights, are sufficient for Tahoma Terra's subdivision, Ecology approval of one portion of those water rights (the Golf Course transfer) occurred after the record closed. *Id.* To Knight, substantial evidence *could only exist* where Ecology has approved the transfer. This Court should reject such an outrageous proposition.

Knight does not dispute that the Examiner had evidence of the conveyances before him, the majority of which had Ecology approval. The Examiner correctly found that this evidence was sufficient to establish that appropriate provisions for water had been made. Knight submitted no evidence that Ecology was unlikely to approve any water rights transfers. The fact that Ecology subsequently approved the Golf Course transfer further demonstrates that the expectation of approval was reasonable and justified.⁴

By the time Knight's argument acknowledges the eventual Ecology approval, stating, "giving the City the benefit of this extra-record evidence that Ecology did approve 77 afy from the Golf Course rights," she is no longer addressing Tahoma Terra's preliminary plat approval but

⁴ Moreover, this Court may take judicial notice of Ecology approval of the Golf Course transfer: "Appellate courts may take judicial notice of 'facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.'" *Tacoma v. State*, 117 Wn.2d 348, 368, 816 P.2d 7 (1991) (citations omitted).

is taking the City to task for its overall water numbers. *See Resp. Brief*, p. 51 n.19. Before the superior court, Knight pursued this same strategy of attempting to shift the focus from the individual Tahoma Terra preliminary plat to all water provision throughout Yelm. She acknowledged that while *Tahoma Terra* may have brought the necessary water, *every* applicant did not. She argued:

If [Tahoma Terra] can bring the water, get it through the transfer process, absolutely they should be entitled to build and get final plat approvals based on that. I just say good for them if they have the water, *but they do not have enough water for all the subdivisions that are at issue in this LUPA appeal.*

VR, October 1, 2008, p. 100, lines 11-16 (emphasis added).

Knight's strategy is unavailing. Tahoma Terra has no burden as to the other applicants or the City's overall water supply. Evidence of Tahoma Terra's water right transfers in sufficient quantities to satisfy its projected water demand was before the Examiner and justified approval of Tahoma Terra's preliminary plat approval with no further condition. Knight cites no authority requiring that Ecology have already approved every transfer. Ecology approval was probable. Tahoma Terra's evidence is substantial.

Moreover, Tahoma Terra double counts nothing, contrary to Knight's allegation. *See Resp. Brief*, pp. 50-51; *see also id.* at note 18.

Knight's allegation in this regard is merely a distraction from Tahoma Terra's actual burden and the record evidence. Tahoma Terra's burden before the Examiner was to demonstrate by substantial evidence that appropriate provisions had been made for potable water supply. Tahoma Terra had no burden to justify water availability throughout the City or water availability for any other applicant. Such a burden is contrary to established law. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002). The water transfers before the Examiner that undisputedly meet the water demand for Tahoma Terra's subdivision require affirmance of the approval of Tahoma Terra's preliminary plat.

IV. By acknowledging that the issue addressed in Conclusion of Law #5, which the superior court entered at Knight's behest, is not ripe, Knight necessarily admits error by the superior court.

The superior court erred in entering Conclusion of Law #5, which is necessarily resolved by operation of this appeal and Knight's failure to defend the Conclusion. Tahoma Terra asserted that Conclusion of Law #5 incorrectly stated the law and was a prohibited advisory opinion. *Opening Brief*, p. 3, Assignment of Error #8; *id.* at pp. 42-45. The superior court entered this Conclusion at Knight's behest over the Appellants' vehement objections, stating: "I think [the Findings and Conclusions proposed in this case] are helpful, and I think they are important. . . ." VR 11/7/2008, p. 12, lines 19-25. Regarding Conclusion of Law #5, the superior court

responded to the Appellants' objection that the issue was not ripe and the Conclusion was an advisory opinion as follows:

Court: I understand that, but I think it's important for it to be in there to assist the parties in further proceedings in this matter. Let's go on to 6.

Id. at p. 21, lines 7-10.

In response to this appeal, Knight completely reverses her prior position and concedes that the substantive issues addressed by Conclusion of Law #5 are not ripe. *Resp. Brief*, pp. 43-44. She also contends that the Conclusion meant nothing, being phrased conditionally. *Id.*, p. 43 n.15.

In sum, Knight does not and cannot defend Conclusion of Law #5 despite her prior insistence that it be entered. All parties agree that this appeal nullifies the Conclusion. For achieving this relief, Tahoma Terra should be entitled to fees, addressed more fully below.

V. When this Court examines the “substance of the relief” the superior court accorded the parties, it should conclude that Tahoma Terra substantially prevailed and is entitled to an attorney fee award.

While obviously an appellant, Tahoma Terra is nonetheless the prevailing party before the superior court because Knight achieved no substantive relief before the superior court. As set forth in Tahoma Terra's Opening Brief, the superior court reversed in name only, primarily because the meaning of the condition was an undisputed issue. Knight has not disputed Tahoma Terra's general authority that whether a party

substantially prevailed for purposes of an attorney fee award under RCW 4.84.370(1), “turns on the substance of the relief which is accorded the parties.” See *Opening Brief*, p. 49, citing *Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). Knight also does not contest that Tahoma Terra was the substantially prevailing party before the City. *Resp. Brief*, pp. 55-56. Knight simply contests whether Tahoma Terra substantially prevailed before the superior court. *Id.* This Court should find that Tahoma Terra did.

To support her objection, Knight offers an ineffectual statutory construction argument based on RCW 4.84.370(2), a section inapplicable to Tahoma Terra. *Id.* at 56. By its plain language, RCW 4.84.370(1) awards fees on appeal of a LUPA petition to a party who is the substantially prevailing party before the local jurisdiction and in all prior judicial proceedings. This is the section that pertains to Tahoma Terra, an applicant. The statute goes on in subsection two to address when *the local jurisdiction* may be a prevailing party. RCW 4.84.370(2). This latter section is clearly addressed exclusively to counties, cities or towns. To qualify for an award of attorney fees, Tahoma Terra need only satisfy

.370(1) by establishing that it was the substantially prevailing party before the City and the superior court.⁵

To oppose fees, Knight points to the fact that Tahoma Terra appealed as proof that it “lost” before the superior court. *Resp. Brief*, p. 57. Knight fails to specify, however, the substance of her relief before the superior court. That is because there was none. In fact, Knight argues in a different section of her brief that the findings and conclusions the superior court entered on her behalf are meaningless. *Id.*, p. 43 n.15. She also emphasizes that Tahoma Terra agreed to change the language of the condition. *Id.*, p. 29. This Court should ask itself what relief Knight won before the superior court that was not: (a) agreed to, or (b) meaningless. The answer is nothing. Knight obtained no meaningful *relief* against Tahoma Terra before the superior court.

For Tahoma Terra’s part, the superior court order resulted in the agreed-to clarification, and the continued conditional approval of Tahoma Terra’s preliminary plat. Tahoma Terra’s preliminary plat remained approved with no detriment or condition it had not accepted before the

⁵ Even application of .370(2) should permit an award to the Appellants here. Knight wants to elevate form over substance in arguing that because the plain terms of the superior court’s order were “reversal and remand,” the City’s decision was not upheld. But the City’s decision was remanded for clarification of the condition to embrace a meaning that the City itself urged. There is no dispute that the City’s position is and was that its condition means exactly what the remanded condition means.

City. Tahoma Terra's success before the City remained unchanged as a result of the superior court proceedings.

Knight's argument that Tahoma Terra would not have appealed if it had not lost before the superior court is simply incorrect. *See Resp. Brief*, p. 57. The substance of the relief afforded by the superior court was acceptable to Tahoma Terra because, as stated above, its preliminary plat approval was affirmed *in essence* and it could go forward with its development. Knight, however, insisted that the superior court address standards applicable to *final* plat approval, and the superior court obliged by specifically entering Conclusion of Law #5. Tahoma Terra appealed to challenge Conclusion of Law #5. Now, on appeal, Knight asserts that Conclusion of Law #5 is meaningless. *Resp. Brief*, p. 43 n.15. At the same time, however, Knight urges that Tahoma Terra had to appeal in order to establish that the Conclusion was not binding. *Id.*, pp. 52-55. The following becomes clear: Knight specifically elicited Conclusion of Law #5 from the superior court, she maintains that Tahoma Terra was forced to appeal it if Tahoma Terra did not want it to be binding, but on appeal she fails to defend it.

Tahoma Terra substantially prevailed before the superior court because Tahoma Terra's substantive relief from the City was unaffected by the superior court decision. Now, Knight no longer challenges Tahoma

Terra's right to conditional approval of its preliminary plat assuming the condition continues to be interpreted as Tahoma Terra has agreed. Knight has about-faced on her arguments to the superior court and this appeal has secured the nullification of Conclusion of Law #5.⁶

CONCLUSION

Tahoma Terra should prevail in this appeal either through dismissal of Knight's petition for failure to assign error to the determinative standing decision under the YMC, or for lack of standing under the LUPA, or through affirmance on the merits of the preliminary plat approval.

RESPECTFULLY submitted this 15th day of May, 2009.

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⁶ Pursuant to *Overhulse Neighborhood Ass'n v. Thurston County, supra*, and *Witt v. Port of Olympia*, 126 Wn. App. 752, 109 P.3d 489 (2005), this Court will not award fees if LUPA appellants prevail solely on procedural grounds. If this Court grants Appellants' motions to dismiss for failure to assign error to the dispositive standing decision or lack of standing, Appellants recognize it is unlikely the Court would award fees under the rationale of *Prekeges v. King County*, 98 Wn. App. 275, 285, 990 P.2d 405 (1999).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JZ KNIGHT,

Petitioner,

vs.

CITY OF YELM; WINDSHADOW
LLC; ELAINE C. HORSAK;
WINDSHADOW II TOWNHOMES,
LLC; RICHARD E. SLAUGHTER;
REGENT MAHAN, LLC; JACK
LONG; PETRA ENGINEERING,
LLC; SAMANTHA MEADOWS,
LLC; TTPH 3-8, LLC,

Respondent.

NO. 38581-3-II

PROOF OF SERVICE

COURT OF APPEALS
DIVISION TWO
MAY 15 PM 1:37
STATE OF WASHINGTON
BY _____

I have personal knowledge of the facts in this declaration and am competent to be a witness in the above-entitled proceeding. On this 15th day of May, 2009, I caused to be served the Appellant Tahoma Terra's Reply Brief on the following parties by the method so indicated.

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