

No. 38581-3-II

WASH. STATE COURT OF APPEALS
COUNTY OF TULSA
JAN 17 2013 9:52
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BY *lw*
DEPUTY

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

JZ KNIGHT,

Petitioner/Appellee,

v.

CITY OF YELM; TTPH 3-8, LLC,

Respondents/Appellants.

REPLY BRIEF OF APPELLANT CITY OF YELM

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I. INTRODUCTION

In this brief, the City of Yelm (“City”) replies to the arguments in the Amended Brief of Respondent JZ Knight (“Resp.Br.”). Knight brought this LUPA action to challenge five preliminary subdivision approvals by City Hearing Examiner Stephen Causseaux, which were upheld by the City Council. The Council dismissed Knight’s appeals of the Examiner’s decisions for lack of standing, but then contingently reached the merits of the Examiner’s decision in case its decision on standing was overturned on appeal.

Until now, Knight’s major substantive argument was that the City erred by failing to condition preliminary subdivision approvals on the requirement that the City demonstrate adequate water supplies prior to any future final subdivision approval, and this proof had to entail City owned water rights sufficient for both the proposed subdivisions and all previously approved development. Knight now agrees, as the City has long argued, that how adequate water supplies must be shown for potential future final subdivision approvals is not ripe for adjudication in this LUPA challenge of preliminary subdivision approvals.

Knight’s other substantive argument is that the Hearing Examiner erred in his wording of a condition (the “Condition”) imposed on each preliminary approval. The Condition requires a determination of “a

potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit....” CP 1284. Knight argues that the conjunction “and/or” allows the City to forego and defer the water determination at final plat approval until subsequent building permit approvals. However, the Hearing Examiner’s Finding 2, accompanying the Condition, made it absolutely clear that the water determination is required at “final plat approval and building permit approval.” CP 111 at 1283; AR: 12/7/07 H.E. Decision on Reconsideration at 2 (emphasis added).

The likely reason the Examiner used “and/or” in the Condition was his recognition that facilities requiring building permits (and using water) sometimes must be installed before final subdivision approvals. The Examiner apparently was making it clear that a water determination would be required for such building permits even though final plat approval would not occur until later, if ever.

Even though the Examiner’s Finding 2 made the Condition’s meaning and effect clear, Knight has ignored Finding 2 and failed to respond to the City’s arguments regarding Finding 2. To terminate argument about what the City considered a non-issue, the City agreed throughout this litigation to a minor clarification of the Condition that would change the conjunction “and/or” to “and.” Knight acknowledges

agreement by all parties on this clarification, and the language employed in the Condition is not at issue. However, Knight misrepresents that the City has conceded that the Condition was a legal error. Resp.Br. at 32-34. The City consistently has maintained that the inconsequential clarification was not legal error because (1) the Examiner's Finding 2 made his meaning clear, precluding Knight's interpretation, and (2) state and local law require the water availability determination at final subdivision and building permit approvals regardless of the Condition. Verbatim Report of Proceedings ("VRP") for Nov. 7, 2008 at p. 18, lines 4-21; VRP for Oct. 1, 2008 at p. 31, line 10 – p. 33, line 2; CP 1206-1207.

As a result of Knight's withdrawal of her water rights argument, and her acknowledgment of all parties' agreement on changing "and/or" to "and," only a single narrow issue regarding the validity of the City's preliminary approvals remains. The issue is whether the trial court erred by purporting to reverse the City's land use decisions rather than simply confirming a minor, inconsequential clarification agreed to by the parties.

The only other substantive issue relates to whether the lower court erred by imposing detailed notice and comment requirements on any future applications for final subdivision approvals. This issue was not properly before the lower court because, as Knight now concedes, the requirements for final subdivision approval is not ripe for adjudication in

this LUPA challenge of preliminary subdivision approvals. Resp.Br. at 3, 43-44. If applications for final approvals are filed and decisions are made by the City, Knight may bring LUPA actions challenging such decisions on the basis of the adequate water supply requirements in RCW 58.17.150 and the Condition. The City provides ample means of obtaining notice of final subdivision applications and approvals.

The remaining issues before this Court are whether Knight actually appealed the City Council's decision that Knight lacked standing to administratively appeal the Examiner's decisions, whether Knight lacked standing to bring the administrative appeal to the City Council and this LUPA action, whether the lower court had authority to enter conclusions of law, and whether the City is entitled to recover attorney fees.

II. ARGUMENT

A. **Knight's Attacks on the City's Water Rights and Water System Management Are Legally Irrelevant and Factually Erroneous.**

In the trial court, Knight focused her attack on the City's water rights and water management practices. The City responded at length that Knight's assertions were factually erroneous and legally irrelevant. CP108 (City Of Yelm's Response To Petitioner JZ Knight's Opening Brief): at 1209-1214 and 1217-1223.

While much of Knight's Opening Brief challenges the validity and extent of the City's water rights, this Court, in

a LUPA action, has no authority to adjudicate or enforce water rights. Similarly, Knight challenges the City's compliance with its Water System Plan, approved by the state Departments of Health and Ecology. But this Court has no authority, in this LUPA appeal, to enforce the [Water System Plan]. Knight also asks this Court to prescribe the water availability determinations that must be made at final subdivision approval and building permit stages of developments. But any such decision would be an advisory opinion because no final subdivision approvals or building permit approvals are before this Court. Since there have been no final subdivision approvals or building permit approvals, they are not final land use decisions ripe for judicial review under LUPA. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 770, 49 P.3d 867 (2002).

While the City acknowledges that additional and more detailed determinations of water availability must be made prior to final subdivision and building permit approvals under RCW 58.17.150 and 19.27.097, respectively, the Court has no jurisdiction under LUPA to render an advisory opinion on the specific nature of the determinations of water availability that must be made prior to those subsequent approvals. If and when such land use decisions are made, Knight will have the opportunity to challenge them in LUPA actions.

CP108 at 1210-1211.

The City of Yelm's Water System Plan was approved by the Department of Health by letter dated September 16, 2002. The Department of Health has not taken any enforcement action against the City for violation of the City's 2002 WSP, and no amendments of Yelm's 2002 WSP have been required by the Department of Health. In short, there is no basis for Knight's request that this Court substitute its judgment for that of the Department of Health, based on mere assertions and Knight's inaccurate portrayal of City's water planning process.

CP108 at 1214.

Knight erroneously asserts that the “City...has a critical water supply crisis. The City has been withdrawing groundwater from the local aquifer in excess of its legal water rights since 2001.” Pet. Op. Br. at 2. While these statements are not directly relevant to the issues before the Court, they are false and misleading. If the City “has a critical water supply crisis,” enforcement actions would be taken by the Departments of Ecology and/or Health. No such enforcement actions have been taken notwithstanding Knight’s complaints to Ecology and Health.

CP108 at 1220-1221. As the foregoing excerpts demonstrate, the City argued at trial that issues regarding the validity and extent of the City’s water rights and the lawfulness of its water management practices are not ripe for adjudication in this LUPA action. The City addressed these issues in its Brief of Appellant City of Yelm (“City Brief”) before this Court only because Knight was expected to continue to rely primarily on the argument that the City erred by failing to condition preliminary subdivision approvals on determinations of sufficient water rights prior to potential future final subdivision approvals. Now, in her response brief, Knight has unexpectedly changed her position and abandoned this argument, recognizing that the lower court decision on this issue was not ripe for adjudication. Resp.Br. at 43-44.

Even though Knight has abandoned this issue, and did not appeal any trial court decision herself, Knight extensively briefs the issue, attacking the City’s water rights and water management practices. Knight

then “reiterates that there is no reason for this Court to address or resolve the issues at this time or on this record.” Resp.Br. at 44.

Because Knight now agrees that the issue is not before this Court, the City will not reply to her irrelevant argument, and the City’s detailed rebuttal of Knight’s identical factual assertions at trial will not be repeated here. CP108 at 1209-1214 and 1217-1223. There is extensive evidence in the administrative record of the City’s exemplary record of water system planning and management. CP111 at 1289-1491; *see* CP111 at 1267-75.

B. Standard of Review

Knight’s assertion that her “burden is not great in this case,” trivializes the deference that is due to interpretations of local officials charged with administering land use laws. *See* City Br. at 32-37. Knight also misrepresents that “the City admits that its decision contains an erroneous interpretation of law.” Resp.Br. at 15. Knight cites “City Brief at 36” in support of this misrepresentation. Nothing on page 36 or any other page of the City Brief makes any such admission. To the contrary, on the cited page of the brief, the City explains that the Hearing Examiner’s Finding 2 made it absolutely clear that he interpreted applicable state and local law as requiring a determination of adequate water supplies at final plat approval and building permit approval and intended his Condition to reflect those requirements. The Examiner’s

interpretation of applicable law in Finding 2, accompanying and explaining the Condition is entitled to deference. By ignoring the accompanying Finding 2, Knight misinterprets the Condition and then attempts to use her own misinterpretation as a basis for challenging the Examiner's correct interpretation of applicable law.

C. Knight Now Has Abandoned Her Principal Argument Below, that Determinations of Adequate Water Supply for Potential Future Final Subdivision Approvals Must Be Based Exclusively on the City's Water Rights, by Agreeing with the City that the Issue Is Not Ripe for Adjudication.

Knight's most extensive argument before the trial court was that the City was required to condition preliminary subdivision approvals on determinations prior to final approvals that the City has adequate water rights to serve the proposed development and all previously approved development. *See, e.g.*, CP116 at 1520-24. Knight argued this repeatedly in her reply brief to the Superior Court:

Because the City of Yelm now concedes that it is required to determine the adequacy and availability of a potable water supply at the time of final plat approval, it may not be necessary for this Court to review and decide Petitioner's claims of factual and legal errors in the City's approval of these five preliminary subdivisions. **Petitioner is prepared to waive all of her objections to the City's approval of these five preliminary subdivisions so long as there is an enforceable condition of approval (either agreed to by the Respondents or imposed by this Court) that will require the City of Yelm to establish a written factual record, prior to final plat approval, that the City has an adequate and available potable water supply to serve the proposed development, as evidenced by water**

rights approved by the Washington State Department of Ecology.

CP116 at 1520 (emphasis in original).

In these unfortunate circumstances, it is appropriate and necessary for this Court to impose a clear and enforceable condition that final plat approval will require evidence that the City has sufficient Ecology-approved water rights to serve the proposed development.

CP116 at 1521 (emphasis in original).

The preliminary plat approval for these five subdivisions must be modified to require evidence of Ecology-approved water rights adequate to serve the development prior to final plat approval.

CP116 at 1523.

Now Knight has abandoned her primary argument below and agrees with the City that the issue is not ripe for adjudication. Resp.Br. at 3. Knight's statement that "Appellants correctly concede" that the issue is not ripe is puzzling. *Id.* It was Knight who raised this issue below. It has been the City's consistent position that the issue of how adequate water supplies must be shown at final subdivision approval was not before the court in this LUPA appeal of preliminary subdivision approvals, and that any adjudication of the issue would be an unlawful advisory opinion. *E.g.*, CP108 at 1210-1211.

In any event, Knight now has abandoned the issue, and all parties agree that it is unripe. The City and Tahoma Terra addressed the issue

only because it was expected that Knight would continue to pursue it. Knight now says she addressed the issue only because Appellants did. Resp.Br. at 3. Since Knight has abandoned the issue and agrees with the City and Tahoma Terra that the issue is not ripe and is not properly before this Court. Knight's extended argument on that issue serves no purpose and the City will not respond. Such argument also is improper because the trial court decided that the issue of how water availability must be shown at final subdivision approval was not ripe, and Knight did not appeal the trial court decision. CP139 at 1641 (Conclusion 6).

D. Contrary to Knight's Misrepresentations, the City Never Has Conceded that the Condition Added by the Hearing Examiner on Reconsideration was Erroneous and, Throughout this Litigation, Has Agreed to Clarification and Confirmation of the Meaning of the Condition by Replacing the Conjunction "and/or" with "and," Even Though Finding 2 Accompanying the Condition Makes That Meaning Absolutely Clear.

Knight continues to argue that the Examiner erred by adding to each of the five preliminary subdivision approvals the Condition requiring "a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit." CP 1284 (Emphasis added). Knight contends that the literal language of the Condition would allow the City to forego a determination of adequate water supply at future final plat approvals and defer the determination until issuance of building permits for the construction of houses. The City

has argued throughout this litigation that such a reading of the Condition is improper in light of the Hearing Examiner's Finding 2 accompanying and explaining the meaning of the Condition:

While State law and the Yelm Municipal Code require potable water supplies at final plat approval **and** building permit approval, the Examiner has added a condition of approval requiring such.

CP 111 at 1283; AR: 12/7/07 H.E. Decision on Reconsideration at 2 (Emphasis added). In light of Finding 2, there is no plausible argument that the Examiner, in using the conjunction, "and/or," intended that a water determination would not be required at final subdivision approval and could be deferred until a later building permit approval. Knight has ignored Finding 2 throughout this litigation even though the City repeatedly has quoted and emphasized the critical importance of this explanatory finding in ascertaining the intended meaning of the Condition.

In fact, the Examiner's use of the conjunction "and/or" is consistent with the reality that facilities using water, such as utility buildings, community buildings, park buildings, or irrigation for roadway planting strips, are constructed after preliminary plat approval but before final approval, requiring only building permits. The Condition apparently was designed to ensure that determinations of adequate water supply would be required for such facilities constructed before final plat approval. There is no basis for Knight's assertion that the Condition would allow

determinations of adequate water supply to be deferred until after final plat approval

Nevertheless, throughout this litigation, the City has agreed to a minor clarification of the Condition's language, replacing "and/or" with "and." In doing so, the City stressed that, in light of Finding 2, this clarification merely confirmed the intended meaning of the Condition. Contrary to Knight's misrepresentations, the City never has agreed that the Condition was erroneous. The City has offered the clarification merely to terminate needless argument about a nonissue. VRP for Nov. 7, 2008 at p. 18, lines 4-21; VRP for Oct. 1, 2008 at p. 31, line 10 – p. 33, line 2; CP 1206-1207.

In addition, the effect of the Condition is immaterial and moot. All parties agree that, regardless of the Condition, state law requires determinations of adequate water supply at both final plat approvals and building permit issuance. RCW 58.17.150; RCW 19.27.097.

E. The Trial Court Exceeded its Authority by Imposing Notice and Comment Requirements on Nonexistent, Potential Future Applications for Final Subdivision Approvals.

For the reasons explained below, the lower court lacked authority to impose special notice and comment requirements on potential future applications for final plat approvals. No such applications have been filed. Knight argues that, without such special notice, she would be deprived of

opportunity to obtain judicial review of compliance with the requirement of RCW 58.17.150 that a determination of adequate water supplies be made prior to final plat approvals. She is incorrect. The City provides notice of upcoming City Council agendas, including applications for all final plat approvals, on the City's website at ci.yelm.wa.us. The City also sends notices to all parties requesting a copy of the City Council agendas. The trial court's requirement of a comment process directly contradicts local ordinances that do not provide for a hearing on such applications. YMC 16.12.310. Final plat approval is an administrative decision subject to judicial review under LUPA. By requesting notice, Knight will be apprised of, and have the opportunity to appeal under LUPA, any future final plat approvals.

1. Knight's Reliance on RCW 36.70C.140 is Misplaced.

Knight argues that RCW 36.70C.140 "expressly authorizes the imposition, on remand, of notice and comment provisions that are necessary to serve the interest of the parties." Resp.Br. at 39. The cited LUPA provision does not "expressly" mention notice and comment provisions. The provision does not even implicitly or generally authorize the notice and comment requirements imposed by the trial court. The provision authorizes "an order as...necessary to preserve the interests of the parties and the public, pending further proceedings or action by the

local jurisdiction.” *Id.* The notice and comment requirements had nothing to do with the “further proceedings” for which the City’s preliminary plat approvals were “remanded.” *Id.* The only “further proceedings” on remand was to make the clarifying change of “and/or” to “and also” in the Condition on the preliminary approvals. CP1643-45. In contrast, the special notice and comment requirements applied only to potential future final subdivision approvals and not to the further proceedings for which the preliminary approvals were remanded. RCW 36.70A.140 authorizes remedial requirements only for the land use decisions that are subject to LUPA review, not for potential future land use decisions that are not even before the court. *Asche v. Bloomquist*, 132 Wn. App. 784, 793, 133 P.3d 475 (2006) does not support Knight’s position. There the court cited RCW 36.70A.140 as authority for measures to redress injury caused by the challenged land use action, not as authority for measures to redress some hypothetical future injury caused by potential future land use decisions that were not before the court.

2. Knight’s Concession That What Is Legally Required for Potential Future Final Subdivision Approvals is Not Ripe for Adjudication also Pertains to the Notice and Comment Processes Required for Potential Future Final Approvals. Both Are Unripe for Adjudication, and the Court’s Advisory Opinion Was Unlawful.

The only land use decisions before the trial court were the City’s

preliminary subdivision approvals. After Knight's concession that issues pertaining to adequate water supplies at final approval are not ripe, Knight's only present claim regarding the preliminary approvals pertains to the language of the Condition. The special notice and comment requirements imposed by the trial court pertain to potential future final approvals, not the challenged preliminary approvals. Because all issues pertaining to potential future final plat approvals are unripe, the trial court's requirement of notice and comment for potential final approvals was an unlawful advisory opinion. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994).

F. Knight's LUPA Petition Failed to Effectively Appeal the City Council's Final Decision that Knight Lacked Standing to Administratively Appeal the Hearing Examiner's Decision to the City Council.

The City Council explicitly dismissed Knight's appeals of the Hearing Examiners' preliminary subdivision approvals because she was not an "aggrieved person" and, thus, lacked standing to appeal under the City Code. CP 25-28 (at Concl. of Law 3). In order to obtain judicial review of the City Council's dismissal for lack of standing, this City decision must be properly brought within a superior court's appellate jurisdiction under LUPA. "[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be

satisfied.” *Crosby v. County of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32 (1999).

Knight failed to comply with LUPA’s procedural requirement that a land use petition “must” set forth “[a] separate and concise statement of each error alleged to have been committed.” RCW 36.70C.070(7). Knight’s land use petition contains a section titled, “A Separate and Concise Statement of Each Error Alleged to Have Been Committed,” which sets out ten separate statements of error allegedly committed by the City. CP 13-16. Knight’s ten alleged errors are specific, but none relates in any way to the City’s dismissal for lack of standing. Therefore, Knight did not appeal the City’s decision dismissing Knight’s appeal for lack of standing; and LUPA’s requirement for alleging error to that City Council decision was not satisfied.

Knight responds that her LUPA petition appealed the City’s “entire decision” (Resp.Br. at 16) by merely referring in the first sentence of the petition to the City’s decision. CP 9. But RCW 36.70C.070 provides that a petition “must” set forth a “separate and concise statement of each error alleged to have been committed.” This mandatory requirement (“must”) would be meaningless if it is satisfied through mere reference to the appealed land use decision. The plain meaning of the words, “separate statement” and “each error,” requires more than a general reference to the

land use decision being appealed. Yet, the petition ignores and fails to even mention the City Council's dispositive dismissal based on lack of standing under the City Code.

Knight also argues that she satisfied RCW 36.70C.070(7) because section 6 of her petition sets forth allegations that she has standing under LUPA to obtain judicial review. See CP 11-13.. However, this section of her brief does not state, explicitly or implicitly, that the City Council erred by dismissing her administrative appeal for lack of standing. Knight simply did not bring before the superior court the City Council's decision to dismiss for lack of standing under the City Code.

Knight relies on cases holding that failure to comply with several minor formalistic LUPA requirements did not deprive the courts of jurisdiction. *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005) (failure to note initial hearing within 7 days did not deprive court of jurisdiction); *Keep Watson Rural Cutoff v. Kittitas County*, 145 Wn. App. 31, 184 P.3d 1278 (2008) (failure to attach copy of land use decision did not deprive court of jurisdiction). Here, the LUPA requirement of RCW 36.70C.070(7) is neither minor nor formalistic. Moreover, the City agrees that Knight's failure to identify, as an alleged error, the City's dismissal of Knight's administrative appeal for lack of standing under the City Code, would not deprive the trial court of jurisdiction to consider the

issues that Knight actually appealed in her LUPA petition. But Knight did not appeal the Council's decision to dismiss her administrative appeal for lack of standing. Knight could have moved to amend her petition to add that claim, and sought relation back under CR15(c), but Knight failed to do so.¹ Accordingly, that unappealed City Council decision was a final decision and *res judicata*. The trial court erred in not dismissing Knight's appeal on that basis.

G. Knight Failed to Satisfy City Code Standing Requirements in Her Appeal of the Examiner's Decisions to the City Council, and Failed to Satisfy LUPA Standing Requirements in Her Appeal of the City's Land Use Decisions to Superior Court.

The most essential element of standing requires a party challenging governmental action to demonstrate that she will suffer injury-in-fact as a result of the action that is immediate, concrete and specific. *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992); *see* City Br. at 28-32. Knight does not directly respond with any plausible argument that her senior water rights will suffer immediate, concrete injury as a result of the City's preliminary approvals. Instead, she argues that Washington courts have held that neighboring property owners have had standing on

¹ *See Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005), *review denied*, 163 Wn.2d 1018 (2008) (failure to name required party in caption was not jurisdictional under LUPA, and petitioner was allowed to amend caption and have it relate back to original filing date)/

the basis of traffic impacts and stormwater impacts. Resp.Br. at 25. But Knight never has argued that she would be injured by traffic or stormwater impacts. Knight's sole basis for asserting standing to challenge the City's approvals is that they will cause injury to her senior water rights.

Injury caused by a development's traffic and stormwater impacts from a preliminary plat approval are distinguishable from supposed injuries to senior water rights. Traffic and stormwater impacts are direct consequences of a development. These types of impacts are directly addressed by land use regulatory requirements for plats. If the land use regulatory requirements for traffic or stormwater are insufficient to protect neighboring property interests, a direct and immediate injury is clearly foreseeable. In contrast, state approval of the use of water is based and conditioned on a finding of no adverse impact to senior water right holders. RCW 90.03.390(3); RCW 90.03.380(1). Given this statutory protection, the relationship between a preliminary development approval and future impacts to water rights is not clearly foreseeable, as with traffic or stormwater impacts, and any claim of future harm is speculative.

In addition, no harm could be possibly be immediate in this case, because the City must determine at final subdivision approval stage that there is sufficient water for the proposed subdivision. RCW 58.17.150. The City must also determine at building permit issuance that there is

sufficient water for the proposed development. RCW 19.27.097. Knight now admits that issues related to final subdivision approval are not ripe for judicial review. This is equally true for any issues related to building permit approval. Until those decisions are made, Knight's assumptions of potential injury to her water rights are purely speculative.

Moreover, a superior court in a LUPA action does not have jurisdiction to decide whether water usage related to a development violates senior water rights. Such determinations may be made only through judicial review under the State Water Code. Chap. 90.03 RCW; *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1996).

Knight herself acknowledges that her water rights are "constitutionally protected property interests" that "cannot be impaired by junior water rights or by changes to other senior or junior water rights," citing RCW 90.03.010 and .380. Resp.Br. at 26. The Department of Ecology is legally required to protect senior water rights from impairment under the State Water Code. Ch. 90.03, RCW. Knight's bare assertion, in a LUPA action, that her senior water rights will be harmed as a consequence of a City preliminary plat decisions is completely speculative, unsupported, and insufficient to establish standing. Since the Superior Court had no jurisdiction in a LUPA appeal to decide whether Knight's water rights will be injured, there cannot be any judicial

determination of injury to water rights or redress for such injury.

H. The Trial Court Lacked Authority to Adopt Findings of Fact and Conclusions of Law Exceeding the Scope of the Court's Actual Decision Embodied in the Judgment.

Knight agrees that the lower court's findings of fact and conclusions of law became nullities when the court's decision was appealed. Resp. Br. at 53-54. Knight also agrees that the lower court had no authority to enter findings of fact. Thus, the only issue before this Court is a narrow procedural one—did the lower court have authority to enter conclusions of law. As explained in the City's Opening Brief, a key reason for the City's appeal of the lower court's decision was the possibility that the court's findings of fact and conclusions of law, if not appealed, might have binding legal effect on the City. Even though the lower court decision has been appealed, the City requests the Court to decide this issue to provide needed guidance for superior courts and LUPA litigants.

1. Knight Agrees that the Lower Court Did Not Have Authority to Adopt Findings of Fact.

Knight concedes that superior courts acting in an appellate capacity, as in this LUPA action, do not have authority to make findings of fact. Resp.Br. at 53' *see State ex rel. Lige & William B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 619, 829 P.2d 217 (1992), Knight

also explicitly agrees that the superior court's function is to decide whether findings of fact made below were supported by substantial evidence." *Id.* In this case, the superior court did not find that any of the Hearing Examiner's and City Council's findings of fact were unsupported by substantial evidence. Thus, the parties agree that the lower court, acting in an appellate capacity, had no authority to enter findings of fact. Knight argues only that the lower court had authority to issue conclusions of law.

2. The Lower Court Did Not Have Authority to Adopt Conclusions of Law.

Knight relies exclusively on RCW 36.70C.130(1)(a)-(f) for the assertion that LUPA allows and requires a superior court to make conclusions of law that are binding unless appealed. Resp.Br. at 51. The plain language of the cited LUPA section has no such effect. RCW 36.70C.130 merely provides that the court shall review the record and may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards for granting relief is met. The statute says nothing about conclusions of law, neither authorizing nor requiring them. Knight essentially argues that because a superior court must decide the case, it must enter conclusions of law. That is not so. LUPA merely requires reviewing courts to decide whether challenged land use decisions

were erroneous under any of the standards set forth in the statute. The judicial act of deciding that a challenged land use decision was clearly erroneous or an erroneous interpretation of the law or unsupported by substantial evidence does not authorize or require conclusions of law that extend beyond the scope of the judicial decision. Knight also misstates the holding in *Grader v. Lynnwood*, 45 Wn. App. 876, 728 P.2d 1057 (1986).. Knight claims that the Grader court "went on to hold that the superior court there had appropriately made legal conclusions." Resp.Br. at 54. That is incorrect. The *Grader* court merely acknowledged that the "[t]rial court adopted the proper standard of review to resolve the legal issues before it," and concluded that "[t]his court reviews the administrative record in rendering its decision and does not rely upon the trial court's findings and conclusions." *Grader*, 45 Wn. App. at 879-880.

I. Recovery of Attorney Fees and Costs

Knight argues that the City is not entitled to recover attorney fees and costs under RCW 4.84.370 solely on the ground that the City did not "substantially prevail" below because the trial court purported to "reverse" and "remand" the challenged land use decisions. Whether the City substantially prevailed before the trial court depends on what the trial court actually did, not what the trial court said. The sole effect of the trial court's decision on the appealed preliminary subdivision approvals was to

remand for a minor, immaterial clarification of the language of the Condition regarding determinations of adequate water supplies prior to final subdivision and building permit approvals, a clarification that Knight acknowledges the City has agreed upon throughout this litigation. The clarification does not change the meaning of the Condition which the Hearing Examiner clearly explained in the accompanying Finding 2.

Knight's briefing before the Hearing Examiner and Trial Court predominantly argued that the City's preliminary approvals were erroneous because they failed to include a condition requiring that the determination of adequate water supplies prior to final approvals must be based on the City's ownership of sufficient water rights to serve the proposed development and all previously approved development. The trial court denied this claim, recognizing that what is required for potential future final approvals is not ripe for adjudication, as Knight now concedes.

Because the City's preliminary plat approvals were not significantly altered by the trial court decision, the City substantially prevailed before the trial court and is entitled to recover attorney fees and costs if the City substantially prevails before this Court.

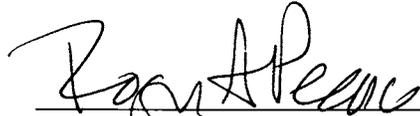
III. CONCLUSION

For the foregoing reasons and the reasons set forth in the City's Opening Brief, the City respectfully requests the Court to uphold the

challenged preliminary subdivision approvals; to dismiss Knight's LUPA petition because she failed to appeal the City Council's dispositive decision that she lacked standing; to dismiss Knight's LUPA petition because she, in fact, lacks standing; and to overturn the Superior Court's Judgment because it purported to reverse the preliminary subdivision approvals, it imposed special notice and comment requirements for final subdivision approvals, and it unlawfully entered findings and conclusions, in particular, findings that purported to determine the City's water rights and conclusions regarding how the City must process final subdivision approvals and how the City must determine adequate potable water for final subdivision approvals.

DATED this 15th day of May, 2009.

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COURT OF APPEALS
JAN 15 2012
BY _____
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No. 38581-3-II

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

JZ KNIGHT,

Petitioner/Appellee,

v.

CITY OF YELM; TTPH 3-8, LLC,

Respondents/Appellants.

CERTIFICATE OF SERVICE

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ORIGINAL

The undersigned certifies that on the 15th day of May, 2009, I caused to be served the **Reply Brief of Appellant City of Yelm** and this **Certificate of Service** in the above-captioned matter upon the parties herein as indicated below:

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

DATED this 15th day of May, 2009.


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