COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38581-3-II

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

JZ KNIGHT,

Respondent

v.

CITY OF YELM AND TTPH 3-8, LLC,

Appellants

BRIEF OF RESPONDENT JZ KNIGHT

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I. INTRODUCTION

The central issue in this appeal is whether the City of Yelm's approval of five preliminary subdivisions should be remanded to correct a condition of approval that the City and Tahoma Terra (the Appellants herein) now acknowledge contains an erroneous interpretation of law. The City approved the preliminary subdivisions, which will add 568 residential units (an increase of some 25 percent) to the City, without imposing a condition requiring appropriate provision for water supply at final plat approval. When JZ Knight (Respondent herein) appealed to superior court, the City changed its position, admitted that determination of adequate water must be made at final plat approval, and agreed that the condition allowing the determination to be made at final plat approval "and/or" later at building permit issuance should be corrected. All five applicants, including Tahoma Terra, agreed to modify the "and/or" language, and the superior court remanded the approvals for the City to amend the condition.

Four of the preliminary subdivision applicants accepted the superior court decision and did not appeal, but Tahoma Terra and the City ask this Court to reverse the superior court and leave in place the condition they had agreed to amend, which contains an interpretation of law they admit is erroneous. Their request should be denied. This Court, like the superior court, has the power and duty under the Land Use Petition Act

(LUPA) to correct an erroneous land use decision.

In order to avoid review of the admittedly erroneous condition, the City and Tahoma Terra devote much of their opening briefs to arguments that Knight lacks standing to challenge the City decision. The superior court correctly rejected those arguments. First, Knight's LUPA petition clearly challenged the City Council decision that Knight lacked standing. The Petition appealed the entire Council decision and included two pages of allegations showing standing under the standard that the City uses to determine standing. Second, Knight easily meets the injury-in-fact requirement for standing: she owns and lives on property in close proximity to the new development and holds senior water rights in the same water that the subdivisions would draw on. Indeed, the Appellants' arguments against standing actually confirm that Knight was harmed by the City's decision because these arguments assume the existence of the very relief that the superior court granted in reversing the City: correcting the erroneous condition to require that determination of adequate water be made prior to final plat approval and providing Knight with sufficient notice to appeal the determination if it is not supported by the record.

As Appellants' standing arguments implicitly concede, Knight can protect her rights in water that may be improperly allocated to these subdivisions at final plat approval only if she has notice that would allow her

to participate in those final plat proceedings and would allow her to appeal an unsupported determination of adequate water. Because the City Code does not otherwise provide for such notice, the superior court used its authority under LUPA (RCW 36.70C.140) to establish requirements for notice to protect Knight's ability to appeal a final plat determination. Knight urges this Court to affirm and maintain those conditions on remand.

Appellants correctly concede that, since the determination of adequate water will not be made until final plat approval, two issues are not ripe in this preliminary plat appeal: (1) what must be shown to demonstrate adequate water for final plat approval and (2) whether that showing was made on this record. There is no need for this Court to address the lengthy arguments Appellants make on those issues (if it does, the Court will find that those arguments are contrary to law and are contrary to the evidence). Similarly, there should be no need to reach Appellants' claim for attorney fees as prevailing parties in this Court. In any event, there is no merit to their remarkable claim that they "prevailed" in the very superior court decision that they seek to reverse.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error to City Decision

1. The City of Yelm Hearing Examiner condition (affirmed by the City Council) for each of the five subdivision approvals that allowed the applicant to provide proof of adequate potable water "at

final plat approval and/or prior to the issuance of any building permit" is an erroneous interpretation of the law. AR (Hearing Examiner Decision on Reconsideration, Conclusion 2; City Council Resolution No. 481) at CP 25-28, 1284.[1]

2. The Yelm City Council conclusion that JZ Knight "is not an aggrieved person with standing to appeal the Examiner's decision to the City Council" is an erroneous interpretation of the law, is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts. *Id.*, CP 26 (Conclusion 3).

3. The City of Yelm Hearing Examiner and City Council erroneously interpreted the law when they stated that the requirement for provisions for adequate water supply is satisfied by a "reasonable expectancy" that water will be available. AR (Hearing Examiner Report and Decision; Resolution No. 481) at CP 27-28, 1275-76.

4. The decision of the City of Yelm Hearing Examiner (affirmed by the City Council), that these proposed subdivisions had made appropriate provisions for potable water is not supported by substantial evidence and is a clearly erroneous application of the law to the facts. *Id.*, CP 25-28, 1276.

B. Issues

1. Should this Court reverse and remand the preliminary subdivision approvals for the City to correct the condition that allows determination of adequate water to be deferred past final plat approval, given that both Appellants concede the determination must be made prior to final plat approval and the City admits the condition

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[1] The Administrative Record (AR) is not page-numbered. Like the City Brief (p. 9, n. 3), where possible this brief cites to copies of AR documents contained in the Clerk's Papers (CP), referencing the CP page numbers. The Hearing Examiner issued a separate Report and Decision and a separate Decision on Reconsideration for each of the five applications. This brief cites to the decisions on Appellant Tahoma Terra's application, which are found at CP 1260-81 and 1282-86, and to the record exhibits ("HE Ex.") as listed in those decisions. Copies of those Hearing Examiner decisions, as well as City Council Resolution No. 481 (located at CP 25-28), are attached to the City's Opening Brief.

is an erroneous interpretation of law? (Assignment of Error # 1; City Assignment # 3; Tahoma Terra Assignments # 4-6).

2. Are the City and Tahoma Terra barred from challenging the superior court's judgment remanding the condition to delete "/or" because they invited the superior court to order that amendment of the condition? (Assignment of Error # 1; City Assignment # 3; Tahoma Terra Assignments # 4-6).

3. Should this Court deny Appellants' request to dismiss Knight's petition based on her alleged failure to strictly comply with LUPA's requirements for the content of a land use petition both because those requirements are not jurisdictional and because Knight in fact fully complied by setting forth detailed allegations showing that she had standing, and thus that the City Council erred in asserting that she lacked standing. (City Assignment # 1; Tahoma Terra Assignment # 2).

4. Knight owns and lives on property in close proximity to the subdivisions that the City approved with the erroneous condition allowing final plat approval without a determination of adequate water supply, and holds senior water rights in the same water that would supply the subdivisions. Did the City Council err in asserting that Knight was not aggrieved and lacked standing, and did the superior court correctly determine that Knight had standing? (Assignment of Error # 2; City Assignment # 2; Tahoma Terra Assignment # 3).

5. Do Appellants' arguments (that the determination of adequate water will be made at final plat and that Knight can appeal that determination if needed) confirm her standing by showing that the relief granted by the superior court (correcting the condition and providing Knight notice of any finding of adequate water) redressed the prejudice that the City decision caused? (Assignment of Error # 2; City Assignment # 2; Tahoma Terra Assignment # 3).

6. Does RCW 36.70C.140, which allows the reviewing court to "make such an order as it finds necessary to preserve the interests of the parties ... pending further proceedings or action by the local jurisdiction," authorize the superior court and this court to require on remand that Knight receive sufficient notice of a determination of adequate water made for final plat approval so that she will ac-

tually be able to appeal as Appellants contend she can? (City Assignment # 4).

7. (a) Should the Court, in this preliminary plat appeal, decline to reach issues regarding the legal standard for determining adequate water at final plat approval and whether the evidence in this record meets that standard, when all the parties agree those issues are not ripe? (b) If the Court were to reach these issues, should it hold (i) that the required finding of adequate provision for potable water requires more than a "reasonable expectancy" that sufficient water will become available, and (ii) that no evidence in the current record supports the City's finding that sufficient water will be available to serve the subdivisions. (Assignments of Error # 3 & 4; City Assignment #s 2, 6; Tahoma Terra Assignments # 3, 8)

8. Are superior courts authorized and required under LUPA to make legal conclusions resolving the issues on appeal and are those conclusions binding on the parties unless the decision is appealed? (City Assignment # 5; Tahoma Terra Assignment # 7)

9. Should this Court reject Appellants' claim that they prevailed in the superior court judgment that they seek to overturn, where that decision did not uphold, but reversed, the City's land use decision?

III. STATEMENT OF THE CASE

A. Even Before Consideration Of These Preliminary Subdivisions, The City's Water Demand Exceeded Its Approved Water Rights.

At the time of the public hearings on the five applications at issue, the Department of Ecology ("Ecology"), the state agency with authority over water rights, had determined that the City's then-current (2006/2007) water rights totaled only 719.66 acre-feet-per-year ("afy").[2] AR (8/20/07

[2] One acre-foot equals 325,851 gallons. Although the City asserted in those proceedings that the 2006/2007 water rights totaled 832.35 afy, it

letter from Ecology, in HE Ex. 15) at CP 724-26; *see* CP 697, 1261, 1268. In the public hearings before the Hearing Examiner, the City acknowledged that its water demand in 2006 was 766 afy and projected that in 2007 it would be 801 afy. AR (8/9/07 Skillings Connolly Letter, in HE Ex. 12) at CP 1324. Both of these annual totals exceeded the City's current water rights of 719.66 afy. In fact, the City's own evidence showed that the City has been pumping more acre feet than it has rights to since at least 2001. AR (7/9/07 E. Smith email, in HE Ex. 12) at CP 1319.

B. The Subdivision Applications.

Five separate applicants applied for approval of preliminary subdivisions from the City. Three of the proposed projects (Windshadow I, Windshadow II, and Tahoma Terra) sought preliminary plat approval under Yelm Municipal Code ("YMC") Chapter 16.12. AR (Resol. 481) at CP 25. The other two (Wyndstone and Berry Valley I) sought binding site plan approval under YMC Chapter 16.32. *Id.* The water availability requirements for both processes are identical. YMC 16.12.170; YMC 16.32.065. The five proposed subdivisions would add a total of 568 new residential units to the City. AR (Community Development Department Memorandum to Council, 1/7/08, p. 1). At the time of the applications,

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subsequently agreed to limit its pumping to the 719.66 afy determined by Ecology (plus subsequently-approved water rights transfers). CP 1252-55.

the City had approximately 2,135 residential units. CP 561, 619.

Based on the City's adopted planning standards, the 568 additional residential connections proposed in these preliminary subdivisions will add an additional 191 afy to the City's existing water deficit. The City uses an Equivalent Residential Unit (ERU) standard of 300 gallons per day for each residential connection or the equivalent. *See* City Comprehensive Joint Plan with Thurston County, Section V(C)(2)(c) ("For planning and concurrency purposes, the City requires 300 gallons per day per connection ... together with a reserve capacity of 15%."), quoted in Hearing Examiner Report and Decision (CP 1274).[3] Applying that standard, the 568 units would require 170,400 gallons per day, which is 62,196,000 gallons, or 191 afy, of potable water per year.

C. Knight's Interest In The Development Proposals.

JZ Knight, the Petitioner in superior court and Respondent in this Court, resides on and owns property located within the City's Urban

[3] The standard of 300 gallons per day (gpd) for planning purposes is also stated in the City's 2006 Comprehensive Plan (CP 636) and in the draft 2002 Comprehensive Water Plan, which explains that it is based on the City's studies showing actual use of an average 271 gpd, with approximately 10 percent allowed for system loss, which is the standard set in state regulations. *See* AR ("Review of Yelm Water Supply and Growth Demand Issues" in HE Ex. 6) at CP 733-34; *see also* WAC 246-290-222. The lower figure of 224.4 gpd cited by the Hearing Examiner (CP 1274) is not used for planning purposes, but is found in the Code section on water connection charges. YMC 13.04.120; *see also* AR (*Id.*) at CP 734.

Growth Area and some 1,300 feet from the closest of the proposed subdivisions. AR (Appellant's Reply in City Council appeal) at CP 115; *see* CP 601, 605. Knight owns a surface water right from Thompson Creek that traverses her property. AR (*Id.*) at CP 115-16; *see* CP 603, 609-10. Knight also operates a Group A public water system that is authorized to use groundwater for potable water requirements under water right certificate No. 5886. AR (*Id.*) at CP 115-16; *see* CP 602, 606-08.

The aquifer from which Knight draws water under certificate 5866 is also the source of supply for the wells used by the City. AR (*Id.*) at CP 116; *see* CP 593. In addition, Thompson Creek is in hydraulic continuity with the City wells. AR (*Id.*) at CP 116; *see* CP 593-94. Any further groundwater withdrawal by the City will adversely impact the flow of groundwater that supports Knight's wells and the flow of Thompson Creek where she has surface water rights. *Id.* As described below, Knight participated in all the City proceedings with regard to the five applications.

D. City Administrative Proceedings.

Separate public hearings on the five proposed subdivisions were held before the City of Yelm Hearing Examiner on July 23, 2007. The City and the subdivision applicants did not provide any documentation regarding water supply and water demand. However, Knight presented extensive documentation regarding the City's water rights, water demand,

ERU calculations based on the City's Comprehensive Plan, and an evaluation of two water rights conveyances promised by Tahoma Terra -- "conveyances" of the McMonigle and Golf Course water rights.[4] AR (HE Ex. 6 - 7/23/08 Moxon letter with attachments); *see* CP 725-41.

This evidence included showing that the City's actual current rights at the time of the hearings totaled only 719.66 afy (not 832.35 afy as claimed by the City in post-hearing submissions) and that after allocating the Dragt water rights (155.66 afy) to serve previously approved phases of the Tahoma Terra project, the City had only 564 acre-feet of current (2006/2007) water rights available to serve all other existing and future water demand (including the five proposed subdivisions). AR (*Id.*) at CP 731, 735.

The Hearing Examiner kept the record open to allow the City and the applicants to provide information regarding water availability and to

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[4] Several water rights are referenced in this case. The Dragt water rights (155.66 afy) were approved by Ecology in December of 2006. CP 905-973. This approval increased the City of Yelm's water rights from 564 afy to to 719.66 afy. AR (HE Ex. 6 & 15) at CP 724-26, 731, 735. The Tahoma Valley Golf Course water rights and the McMonigle water rights are proposed water rights transfers "conveyed" to the City by the developer of the Tahoma Terra subdivision, but had not been approved by the Department of Ecology at the time of the City's public hearings and decisions. The City claimed the Tahoma Valley Golf Course water rights would add 125 afy to the City's water rights, but this transfer was approved in March of 2008 (long after the record closed) in the amount of only 77 afy. CP 638-41. The City claims the McMonigle water would add 175 afy to the City's water rights, but this transfer has not been approved by Ecology.

allow Knight to respond to such information. In response, the City, some of the subdivision applicants, and Knight made post-hearing submissions to the record. AR (HE Exhibits 7-19). Neither the City nor any of the applicants challenged Knight's standing or right to participate at any point in the proceedings before the Hearing Examiner.

The Examiner issued decisions approving the five preliminary subdivisions on October 9, 2007. Those decisions each stated that:

> [C]onditioning a preliminary plat to provide both domestic water and fire flow prior to final plat approval satisfies the provisions of RCW 58.17.110 and the YMC that require an applicant to show that a proposed preliminary plat makes appropriate provision for ... potable water supplies [CP 1274]

However, the decisions did not include such a condition. Knight filed motions for reconsideration, asking the Examiner to add a requirement that provisions for water be made prior to final subdivision approval. AR (10/19/07 Motion for Reconsideration) at CP 97-103. In response, the Hearing Examiner issued five decisions on reconsideration dated December 7, 2007, each of which added the following condition of approval:

> The applicant must provide 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 timely appealed the Examiner's decisions to the Yelm City Council. AR (Tahoma Terra, Windshadow I, Windshadow II, Wyndstone,

and Berry Valley I appeals, dated 12/17/07); *see* CP 105-09. As required by YMC 2.26.150, the appeals were filed "upon forms provided by the [Community Development] department." *See* CP 105, 635. The appeals contained all the information requested on the City's required appeal form, which does not request any information about standing. AR (12/17/07 appeal) at CP 105-09. In their responses to the appeals, several applicants (not Tahoma Terra) and the City for the first time argued that Knight did not have standing. AR (Community Development Department Memorandum to Council, 1/7/08 p. 2; Applicant's Response (Windshadow), 1/6/08, pp. 2-4). In reply, Knight presented detailed factual allegations showing her standing. AR (Appellant's Reply, 1/14/08) at CP 115-16.

Following a closed record appeal hearing, the Yelm City Council issued a final decision approving the five preliminary subdivisions on February 12, 2008. AR at CP 25-28. The Council considered Knight's allegations of standing as part of the record, but asserted that she was not an aggrieved person with standing. *Id.* at CP 25 (second WHEREAS clause) and 26 (Conclusion 3). However, the Council reached and resolved the substantive issues that Knight raised. *Id.* at CP 26-28 (Conclusions 4-18). The City Council's decision affirmed the Hearing Examiner's factual findings and legal conclusions approving the five preliminary subdivisions. *Id.* at CP 25.

E. Land Use Petition and Superior Court Rulings.

Knight filed a timely judicial appeal under the Land Use Petition Act challenging the City's decision in Thurston County Superior Court. CP 9-28. The Petition challenged the entire City Council decision (CP 9) and contained detailed allegations showing Knight's standing (CP 11-13). The City and applicants moved to dismiss the petition, alleging that Knight had not appealed the City conclusion that she lacked standing, and later moved for summary judgment claiming that Knight did not have standing. CP 215-37, 540-59. The superior court denied both motions. CP 443-46, 659-60.

The Department of Ecology moved for leave to file an amicus curiae brief, which the superior court granted. Supp CP ____ (Sub Nos. 24 & 75). In its Amicus Brief (CP 1482-98), Ecology showed that the subdivision statute requires appropriate provisions for water before final plat approval, that pending water rights applications do not constitute appropriate provisions for water, and that the City's existing water rights were insufficient to meet the needs of the proposed subdivisions. CP 1490-98.

In their superior court briefs, the City and most of the applicants conceded that determination of water adequacy must be made at the final plat stage. CP 1207 (City Brief), 1091 (Windshadow brief). Tahoma Terra's brief continued to argue that the determination could be deferred to

building permit issuance. CP 829, 846, 849. However, when the City agreed to amend the language of the condition to delete "/or," the applicants all agreed or expressed no objection. CP 1562, 1641.

On October 7, 2008, the superior court issued a Letter Opinion stating that it would remand the decisions to the City to remove the "/or" from the condition. CP 1561-65. The Letter Opinion also provided that Knight should receive notice of City findings of appropriate provision for water so that she would be able to seek court review of final subdivision approvals if necessary. CP 1565. On November 7, 2008, the court entered findings and conclusions and a judgment in favor of Knight. CP 1636-45. The City and one applicant, Tahoma Terra, appealed. CP 1646-60, 1663-84. The other four applicants did not appeal.

IV. ARGUMENT

A. Standard of Review.

This Court can grant relief if Knight establishes one or more of the LUPA standards for relief. Three are at issue here:

> The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]
>
> The land use decision is a clearly erroneous application of the law to the facts;

RCW 36.70C.130(1)(b), (c) & (d).

Knight's burden is not great in this case: "the question of who has the burden of proof is not significant here because [the Court is] reviewing a legal decision." *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007) ("*Quality Rock II*"). Moreover, as discussed in § IV(C) below, the City admits that its decision contains an erroneous interpretation of law. City Brief at 36. Reviewing courts do not defer to erroneous interpretations of law. *See, e.g., Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wash.2d 224, 238, 110 P.3d 1132 (2005).

B. The Superior Court Correctly Determined That Knight Has Standing; The City Erred In Concluding That Knight Lacked Standing.

1. The Petition Expressly Alleged Knight's Standing, Thus Challenging the City Council's Erroneous Conclusion That She Lacked Standing.

Neither the facts nor the law justify Appellants' argument that Knight's Land Use Petition should be dismissed for failure to strictly comply with RCW 36.70C.070, which lists the elements that a petition must set forth. *See* City Brief at 25-28; Tahoma Terra Brief at 20-22.

Factually, the Petition fully complied with RCW 36.70C.070 by demonstrating, in two pages of allegations, that Knight had standing, thus showing that the City Council's contrary conclusion was erroneous. CP 11-13. Legally, no Washington case has ever held that the requirements of RCW 36.70C.070 (or of any LUPA provision except RCW 36.70C.040) are jurisdictional or require strict compliance. On the contrary, in a case Appellants failed to disclose to this Court, the Court of Appeals expressly rejected that argument: "we conclude that the elements of a LUPA petition, even though statutorily required, are not jurisdictional requirements that divest a superior court of jurisdiction if not met." *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 39, 184 P.3d 1278 (2008).

Appellants' argument rests entirely on a factual assertion that is simply wrong: that the Petition does not appeal the City Council conclusion that Knight lacked standing. In fact, read in its entirety the Petition unequivocally challenges the Council ruling on standing. The Petition states that it is brought "to challenge the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008)." CP 9. As such, it appeals the <u>entire</u> decision, which includes, as Appellants indicate, an assertion that "Knight lacks standing to appeal." CP 26.

Having indicated that it challenges all of the City decision, the Petition then devotes almost two full pages to showing that, contrary to the

City Council conclusion, Knight does in fact have standing. CP 11-13. 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. The City's attempt to suggest that Knight's allegations "pertain only to whether she has judicial standing" is completely undercut by the City's admission one page later that "[t]he City construes the administrative appeal standing requirement of YMC 2.26.150 ("aggrieved person") to be the same as LUPA's judicial standing requirements." City Brief at 27 (City's emphasis) and at 28, citing CP 72. Given that the two standards are, in the City's view, identical, Knight's allegations that she had judicial standing necessarily also alleged that she had standing under the City's construction of its standing requirement. And by alleging that Knight had standing, the Petition clearly challenged the City's conclusion that she did not.

In the end, Appellants' argument boils down to insisting that where a local land use decision asserts lack of standing, RCW 36.70C.070 requires that a petitioner must not only set forth her standing in section 6 of a petition, but must then repeat the very same allegations again in a section 7. Even under the strictest construction imaginable, RCW 36.70C.070 contains no such requirement. In fact, while the statute contains nine numbered subsections, each identifying a required petition element, it does

not mandate how those elements should be set forth, much less state that each element can only be set forth in a single numbered section corresponding exactly to the statutory number.[5] Nor does it prohibit one petition section from setting forth all or part of more than one required element. Having set forth, in section 6 (CP 11-13), allegations showing that Knight had standing under the standard applicable to both the Council decision and judicial review, the Petition strictly complied with RCW 36.70C.070(7) & (8) with regard to the standing error. Those detailed factual assertions set forth "[a] separate and concise statement of [the] error alleged to have been committed" regarding standing pursuant to RCW 36.70C.070(7) and "[a] concise statement of facts upon which the petitioner relies to sustain the statement of error" regarding standing in accord with RCW 36.70C.070(8).[6]

Even if, contrary to the actual facts, the Petition had not fully complied with the requirements for content of a petition, the controlling case-

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[5] Respondent Knight recognizes that it is common practice to organize land use petitions in this manner, but it is certainly not mandatory. For instance, a petition could include one section labeled "Parties" that would set forth all the elements required by subsections (1)-(5). Similarly a petition could omit a separate section giving the name and address of the petitioner's attorney and still strictly comply with the statute if the name and mailing address of the attorney were set forth elsewhere in the petition, for instance under the attorney's signature.

[6] Additional errors and their supporting facts, which were not related to standing and therefore were not already set forth in section 6, were identified in subsequent sections.

law makes clear that any such alleged lack of compliance is not grounds for dismissing a LUPA appeal. *See Conom v. Snohomish County*, 155 Wn.2d 154, 161-62, 118 P.3d 344 (2005); *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 271-72, 108 P.3d 805 (2005) (*Quality Rock I*); *Keep Watson Cutoff Rural*, 145 Wn. App. at 39. Appellants wrongly seek to extend the line of cases holding that the filing and service requirements of RCW 36.70C.040 are jurisdictional, such that lack of strict compliance requires dismissal[7], to the very different requirements in RCW 36.70C.070. Their effort overlooks the fact that no court has extended the strict compliance rule applicable to RCW 36.70C.040 to any other provision of LUPA. Indeed every court to address the issue has rejected such extension.

For example, the Supreme Court held that RCW 36.70C.080(1), requiring a LUPA petitioner to note an initial hearing within seven days of serving a petition, is not a jurisdictional requirement and reversed a dismissal that was based on petitioner's failure to comply with that provision.

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[7] For example, the Tahoma Terra Brief (pp. 21-22) cites *Witt v. Port of Olympia,* 126 Wn. App. 752, 109 P.3d 489 (2005) (affirming dismissal of LUPA action for failure to serve Port district in manner required by RCW 36.70C.040(5)), while the City Brief (p. 27), cites *Twin Bridge Marine Park, L.L.C. v. Dept. of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008) for the proposition that a land use decision can only be challenged by appealing within 21 days as mandated by RCW 36.70C.040(3). Appellants do not and cannot dispute that Knight strictly complied with all the service and filing requirements of RCW 36.70C.040.

Conom, 155 Wn.2d at 161-62. The Court distinguished RCW 36.70C.040 from other LUPA requirements by noting its express directive that "[a] land use petition is barred, and the court may not grant review, unless the petition is timely filed ... and timely served...". *Conom*, 155 Wn.2d at 158, citing RCW 36.70C.040(3).

In *Conom*, the Supreme Court cited with approval this Court's similar decision in *Quality Rock I*, 126 Wn. App. at 271. There, the superior court had dismissed a LUPA appeal on the same basis that Appellants claim this appeal should be dismissed, an alleged error in the content of the petition (the petition caption did not name one of the parties, although that party was named in the body of the petition). *Id.* at 255, 258. This Court reversed the dismissal, ruling that that "[a] formalistic error in the land use petition's caption should not serve as the sole basis to deny review of land use actions ..." *Id.* at 271.

Finally, in a decision that Appellants fail to address, Division 3 of the Court of Appeals applied the holdings of *Conom* and *Quality Rock I* to the precise issue raised here – whether lack of compliance with RCW 36.70C.070 is jurisdictional and deprives the court of jurisdiction. *Keep Watson Cutoff Rural*, 145 Wn. App. at 35. The Court held that it is not. *Id.* at 39. The superior court had dismissed the case because the petitioner did not attach a copy of the challenged decision to its petition as required

by RCW 36.70C.070(4). *Id.* at 34-35. The Court of Appeals reversed:

> Like *Conom* and *Quality Rock [I]*, this case does not involve issues of timely or proper service. KWCR strictly complied with LUPA's service and filing requirements-there is no question that the correct parties were timely served. But these requirements are distinct from the content and form requirements under RCW 36.70C.070. Because of this clear distinction, we conclude that the elements of a LUPA petition, even though statutorily required, are not jurisdictional requirements that divest a superior court of jurisdiction if not met. Our conclusion is reinforced by RCW 36.70C.070, which does not state that a petition is barred if a party fails to comply with its requirements. Further, our conclusion is consistent with the legislative purpose of LUPA, which is to establish consistent, predictable, and timely review. RCW 36.70C.010.

Keep Watson Cutoff Rural, 145 Wn. App. at 39.

This holding, based on the plain language of LUPA and consistent with the holdings in *Conom* and *Quality Rock I*, is directly on point. Appellants' unsupported arguments for a contrary rule should be rejected. As in *Keep Watson Cutoff Rural*, the Petition here substantially (at the very least) complied with RCW 36.70C.070 by including detailed allegations showing that, contrary to the Council conclusion, Knight had standing. Accordingly, this Court has jurisdiction to review these land use decisions.

2. Knight Has Standing: The City Decision Prejudiced Her And Affirming The Superior Court Judgment Will Eliminate That Prejudice.

i. Knight Demonstrated Her Standing in the City Council Appeal.

No party challenged Knight's standing to participate in the proceedings before the Hearing Examiner and the City Code imposes no requirement to demonstrate standing at that stage. When some applicants and the City challenged Knight's standing for the first time, in their responses to her appeal to City Council, she replied with detailed allegations demonstrating her standing. AR (Appellant's Reply in City Council appeal) at CP 115-16. The Tahoma Terra brief (23-25) mistakenly asserts that Knight had to prove she was "aggrieved" before the Hearing Examiner issued the decision that aggrieved her.[8] However, it admits (p. 25) that Knight's allegations before the City Council were part of the administrative record and were considered by the Council. *See* CP 25 (Resol. 481,

[8] The City appears to have abandoned this mistaken claim, which is not presented in its brief to this Court. There is, in any event, no support in the City Code for Tahoma Terra's argument. The Code provisions it cites do not require that a party prove that it is aggrieved or otherwise establish standing in the Hearing Examiner proceedings; rather they specify that a party aggrieved by the Examiner's decision (which cannot occur until the decision is entered) may appeal to the Council and that the Council's review is based on the evidence presented to the Examiner and submissions by the parties to the Council. YMC 2.26.150, 2.26.160. As admitted by Tahoma Terra, Knight did submit allegations to the Council showing how she was aggrieved. AR (Appellant's Reply) at CP 115-16.

second WHEREAS clause). The Council reached and decided the substance of the standing issue, and did not rule that Knight was required to demonstrate standing in the public hearings before the Hearing Examiner or in her initial appeal paperwork for her City Council appeal. CP 26 (Conclusion 3). Tahoma Terra did not appeal the Council decision to superior court and it expressly declined to assign error to the Council decision in this Court. Tahoma Terra Brief at 2, Assignment of Error 1. Therefore it cannot now ask this Court to revisit the Council conclusion that Knight's allegations of standing are part of the record to be resolved on their merits. *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 617 n. 5, 191 P.3d 928 (2008); RAP 2.5(a) & 10.3(g).

Other than its waived (and mistaken) procedural claim, Tahoma Terra's argument pertaining to standing at the City level consists of three conclusory assertions devoid of factual or legal argument. Tahoma Terra Brief, p. 25. In any event, Tahoma Terra admits that the standing allegations presented to and considered by the City Council are "virtually identical" to the standing allegations in the LUPA Petition, and agrees with the City that the requirements for standing under the City Code are "[s]imilar to" the requirements under LUPA. (Tahoma Terra Brief at 25-26). Thus, like the City Brief (pp. 28-32), this Response Brief addresses those requirements in a single argument (the following subsection), showing that

Knight has LUPA standing and so also has standing under the City Code.

ii. Appellants' Own Arguments Demonstrate Knight's Standing By Assuming The Existence Of The Relief That The Superior Court Ordered.

Appellants seek to avoid judicial review of the City's decision to approve, without adequate provisions for water supply, five subdivisions that will increase the City's size and water demand by more than 25 percent by arguing that Knight's interests are only those of the general public and that she has suffered no specific injury.[9] This argument is without merit. Knight's injury involves much more than an abstract interest in seeing the law enforced: she resides on, and owns, property very close to the subdivisions at issue and holds water rights dependent on the same aquifer from which the subdivisions will draw, which rights would be specifically and adversely affected absent the relief granted by the superior court in response to Knight's Petition.

Knight is "aggrieved or adversely affected" under LUPA because "[t]he land use decision has prejudiced or is likely to prejudice [her]."

[9] If accepted, Appellants' argument would render meaningless the detailed provisions of RCW 58.17.110, requiring determination of appropriate provisions for public health and safety to be made prior to preliminary plat approval and shown in specific written findings. If Knight, a close neighbor with prior water rights in the same water that the subdivisions will draw on, does not have standing to challenge the compliance with these provisions, it is difficult to conceive who, under Appellants' exceptionally narrow interpretation, would ever be able to seek review of decisions under RCW 58.17.110.

RCW 36.70C.060(2) (a) (emphasis added).[10] LUPA's prejudice requirement is a codification of the injury-in-fact requirement derived from standing case law. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). As the Court of Appeals has recognized, review of that case law establishes certain principles, including that "[in] general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Id.* at 829-830, citing *Anderson v. Pierce County*, 86 Wn.App. 290, 300, 936 P.2d 432 (1997). In *Suquamish Indian Tribe*, 92 Wn. App. at 831, the Court applied this principle and found standing where the petitioners lived near the proposed project and asserted that increased traffic on roads they used would harm them. *See also Anderson*, 86 Wn.App. at 300 (organization member had standing based on testimony that he owned property adjacent to project site and that stormwater runoff would damage his property).

As in these cases Knight alleged, and demonstrated, that she owned nearby property that would be harmed by the City decision approv-

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[10] Appellants focus their arguments on prejudice, the first of four elements of standing set forth in RCW 36.70C.060(2). The Tahoma Terra Brief also suggests in passing (p. 32) that a judgment in Knight's favor would not eliminate the prejudice, as required by RCW 36.70C.060(2)(c). In fact, as shown below, the superior court judgment does eliminate the prejudice resulting from the City's erroneous decision. Neither Appellant discusses or suggests that Knight failed to meet the other two elements: that her interests were among those the City was required to consider and that she exhausted her administrative remedies. RCW 36.70C.060(2)(b) & (d).

ing large subdivisions without proof of adequate water. Her property includes significant water rights approved by Ecology, specifically a surface water right from Thompson Creek and a Group A public water system operating under a groundwater certificate. AR (Appellant's Reply in City Council appeal) at CP 115; *see* CP 602-03, 606-10. Because the City's wells draw from the same aquifer that provides water for Knight's domestic water system and are in hydraulic continuity with Thompson Creek, any increase in groundwater withdrawal will adversely impact Knight's ability to utilize her water rights. AR (*Id.*) at CP 116; *see* CP 593-94. Those water rights are constitutionally protected property interests. *Dept. of Ecology v. Acquavella*, 100 Wn.2d 651, 655-656, 674 P.2d 160 (1983). They cannot be impaired either by junior water rights or by changes to other senior or junior water rights. *See* RCW 90.03.010 & 90.03.380.

Ecology, the state agency entrusted to manage and regulate the waters of the State, including the protection of existing water rights, has determined that, as of 2007, Yelm's water rights were limited to a total use of 719.66 afy. AR (8/20/07 letter from Ecology, in HE Ex. 15) at CP 724-26; *see* RCW 43.21A.064. Even before approving the subdivisions at issue here, the City's use had exceeded that amount: it used 766 afy in 2006 and projected it would use 801 afy in 2007. AR (Skillings Connolly letter) at CP 1324. If the City uses or commits water use to developers and fu-

ture homeowners before Ecology approves a water right for the City – as it did by approving these subdivisions -- Knight's existing water rights are jeopardized. As one who relies on that same water source for permitted domestic use, her rights to have the State water right permit system implemented for her protection are directly harmed if the City continues to use water in excess of its Ecology-approved water rights.

The arguments that Appellants make to rebut this showing actually serve to confirm that the City decision prejudiced Knight and that a judgment in her favor, and in particular the judgment ordered by the superior court, will redress that prejudice. This is because the Appellants' claims that Knight is not harmed implicitly assume the existence of the very relief that they say she is not entitled to. First, Appellants insist that Knight cannot be harmed by preliminary plat approval because that approval is conditioned on demonstration of adequate water supplies both prior to final plat approval <u>and</u> again at building permit issuance. City Brief at 30, Tahoma Terra Brief at 28. However, as shown in Argument §(C) below, and as conceded by the City Brief (p. 36), the condition written by the Hearing Examiner and upheld by the City Council did not require demonstration of adequate water at final plat approval, but allowed that issue to be deferred until the later building permit stage. Knight's standing is graphically demonstrated by the fact that she had to appeal to obtain re-

dress from the City's erroneous condition.

Second, the City goes on to assert that Knight is not harmed by the preliminary plat approval because she can still appeal the final plat or building permits if an adequate showing of water supply is not made when those approvals are granted. City Brief at 30. Again however, this assertion is true only if the relief granted by the superior court is affirmed. As shown in Argument § (D), below, the Yelm City Code does not ensure that Knight will receive any notice of either final plat approval or building permit approvals. Obviously, without notice Knight cannot obtain judicial review of subsequent subdivision approvals made without adequate showing of water, and without judicial review the courts cannot invalidate such improper approvals. In other words, the results that the City Brief (p. 31) calls "a hypothetical parade of unlikely events" could easily come to pass if Knight does not receive notice of subsequent approvals.

Appellants are correct that <u>if</u> an appropriate determination of adequate water supply is made prior to final plat approval (not deferred until building permit issuance) and <u>if</u> Knight receives adequate notice of that determination so that it can be judicially reviewed in the event it is not proper, then the current preliminary plat approval does not result in harm. But that does not mean Knight was not injured by the City decision; rather it confirms Knight's standing by showing that, contrary to Tahoma Terra's

assertion, a judgment in her favor – like that entered by the superior court – will redress the prejudice. Until entry of final judgment correcting the City's error, Knight was and will be harmed by the City decision, as Appellants' own arguments show.

C. The City Decision Should Be Reversed And Remanded To Correct The Erroneous Condition That The City And Applicants Agreed Should Be Amended.

In their briefs to this Court, the City and Tahoma Terra admit that state law and the Yelm City Code require that a determination of adequate water supply must be made before final plat approval and cannot be deferred to the building permit stage. City Brief at 36, Tahoma Terra Brief at 35-36. Moreover, in superior court they agreed that the Hearing Examiner condition should be amended to conform to this law. CP 1562 ("[t]he other parties appear to be in agreement with the City's position"); CP 1589; CP 1641 (Conclusion of Law 4); *see* City Brief at 2. Yet Appellants now argue that the superior court erred by remanding for the City to do exactly what the City agreed should be done. That argument is barred by their prior agreement and is contrary to law. Indeed, both the Appellants' current refusal to acknowledge that the erroneous condition should be corrected and their mistaken position – expressed throughout the administrative proceedings and in the City Council decision -- that determination of adequate water supply can be deferred until final plat "or" until

building permit approval, demonstrate why the erroneous condition must be corrected.

There is now no dispute "that state and local law require[...] at *both* final plat approval *and* building permit issuance a determination of an adequate potable water supply to serve the proposed subdivision." Tahoma Terra Brief at 35 (italics in original); *see* City Brief at 36; *see also* RCW 58.17.110 (prohibiting approval of a proposed subdivision unless written findings are made that "[a]ppropriate provisions are made for ... potable water supplies"); RCW 58.17.150 (a request for final plat approval must be accompanied by a statement from the agency supplying water "as to the adequacy of the proposed means of ... water supply"); YMC 16.12.170; RCW 19.27.097 (evidence of adequate potable water also required prior to issuing a building permit).

Indeed, the Hearing Examiner's initial decision included a "finding" (actually a conclusion of law) that acknowledged these requirements. CP 1274 ("conditioning a preliminary plat to provide both domestic water and fire flow prior to final plat approval satisfies the provisions of RCW 58.17.110 and the YMC"). But the Examiner actually imposed a condition with a very different legal effect:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval <u>and/**or**</u> prior to the issuance of any building permit except as [sic]

> model homes as set forth in Section 16.04.150 YMC. [CP 1284, emphasis added]

As the City concedes, the Hearing Examiner's insertion of the word "or" renders the condition "susceptible to ... interpretation that the condition allowed deferral of the determination of adequate water supply to building permit issuance." City Brief at 36. In fact, the City understates the error. The plain meaning of "or" is disjunctive, such that only one, and not all, of the listed items is required. *See Tesoro Refining and Marketing Co. v. Dept. of Revenue*, 164 Wn.2d 310, 318-19, 190 P.3d 28 (2008). "As a default rule, the word 'or' does not mean 'and' unless legislative intent clearly indicates to the contrary." *Id.* at 319. Here, the Examiner cannot possibly have intended the words "and/or" to be read as "and/and" because that is a nonsensical reading. The only possible interpretation of the Examiner's deliberate insertion of the word "or" into the condition is to make the requirement disjunctive, so that it is satisfied by a water supply determination that is not made until building permit issuance.

Despite the plain meaning of "or" in the Examiner's condition, which allowed determination of adequate water to be put off long past final plat approval, and Appellants' concession that the law requires the determination to be made at final plat approval (as well as at the later building permit stage), Appellants contend that the trial court erred by remand-

ing for the City to rewrite the condition to conform to the law. There is no merit to this contention.

To begin with, Appellants should not be permitted to argue on appeal that the remedy they agreed to below – amending the condition to delete "or" – is erroneous or should be reversed. The appellate courts have repeatedly held that parties cannot take inconsistent positions at different stages of a proceeding, nor argue on appeal that actions they requested or agreed to are erroneous. *See Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163-64, 951 P.2d 817, (1998) (judicial estoppel precluded party from making argument inconsistent with its position in earlier proceeding); *Suquamish Indian Tribe*, 92 Wn. App. at 826 (appellants "cannot be permitted to argue on appeal that their own motion was erroneous"); *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (attempted change in position violated equitable rules of invited error and estoppel); *Heath v. Uraga*, 106 Wn. App. 506, 521, 24 P.3d 413 (2001).

Here, the City unambiguously agreed that it would amend the language of the condition by deleting the word "or." The superior court's Letter Opinion, the City's Opposition to the proposed findings, conclusions, and order, and the superior court's Conclusion 4 all reflect this agreement. CP 1562, CP 1589, CP 1641. Moreover, the City Brief (p. 2) acknowledges that "all parties agreed to the … clarification." As the City

Brief and the superior court's Letter Opinion and Conclusion (CP 1562, 1641) indicate, all parties, including Appellant Tahoma Terra, joined in this agreement to amend the Hearing Examiner condition, or at least expressed no objection to the superior court. Having agreed to the relief that the superior court then ordered, the Appellants cannot now object to granting that relief in the judgment. *JDFJ Corp.*, 97 Wn. App. at 10 (where the trial judge calculated the money judgment in accordance with the plaintiff's request, the plaintiff "cannot successfully complain of ... rulings which he has invited the trial court to make"); *Heath*, 106 Wn. App. at 521 (defendant who rejected trial court's suggestion that he lower the roof of a house built in violation of height limits cannot argue on appeal that the trial court erred by not ordering the roof lowered).

Even if Appellants had not invited the very relief that they now challenge, there is no basis for their illogical contention that the superior court erred by remanding to correct a condition that contained an erroneous interpretation of the law. As they now concede, the law requires that determination of adequate water supply be made at both final plat approval <u>and</u> building permit approval. Tahoma Terra Brief at 35; City Brief at 36. That is precisely, and only[11], what the corrected condition, set forth in

[11] In superior court, the City argued that the court should only require deleting the word "or" and should not add the word "also" following "and."

the superior court judgment, requires. CP 1644. Neither Appellant has presented any authority explaining how a court order setting forth a requirement that they agree conforms to the law could possibly constitute an error of law.

Nor is there any merit to the suggestion that the Hearing Examiner's condition containing "and/or" did not need to be corrected. As explained above, and conceded in the City Brief (p. 36), the insertion of "or" into the condition results in an interpretation that is contrary to law. The superior court had both the authority and the duty to correct that erroneous interpretation of law. RCW 36.70C.130(1)(b).

Ultimately, both Appellants are reduced to arguing that the superior court erred in correcting the Hearing Examiner's error because that error was allegedly harmless. Tahoma Terra Brief, p. 36; City Brief, p. 37. This argument fails legally and factually. Legally, LUPA does not allow, much less permit, a reviewing court to let stand a substantive legal error on the ground that it is "harmless." The City apparently relies on RCW 36.70C.130(1)(a), which addresses procedural error. However, the

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CP 1589. The City does not appear to pursue this argument on appeal, presumably because as it noted, the addition of "also" is redundant and does not change the meaning from "and" standing alone. *Id.* Since as the City pointed out, "and also" has the same meaning and legal effect as "and" standing alone, the condition as written by the superior court is legally identical to what the law conceded by the City requires.

Hearing Examiner did not "engage[...] in unlawful procedure or fail[...] to follow a prescribed process," as contemplated in RCW 36.70C.130(1)(a), when he drafted the erroneous condition. Rather, in doing so he made a substantively "erroneous interpretation of the law." RCW 36.70C.130(1)(b). In direct contrast to subsection (a), this subsection (b) does not carve out an exception for harmless error, for obvious reasons. A procedural error under subsection (a) could be harmless if the end result complies with the law, but an erroneous substantive legal interpretation included in a final decision by definition does not comply with the law and therefore is not harmless. The plain language of RCW 36.70C.130(1)(b), especially considered in contrast with the different language in the preceding subsection, expressly authorized, and required, the superior court to correct the Hearing Examiner's erroneous interpretation of law.

The arguments and behavior of both the City and Tahoma Terra in the City's preliminary plat proceedings – as well as their arguments in this Court – make abundantly clear that the Hearing Examiner error was not harmless and that a binding court order is necessary to ensure that the City and the plat applicants comply with what they now, belatedly, acknowledge is the law. This is because, contrary to their claims to this Court, until Knight brought this land use petition, both the City and Tahoma Terra

repeatedly contended that the determination of adequate water could be made either at final plat approval or deferred until building permit issuance (or later).

When the Hearing Examiner's initial Report and Decision failed to include a condition requiring a determination of adequate water supply prior to final plat approval, Knight asked the Examiner to reconsider and include such a condition. AR (10/19/07 Motion for Reconsideration) at CP 100. Far from agreeing that the law requires the determination to be made before final plat approval, both the City and Tahoma Terra opposed the Motion for Reconsideration that requested such a condition. AR (11/08/07 Callison letter; 11/08/07 Smelser letter); *see* CP 1282. Tahoma Terra expressly argued that the preliminary plat approval could be conditioned on sufficient water at "final plat approval or the issuance of building permits." AR (11/08/07 Smelser letter, p. 2; emphasis added).

Thus, in the condition at issue in this appeal, the Hearing Examiner adopted precisely the erroneous position advocated by Tahoma Terra. When Knight then appealed to the City Council, both Tahoma Terra and the City continued to actively oppose the position (which they now claim they always agreed with) that water determination must be made by the time of final plat approval. Instead, both insisted that, as Tahoma Terra wrote, "preliminary plat approval may be conditioned upon the availability

of water at the time of final plat approval or the building permit stage." AR (Tahoma Terra's Response dated 1/2/08 to Knight's City Council appeal, p. 1; emphasis added). At least four more times, Tahoma Terra and the City repeated that water could be determined at final plat "or" building permit issuance. AR (Tahoma Terra's Response, pp. 6,7, & 10; Community Development Department Memorandum to Council, 1/7/08 p. 4).

Only after Knight appealed the City decision to superior court and filed her opening LUPA brief did the City finally admit what it had previously denied: state law requires a determination of water adequacy and availability at both the final plat and building permit stages. CP 1207.[12] Contrary to Tahoma Terra's claims in its brief to this Court (pp. 35-36) that "[a]ll respondents" agreed with Knight that a determination of water availability must be made at final plat approval and building permit issuance, Tahoma Terra made its disagreement with Knight's position plain in superior court. It expressly rejected what it termed Knight's "argument that proof of an adequate and available water supply is required prior to final plat approval," asserting that a cited case "does not stand for that proposition." CP 849. Tahoma Terra declared that "[t]he law is clear:

[12] Other applicants, who have not appealed to this Court, also conceded that potable water must "be available at the time of final plat approval" and expressly requested that the superior court remand the approval to the City to delete the portion of the condition allowing the determination to be made at the building permit stage. CP 1091.

preliminary plat approval may be conditioned on the availability of water at the time of final plat approval <u>or</u> the building permit stage." CP 829 (emphasis added).

In short, the record completely refutes Appellants' new-found argument that they have always interpreted the Hearing Examiner condition to require determination of adequate water before final plat approval. They adamantly rejected this interpretation, and persisted in arguing they could defer the determination to building permit issuance or later, until it became apparent (to the City) that they would lose or (in Tahoma Terra's case) after they did lose in superior court. Without a binding order on remand, nothing prevents the City and the subdivision applicants from reverting to their longstanding prior position and erroneously deferring the determination of adequate water past the point that the law requires such a determination. Like the superior court, this Court should remand for the City to amend the erroneous condition as it agreed to do.

D. LUPA Expressly Authorizes The Imposition, On Remand, Of Notice And Comment Provisions That Are Necessary To Serve The Interest Of The Parties.

LUPA provides the reviewing court with broad authority to grant appropriate relief when it remands an erroneous land use decision:

> The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. <u>If the decision is remanded for modification</u>

> 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.

RCW 36.70C.140 (emphasis added).

This Court has recognized that RCW 36.70C.140 gives a court acting in its appellate capacity under LUPA the same authority to provide relief that it has when acting under its original jurisdiction. *Asche v. Bloomquist*, 132 Wn. App. 784, 793, 133 P.3d 475 (2006). The Court held that "a reversal [under LUPA] still provides the same relief as an injunction via a nuisance claim" and that with the authority of RCW 36.70C.140, "the trial court could have redressed the [plaintiffs'] injury." *Id.* at 793.

Here, the superior court order requiring that the City provide Knight with sufficient notice to allow her to challenge a determination of adequate water supply made in the process of final plat approval both in City administrative proceedings and in court, if necessary, falls squarely within the court's authority to "make such an order as it finds necessary to preserve the interests of the parties ... pending further proceedings or action by the local jurisdiction." RCW 36.70C.140.

The City Brief (p. 44) contains one paragraph of argument objecting to the notice requirement, but provides no citation to support its claim that the superior court lacked authority to impose the requirement. The

City does not even mention the controlling statute, RCW 36.70C.140, much less make any showing that the narrowly tailored notice requirement exceeds the broad authority granted by that statute and recognized in *Asche*. Nor does the City dispute the superior court's implicit finding that notice and an opportunity to challenge a determination of adequate water is "necessary to protect the interests" of Knight, a party to the proceedings.

In fact, both the record and the City's own arguments demonstrate that such notice is indeed necessary to protect Knight's priority interests in her legal water rights. The City currently does not have enough approved water rights to meet its existing demand, much less supply the 568 units in these five subdivisions. AR (HE Ex. 6 & 15) at CP 724-26, 731, 735. Unless the superior court's notice requirement is affirmed, however, Knight will be unable to challenge, either at the City level or in court, any subsequent decision by the City that it can and will have a lawful supply of water for those 568 units. This is because YMC Ch. 16.12, which pertains to subdivision application and review procedures, contains no provision for public notice or comment relating to final plat approval. Indeed, the City confirms that without the superior court order, Knight would not receive notice of, nor be able to comment on (or appeal), determinations of adequate water made at final plat approval, when it describes that order as "impos[ing] special process requirements beyond those required by appli-

cable law." City Brief (p. 44).

However, as discussed in regard to standing (Argument §(B)(2)(ii)), the City's position that Knight is not harmed by the preliminary plat approval is based on the assumption that she can challenge a final plat decision. *See* City Brief at 30. Since both notice of a final land use decision, and exhaustion of remedies by participating in the administrative proceedings leading up to that decision, are necessary in order to appeal a decision, the City itself confirms the need for the notice provisions ordered by the superior court, including those that will allow Knight to participate in the City proceedings before a final plat decision is made. Indeed, given the City's, and the applicants', persistent and erroneous challenges to Knight's standing, they would undoubtedly raise standing arguments in an attempt to bar an appeal of a final plat decision in which Knight did not participate due to lack of notice.

Where the City on the one hand argues that Knight can fully protect her prior water rights by appealing a final plat decision that would jeopardize them, but on the other hand admits that its Code does not contain any notice or comment provisions for final plat approval and insists that Knight lacks standing to challenge its determinations regarding subdivision water supply, it is evident that the requirements that Knight receive sufficient notice and opportunity to establish standing and to appeal an

adverse decision are indeed necessary to protect her interests. As such, those requirements are squarely within the authority granted by RCW 36.70C.140. Knight urges this Court to affirm the trial court and require the notice and comment provisions on remand.

E. The City Decision That There Is A Reasonable Expectancy That Adequate Water Will Be Available For The Subdivisions Is Contrary To Law And Unsupported By The Evidence.

1. Because The Determination Of Adequate Water Will Be Made At Final Plat Approval, Issues Regarding The Proper Standard For That Determination And Whether It Is Met In This Record Are Not Ripe.

Having determined that a finding of adequate water supply should be made when final plat approval is sought (and not deferred beyond that point) the superior court stated that it did not need to resolve, in this preliminary plat appeal, what an adequate finding would entail or whether it could be made on the present record. CP 1564 & 1641 (Conclusion 6). Appellants admit that issues regarding legal standards for final plat approval and evidence to meet those standards are not ripe. *See* City Brief at 43; Tahoma Terra Brief at 42-44.[13]

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[13] Appellants do so in the course of objecting to the superior court's Conclusion of Law 5, but they misstate that conclusion. In order to assist the parties, the court did indicate that <u>if</u> it were to resolve the issue on the current record, it would conclude that a finding of adequate water should be based on approved and available water rights and that a finding of "reasonable expectancy" would be insufficient. CP 1641. The court's language is expressly conditional and makes clear that it is not resolving the

Knight agrees that – as long as the erroneous condition is corrected to ensure that the determination of adequate water is made prior to final plat approval and she is provided sufficient notice to appeal the determination if needed –the legal standard and evidentiary record for making the water availability determination for final plats are issues that are not ripe until the City makes that determination. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 770, 49 P.3d 867 (2002). They do not need to be, and should not be, addressed in this preliminary plat appeal. *Id.* Nonetheless, despite asserting that such issues are not ripe and that the superior court erred by addressing them, the Appellants devote significant portions of their briefs to arguments about the standard the City should use to determine if there is adequate water at final plat approval and whether the current record supports such a finding. City Brief at 41-43 and 44-46; Tahoma Terra Brief at 36-42 and 45-48. Because those arguments are legally and factually mistaken, Knight is compelled to respond and does so in the following subsections. But Knight reiterates that there is no reason for this Court to address or resolve the issues at this time or on this record.

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issue. *Id.* (*see especially* Conclusion 6). Contrary to the City Brief (p. 41), the superior court did not "Require a Particular Determination of Sufficient Water Rights at Final Approval."

2. The Required Finding Of Adequate Provision For Water Supply Requires More Than "A Reasonable Expectancy" That Water May Become Available.

Although Appellants have finally conceded that a finding of adequate water supply must be made prior to final plat approval, they continue to defend the conclusions of the Hearing Examiner and City Council that this finding requires no more than an assertion of a "reasonable expectancy" that water will be available. The plain language and clear public policy of state statutes and the City Code require more.

Appellants suggest that state law defers to local jurisdictions to determine whether and how such a jurisdiction can provide water. In fact, state law establishes the Department of Ecology, not local governments, as the administrator of the state's water resources. Those resources belong to the public and can only be used as approved by Ecology through permit (water right) issuance, with one limited exception not applicable in this case. RCW 43.21A.064, 90.03.010, 90.44.050. Ecology was concerned enough by the City's water practices and the approval of these subdivisions without adequate provision for potable water that it sought and received permission to file an Amicus Curiae Brief in support of Knight's appeal. CP 1482-98.

As explained in that brief, Ecology determines whether water rights for surface water diversion and groundwater withdrawal can be

granted, and also decides on applications to change or transfer existing water rights. RCW 90.03.010, 90.44.050, 90.03.380, 90.44.100. Given this regulatory scheme, the mandate in the subdivision statute for provision of potable water can only be met by possession of actual existing water rights granted by Ecology. For a subdivision to be approved, the statute requires written findings that "[a]ppropriate provisions are made for ... potable water supplies" and a statement from the agency supplying water "as to the adequacy of the proposed means of ... water supply." RCW 58.17.110, 58.17.150. As Ecology's Amicus Brief explained, the ordinary meaning of the statutory terms requires that a water supply be legally available to the subdivision in order for final plat approval to be granted. CP 1492. Because Ecology exercises ultimate control over water supply, there can be no supportable finding of appropriate provisions for potable water, and no valid assertion by the City that it has an adequate supply, without sufficient Ecology-approved water rights available to the subdivisions.

The need for Ecology-approved water rights to satisfy the requirements for final plat approval is further confirmed by the City's code.[14] The subdivision code requires that the potable water supply and all other

[14] The state building code also expressly forecloses any argument that pending applications are sufficient: "An application for a water right shall not be sufficient proof of an adequate water supply." RCW 19.27.097.

improvements required to serve the final plat must be "completed" by the time of final plat approval or the City must find that "arrangements or contracts have been entered into to guarantee that such required improvements will be completed." YMC 16.12.310 (emphasis added). While the City may accept contracts, bonds, or similar agreements guaranteeing that physical improvements will be completed, such devices cannot guarantee Ecology approval of water rights to serve the final plat. Only an approved water right provides such a "guarantee."

A final plat approval is a guarantee, not a "reasonable expectation," that potable water will be available to each lot in the final plat. "A final plat shall vest the lots within such plat with a right to hook up to sewer and water for a period of five years after the date of recording of the final plat." YMC 16.12.330 (emphasis added). The only way the City can meet this potable water obligation is to have in place at the time of final plat approval an adequate legal source of potable water, which means Ecology-approved water rights. An alleged "reasonable expectancy" that Ecology might approve applications for sufficient water falls far short of providing the vested right to water that the final plat approval requires under the City code.

3. No Evidence Supports The City's Finding That There Is A Reasonable Expectancy That Water Will Be Available For The 568 Units In These Subdivisions.

The record is devoid of any evidence to support the Hearing Examiner's key finding, affirmed by the City Council, that "the total cumulative water rights available to the City will far exceed the cumulative water demand." CP 1270 (Finding 15). In that very finding, the Hearing Examiner characterized evidence regarding "additional water rights in the future" as "speculation." *Id.* Then, ignoring his own admonitions, the Examiner cited one item of such speculation as sufficiently "persuasive" to support a finding that the City would "secur[e] new water rights" exceeding the demand including the five proposed subdivisions. *Id.*, citing August 9, 2007, letter from Skillings Connolly (located at CP 1323-25).

This letter, identified as the sole source for the Examiner's finding, expressly disclaims any role in providing data or evidence of water rights – it states "schedule of water right acquisitions provided by Kathleen Callison," the City's attorney. AR (Skillings Connolly letter) at CP 1324. That schedule includes an assumption that in 2012 the City will acquire a "New Water Right" of 3054 acre feet. *Id.* The remarkable assertion that the City will be able to triple or quadruple its existing water rights was not based on any studies or calculations by the engineer who wrote the letter, but was simply assumed based on what the attorney "provided." The un-

substantiated assumption is not evidence, let alone substantial evidence. Indeed, Ms. Callison herself described the projected water rights figure that included the assumed 3054-acre-feet increase as a "current estimate of demands" that "may be revised." CP 1317. In short, it is not evidence of anything. It is a planning projection that simply assumes the City will, in some unspecified manner, meet its rising demand.[15]

The utter lack of evidence that the City will acquire 3054 acre feet of approved water rights in 2012 is only the most glaring example of the lack of support for the Hearing Examiner's finding of adequate water supplies. The schedule of water rights provided by the City's attorney is also based on an erroneous claim that its current (2006-2007) water rights total 832.35 afy. *See* CP 1317. In fact, the Department of Ecology confirmed that the City's current (2006/2007) water rights totaled only 719.66 acre-feet. AR (8/20/07 letter from Ecology, in HE Ex. 15) at CP 724-26; *see also* AR (HE Ex. 6) at CP 731, 735. This discrepancy is critical because

[15] In superior court, the City submitted a declaration attempting to justify the unsubstantiated claim of an additional 3054 afy by alleging that "applications for new water rights from a deep aquifer in the Nisqually basin" are "estimated to be 3054 afy" and "are reasonably expected to be approved during the next several years." CP 1243-44. These assertions are not part of the administrative record and so do not support the City decision. RCW 36.70C.120(1), 36.70C.130(1)(c). Even if they were in the record, allegations regarding applications ongoing since 1994 and expected to continue for "several years" more hardly support a conclusion that 3054 afy will be available in 2012 or whenever the subdivisions seek final approval.

the City's admitted water demand shown in the Skillings Connolly letter (CP 1324) -- 766 afy in 2006 and 801 afy in 2007 -- was higher than its actual water rights of 719.66 afy.

Another serious flaw in the City's record "evidence" regarding its water supply is that it includes "conveyances" of existing irrigation water rights (from the Tahoma Valley Golf Course and McMonigle farm) that at the time of the public hearings before the Hearing Examiner and City Council had not been validated or approved in any manner by Ecology. The express language in the "conveyance" documents for both water rights, as well as settled case law, makes clear that the water is not available to the City until after approval by Ecology. CP 1416-18, 1438; *see Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 786, 947 P.2d 732 (1997).

Tahoma Terra wrongly claims that "[t]he record demonstrates" that Ecology approved transfers to the City of enough water to serve the current subdivision. Tahoma Terra Brief at 9 (*see also* pp. 9-10, 46-47). In fact, the conveyance of 77 afy of Golf Course water rights on which this claim rests occurred on March 6, 2008, long after the record closed and the City made the decision at issue on appeal. *See* CP 638-41 & 832 (at note 8). This confirms both that the actual record does not support a determination of adequate water and that the issue is not ripe for resolution

on this record. Moreover, Tahoma Terra's claim is completely undermined by its attempt in superior court to double count the water rights it brought to the City: once as water for Tahoma Terra's development and again as water to meet the City's current demand. *See* CP 836-37. Tahoma Terra cannot make appropriate provision for water to serve its development at final plat approval if the water on which it seeks to rely is being used to meet the City's current demand.[16]

When the unsubstantiated assumptions are eliminated and the errors are corrected, the evidence shows that, contrary to the Examiner's unsupported finding of supply far exceeding cumulative demand, the City has and will continue to have a growing water deficit even without the demand generated by the 568 units in these five subdivisions:[17]

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[16] While Tahoma Terra double-counts and relies on approvals that are not part of the current record, the very fact that it attempts to cite approved water rights to show its alleged appropriate provision for water dramatically reinforces the complete lack of evidence that the other four subdivisions – whose applicants have not appealed the superior court decision – made appropriate provisions for water.

[17] The figures for water demand in this chart are taken directly from the Skillings Connolly memorandum on which the City relies. CP 1324. The 719.66 afy of approved water rights in 2007 is the amount determined by Ecology, to which the City agreed to limit its pumping. The chart also reflects the increase in approved water rights to 796.66 in 2008, based on Ecology's approval of 77 afy from the Golf Course rights that occurred after the record closed. Even giving the City the benefit of this extra-record evidence, the deficit is substantial. In the absence of evidence that the golf course well is Department of Health approved, the deficit may be even greater than this chart shows.

	Water Demand	Approved Water Rights	Water Deficit
2007	801 afy	719.66 afy	<81.44> afy
2008	847 afy	796.66 afy	<50.34> afy
2009	895 afy	796.66 afy	<98.34> afy
2010	946 afy	796.66 afy	<150.34> afy
2011	1,000 afy	796.66 afy	<203.34> afy
2012	1,057 afy	796.66 afy	<260.34> afy

The City finding that appropriate provision for water supply was made is not supported by substantial evidence. If this Court chooses to reach the issue, the finding, and the preliminary plat approvals based on it, should be reversed on that basis.

F. LUPA Allows And Requires A Superior Court To Make Conclusions Of Law That Are Binding Unless Appealed.

LUPA requires that the superior court review the administrative record and determine whether one or more of six standards for granting relief are met. RCW 36.70C.130(1)(a)-(f). Such determinations necessarily require the superior court to make legal conclusions. Whether the decision making body engaged in unlawful procedure, whether the decision is an erroneous interpretation of law, whether the decision is supported by substantial evidence, whether it is a clearly erroneous application of law to facts, whether it is outside the jurisdiction of the body that made it, and whether the decision violates the petitioner's constitutional rights are all conclusions of law. Indeed, the main role of any court acting in an appellate capacity is to apply the relevant law to the facts of the case; that is, to

make conclusions of law.

Nevertheless, ignoring both the language of LUPA and common sense, the City (in an argument adopted by Tahoma Terra) asks this Court to make a remarkable holding: that entering factual findings and legal conclusions in a LUPA appeal is "unlawful" and that even where a decision is not appealed, the superior court's conclusions of law "have no legal effect." City Brief at 46-47; *see* Tahoma Terra Brief at 42. This request is not supported by the cases cited (or any other authority) and is directly contrary to the superior court's responsibilities spelled out in RCW 36.70C.130 and .140.

The City's argument confuses two different principles of law, neither of which states or implies that superior courts cannot make legal conclusions in LUPA appeals. First, it notes that courts acting in an appellate capacity are not permitted or required to make findings of fact. City Brief at 46-47, citing *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 829 P.2d 217 (1992) and *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 103 P.3d 802 (2004). However, findings of fact are legally and conceptually distinct from conclusions of law. Neither these cases nor any others hold that a court acting in an appellate capacity is prohibited from making legal conclusions. On the contrary, as noted above, that is what appellate courts do. As this Court has

said, "on factual issues, [the superior court's] function, like ours, [is] to decide whether findings of fact made below were supported by substantial evidence." *Wm. B. Dickson Co.*, 65 Wn. App. at 619.

Second, the City relies on the fact that, when a superior court LUPA decision is appealed, the Court of Appeals will treat its findings and conclusions as "surplusage." City Brief at 47, citing *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006). The fact that a superior court's legal conclusions are "surplusage" on appeal, however, is no more than a reflection of the fact that appellate review at any level is confined to review of the administrative record and decision, not the decision of a lower appellate court. *Grader v. Lynnwood*, 45 Wn. App. 876, 879-880, 728 P.2d 1057 (1986). In *Grader* – the cited authority for the principles stated in both *Holder* and *Wm. B. Dickson Co.* – the Court explained that superior court findings and conclusions may be surplusage on appeal but entering them "does not in itself constitute grounds for reversal." *Id.* (emphasis added).

Indeed the *Grader* decision went on to hold that the superior court there had appropriately made legal conclusions:

> The trial court adopted the proper standard of review to resolve the legal issues before it[,] determining that the administrative action was arbitrary and capricious or contrary to law.

Grader, 45 Wn. App. at 880 (emphasis added).

The holding in *Grader* is consistent with the requirements of RCW 36.70C.130 and .140. Both make clear that the superior court has the authority, and duty, to resolve the legal issues presented by the petition, a task that it can only undertake by making, and enforcing, legal conclusions. If, as in this case, the superior court decision is appealed, that decision, including any findings and conclusions, may become "surplusage." But the City's suggestion, that absent an appeal, it can simply ignore the superior court's legal conclusions is contrary to the holding in *Grader* and would render the standards set forth in RCW 36.70C.130 meaningless. The City, and all the parties, are bound by an unappealed superior court decision entered under RCW 36.70C.140, including the legal conclusions on which that decision is based, just as they will be bound by this Court's opinion, including legal conclusions, when it is issued. The request for a contrary holding should be rejected.

G. Appellants Are Not Entitled To Attorney Fees Because They Did Not Prevail In The Superior Court Decision That They Seek To Overturn.[18]

Tahoma Terra's request, which the City joins, for attorney fees and costs pursuant to RCW 4.84.370(1) borders on the frivolous. Appellants'

[18] Appellants' request for attorney fees as the substantially prevailing party is moot, and need not be considered, if they do not prevail in this Court, which they should not for the reasons set forth above.

claim that they "substantially prevailed" both in the City decision and in the superior court decision that reversed and remanded the City decision defies logic and clear statutory language. RCW 4.84.370 provides for an award of fees in the Court of Appeals or Supreme Court only if:

> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (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.

The language of RCW 4.84.370(2), which Appellants ignore, makes clear that neither the City nor Tahoma Terra was a substantially prevailing party in the superior court. By its terms, that section forecloses the City's request for fees, which the City erroneously seeks under RCW 4.84.370(1). The City is only "considered a prevailing party if its decision <u>is upheld at superior court</u> and on appeal." RCW 4.84.370(2) (emphasis added). The superior court judgment plainly did not "uphold" the City decision; it expressly reversed and remanded that decision. CP 1644.

While the language of RCW 4.84.370(2) applies directly to the City, the logic of that provision applies equally to Tahoma Terra. Just as a

city that issues a decision is not a prevailing party unless its decision is upheld at superior court, so an applicant granted approval by a city cannot be a prevailing party unless that approval is upheld in superior court. There is no authority in RCW 4.84.370 or elsewhere to suggest that the test for whether an applicant is a prevailing party under the statute is any different from the test for the local jurisdiction. If the decision granting the application is not upheld at all levels, including superior court, an applicant is no more entitled to fees than is a city.

Tahoma Terra's assertion (p. 49) that it, not Knight, prevailed in the superior court because the court purportedly "award[ed] Knight no relief that differed from the outcome before the City" is belied by the fact that it is Tahoma Terra and the City, not Knight, that have appealed to this Court. If the outcome in superior court were truly no different than that before the City (where Tahoma Terra actually did prevail), then why is Tahoma Terra spending its money, and this Court's time and resources, by requesting reversal of a decision that has no effect? Why is the City spending its taxpayers' scarce funds to appeal a decision that supposedly did not affect the City's action? The questions answer themselves: Tahoma Terra and the City want this Court to reverse the superior court precisely, and only, because they did <u>not</u> prevail in that court. They should not prevail here either, but even if they were to prevail in this Court, they

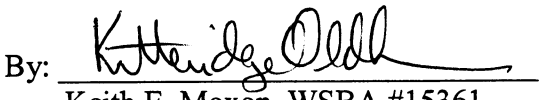
are not entitled to attorney fees or costs.

V. CONCLUSION

For the foregoing reasons, Knight respectfully requests that this Court reverse and remand the City's five subdivision approvals to correct the condition of approval that the City concedes is erroneous, and that this Court, like the superior court, exercise its authority under LUPA to impose conditions on remand ensuring that Knight receives sufficient notice to appeal the determinations regarding adequate provision of water that the City will have to make prior to final plat approval.

Respectfully submitted this 23rd day of March, 2009.

GORDONDERR LLP

By: 

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COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

JZ KNIGHT, Respondent, v. CITY OF YELM AND TTPH 3-8, LLC, Appellants	)	No. 38581-3II DECLARATION OF DELIVERY

I, Lynne M. Overlie, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant in the office of GordonDerr, LLP, caused true and correct copies of the following documents to be delivered as set forth below:

1. Brief of Respondent JZ Knight;
2. Supplemental Designation of Clerks Papers
3. Motion for Over-length Brief of Respondent; and
4. Declaration of Delivery

and that on March 23, 2009, I addressed said documents and deposited them for delivery as follows:

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

EXECUTED at Seattle, Washington on March 23, 2009.

Lynne M. Overlie, Declarant