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DIVISION II

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No. 38857-0-II

STATE OF WASHINGTON
BY  _____
DEPUTY

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

City of Puyallup, a municipal corporation, Appellant,

vs.

Michael Stanzel and Pierce County, a Washington State political
subdivision, Respondents.

REPLY BRIEF OF APPELLANT CITY OF PUYALLUP

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Table of Contents

I. INTRODUCTION	3
II. ARGUMENT	3
A. Mr. Stanzel misled the examiner and courts.	3
B. The superior court did not rule on annexation.	11
C. The doctrine of res judicata did not bar the City’s land use petition action.	15
D. Mr. Stanzel should be denied an award of attorney fees.	18
III. CONCLUSION	21
APPENDIX	24

Table of Authorities

Cases

<i>DeTray v. City of Olympia</i> , 121 Wash.App. 777, 90 P.3d 1116 (2004).....	15, 16, 17
<i>Habitat Watch v. Skagit County</i> , 155 Wash.2d 397, 120 P.3d 56 (2005)....	19
<i>Heller Bldg., LLC v. City of Bellevue</i> , 147 Wash.App. 46, 194 P.3d 264 (2008).....	19
<i>Hilltop Terrace Homeowner’s Association v. Island County</i> , 126 Wash.2d 22, 891 P.2d 29 (1995).....	15, 16, 17
<i>Stanzel v. City of Puyallup</i> , 150 Wash.App. 835, 209 P.3d 534 (2009). 8, 17, 19	
<i>Thurston County v. Cooper Point Ass’n</i> , 148 Wash.2d 1, 57 P.3d 1156 (2002).....	19

Statutes

RCW 4.84.370	18, 19
--------------------	--------

Other Authorities

Order Denying Motion to Reconsider.....	10
PMC 14.02.240	7, 11
PMC 14.22.020(5)	11

I. INTRODUCTION

Appellant City of Puyallup submits this brief in reply to the “Reply Brief of Respondent Michael Stanzel”.

II. ARGUMENT

A. Mr. Stanzel misled the examiner and courts.

Mr. Stanzel continues to mislead this Court. In his brief, he implies that he fully explained his proposed game room facility with restroom and kitchen facilities to the hearing examiner, and then to support this implication, relies heavily on the hearing examiner’s erroneous conclusion that the new information provide by Mr. Stanzel about his proposed development was consistent with his previous testimony before the hearing examiner. Mr. Stanzel knows full well that the information that he provided to the hearing examiner is remarkably different from the information that he provided to the City in his application in the summer and fall of 2008.

Mr. Stanzel first interacted with the City in June of 2004. He provided no information about his proposed project to the City until his June 20, 2007 testimony before the deputy hearing examiner. His testimony concealed the true nature and scope of his project. In August of 2008, he finally submitted an application for water service and a water availability letter to the City. CP 141-142. The application was incomplete, and thus, in September of 2008, Mr. Stanzel provided additional information in

response to the City’s notice of incompleteness and request for additional information. CP 144-161. The contrast between the lack of information that he provided in his 2007 testimony and the amount of information that he provided in his August and September of 2008 application is stark.

The following table contrasts his June 20, 2007 testimony before the hearing examiner with the information that he provided to the City in his August and September of 2008 application. Please recall that Mr. Stanzel’s property contains an existing church, and it is the only building that has a connection to, and receives water service from Puyallup’s water system. VT 32, 36, 37.¹ CP 153, 154.

	2007 Testimony/Evidence	2008 Application
Location	“add a game room” to the existing church. VT 37	standalone “game room facility”, entirely separate from the existing church or any other building. CP 153, 158-160
Size	Undisclosed.	“8,000 to 9,000 square” feet. CP 153
Kitchen	Undisclosed.	“commercial kitchen facility for service of food on premises”. CP 154, 159.
Water Supply Fixture Units	“some restrooms” and “washbasins and things”. VT 37, 63	<u>Church:</u> 2 bathroom sinks, and 1 kitchen sink. CP 153

¹ References herein to the June 20, 2007 administrative verbatim report of proceeding, which is entitled, “Verbatim Transcript of June 20, 2007 Hearing”, will be abbreviated as “VT”. The transcript is filed in case number 07-2-11228-1 and is part of the record in Court of Appeals No. 37697-1-II, a related appeal, but for the reasons set forth in Puyallup’s Brief of Appellant, it is not yet a part of this appellate record.

		<p><u>Gaming Facility:</u> 6 toilets, 2 urinals, 4 bathroom sinks, 1 kitchen mop sink, 1 kitchen hand wash sink, and 1 three compartment kitchen sink. CP 154, 159.</p> <p><u>Additional Restrooms:</u> Two 100 square foot restrooms, containing a total of: 4 toilets, and 4 hand wash sinks. CP 154, 161.</p>
Site Plan for Gaming Facility and Additional Restrooms	None provided.	Provided. VT 160 (Shows that the gaming facility will not be a minor addition to the church, but rather a standalone building. Shows that the two 100 sq. ft. restrooms are standalone buildings.)
Gaming Facility Floor Plan	None provided.	Provided. VT 159 (Shows the commercial kitchen and bathrooms with associated water supply fixture units.)
Additional Restrooms' Floor Plan	None provided.	Provided. VT 161 (Shows the associated water supply fixture units.)
Architectural Elevation	None provided.	Provided. VT 158 (Shows that the gaming facility will not be attached to the church.) "The game room facility . . . is intended to resemble the 'Hummer' building in the city of Fife." CP 153.

In addition to substantially minimizing the nature and scope of his proposed project in his 2007 testimony, Mr. Stanzel, told the hearing examiner that City would only require him to change his water meter: “The city might require us to change water meters but really nothing, its already there.” VT 39. See also, CP 154. (Even as late as September of 2008, Mr. Stanzel continued to claim that “one connection to the property should be adequate”. CP 154.) The deputy hearing examiner, who was apparently wholly unqualified to assess and process requests for municipal water service, believed Mr. Stanzel’s misleading testimony:

This is not an extension of water service because this particular property is already being serviced by the City of Puyallup. CAR 8. [T]his is not an extension or significant expansion of water service. The applicant is already receiving water service from the City of Puyallup for residential use. . . . There will be very limited improvement on the site. The increased water requirements, if any, will be very limited. This is a situation where water is already being provided and there will be no substantial increase in use levels. . . . The City actually has provided water to this property. CAR 9, 10.²

A slight digression: Please notice the deputy hearing examiner’s use of the following language: “[t]his particular property is already being serviced”; “[t]he applicant is already receiving water service”; and “[t]he City actually has provided water to this property.” The deputy examiner’s

² References herein to the administrative record, which is entitled, “Certified Administrative Record”, will be abbreviated as “CAR”. The administrative record is filed in case number 07-2-11228-1 and is part of the record in Court of Appeals No. 37697-1-II, a related appeal, but for the reasons set forth in Puyallup’s Brief of Appellant, it is not yet a part of this appellate record.

use of this language reveals his fundamental misunderstanding about water connections from Puyallup's water system to buildings. PMC 14.02.240 requires that separate buildings on the same premises or on adjoining premises be served through separate service pipes and meters, and prohibits the piping system from being interconnected. Thus, the appropriate inquiry is not whether the "property" or "applicant" receives service, but whether a building is or will be connected to the water system. In this case, the existing church on Mr. Stanzel's property is the only building that has a connection to, and receives water service from Puyallup's water system. VT 32, 36, 37. CP 153, 154.

After misleading the deputy hearing examiner, Mr. Stanzel also misled the Pierce County Superior Court. During argument before the superior court on February 21, 2008, counsel for Mr. Stanzel represented the following to the court:

MR. ARAMBURU: Mr. Stanzel is certainly prepared to tell the City what he's going to do out there. In fact, the hearing examiner specifically concluded that the activities that Mr. Stanzel indicated he was going to undertake on this property, a little game room, recreational area, have a couple of toilets out there for his patrons to use while they're using the facilities, is not a big deal, but he's more than happy to tell them what the water is going to be used for. RPI 24.³

³ References herein to the February 21, 2008 transcript of proceedings, which is entitled, "Verbatim Transcript of Proceedings", will be abbreviated as "RPI". This hearing took place in case number 07-2-11228-1 and is part of the record in Court of Appeals No. 37697-1-II, a related appeal, but for the reasons set forth in Puyallup's Brief of Appellant, it is not yet a part of this appellate record.

In September of 2008, Mr. Stanzel did eventually tell the City about his proposed project. The project details are set forth in the table above. But, Mr. Stanzel then misled this Court about the true nature and scope of his project. In October of 2008, in his appellate brief to this Court, he continued to attempt perpetuate the myth that his project would be very limited in scope by citing to the hearing examiner's decision:

Further, the Hearing Examiner concluded in his decision (Doc 10) that:

There will be very limited improvement on the site. The increased water requirements, if any, will be very limited. This is a situation where water is already being provided and there will be no substantial increase in use levels. (Emphasis added by counsel for Mr. Stanzel.)

Unfortunately, Mr. Stanzel's efforts to obfuscate led this Court to conclude that "[s]ubstantial evidence supports the hearing examiner's decision that Stanzel's proposed changes did not constitute an extension and were not material changes in the size, character, or extent of the necessary city services." *Stanzel v. City of Puyallup*, 150 Wash.App. 835, 846, 209 P.3d 534 (2009).

Several factors enabled Mr. Stanzel obscure the true nature and scope of his proposed project. First, Mr. Stanzel skipped the City's application process for more than four years. If he had complied with the application process, a permit technician and the City's engineering department would have reviewed his application and required Mr. Stanzel

to provide sufficient information so as to enable the City to determine “whether service is available, and to address any related issues, such as those concerning usage, supply line location, connections, meter type, supply volume and pressure, fire flow, and other related issues.” CP 141. For example, information about the gaming facility size or its proposed uses may have triggered Pierce County requirements for an automatic sprinkler system. Information about the location of the proposed game room facility, i.e., whether it would be a minor addition to the church or standalone facility, would determine whether it must be connected to separate service pipes and meters. And, information about proposed water supply fixture units would be used to calculate a building’s meter size. If Mr. Stanzel failed to provide sufficient information, then the City would have issued him a notice of incompleteness. See, for example, CP 144-146.

Judge Armstrong, in his dissent, discussed the importance of the application and review process:

Michael Stanzel has succeeded in obtaining a hearing examiner’s decision that he is entitled to [a] commercial permit for his property. The superior court affirmed this finding and also ruled that the hearing examiner had the authority to order the City to provide commercial water use for Stanzel’s property. We have now affirmed these rulings although Stanzel never filed the required application with the City for this use. If he had, the application would have described his proposed use with specific information that would have allowed the City to evaluate Stanzel’s request. Although the City may not have the authority to deny Stanzel’s application on the grounds that his property was not being annexed to the City, that does not excuse Stanzel from complying with the

City's application procedure so the City can evaluate the impact of Stanzel's proposed use and effect, if any, on other city water users. I would reverse the trial court's decision, vacate the hearing examiner's findings, and require Stanzel to follow the City's application procedure.

Order Denying Motion to Reconsider, 1, 2. (*Stanzel, Respondent v. Pierce County, Respondent, City of Puyallup, Appellant*, Case No. 37697-1-II.)

Second, the deputy hearing examiner simply was not qualified to review and analyze requests for water service. And, as an ostensibly neutral evidentiary hearing officer, he was not positioned to be able to acquire additional information from Mr. Stanzel.

Third, Mr. Stanzel, like any applicant, was in full control over the information about his proposed project, including the release of details about his project, and the timing for releasing such information. He initially chose to tell the City nothing about his proposed project: When asked about his plans, he told the City "it was really none of [the City's] business, [he] just needed a commercial water availability letter." VT 43. And he chose to refrain from revealing the true nature and scope of his project until September of 2008. CP 141-161.

Throughout this process, Mr. Stanzel has used tactics that, unfortunately, seem to be prevalent in the human experience: When he became aware that the City might require him to annex his property as a condition of service, he misled other entities, the hearing examiner and

courts, into providing the answer that he wanted. Rather than being forthright about his project, he chose to minimize, obscure and evade.

Despite these tactics, Puyallup's water regulations will govern Mr. Stanzel's gaming facility project. PMC 14.02.240 requires that separate buildings on the same premises or on adjoining premises be served through separate service pipes and meters, and prohibits the piping system from being interconnected. The gaming facility must have its own connection to the City's water system. And, because the gaming facility will need a new connection to the City's water system, Mr. Stanzel must agree to annex his property into the City. PMC 14.22.020(5).

B. The superior court did not rule on annexation.

In his brief, Mr. Stanzel contends that the superior court's subsequent January 30, 2009 characterization of its earlier April 4, 2008 *Order Granting Land Use Appeal and Remanding to the Pierce County Hearing Examiner for Further Proceedings* changes the fact that the superior court did not rule on the issue of annexation. Specifically, Mr. Stanzel contends that the "court emphatically and unequivocally reaffirmed its prior ruling that annexation was not required." Reply Brief of Respondent Michael Stanzel, 10. But, nowhere in its oral decision on February 21, 2008 or in its written order, dated April 4, 2008, did the court address or rule on any requirements or conditions of water service,

including, and especially, the issue of annexation. CPI 174.⁴ In fact, the only statement from the court regarding annexation in its February 21, 2008 oral decision was ambiguous: “You don’t have to agree with the City and their policies and whether an annexation is an issue or not.” CPI 135, 136. And, on January 30, 2009, the superior court did not contradict the fact it had not ruled on the issue of annexation in February or April of 2008, but rather claimed that it was the court’s intent to rule on the annexation issue in February or April of 2008. RP 13.⁵

Please note, the City’s seemingly affirmative response to the superior court’s question concerning intent should not be misconstrued. The City’s initial response was going to be, “Yeah, well, that may have been your intent, but I can’t read your mind.” (See the accompanying declaration of Kevin Yamamoto in the appendix to this answer.) The City paused in order to articulate its initial response in a more diplomatic manner, and the superior court interjected before the City completed its response. In fact, the City argued as follows:

MR. YAMAMOTO: In response to the – initially to the motion to dismiss, Your Honor, the essence of what is happening in this case – and I hate to use the metaphor, but it is the elephant in the dining room, that Mr. Stanzel wants water service, he wants water availability letter from the City, but he doesn’t want to

⁴ References herein to the clerk’s papers in the first appeal, No. 37697-1-II, will be abbreviated as “CPI”.

⁵ References herein to the January 30, 2009 Verbatim Transcript of Proceedings will be abbreviated as “RP”.

comply with the City's requirement for that. And the major requirement here is that he has to annex, and he's declined to do that.

THE COURT: What did I rule about annexation? Did he have to do it or not?

MR. YAMAMOTO: You didn't rule anything about annexation, Your Honor. Your April 2008 letter – order says nothing about annexation.

THE COURT: Well, it was my intent to give him the water without annexing his property to the City of Puyallup, wasn't it?

MR. YAMAMOTO: Yeah.

THE COURT: Yeah, it was. So that is my intent. So what? Do you expect me to change that today?

...

MR. YAMAMOTO: It is impossible, Your Honor, for either the Hearing Examiner or you to have actually ruled that annexation could not be a requirement, and that is because the argument that they have brought forward is the property receives water, but the property is not the question. Puyallup's code is based on whether or not a new building occurs. If there's a new building to be built, then that building must obtain a new connection to the Puyallup water system. It is not an issue of the property or some other building on the property receiving water, it is whether or not there is a new building, and that requires a new connection. And because of that – I think that has always been a finesse in this case to say, well, the property receives water, but the only thing that receives water on that property right now is a church, and he wants to build an entirely separate building, a new building, an 8- to 9,000-square-foot building, a game room that is not part of the church.

THE COURT: But I knew all of that when I made the decision last, didn't I?

MR. YAMAMOTO: How could you, Your Honor?

...

So the first time that he [Mr. Stanzel] told us what he was doing, Your Honor, is in September 2008. Your order was April 2008, and they acknowledged that is the first time that they ever told us. That is the first time that they told us that he's going to build a separate 9- to 9,000-square-foot building. It doesn't have anything to do with the church, it is not going to be connected to the church, not going to be a renovation. It's a totally new building.

THE COURT: I understand that, and I read the materials here.
MR. YAMAMOTO: What I'm saying, Your Honor, is there's no way you could have in April 2008 known whether or not annexation would be required, and nor could the Hearing Examiner when the Hearing Examiner ruled in July of 2007. Mr. Stanzel at that point hadn't told anybody what he was going to do. Remember, the main contention of the City throughout this whole process until now has been, tell us what you're going to do, then we can tell you what the rules are. RP 12-16.

Clearly, the City argued vigorously that the superior court did not, and could not have, ruled on the issue of annexation. Thus, as noted above, the City's seemingly affirmative response to the superior court's question concerning intent should not be misconstrued.

In addition to an absence of any ruling on the record concerning the issue of annexation, it was simply impossible for the superior court to have validly ruled on the issue because Mr. Stanzel did not provide substantive information about his proposed project until September of 2008. Please recall that superior court's oral decision occurred in February of 2008, and its order was entered in April of 2008. Mr. Stanzel first provided substantive information about his proposed project five months later, in September of 2008. Consequently, in February and April of 2008, the superior court did not know that Mr. Stanzel's proposed building would be an 8,000 to 9,000 square foot game room with restroom and kitchen facilities (6 toilets, 2 urinals, 4 bathroom sinks, 1 kitchen mop sink, 1 kitchen hand wash sink, and a 3 compartment kitchen sink). The superior

court also did not know that the game room would be a new building and entirely separate from the existing church or any other building. Thus, the superior court could not have properly ruled that the game room would not require its own connection to the Puyallup water system, and that Mr. Stanzel would not be required to agree to annex his property into the City.

C. The doctrine of res judicata did not bar the City's land use petition action.

As the City notes in its Brief of Appellant, the doctrine of res judicata can bar reassertion of the same claim in a subsequent land-use matter. *Hilltop Terrace Homeowner's Association v. Island County*, 126 Wash.2d 22, 31, 891 P.2d 29 (1995). *DeTray v. City of Olympia*, 121 Wash.App. 777, 785, 90 P.3d 1116 (2004). Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. *Hilltop*, 126 Wash.2d at 31. *DeTray*, 121 Wash.App. at 785. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 785.

Subject matters are not identical if they differ substantially. *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786. Thus, for example, a second land use application may be considered if there is a substantial

change in circumstances or conditions relevant to the application **or a substantial change in the application itself.** (Emphasis added.) *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786.

The subject matter of Mr. Stanzel's 2007 land use petition and the subject matter of the City's 2008 land use petition differed substantially because Mr. Stanzel made a substantial change to his constructive application for water service. Although Mr. Stanzel failed to submit an application to the City that satisfied the form and content requirements of its code, for the sake of argument, please treat his June of 2004 and January of 2006 letter requests for service with his subsequent testimony before the hearing examiner as an application. VT 43, 45. CAR 166, 167. As noted above, when the City initially asked about his project, Mr. Stanzel told City "it was really none of [the City's] business, [he] just needed a commercial water availability letter." VT 43. Mr. Stanzel provided the City with no information until June of 2007. The information that he provided was only that he wanted to add a game room to the church and install some additional restrooms and washbasins. VT 37, 70. The information was provide in testimony before the Pierce County hearing examiner, but not directly to the City. VT 37, 70.

Again, for the sake of argument, please treat his June of 2004 and January of 2006 letter requests for service, in combination with his June of

2007 testimony before the hearing examiner, as an application for water service. (Mr. Stanzel's 2007 land use petition was based only on this scant information, thus leading Court of Appeals to believe that his "intended use for the church property would involve 'very limited improvement on the site'", and that "increased water requirements, if any, will be very limited,' without [a] 'substantial increase in use levels.'" *Stanzel*, 150 Wash.App. at 846. Mr. Stanzel significantly changed his application in September of 2008 when he described his proposed project to the City in detail: An 8,000 to 9,000 square foot game room facility with restroom and kitchen facilities (6 toilets, 2 urinals, 4 bathroom sinks, 1 kitchen mop sink, 1 kitchen hand wash sink, and a 3 compartment kitchen sink). CP 151-161. Mr. Stanzel also provided, for the first time, a proposed site plan and an architectural elevation that show that the game room facility is a new building and entirely separate from the existing church or any other building. CP 158-161. Clearly, Mr. Stanzel's project was no longer a "very limited improvement on the site"—if it ever was.

Under the doctrine of res judicata, subject matters are not identical if they differ substantially. *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786. And, a substantial change to an application creates subject matters that differ substantially. *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786. Accordingly, when Mr. Stanzel

substantially changed his application from an amorphous project involving “very limited improvement on the site” to an 8,000 to 9,000 square foot standalone game room facility with restroom and kitchen facilities the underlying subject matter was no longer identical. Thus, the doctrine of res judicata could not bar the City’s land use petition, which was based on the new information provided years later in September of 2008 by Mr. Stanzel.

D. Mr. Stanzel should be denied an award of attorney fees.

The Court should rule in favor of Appellant City of Puyallup, and on that basis, deny an award of attorney fees to Respondent Stanzel. However, even if Mr. Stanzel prevails in this second appeal, the Court should deny his request because he fails to satisfy the statutory criteria under RCW 4.84.370, and fails to establish that the City’s appeal is frivolous.

First, in this case, the City of Puyallup as an entity, or through its officials, never made a decision to issue, condition, or deny a permit for Mr. Stanzel. Mr. Stanzel would have had to obtain approval from the city council for commercial water service. But he chose to skip the City’s application and approval process: Mr. Stanzel simply brought a motion for an order compelling the City of Puyallup to provide water service in a case before the Pierce County hearing examiner where he was not a party. CAR 39. As this Court concluded, “it is undisputed that Stanzel did not meet with the city council, and he certainly did not receive the council’s

approval.” *Stanzel*, 150 Wash.App. at 844. Under RCW 4.84.370, the City of Puyallup must have made a decision that favored Mr. Stanzel, and then that decision must have been sustained on appeal at least twice. *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 412, 413, 120 P.3d 56 (2005). *Heller Bldg., LLC v. City of Bellevue*, 147 Wash.App. 46, 64, 194 P.3d 264 (2008). The City did not make a decision that favored Mr. Stanzel, and thus, his request for attorney fees should be denied.

Second, a request for water service is not the equivalent of an application for a development permit involving land use, and thus, RCW 4.84.370 does not apply. See *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 15, 57 P.3d 1156 (2002) (concluding that a proposed sewer line did not amount to a spot rezone and was not equivalent to a permit). Mr. Stanzel has provided no authority to establish that a request for water service is a development permit involving land use within the scope of RCW 4.84.370, and thus, the Court should deny his request for attorney fees.

Third, Mr. Stanzel did not truly prevail before the superior—insofar as his request that the court order the City to provide water service is concerned. Mr. Stanzel asked the superior court to order the City to issue a water availability letter, but the superior court declined to issue the order, and reserved ruling on the request for another time. CP 186. RP 21, 22.

The relevant portion of the transcript from the January 30, 2009 hearing is as follows:

THE COURT: On the order today, I am going to reserve a decision on whether I am going to issue an order on the water availability and I'm reserving sanctions, those other two matters, and I am going to hear the argument on the stay. After I hear all of that, then I may get back to those two other things. RP 21, 22.

After argument, the court granted the stay, and reserved ruling on the requests for an order compelling issuance of a water availability letter and sanctions:

THE COURT: So I am going to grant the motion. I think it is reasonable in this case. And to put the time and effort in and then if it is a change of decision, that doesn't make sense. That is not judicial economy either. I am going to reserve on all of the other issues then until we get to that point.

MR. ARAMBURU: Your Honor, as we have said, we are very much concerned that Mr. Stanzel be prepared to move ahead with his —

THE COURT: And if he doesn't move ahead, he's going to be damaged, isn't he?

MR. ARAMBURU: He is indeed, Your Honor.

THE COURT: Right. Those issues, if he's right, then they'll take care of themselves.

MR. ARAMBURU: Your Honor, I would request that because the '08 case has gone away and because the Hearing Examiner's decision is accordingly a final decision, the water availability letter should be issued to Mr. Stanzel so that he can proceed.

THE COURT: Well, now, you might not like my decision on this part of it, but I granted their request. So there it is.

Pursuant to the court's ruling, the court specifically struck language concerning the issuance of a water availability and sanctions in the January 30, 2009. CP 186. Because, Mr. Stanzel did not prevail before the superior

court—insofar as his request that the court order the City to provide water service is concerned, the Court should deny his request for attorney fees.

Fourth, the City's appeal is not frivolous, but rather is well grounded in the new information that Mr. Stanzel provided in September of 2008: An 8,000 to 9,000 square foot game room facility with restroom and kitchen facilities (6 toilets, 2 urinals, 4 bathroom sinks, 1 kitchen mop sink, 1 kitchen hand wash sink, and a 3 compartment kitchen sink). CP 141-161. Mr. Stanzel also provided a proposed site plan and elevation, which show that the game room facility is a new building and entirely separate from the existing church or any other building. CP 158-161. When the Pierce County deputy hearing examiner failed consider the City's codified connection and annexation requirements in light of the new and only substantive information provided by Mr. Stanzel about his proposed project, the City was justified in appealing the matter to the superior court.

III. CONCLUSION

Because the superior court dismissed the City's land use petition before the hearing examiner prepared and submitted a certified record, the City requests (a) that this matter be remanded to the superior court to enable the Pierce County hearing examiner to submit the certified record to the superior court, or (b) that the Court of Appeals direct the Pierce County hearing examiner to prepare the certified record and transmit it to the Court

of Appeals to supplement the record on appeal.

In addition, based on the foregoing, and its earlier filed Brief of Appellant, the City of Puyallup respectfully requests that the Court rule that:

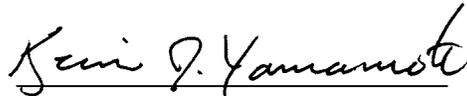
1. The superior court err by hearing Mr. Stanzel's dismissal motion before the initial hearing and before the certified record had been submitted to the court;
2. The deputy examiner's December 10, 2008 Supplemental Decision on Remand was insufficiently supported by evidence that is substantial when viewed in light of the whole record before the court;
3. The superior court err when it ruled that the issue regarding the City's requirement for annexation as a precondition to water service had previously been decided and was res judicata; and
4. The deputy examiner erred when he determined that Mr. Stanzel did not have to agree to annex his property, and thus, his decision was a clearly erroneous application of the law to the facts.

Furthermore, the City requests that the Court reverse the superior court and (a) reinstate the City's land use petition action or (b) rule that Mr. Stanzel's proposed game room facility will require its own connection to

the Puyallup water system, and as a result, Mr. Stanzel will be required to agree to annex his property into the City.

Respectfully submitted,

Dated: December 18, 2009



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APPENDIX

Declaration of Kevin Yamamoto

State of Washington)
)
County of Pierce)

Declaration of Kevin Yamamoto

1. I am Kevin Yamamoto, Senior Assistant City Attorney for the City of Puyallup. I am over the age of eighteen years and am competent to testify. The following information is based on my personal knowledge.

2. During a hearing before Judge Larkin of the Pierce County Superior Court, in the matter of the *City of Puyallup v. Michael Stanzel and Pierce County*, Case No. 08-2-15809-3, the superior court asked me the following question:

THE COURT: Well, it was my intent to give him the water without annexing his property to the City of Puyallup, wasn't it?

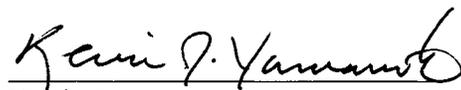
My initial response was going to be, "Yeah, well, that may have been your intent, but I can't read your mind." However, I paused after saying the word "Yeah" in order to recompose my initial response so that it would be more diplomatic. Unfortunately, the superior court interjected before I was able to rearticulate and complete my response.

3. My incomplete response was not an admission.

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

Dated: December 18, 2009 in Puyallup, Washington.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II


Kevin J. Yamamoto

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8

9 Service by personally delivering a copy to the clerk at the following address:

10
11 David B. St.Pierre
12 Deputy Prosecuting Attorney
13 Pierce County Prosecuting Attorney - Civil Division
14 955 Tacoma Avenue South, Suite 301
15 Tacoma, WA 98402
16 253-798-6503
17 WSBA No. 27888
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19

20 Service by mailing a copy, postage prepaid, to the following address:

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22 Michael C. Walter
23 Keating Bucklin & McCormack, Inc., P.S.
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26 206-623-8861, ext. 34
27 WSBA No. 15044
28 Michael C. Walter [MWalter@kbmlawyers.com]
29

30 I declare, under penalty of perjury of the laws of the State of Washington, that the
31 foregoing is true and correct.
32

33
34 Dated: December 18, 2009
35

36 
37 Kevin J. Yamamoto 26787
Senior Assistant City Attorney