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SUPREME COURT
OF THE STATE OF WASHINGTON

JZ Knight,

Petitioner,

v.

City of Yelm and TTPH 3-8, LLC,

Respondents

CITY OF YELM'S ANSWER TO BRIEF OF AMICUS CURIAE
CENTER FOR ENVIRONMENTAL LAW AND POLICY

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ORIGINAL

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RCW 19.27.0975

RCW 58.17.1505

RCW 90.03.0105

I. INTRODUCTION

Knights standing and liability for attorney fees under RCW 4.84.370 are the only two issues presented to this Court in Knight's Petition for Review. The Motion of the Center for Environmental Law & Policy (CELP) for Leave to File *Amicus Curiae* Brief was granted in part by the Chief Justice. Seven pages of the ten-page Argument section of CELP's amicus brief were stricken because these seven pages discussed water issues that were not before the Court.¹ A similar share of the preliminary sections of CELP's amicus brief attempts to establish a foundation for the stricken arguments, and presumably was implicitly stricken. When CELP's factual assertions and arguments related to water issues are set aside, very little remains of the submitted amicus brief.

The few pages of the amicus brief that address the issues actually before the Court (standing and attorney fees) do so only through broad and vague policy arguments. These pure policy arguments do not even attempt to explain how they relate to the specific requirements of the well-established body of Washington standing law and the statutory language of RCW 4.84.370, as judicially interpreted.

¹ May 9, 2011 letter from Supreme Court Commissioner Steven M. Goff to Rachael Paschal Osborn and David L. Monthie

**II. ANSWER TO THE AMICUS BRIEF STATEMENT OF THE
CASE AND BACKGROUND**

Throughout this litigation, Knight has groundlessly attacked the City's water system management. Even though those attacks were irrelevant to the issues being litigated, the City could not ignore the false and misleading arguments that dominated Knight's briefs. So the City has been forced to devote much of its briefing to correcting and rebutting those false and misleading statements.

Now CELP has taken the baton from Knight and continues the attacks on the City's water system planning, parroting Knight's briefing and campaign of deception and distraction from the issues actually before the Court. This is a classic case of the "big lie." If you tell it often enough and indignantly enough, people may believe it.

At trial and on appeal, the City responded to Knight's attacks at length, demonstrating that Knight misrepresented or grossly distorted the City's water planning record. CP 108 (City of Yelm's Response to Petitioner JZ Knight's Opening Brief: 1209-1214; 1217-1223; Reply Brief of Appellant City of Yelm at 4-7 and 7-13. There is abundant evidence in the administrative record of the City's exemplary record of water system planning and management, including a successful proactive program of water rights acquisition and transfer, new water rights

applications, and leading programs in water conservation, reclamation, and reuse. CP 111: 189-1491; CP 111: 1267-75. The City's extensive briefing in response to Knight's attacks are cited in the Supplemental Brief of Respondent City of Yelm, pages 3-4.

Were there a grain of accuracy in CELP's broadside attacks on the City's water system management, the state Department of Ecology and Department of Health would have taken enforcement actions. But there have been no such enforcement actions against the City. The City is working diligently and effectively to accommodate rapid growth, just as the Growth Management Act requires, so that population growth occurs in cities and urban growth areas rather than sprawling on large lots in rural areas served by exempt wells.²

² CELP also cites a pending case before this Court, *Kittitas County v. Eastern Wash. Growth Mgt Hrgs. Bd.*, No 84187-0, without any explanation of how the case has any bearing on the issues before the Court in this case. The *Kittitas* case deals only with whether Kittitas County plan amendments and development regulations violate the Washington Growth Management Act, and have nothing to do with standing or attorney fee awards under RCW 4.84.370.

III. ARGUMENT

A. CELP's Policy Argument that Standing Must Be Permissive to Encourage Citizen Participation in Superior Court Review of Local Land Use Decisions Would Negate this Court's Long-Held Standing Requirements.

CELP asserts that “[a] decision in this case that allows and encourages citizen participation in local land use decisions and in superior court review of those decisions is critical to ensure that CELP and the public may meaningfully engage in land use decisions affecting Washington’s valuable water resources.”³ Nowhere in this assertion or CELP’s subsequent one-page argument⁴ does CELP relate this call for permissive standing to the law of standing in Washington. No authority is presented in support of CELP’s broad proposition. Washington standing doctrine and case law authorities are absolutely ignored.

CELP’s broad policy assertion implicitly assumes that litigation challenging land use decisions on the basis of water concerns always is socially desirable. But litigation imposes immense burdens and often is oppressive. When litigation serves legitimate interests of the initiating party, such consequences may be acceptable. But litigation also can be brought frivolously or for ulterior motives. The law of standing limits those who may initiate litigation. They must be able to show that the land

³ Amicus Brief, 1-2

⁴ *Id.*, 15

use decision they are challenging would cause them to suffer immediate, concrete, injury in fact. *E.g., Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992).

Contrary to established standing doctrine, CELP advocates that anyone who holds a senior water right may initiate litigation based on speculation about conceivable, but extremely unlikely, potential future harm to that senior water right.⁵ Under the permissive standing policy advocated by CELP, thousands of people residing in a watershed and using water under a senior water right could challenge any approval of development anywhere else in the watershed. But senior water rights, by law, are already protected from impairment under the State's Water Code and, thus, are not subject to impairment by junior water rights.⁶ Moreover, in this case, the City land use decisions were only preliminary plat decisions, and determinations of water availability were still required prior to final plat approval⁷ and prior to building permit issuance.⁸

⁵ Although Knight has asserted that her water rights are senior to the City's water rights, there is no evidence of the seniority of Knight's water rights in the record. However, even if Knight's water rights are senior to the City's, there has been no showing that the preliminary plat approvals would cause immediate, specific, tangible injury in fact to Knight's water rights.

⁶ RCW 90.03.010 and .380.

⁷ RCW 58.17.150.

⁸ RCW 19.27.097.

Accordingly, the supposed "impairment" of Knight's senior water rights was extremely unlikely to ultimately occur and was far too uncertain, contingent, speculative and conjectural to establish standing.

No one knows why Knight has initiated and perpetuated this marathon litigation. Nothing in the record shows that JZ Knight has any special interest in water resources. We will never know whether this litigation really was motivated by concern about her water rights or something else because she did not show that her senior water rights would be immediately, concretely injured in fact by the preliminary plat approvals of the proposed developments.

B. CELP's Assertion that Attorney Fees Should Not Be Assessed Against Knight Is Based on a Factual Error and Is Contrary to the Plain Language of RCW 4.84.370.

While it is unusual for attorney fees to be recoverable against a party who did not appeal a superior court decision, doing so in this case is consistent with the plain language of RCW 4.84.370. That statute authorizes attorneys' fees and costs to the "substantially prevailing party" and the Court of Appeals correctly found that the City prevailed because the City Hearing Examiner, City Council, the Superior Court, and the Court of Appeals all upheld the City's decisions approving the preliminary plat applications.

CELP's argument to the contrary is based on a factual error. CELP states that "[t]he Superior Court reversed the City's decision approving the five plats... ." ⁹ This is incorrect. The Hearing Examiner granted preliminary plat approvals. The City Council upheld the approvals. The Superior Court did not reverse the approvals but merely remanded to the Examiner for clarification of a condition to literally reflect what the Examiner clearly stated that he meant in a finding accompanying the condition and what all parties agreed the effect of the condition should be. But Knight pushed the trial court, over the strenuous objections of the City, to make findings and conclusions determining the extent of the City's water rights, even though the Superior Court had no jurisdiction over that issue, and even though Knight knew they would immediately become nullities if appealed. Thus, when Knight advocated such findings and conclusions, she knew the City would be forced to appeal so that they would become nullities.

The applications for preliminary plat approval doggedly opposed by Knight were upheld by the Yelm City Council, the Superior Court, and the Court of Appeals. Yelm, a small City, was forced by Knight's tactics to spend an inordinate share of its limited resources for attorney fees and

⁹ Amicus Brief, 6

other costs of litigation. In opposing the award of attorney fees, Knight improperly relies before this Court on arguments and authorities that were not presented to the Court of Appeals. See Supplemental Brief of Respondent City of Yelm, 13-14. Under these unusual circumstances and the plain language of RCW 4.84.370, which CELP ignores, the City was entitled to recover attorney fees.

IV. CONCLUSION

The City of Yelm requests that this Court uphold the unpublished decision of Division Two of the Court of Appeals.

Respectfully submitted this 16th day of May 2011.

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CERTIFICATE OF SERVICE

On this 16th day of May 2011, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing **City of Yelm's Answer to Brief of Amicus Curiae Center for Environmental Law and Policy** to the following:

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

Executed at Seattle, Washington, this 16th day of May 2011.



Helen Stubbart