FILED
COURT OF APPEALS
DIVISION II
09 FEB 19 PM 3:49
STATE OF WASHINGTON
BY
DEPUTY

84831-9

No. 38581-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

JZ KNIGHT,

Petitioner / Appellee

v.

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

Respondents / Appellants

OPENING BRIEF OF APPELLANT TTPH 3-8, LLC ("Tahoma Terra")

Curtis R. Smelser, WSBA 17318
Averil B. Rothrock, WSBA 24248
Philip T. Kasin, WSBA 35389
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339

Attorneys for Appellant TTPH 3-8, LLC
("Tahoma Terra")

ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENT OF ERRORS 2

A. Assignments of Error. 2

B. Issues Pertaining to Assignments of Error. 3

III. STATEMENT OF THE CASE 4

A. Factual Background. 4

1. The Tahoma Terra master planned community and subdivision. 5

2. Water rights provided by Tahoma Terra to the City of Yelm that provide more than ample water to serve the subdivision. 7

B. Procedural History. 11

1. Proceedings before the Yelm Hearing Examiner: Tahoma Terra meets its burden for conditional approval of its preliminary plat. 11

2. Proceedings before the Yelm City Council, which upholds the conditional approval: Knight fails to demonstrate standing and fails to meet her burden on appeal. 14

3. Proceedings before the Thurston County Superior Court: Knight wins no substantive relief, though the superior court remands to clarify the undisputed meaning of the condition and enters prohibited findings and conclusions. 17

IV. ARGUMENT 20

A. This Court should dismiss Knight's Petition because Knight did not appeal the City Council's determination that

she lacked standing; the superior court erred in failing to do so. 20

B. This Court should dismiss Knight's Petition because Knight failed to establish standing under both the Yelm Municipal Code and LUPA to obtain judicial review of the land use decision; the superior court erred in failing to do so. 22

1. Knight was not an aggrieved person with standing to appeal the Examiner's Decision to the Yelm City Council. 23

2. Knight lacked standing to seek judicial review under LUPA. 25

a. Knight has not and cannot demonstrate that the land use decisions will prejudice her ...26

b. A judgment in Knight's favor would not substantially eliminate or redress any alleged prejudice to Knight 32

C. Knight failed to meet her burden of proving that one of the LUPA standards was met in order to reverse the City's conditional preliminary approval of the Tahoma Terra Subdivision. 32

1. The City properly interpreted the law, after allowing the deference afforded to it as a local jurisdiction with expertise. 33

a. The Examiner's condition on preliminary plat approval was proper and was a proper interpretation of the law 34

b. The City properly interpreted the Subdivision Act and the Yelm Municipal Code in determining what constitutes "appropriate provisions" for potable water supplies 36

c. The superior court's Conclusion of Law #5, a nullity on appeal, was erroneous.....42

2. The City's decision is supported by substantial evidence and correctly applies the law to the facts. 45

D. This Court should award Tahoma Terra its attorneys' fees and costs incurred on appeal if it substantially prevails. .. 48

V. CONCLUSION..... 50

TABLE OF AUTHORITIES

STATE CASES

Baker v. Tri-Mountain Res., Inc.,
94 Wn. App. 849, 973 P.2d 1078 (1999) 48

Benchmark Land Co. v. City of Battle Ground,
146 Wn.2d 685, 49 P.3d 860 (2002) 45

Concerned Olympia Residents for the Env't v. Olympia,
33 Wn. App. 677, 683, 657 P.2d 790 (1983) 27, 28

Chelan County v. Nykreim,
146 Wn.2d 904, 52 P.3d 1 (2002) 23-24

Coughlin v. Seattle School Dist.,
27 Wn. App. 888, 621 P. 2d 183 (1980) 27, 31

Gogerty v. Dep't of Insts.,
71 Wn.2d 1, 426 P.2d 476 (1967) 47

Harrington v. Spokane County,
128 Wn. App. 202, 114 P.3d 1233 (2005) 23

Isla Verde Int'l Holdings, Inc. v. City of Camas,
146 Wn.2d 740, 49 P.3d 867 (2002) 47-48

Landmark Dev., Inc. v. City of Roy,
138 Wn.2d 561, 980 P.2d 1234 (1999) 45

Leavitt v. Jefferson County,
74 Wn. App. 668, 875 P.2d 681 (1994) 26

Lu v. King County,
110 Wn. App. 92, 38 P.3d 1040 (2002) 43-44

Marine Enters., Inc. v. Sec. Pac. Trading Corp.,
50 Wn. App. 768, 750 P.2d 1290 (1988) 49

Michak v. Transnation Title Ins. Co.,
148 Wn.2d 788, 64 P.3d 22 (2003) 23

Rettkowski v. State,
122 Wn.2d 219, 858 P.2d 232 (1993) 32

Save a Valuable Env't (SAVE) v. Bothell,
89 Wn.2d 862, 576 P.2d 401 (1978) 26

Silverstreak, Inc. v. Dep't of Labor & Indus.,
159 Wn.2d 868, 154 P.3d 891 (2007) 40

Snohomish County Prop. Rights Alliance v. Snohomish County,
76 Wn. App. 44, 882 P.2d 807 (1994) 27

Suquamish Indian Tribe v. Kitsap County,
92 Wn. App. 816, 965 P.2d 636 (1998) 29

Tenore v. AT&T Wireless Servs.,
136 Wn.2d 322, 962 P.2d 104 (1998) 21

Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.,
164 Wn.2d 329, 190 P.3d 38 (2008) 41

Topping v. Pierce County Bd. of Comm'rs,
29 Wn. App. 781, 630 P.2d 1385 (1981) 36

Trepanier v. Everett,
64 Wn. App. 380, 824 P.2d 524 (1992) 26, 27

Walker v. Munro,
124 Wn.2d 402, 879 P.2d 920 (1994) 44

Wells v. Whatcom County Water Dist. No. 10,
105 Wn. App. 143, 19 P.3d 453 (2001) 21, 22-23

Wenatchee Sportsmen Ass'n v. Chelan County,
141 Wn.2d 169, 4 P.3d 123 (2000) 46

Wilson v. Steinbach,
98 Wn.2d 434, 656 P.2d 1030 (1982) 23

Witt v. Port of Olympia,
126 Wn. App. 752, 109 P.3d 489 (2005) 21-22

FEDERAL CASES

Port of Astoria, Oregon v. Hodel,
595 F.2d 467 (9th Cir. 1979) 26

Valley Forge Christian Coll. v. Ams. United for Separation of Church and State,
454 U.S. 464 (1982) 26

STATE STATUTES

RCW 4.84.370(1) 4, 48, 50

RCW 7.24 *et seq* 44

RCW 19.27.097 ..... 12, 29, 39-40

RCW 36.70A *et seq* 41

RCW 36.70A.020(12) 38

RCW 36.70A.030(12) 38

RCW 36.70C *et seq* 17

RCW 36.70C.020(a) 43

RCW 36.70C.060 ..... 21, 25

RCW 36.70C.060(2) 25, 26, 32

RCW 36.70C.070 ..... 21, 22, 25

RCW 36.70C.130 ..... 3, 4, 33, 44, 50

RCW 43.21C *et seq* 6

RCW 58.17 *et seq* 35

RCW 58.17.110 .....1, 10, 12, 37, 42, 50

RCW 58.17.150 .....28, 36

RCW 58.17.180 .....47, 48

RCW 90.03.380(1).....30

YELM MUNICIPAL CODE

YMC 2.26.150 .....14-15, 22, 23, 24, 25-26

YMC 2.26.160.C..... 14-15

YMC 15.40.010 38-39

YMC 15.40.020.B.2.b.....39

YMC 16.12.170 .....24, 42

YMC 17.62.050 - .080 5

I. INTRODUCTION

This Land Use Petition Act (LUPA) appeal concerns whether Tahoma Terra satisfied the requirement of the Yelm Municipal Code (YMC) and the State Subdivision Act (Chapter 58.17 RCW) at the *preliminary* platting stage to establish that "appropriate provisions" have been made for potable water supplies to serve its proposed subdivision. The City of Yelm Hearing Examiner (Examiner) found that Tahoma Terra had. The record developed before the Examiner is uncontroverted: Tahoma Terra has conveyed to the City of Yelm (City) *ample* water rights to serve its proposed subdivision. In fact, Tahoma Terra has conveyed to the City more water rights than are necessary to serve the proposed plat. The City, as the water purveyor, testified that it will serve the development. This should be the end of the inquiry.

JZ Knight (Knight) appealed the Examiner's approval to the Yelm City Council. The City Council denied Knight's appeal on the basis that Knight was not an "aggrieved" person with standing to appeal. The City Council then contingently decided Tahoma Terra had made "appropriate provisions" for potable water supplies at the preliminary plat approval stage. On appeal to the superior court, Knight urged a construction of the YMC and RCW 58.17.110 that is not supported by their plain language and that contradicts other enactments of the Legislature. This revision of State law, which the superior court bought and expressed in prohibited findings of fact and conclusions of law, must be corrected. The superior court's "reversal" to change a stylistic issue in the Examiner's condition of

approval ignored the evidence in the record demonstrating that Tahoma Terra has *already* satisfied the condition to make appropriate provisions for potable water supplies.

Moreover, this case never should have proceeded to the City Council or to the superior court due to Knight's lack of standing to appeal the preliminary plat approval by the Examiner. The Yelm City Council properly concluded Knight lacked standing under the YMC to appeal the Examiner's approval to it. Knight never appealed this dispositive decision. Knight's appeal to superior court should have been dismissed for this failure. Additionally, Knight lacked standing to appeal to the superior court under LUPA. Knight's Petition should be dismissed not only for her lack of standing, but on the merits as well.

II. ASSIGNMENT OF ERRORS

A. Assignments of Error.

1. Tahoma Terra assigns no error to the decision of the Hearing Examiner or the City of Yelm's affirmance of that local decision. This Court should affirm the decision of the local jurisdiction to conditionally approve Tahoma Terra's preliminary plat.

2. The superior court erred in denying Tahoma Terra's May 2008 motion to dismiss because Knight did not appeal the City Council's determination that she lacked standing under the Yelm Municipal Code to appeal the Hearing Examiner's decision to the City Council.

3. The superior court erred in denying Tahoma Terra's July 2008 motion for summary judgment because Knight failed to establish standing under the Yelm Municipal Code to administratively appeal the Hearing Examiner's decision to the City Council and Knight failed to establish standing under LUPA

to obtain judicial review of the City's land use decision.

4. The superior court erred in "reversing" the City Council and purportedly granting Knight's LUPA petition to modify the condition placed on Tahoma Terra's preliminary plat approval when the parties did not dispute the meaning of the condition, the condition was clear from the Hearing Examiner's findings, and the condition is required by state statutes.

5. The superior court erred in finding that Knight sustained her burden under LUPA, RCW 36.70C.130(1), to justify reversal of Tahoma Terra's preliminary plat approval.

6. The superior court erred in "reversing" the City's conditional approval of Tahoma Terra's preliminary plat application when the uncontroverted evidence on the record establishes Tahoma Terra has made appropriate provisions for potable water.

7. The superior court erred in entering findings of fact and conclusions of law in a LUPA action.

8. The superior court erred in Conclusion of Law #5 by providing a prohibited advisory opinion that incorrectly states the law.

B. Issues Pertaining to Assignments of Error.

1. Should this Court reverse the superior court and dismiss Knight's LUPA petition because she failed to assign error to the City Council's dispositive decision that she did not have standing under the YMC to appeal the Examiner's decision? (Assignment of Error #2).

2. Should this Court reverse the superior court and dismiss Knight's LUPA petition when Knight submitted no evidence of being an aggrieved party, and, therefore, failed to establish standing under either the YMC or LUPA? (Assignment of Error # 3).

3. Should this Court affirm the local jurisdiction's conditional approval of Tahoma Terra's preliminary

plat application because Knight failed to meet her burden for reversal under LUPA, RCW 36.70C.130(1)? (Assignments of Error # 4, 5 and 6).

4. Should this Court affirm the local jurisdiction's conditional approval of Tahoma Terra's preliminary plat application because the substantial evidence in the record establishes that Tahoma Terra has made appropriate provision for potable water supplies to serve its subdivision? (Assignments of Error #5 and 6).

5. When the Examiner's condition on preliminary plat approval, read in the context of the entire order, requires that the applicant must provide a potable water supply adequate to serve the development at final plat approval **and** prior to issuance of any building permit, was it error to reverse the City and order the same relief? (Assigments of Error #4).

6. Did the superior court err by entering findings of fact and conclusions of law in violation of its role as appellate reviewer? (Assignment of Error #7).

7. Did the superior court err in Conclusion of Law #5 when the superior court incorrectly stated the law regarding what would constitute a legally sufficient showing of "appropriate provisions" for potable water supplies, and indicated how it would rule in the future on that issue? (Assignments of Error # 7 and 8).

8. Should this Court award Tahoma Terra its attorney fees under RCW 4.84.370(1)?

III. STATEMENT OF THE CASE

A. Factual Background.

Tahoma Terra's appeal involves the City of Yelm's conditional approval of Tahoma Terra's preliminary plat application to subdivide approximately 32.2 acres into 198 single-family residential lots. The project is known as Tahoma Terra Phase II, Divisions 5 and 6 (the Tahoma Terra Subdivision). The Tahoma Terra Subdivision is one

development in a previously approved 220-acre master plan development—the Tahoma Terra Master Planned Community (MPC).

1. The Tahoma Terra master planned community and subdivision.

By way of background, the southwest area of the City of Yelm (where the MPC and the Tahoma Terra Subdivision at issue are located) was annexed in 1993 and zoned for master plan development. As part of that annexation process, an environmental impact statement (EIS) was issued that required any development within that area to provide water rights to the City sufficient to serve such development. In essence, developers had to bring their own water to serve their proposed developments. When Tahoma Terra purchased land within the annexed area, it also purchased the water rights appurtenant to that land and began planning the 220-acre MPC.

Pursuant to the YMC, approval of a development in the MPC is a three-step process: (1) review and approval of a Conceptual Master Site Plan; (2) review and approval of a Final Master Site Plan; and (3) review and approval of specific development applications within the MPC through their required review processes. YMC 17.62.050 - .080.

Tahoma Terra's application for Conceptual Master Site Plan approval for the entire MPC[1] was subject to review under the State

[1] Tahoma Terra actually submitted an application for Conceptual Master Site Plan approval for the entire MPC, Final Master Site Plan approval for the area of the MPC east of Thompson Creek, and preliminary subdivision approval for no more than 89 lots in an area of the MPC east of Thompson Creek all at the same time, as allowed under YMC 17.62.080.

Environmental Policy Act (SEPA), RCW 43.21C *et seq.* The City's designated SEPA responsible official issued a Mitigated Determination of Non-Significance (MDNS) for the MPC.[2] One of the conditions of the MDNS requires Tahoma Terra to provide water rights to the City sufficient to serve developments within the MPC.[3] That is also one of the conditions of the Final Master Site Plan approval and, as mentioned above, is a condition of the EIS issued when the southwest area of Yelm was annexed.

At the time Tahoma Terra submitted its preliminary plat application for the Tahoma Terra Subdivision at issue (April 27, 2007), Tahoma Terra had already received Conceptual Master Site Plan approval and Final Master Site Plan Approval for the entire MPC. Additionally, the following specific development proposals within the MPC had been approved:

- Phase I, Divisions 1 and 2 (preliminary and final subdivision approvals): two residential subdivisions consisting of 215 single-family lots;
- Phase I, Multi-Family (site plan review approval): 48 multi-family units/apartments;
- Phase II, Divisions 3 and 4 (preliminary and final subdivision approvals)[4]: one residential subdivision consisting of 200 single-family lots.

Thus, a total of 463 lots have been approved within the MPC, and the Tahoma Terra Subdivision would add another 198 lots.

---

[2] AR: 5/24/05 Mitigated Determination of Non-Significance.
[3] *Id.* at Finding of Fact 16 and Mitigation Measure 5.
[4] Final plat approval for this subdivision was not granted by the Yelm City Council until August 26, 2008.

2. Water rights provided by Tahoma Terra to the City of Yelm that provide more than ample water to serve the subdivision.

The evidence on the record before the Examiner demonstrates that Tahoma Terra has provided more than sufficient water rights to the City to serve all development within the Tahoma Terra MPC. Specifically, Tahoma Terra purchased the Henry Dragt farm and its appurtenant water rights. Tahoma Terra has conveyed all three of those water rights, totaling 155.66 acre feet per year (afy), to the City.[5] Additionally, Tahoma Terra purchased the Tahoma Valley Golf and County Club f/k/a Nisqually Valley Golf Course (Golf Course), including the water rights appurtenant thereto. Tahoma Terra has conveyed those water rights, which total at least 124.91 afy, to the City.[6] Finally, Tahoma Terra procured a lease of some of the water rights appurtenant to the McMonigle property. The total amount of those water rights has not been finally determined because there are a number of variables that go into that calculation, but the leased water rights are approximately 175 afy or more. Tahoma Terra has assigned its interest in the McMonigle water rights to the City.[7] In sum,

[5] AR: 12/27/06 Special Warranty Deed for Water Rights (Dragt—Certificate of Ground Water Right No. 1581, Certificate of Surface Water Right No. 4980, and Certificate of Water Right No. G2-24778); 5/19/05 Water Right Conveyance and Right-of-Entry Agreement (Dragt); 12/13/06 First Amendment to Conveyance and Right-of-Entry Agreement (Dragt).

[6] AR: 12/27/06 Special Warranty Deed for Water Rights (Golf Course—Certificate of Ground Water Right No. 5155-A, Certificate of Ground Water Right No. 5721-A, and Certificate of Water Right No. G2-27096C); 9/13/06 Water Right and Real Property Conveyance and Right-of-Entry Agreement (Golf Course). The Golf Course water rights actually total 151 afy. The exact amount of the Golf Course water rights was only recently determined. The 124.91 afy figure is used simply because that was the figure presented to the Yelm Hearing Examiner at the time of his decision.

[7] AR: 12/11/06 Lease, Reservation of Rights, And Conveyance Agreement For McMonigle Water Rights.

Tahoma Terra has purchased and conveyed *at least* **455.57** afy of water rights to the City of Yelm in connection with development of the MPC.

The record further demonstrates that the Department of Ecology (Ecology) *has approved* the transfer to the City of all of the Dragt water rights (155.66 afy) and, as Knight conceded in briefing to the superior court, some of the Golf Course water rights (77 afy).[8] All of the applications for water right transfers made to Ecology to date have been approved, and the total amount of water rights approved by Ecology for transfer to the City is **232.66** afy.

Knight and the City dispute how water demand should be calculated, especially the calculation of an Equivalent Residential Unit (ERU). This dispute does not affect Tahoma Terra's preliminary plat approval. Even using Knight's asserted formula for calculating an ERU, Tahoma Terra has conveyed sufficient water rights to the City. Ecology has approved the transfer of sufficient water rights to the City to serve the demand of Tahoma Terra's already approved developments within the MPC and the demand created by the Tahoma Terra Subdivision using Knight's method of calculation.

---

[8] AR: 12/22/06 Department of Ecology letters re: Water Right Change Application Nos.. 1581, 4980, and G2-24778; CP 686; *see also* CP 616 and CP 638 – 641. While Knight has implied that Ecology did not approve the transfer of the full amount of the Golf Course water rights to the City, such an implication is misleading. Only 77 afy were approved because the transfer application did not seek to transfer all of the water rights. In fact, the application sought to transfer 81 afy, of which Ecology approved 77 afy. Tahoma Terra is holding the remaining 70 afy (see footnote 6) to irrigate the golf course until the City can supply sufficient reclaimed water for such irrigation use. At that time, an application will be submitted to Ecology for transfer to the City of the remaining Golf Course water rights.

Specifically, one acre foot of water per year is the equivalent of 325,850 gallons per year. Assuming, as Knight contends, one ERU requires 300 gallons of water per day, 3 ERUs will be served per year by one acre foot of water (325,850 gallons per year, divided by 365 days, divided by 300 gallons per day = 2.975 ERUs—rounded to 3). Given this calculation, the total number of ERUs (or lots) that could be served per year by the 232.66 afy of water rights conveyed by Tahoma Terra and already approved for transfer to the City by Ecology equals **698** (232.66 afy times 3 ERUs per afy = 697.98—rounded to 698). Additionally, the total number of ERUs (or lots) that could be served by the 455.57 afy of water rights that have been conveyed by Tahoma Terra to the City equals **1,367** (455.57 afy times 3 ERUs per afy = 1,366.71—rounded to 1,367).

When these numbers are compared to the demand that will arise from the developments in the MPC, the results conclusively demonstrate Tahoma Terra has provided more water to the City than it will use in its developments. The total number of lots approved to date in the MPC is 463. Of those 463 approved lots, 48 are for multi-family apartments and 415 are for single-family homes. Because one apartment only requires 0.75 ERUs while one single-family home requires 1 ERU, the total number of previously approved lots, in terms of ERUs, is only 451 (463 minus 48 plus (48 x 0.75) = 451). Adding the 198 single-family lots from the Tahoma Terra Subdivision at issue, the total number of lots, in terms of ERUs is only 649. The total amount of water rights Tahoma Terra has conveyed to the City amply meets this number. After subtracting the

demand from the already approved Tahoma Terra developments *and* the Tahoma Terra Subdivision at issue, water sufficient to serve an additional 718 single-family lots remains. The table below illustrates these figures:

Water Rights Conveyed by Tahoma Terra	**Demand from Previous Tahoma Terra Developments within the MPC**	**Demand from the Tahoma Terra Subdivision**	**Surplus of Water Rights**
1,367 ERUs (455.57 afy x 3)	451 ERUs	198 ERUs	718 ERUs

Moreover, Ecology has *already approved* Tahoma Terra's transfer to the City of sufficient water rights to serve all of the approved Tahoma Terra developments, the Tahoma Terra Subdivision at issue, and 49 additional single-family lots. The table below illustrates these figures:

Water Rights Approved for Transfer by the DOE	**Demand from Previous Tahoma Terra Developments within the MPC**	**Demand from the Tahoma Terra Subdivision**	**Surplus of Water Rights**
698 ERUs (232.66 afy x 3)	451 ERUs	198 ERUs	49 ERUs

These numbers establish that Tahoma Terra has *already* met the condition contained in the City's preliminary plat approval for the Tahoma Terra Subdivision at issue. Additionally, Tahoma Terra has met the conditions of the annexation EIS, the Conceptual and Final Master Site Plan approvals, and the MDNS. Tahoma Terra has provided more than adequate water rights to the City to serve the development. Tahoma Terra has made appropriate provisions for water as required by RCW 58.17.110.

B. Procedural History.

1. Proceedings before the Yelm Hearing Examiner: Tahoma Terra meets its burden for conditional approval of its preliminary plat.

Tahoma Terra submitted its preliminary plat application for the Tahoma Terra Subdivision to the City on April 27, 2007.[9] Tahoma Terra's application was subject to review by City staff and an opportunity for public comment.

The Examiner held a public hearing on July 23, 2007.[10] At the hearing, counsel for Knight submitted testimony and a letter asserting, in relevant part, that Tahoma Terra and the City failed to establish that appropriate provisions have been made for potable water supplies to serve the subdivision, that the subdivision complies with the water availability requirements of the Comprehensive Plan and the Water System Plan, and that the proposed water supply is adequate and available to serve the subdivision concurrently with development.[11] Grant Beck, the City's Director of Community Development, testified that the City, as the water purveyor, had determined it could serve the subdivision, but that the City does not issue a letter of water availability to itself.[12] The Examiner left the record open for Tahoma Terra and the City to respond further to Knight's newly asserted position, and Knight to reply.[13]

---

[9] AR: 4/27/07 Application for Preliminary Plat.
[10] AR: Notice of Public Hearing, Yelm Hearing Examiner.
[11] AR: 7/23/07 Letter from Keith Moxon to the Yelm Hearing Examiner.
[12] AR: Transcript of 7/23/07 Hearing on the Tahoma Terra Subdivision, p. 14, lines 2 – 25; p. 70, lines 14 – 19; p. 71, lines 10 – 14.
[13] *Id.* at p. 80, line 10 – p.83, line 17.

Through post-hearing submissions, Tahoma Terra and the City provided evidence of the City's water rights and water demand, as well as evidence of the water right conveyances and transfers set forth in section III.A.2 above.[14] After receipt of the post-hearing submissions, the Examiner closed the record on August 20, 2007, and denied Knight's request to re-open the record.[15]

After closing the record, the Examiner considered the parties' submissions and arguments, the City's Plans, the YMC, the Growth Management Act (GMA) and the Subdivision Act; weighed the credibility and probity of the evidence; and then conditionally approved the Tahoma Terra Subdivision on October 9, 2007 (Examiner's Decision).[16] The Examiner specifically determined:

- Concurrence of potable water and fire flow must occur at the final plat approval stage and/or upon submittal of an application for a building permit.[17]

- RCW 58.17.110 requires a finding that a preliminary plat for a subdivision makes "appropriate provision" for potable water supplies, while RCW 19.27.097(1) requires evidence of the actual provision of potable water supplies at the building permit stage.[18]

- At the preliminary plat approval stage, an applicant must show a reasonable expectancy that the water purveyor will

[14] AR: 8/2/07 and 8/17/07 Letters from Curt Smelser to the Yelm Hearing Examiner; 8/3/07 and 8/16/07 Letters from Kathleen Callison to the Yelm Hearing Examiner.
[15] AR: 9/13/07 Memorandum Decision.
[16] AR: 10/9/07 Report and Decision.
[17] *Id.* at Finding 12.
[18] *Id.* at Finding 16.

have adequate water to serve the development upon final plat approval.[19]

- The documents submitted provide a "reasonable expectation" that domestic water will be available to serve the subdivision upon submittal of applications for building permits or for final plat approval.[20]

- While much of the written evidence in the record addressed the present and future amount of available water to the City, the most persuasive evidence was the August 9, 2007 letter from Skillings Connelly, the City's engineer, which showed that upon transfer of the Golf Course and McMonigle water rights and by securing a new water right in 2012, the City's water rights will exceed the cumulative water demand.[21]

Knight then moved for reconsideration of the Examiner's Decision.[22] The Examiner upheld his decision on December 7, 2007, but added two additional findings relevant to this appeal:

- The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and County Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If Ecology does not approve future applications, the City may need to explore

[19] *Id.* at Finding 12.
[20] *Id.* at Finding 15.
[21] *Id.* at Finding 15.
[22] AR: 10/19/07 Motion for Reconsideration.

other options to provide potable water and fire flow to the City as a whole.

- While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon [Knight's attorney] in his response are beyond the Examiner's authority and interfere with the City's ability to manage his [sic] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.[23]

The Examiner also added the following condition to the 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 except as model homes as set forth in Section 16.04.150 YMC.[24]

2. Proceedings before the Yelm City Council, which upholds the conditional approval: Knight fails to demonstrate standing and fails to meet her burden on appeal.

Knight then appealed the Examiner's Decision to the Yelm City Council, which consolidated the appeal with four other appeals of similar developments filed by Knight (two other preliminary plat approvals and two binding site plan approvals: Windshadow I, Windshadow II, Wyndstone and Berry Valley I). Pursuant to YMC 2.26.150.F, Knight's

[23] AR: 12/7/07 Decision on Reconsideration, Additional Findings 1 and 2 (emphasis added).
[24] *Id.* at Conclusion 2.

appeal to the City Council was a closed record appeal—i.e. it was based solely on the record created by the Examiner.

Knight presented no facts to the Examiner, either at the open record hearing or in the post-hearing briefing, which demonstrated her standing to challenge the Examiner's Decision—*i.e.* that she was "aggrieved." See YMC 2.26.150. Knight conceded this fact in briefing to the superior court.[25] Knight also conceded that her appeal to the City Council did not allege she would be aggrieved by the Examiner's Decision or allege facts that, if proven, would support standing.[26]

Because Knight had not alleged to the Examiner or the Yelm City Council, much less presented evidence that she was "aggrieved," the applicants asked the City Council to deny her appeal based on lack of standing. Knight first alleged "facts" intended to support her standing to challenge the Examiner's Decision in a consolidated reply brief to the City Council. Even then, Knight did not make any attempt to create an evidentiary record which would support her claim of standing. She did not submit any declarations or affidavits verifying facts allegedly giving her standing. In that reply brief, Knight for the first time alleged: (1) her ability to obtain future water service for an unidentified and undeveloped piece of property she owns in the City of Yelm would be adversely affected by the Examiner's Decision; and (2) the Examiner's Decision

[25] CP 248.
[26] CP 241; CP 249.

would impair her "senior" water rights appurtenant to the property she owned in Yelm's Urban Growth Area near the proposed subdivisions.[27]

After reviewing the briefing of the parties and holding a closed record public hearing on January 22, 2008, the Yelm City Council denied Knight's appeal and issued City of Yelm Resolution No. 481 on February 12, 2008.[28] The denial of Knight's appeal was based on Knight's lack of standing:

> JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, Knight is not an aggrieved person with standing to appeal the Examiner's decisions to the City Council. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council contingently decides Knights appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.[29]

After conclusively determining that Knight was not an "aggrieved" person with standing to appeal the Examiner's decisions, the City Council went on to *contingently* affirm on the merits the Examiner's conditional approval of all five proposed subdivisions, including the Tahoma Terra Subdivision. The City Council adopted the Examiner's individual findings and conclusions.[30]

---

[27] AR: 1/14/08 Appellant's Reply to Applicants' and City's Responses to Appeals.
[28] AR: 2/12/08 City of Yelm Resolution No. 481.
[29] *Id.* at Conclusion of Law 3 (emphasis added).
[30] *Id.* at Conclusion of Law 4.

3. Proceedings before the Thurston County Superior Court: Knight wins no substantive relief, though the superior court remands to clarify the undisputed meaning of the condition and enters prohibited findings and conclusions.

Knight filed a petition in Thurston County Superior Court under the Land Use Petition Act, RCW 36.70C *et seq.*, challenging the City's conditional preliminary approval of the Tahoma Terra Subdivision and the four other proposed subdivisions.[31]

Knight assigned numerous errors, but failed to assign error to the City Council's ultimate and dispositive conclusion that she lacked standing to appeal to the City Council.[32] Knight did not allege in Section 7 of her LUPA petition, entitled "A Separate and Concise Statement of Each Error Alleged to Have Been Committed," that the City Council erred by concluding she was not a person "aggrieved." Knight's allegations concerning her standing in Section 6 of her LUPA petition were identical to the allegations of standing made in her reply brief to the City Council.[33]

In April 2008, two applicants/respondents filed a Motion to Dismiss Knight's petition based on her lack on standing.[34] The City and Tahoma Terra (also respondents below) joined in the motion and further argued that Knight's LUPA petition should be dismissed because she failed to appeal the City Council's dispositive determination that she was

[31] CP 9 – 28.
[32] CP 13 – 16.
[33] CP 11 – 13.
[34] CP 41 – 56.

not an "aggrieved" party under the YMC with standing to administratively appeal the decisions of the Examiner.[35]

Without consideration of the record below, the superior court found that Knight had alleged sufficient facts in her petition to withstand a motion to dismiss on the pleadings for lack of standing and failure to assign error to the City Council's conclusion, and denied the motion to dismiss.[36]

After the administrative record was certified, Tahoma Terra and other applicants/respondents filed a joint motion for summary judgment in June 2008.[37] That motion argued Knight's petition should be dismissed as a matter of law on two independent bases: (1) Knight was not an aggrieved person with standing to administratively appeal the Examiner's decisions to the City Council; and (2) Knight did not have standing to seek judicial review of the City's decisions under LUPA. The City joined in the motion for summary judgment.[38] The superior court denied the motion for summary judgment.[39]

The parties submitted briefing on the merits.[40] Knight made two arguments: (1) a finding that "appropriate provisions" have been made for potable water at the preliminary plat approval stage requires the City to condition preliminary approval on a determination of water availability at

---

[35] CP 215 – 220; CP 221 – 236.
[36] CP 443 – 446.
[37] CP 540 – 557.
[38] CP 558 – 559.
[39] CP 659 – 660.
[40] CP 829 – 859 (Tahoma Terra); CP 1198 – 1238 (City); CP 661 – 698 (Knight).

the final plat approval stage rather than the building permit stage, and (2) a determination of water availability at the final plat approval stage must be based upon available and Ecology approved water rights currently held by the water purveyor, which in this case is the City of Yelm, sufficient to serve all demand, including all approved but not yet constructed developments and the pending development applications.[41]

The parties did not dispute Knight's first argument, agreeing that Knight's urged interpretation was what the Hearing Examiner in fact decided and what the law requires.[42] As to Knight's second argument, Tahoma Terra argued that Knight's position had no basis in law.[43] Tahoma Terra also argued that the record demonstrated that it had already made appropriate and adequate provisions of potable water for its proposed subdivision.[44] Tahoma Terra urged that it had unquestionably met its burden as an applicant.[45]

The superior court held a hearing on Knight's LUPA petition on October 1, 2008.[46] The superior court issued a letter opinion on October 7, 2008.[47] Following the court's letter opinion, Knight submitted a proposed judgment and proposed findings of fact/conclusions of law.[48] Over the objections of Tahoma Terra, the City of Yelm, and other

---

[41] CP 661 – 662; CP 673.
[42] CP 1641.
[43] CP 846 – 847.
[44] CP 855 – 856.
[45] CP 857.
[46] CP 1561.
[47] CP 1561 – 1565.
[48] CP 1573 – 1579; CP 1581 – 1583.

respondents below,[49] the superior court signed Knight's proposed judgment and proposed findings of fact/conclusions of law.[50]

In its order, the superior court "reversed" on the undisputed issue of whether a determination of water availability had to be made both at the final plat approval and building permit stages.[51] The superior court remanded to re-word the condition, but the meaning remained the same. The superior court also created new notice obligations in Knight's favor.[52] In an order entered simultaneously, the superior court entered prohibited findings and conclusions.[53] Conclusion of Law #5, specifically, provides an inaccurate statement of law and an advisory opinion as to what standards should apply upon future application for final plat approval.[54] This timely appeal followed.[55]

IV. ARGUMENT

A. This Court should dismiss Knight's Petition because Knight did not appeal the City Council's determination that she lacked standing; the superior court erred in failing to do so.

The superior court erred in denying Tahoma Terra's motion to dismiss.[56] Tahoma Terra renews its motion here and asks this Court to dismiss Knight's petition. Tahoma Terra also adopts and incorporates by this reference the arguments of the City on this issue in this appeal.

---

[49] CP 1584 – 1591 and CP 1633 – 1635 (City); CP 1599 – 1600 (Windshadow, Horsak, Slaughter); CP 1603 – 1605 (Tahoma Terra).
[50] CP 1636 – 1645.
[51] CP 1644.
[52] CP 1644 – 1645.
[53] CP 1636 – 1642.
[54] CP 1641.
[55] CP 1663 – 1665.
[56] CP 443 – 446; CP 221 – 236.

In a LUPA appeal, an appellate court "stand[s] in the shoes of the superior court and review[s] the hearing examiner's action de novo on the basis of the administrative record." *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). "The proper focus of our inquiry is therefore the [decision by the local jurisdiction], rather than the trial court's decision." *Id.* An appellate court reviews *de novo* a motion to dismiss. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

This Court should dismiss Knight's LUPA petition for failure to assign error to the City Council's dispositive conclusion that Knight lacked standing to appeal to the City. LUPA specifically requires that each land use petition must set forth, among other things:

- Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060; AND
- A separate and concise statement of each error alleged to have been committed; AND
- A concise statement of facts upon which the petitioner relies to sustain the statement of error.

RCW 36.70C.070(6), (7) and (8). Knight fatally failed to comply with the express requirements of the statute regarding the City's conclusion that she lacked standing.

Washington courts require "strict compliance with LUPA's procedure," emphasizing that a land use petition is barred, and the court may not grant review, if timely filing and service is not completed in accordance with LUPA's procedures. *Witt v. Port of Olympia*, 126 Wn.

App. 752, 756, 109 P.3d 489 (2005) (quotations omitted); *see also* RCW 36.70C.040(2). The "explicit statutory language [of LUPA] forecloses the possibility that the doctrine of substantial compliance applies." *Id.* Under LUPA, Knight was required to set forth in her petition "[a] separate and concise statement of each error alleged to have been committed." RCW 36.70C.070(7). By failing to assign error to the City Council's conclusion that she lacked standing, Knight left that conclusion a verité on appeal. Dismissal is, therefore, appropriate.

Tahoma Terra's motion to dismiss Knight's petition should have been granted because Knight did not timely appeal the City Council's dispositive decision that she lacked standing under YMC 2.26.150. This failure deprived the superior court of appellate jurisdiction.

B. This Court should dismiss Knight's Petition because Knight failed to establish standing under both the Yelm Municipal Code and LUPA to obtain judicial review of the land use decision; the superior court erred in failing to do so.

The superior court erred in denying Tahoma Terra's motion for summary judgment.[57] This Court should reverse and grant Tahoma Terra's motion, which Tahoma Terra renews here. Knight lacked standing to administratively appeal the Examiner's Decision to the City Council, and Knight lacked standing to appeal the City's land use decisions under LUPA.

Again, this Court stands in the shoes of the trial court on appeal, conducting *de novo* review of the administrative decision. *Wells v.*

[57] CP 659 – 660; CP 540 – 557.

Whatcom County Water Dist. No. 10, supra, 105 Wn. App. at 150. This Court also reviews *de novo* disposition of a motion for summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003), citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The legal determination of standing is a jurisdictional issue reviewed *de novo*. *Harrington v. Spokane County*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005) (assessing standing under LUPA). Statutory interpretation is reviewed *de novo*. *Id.* Because the City Council's resolution of standing under the YMC was not designated for review in Knight's petition, the judiciary is bound by the City's determination and dismissal is required. Even when this Court examines the merits of the standing issue, this Court should reverse the trial court and dismiss the petition.

1. Knight was not an aggrieved person with standing to appeal the Examiner's Decision to the Yelm City Council.

Summary judgment should have been granted and Knight's LUPA petition should have been dismissed with prejudice because Knight lacked standing to appeal the Examiner's Decision to the Yelm City Council. Under the YMC, an appeal of a hearing examiner's final decision to the Yelm City Council can only be filed by an "aggrieved person or agency of record." YMC 2.26.150 (emphasis added). This language is clear and unambiguous. When the language of a statute or code provision is clear on its face, courts must give effect to the plain meaning and should assume the Legislature meant exactly what it said. *Chelan County v. Nykreim*,

146 Wn.2d 904, 926, 52 P.3d 1 (2002) (citations omitted). Courts are "obliged to give the plain language of a statute [or code provision] its full effect, even when its results may seem harsh." *Id.*

Knight failed to comply with the YMC by failing to offer evidence to the Examiner of her alleged standing. The City Council's review of the Examiner's Decision is to be based solely upon the evidence presented to the Examiner, the Examiner's report, the notice of appeal, and submissions by the parties. YMC 2.26.160(C). No new evidence or information is to be included in the parties' submissions; only appellate argument is allowed. YMC 2.26.150(B) and (F).[58] By failing to present evidence that she was "aggrieved" to the Examiner, Knight foreclosed the opportunity to appeal the Examiner's Decision.

Knight argued below that her failure should be overlooked because the requirement otherwise "create[s] hidden traps for citizens who wish to file appeals of Hearing Examiner decisions to the City Council."[59] Clear and unambiguous statutory language, however, is not a "hidden trap." Knight was represented by legal counsel throughout the course of the Tahoma Terra Subdivision approval process, including at the open record hearing before the Examiner. Throughout that process, the YMC required that a person be "aggrieved" in order to appeal a land use decision. YMC

[58] The YMC requirements are consistent with, indeed mandated by, another chapter of the Regulatory Reform Act, chapter 36.70B RCW, which was enacted to address the potential for conflict, overlap, and duplication between various land use permit review processes and make it easier for the public to know how and when to provide timely comments on land use proposals. RCW 36.70B.010 (purpose section); 36.70B.060 (hearing limited to one open-record hearing and one closed-record appeal).

[59] CP 569.

2.26.150; *see also* RCW 36.70C.060(2). Such a requirement is not a hidden trap, it is the law. It was incumbent upon Knight to establish an evidentiary record of standing before the Examiner. She conceded that she failed to do so.[60] Dismissal is required.

Even if one considers the tardy allegations made in her reply brief to the City Council, as the City Council did,[61] standing remains lacking. Knight's interest amounts only to that of the general public. Knight never demonstrated her standing. The City's substantive determination of this issue should be affirmed on the merits.

2. Knight lacked standing to seek judicial review under LUPA.

A LUPA petition must allege facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060. RCW 36.70C.070(6). Similar to the "aggrieved" standard in the YMC, under LUPA, Knight must demonstrate that she is a "person aggrieved or adversely affected by the land use decision" by showing all of the following: (a) the Tahoma Terra Subdivision preliminary plat approval has or likely will prejudice her; (b) the interests she asserts are among those that the City was required to consider when it preliminarily approved the Tahoma Terra Subdivision; (c) a judgment in her favor would substantially eliminate or redress the alleged prejudice; and (d) she has exhausted her administrative remedies to the extent

[60] CP 248.
[61] AR: 2/12/08 City of Yelm Resolution No. 481.

required by law. RCW 36.70C.060(2)(a)-(d).[62] If Knight cannot demonstrate any one of the above elements, she lacks standing to bring a LUPA appeal.

When this Court examines Knight's petition, it should conclude that she alleged insufficient facts to confer standing. Knight's LUPA petition contained allegations virtually identical to those made in her reply brief to the City Council.[63] The only other evidence of Knight's standing was presented to the superior court in declarations in response to the motion for summary judgment.[64] These facts do not demonstrate that the Examiner's preliminary conditional approval of the Tahoma Terra Subdivision has or likely will prejudice her. Summary judgment should have been granted dismissing her petition with prejudice.

a. Knight has not and cannot demonstrate that the land use decisions will prejudice her.

Knight has no injury-in-fact. In order to demonstrate the Examiner's preliminary conditional approval of the Tahoma Terra

[62] LUPA's standing requirement embodies the Washington Supreme Court's approach in environmental cases. *Save a Valuable Env't (SAVE) v. Bothell*, 89 Wn.2d 862, 865-68, 576 P.2d 401 (1978). Washington courts require an appellant in an environmental case to demonstrate that: (1) the governmental action caused a specific and perceptible injury-in-fact that is immediate, concrete and specific, and (2) that the interest sought to be protected falls within the zone of interests a statute is designed to protect. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994); *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992). This is similar to the federal approach. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (injury, causation and redressibility are requirements for Article III standing); *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 474 (9th Cir. 1979) (for standing, plaintiff must allege an 'injury in fact' that is 'arguably within the zone of interests to be protected or regulated' by the statute).

[63] CP 11 – 13; AR: 1/14/08 Appellant's Reply to Applicants' and City's Responses to Appeals.

[64] CP 585 – 643.

Subdivision has or likely will prejudice her, Knight must set forth facts showing she will suffer an "injury-in-fact" as a result of the Examiner's decision. *Trepanier v. Everett, supra*, 64 Wn. App. at 382. Injuries that are nothing more than conjectural or hypothetical will not support standing. *Id.* at 383. Knight must demonstrate she will be "specifically and perceptibly" harmed by the appealed action. *Id.* at 382. "An interest sufficient to support standing to sue...must be more than simply an abstract interest of the general public in having others comply with the law." *Nykriem*, 146 Wn.2d at 935 (citations omitted). A bald assertion that a plaintiff has standing is insufficient. *Concerned Olympia Residents for the Env't v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983) ("*CORE*"). "The pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected." *Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994); *Coughlin v. Seattle School Dist.*, 27 Wn. App. 888, 894, 621 P.2d 183 (1980).

Knight initially asserted two interests that she claimed will be injured in fact by the City's preliminary approval of the Tahoma Terra Subdivision: (1) there may be an inadequate supply of water should she decide at some unspecified, future time that she wishes to develop a currently undeveloped and unidentified piece of property she owns in the City of Yelm, and (2) her water rights will be impaired if the City approves the Tahoma Terra Subdivision without an adequate supply of water. Knight apparently abandoned the former allegation, as she only

alleged the latter interest will be prejudiced in her opposition to Tahoma Terra's summary judgment motion at the superior court level below.[65] Neither is sufficient to establish standing.[66]

Knight cannot show injury-in-fact because the Examiner's Decision was a *preliminary* conditional approval. The alleged injury-in-fact to Knight's asserted interests are exactly the type of conjectural and hypothetical injuries that are insufficient to support standing. For the Tahoma Terra Subdivision to generate a demand for water, it must first obtain final plat approval and building permits. The Examiner explicitly conditioned the preliminary approval upon Tahoma Terra providing adequate potable water to serve the subdivision at the time of final plat approval and/or building permits. All parties agreed that this condition means both final plat approval *and* building permit approval. Even if this were not a condition of approval, it is required by State law—RCW 58.17.150(1) requires a showing of the adequacy of the proposed potable water supply at final plat approval. Thus, the Examiner's condition and State law both require a showing of an adequate supply of potable water at the time of final plat approval. If such a showing is not made, the City

---

[65] CP 560 – 584.

[66] Even if Knight had not abandoned the former allegation, Knight's asserted inability to develop her property in the City of Yelm is an economic interest that is not even arguably within the zone of interests the City was required to consider under either the State Subdivision Act or the City's subdivision regulations. *See CORE*, 33 Wn. App. at 682-83 (holding the petitioner's alleged loss of profit from the sale of his property to a potentially competing hospital was a type of economic harm that was "not even arguably" within the zone of interest to be protected by the State Environmental Policy Act).

cannot grant final plat approval and Knight's alleged injury cannot come to fruition.

Moreover, homes cannot be built in the Tahoma Terra Subdivision until building permits are issued. Consumption of water and increased demand for water, therefore, will not occur until after the building permit stage. If evidence of a potable water supply adequate to serve the Tahoma Terra Subdivision, as required by RCW 19.27.097, is not provided at that time, the City cannot issue building permits. Without building permits, no new demand for potable water will be created. As a matter of law, no harm can result to Knight's asserted interest in protecting her water rights from impairment as a result of the City's preliminary conditional approval of the Tahoma Terra Subdivision.

The preliminary subdivision approval cannot and will not "necessarily lead to the impacts alleged" by Knight. *See Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 830, 965 P.2d 636 (1998). Knight's alleged interests could only be injured in fact if the "parade of horribles" described in the City's opening brief in this appeal occurred. Such a "parade of horribles" is speculative and simply inconceivable. Knight cannot establish an injury-in-fact sufficient to support her standing. This alone is dispositive of the standing issue.

Knight's water rights also cannot be harmed by the Tahoma Terra Subdivision as a matter of undisputed fact. Using Knight's calculations, Tahoma Terra has undeniably conveyed more water rights (1,367 ERUs), and Ecology has approved the transfer of more water rights (698 ERUs),

to the City than necessary to serve the Tahoma Terra Subdivision (198 ERUs). Tahoma Terra's water rights conveyances in connection with development of the Tahoma Terra Subdivision have provided the City with more total water rights than it would have had otherwise. These facts bely any injury to Knight from the Tahoma Terra Subdivision.

Additionally, Knight cannot show injury-in-fact to her asserted interests because her water rights are adequately protected under State law. Knight even conceded as much in her opposition to the motion for summary judgment: "The permit system [of the State Water Code] protects Petitioner Knight's water rights before impairment can occur by insuring that no water is withdrawn and used by others without the state [sic] Department of Ecology first processing an application for a water right permit or water right change."[67] Under the State Water Code, transfers or changes in water rights cannot be approved unless Ecology finds that the transfers or changes will not detrimentally impact existing water rights. RCW 90.03.380(1). Ecology made such findings in approving the transfers of the Dragt water rights and the Golf Course water rights to the City. Future water right transfers to the City, including the McMonigle transfer, will have to meet the same high standard. Given this protection, Knight cannot possibly show that her water rights have been or will be impaired by the preliminary approval of the Tahoma Terra Subdivision in the context of this LUPA appeal.

[67] CP 577.

Knight's allegations of injury-in-fact are entirely conjectural and speculative, and no different than those found insufficient in *Coughlin*, *supra*. In *Coughlin*, the plaintiff, a resident homeowner in the Seattle School District who was active in school planning issues, appealed a school closure decision alleging that the closure would, among other things, diminish the value of her property, illegally amend the city's comprehensive plan, and use taxes against her interest. The School District filed a motion for summary judgment on the grounds that petitioner lacked standing. In granting the motion, the trial court specifically noted that general interest and activism asserted by the petitioner was insufficient to establish standing. *Coughlin*, 27 Wn. App. at 891. In upholding the trial court's rejection of the petitioner's standing, the Court of Appeals explained that interests are too remote to confer standing if they are based merely on one's capacity as a concerned, involved and proximate citizen:

> [The requirement to allege and prove injury in fact] precludes standing based solely upon the harm claimed by Coughlin in her capacity as a concerned and active citizen, taxpayer, and resident of the District. Such harm is too remote to establish standing in a SEPA case.

Id. at 894. Similar to *Coughlin*, Knight cannot base standing to bring this LUPA petition solely in her capacity as a concerned and active citizen.

Knight's alleged injury-in-fact is no different than that of anyone owning land in the planning area for the City of Yelm's water system, or anyone wishing to secure any prospective water. As in *Coughlin*,

Knight's alleged injury is too remote to confer standing. The Superior Court should have granted Tahoma Terra's summary judgment motion on this basis.

b. A judgment in Knight's favor would not substantially eliminate or redress any alleged prejudice to Knight.

In order to have standing, Knight also has to demonstrate that a judgment in her favor would redress the injuries she claims. RCW 36.70C.060(2)(c). Her claimed injury to her more "senior" water rights could not have been redressed in her LUPA appeal. In ruling on applications for preliminary subdivision approval, the City has no authority to determine the status or content of the City's water rights; nor does the superior court or this Court, both acting in an appellate capacity, in an action brought under LUPA. A final determination of water rights may be made only in a formal water rights adjudication under Washington's Water Code. *Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993). That is not the nature of this LUPA action. A judgment in Knight's favor, therefore, would not substantially eliminate or redress her alleged injury as required for standing under RCW 36.70C.060(2)(c). Knight's standing arguments fail.

C. Knight failed to meet her burden of proving that one of the LUPA standards was met in order to reverse the City's conditional preliminary approval of the Tahoma Terra Subdivision.

Not only did Knight lack standing, she also failed to satisfy LUPA's standards for relief. The Subdivision Act provides "any decision

approving or disapproving any plat shall be reviewable under chapter 36.70C RCW [LUPA]." RCW 58.17.180. Specifically, RCW 36.70C.130(1) provides that the reviewing court may grant relief only if the party seeking relief carries the burden of establishing one of the standards set forth in subsections (a) through (f). Knight classified her purported errors under the standards set forth in subsections (b), (c) and (d). The standard in subsection (b) required Knight to establish that "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 standard in subsection (c) required Knight to establish that "the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court." Finally, the standard in subsection (d) required Knight to establish that "the land use decision is a clearly erroneous application of the law to the facts." *See* RCW 36.70C.130(1). Knight established none of these standards.

1. The City properly interpreted the law, after allowing the deference afforded to it as a local jurisdiction with expertise.

Knight argued below that the City erroneously interpreted the law by allowing a determination of adequate potable water supplies to be deferred until the building permit stage rather than made at the final plat approval stage.[68] Knight further argued that in order to establish that

[68] Knight originally argued to the Examiner that "Washington's subdivision statute and the City's subdivision code both require that the determination regarding the availability

"appropriate provisions" have been made for potable water supplies at the preliminary plat approval stage, the law requires conditioning preliminary plat approval on a showing at final plat approval of written documentation that the City has sufficient Ecology-approved water rights to serve all existing needs, all approved development not yet constructed, and any proposed development. Knight's arguments are meritless. The City properly conditioned Tahoma Terra's preliminary plat approval. Moreover, the City properly interpreted what constitutes "appropriate provisions" for potable water supplies. To the extent the superior court "reversed" the City's conditional preliminary approval, the superior court erred.

a. The Examiner's condition on preliminary plat approval was proper and was a proper interpretation of the law.

The Yelm Hearing Examiner added on reconsideration of the preliminary plat approval of the Tahoma Terra Subdivision a condition requiring that Tahoma Terra "provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit..."[69] Knight argued below, and the superior court concluded, that this condition, by employing the conjunction "and/or,"

---

of water must be made at the time of preliminary plat approval." AR: 8/10/07 Letter from Keith Moxon to Yelm Hearing Examiner. Knight abandoned this argument when confronted with contrary authority directly on point in post-hearing briefing submitted to the Examiner. Knight apparently recognized her original argument had no merit, and thereafter changed her position to argue that preliminary plat approval must be conditioned on proof of an adequate and available water supply sufficient to serve the development at the time of final plat approval. CP 9 – 28.

[69] AR: 12/7/07 Decision on Reconsideration, Conclusion 2.

was an erroneous interpretation of the law because it allowed a determination of water availability to be deferred until the building permit stage rather than made at the final plat approval stage. The superior court granted Knight's LUPA petition, and remanded the matter back to the Yelm City Council to remove the "/or" and add "also" to language of the condition. This action and Knight's arguments were erroneous and unnecessary given the parties' agreement on the meaning of the Examiner's original condition, the clarity of the Examiner's original condition in the context of his decision, and the legal effect of Washington's Subdivision Act, RCW 58.17 *et seq,* which would render any error harmless. The preliminary plat approval should be affirmed on the condition as written.

All respondents agreed that the Examiner's condition and existing State law required a determination of water availability to be made at final plat approval *and* building permit approval.[70] And the Examiner's meaning was clear, especially on consideration of one of the Examiner's additional findings where he demonstrates his understanding that state and local law required at *both* final plat approval *and* building permit issuance a determination of an adequate potable water supply to serve the proposed subdivision. The Examiner clearly explained that his condition required both, stating "While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval,

[70] CP 1641.

the Examiner has added a condition of approval requiring such."[71] No party contested the meaning urged by Knight, which duplicated that meant by the Examiner.

Even if the meaning of the Examiner's condition had been in dispute, it duplicated State law as contained in RCW 58.17.150. The condition itself, therefore, was meaningless. A preliminary plat approval does not have to be conditioned on compliance at final plat approval with legal requirements that would apply regardless of any such condition. *Topping v. Pierce County Bd. of Comm'rs*, 29 Wn. App. 781, 783, 630 P.2d 1385 (1981). Any error would have been harmless, because State law required what the condition imposed. Reversal was improper. The conditional approval should have been affirmed.

b. The City properly interpreted the Subdivision Act and the Yelm Municipal Code in determining what constitutes "appropriate provisions" for potable water supplies.

No law or other authority supports Knight's position that a condition must be imposed on the preliminary plat approval of the Tahoma Terra Subdivision at issue requiring the City to have available Ecology-approved water rights to serve the proposed subdivision and other water demand prior to final plat approval. Washington's Subdivision Act makes no mention of water rights. The Subdivision Act merely provides that prior to "approval" of a proposed subdivision, the

[71] AR: 12/7/07 Decision on Reconsideration, Additional Finding 2 (emphasis added).

City must make written findings that "appropriate provisions are made for...potable water supplies" and "the public use and interest will be served by the platting of such subdivision." RCW 58.17.110(2).

The Subdivision Act does not define what constitutes "appropriate provisions." By using such broad and ambiguous language, the Washington legislature specifically did not impose detailed mandates as to what findings must be made with respect to water. The language is intended to ensure that local jurisdictions with expertise consider the issue and make their own determinations as to what constitutes "appropriate provisions" for potable water supplies. Knight's proposed interpretation to require a specific finding that available Ecology-approved water rights are in hand at final plat approval runs directly contrary to the broad and general language used by the legislature. The Subdivision Act does not require such a detailed finding.

Similarly, Knight does not and cannot cite any authority in the Yelm Municipal Code requiring any specific findings that available Ecology-approved water rights must be in hand before a proposed subdivision can be granted final plat approval. The provisions in the YMC are nearly identical to those contained in the Subdivision Act:

> A proposed subdivision...shall not be approved unless the decision-maker makes written findings that:
>
> A. Appropriate provisions are made for...potable water supplies...

> D. Public facilities impacted by the proposed subdivision will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed facilities in time to assure retention of an adequate level of service.

YMC 16.12.170. Nothing in these provisions of the YMC, or any other provisions in the YMC, supports Knight's proposed interpretation.

Under the statutory framework, local legislative authorities are left to promulgate ordinances that are based upon and consistent with the general mandates of Washington's Subdivision Act in regulating the subdivision of land. The City has done exactly that.

The City's interpretation is consistent with the mandates of the Growth Management Act (GMA). The finding required in YMC 16.12.170.D is consistent with Goal 12 of the GMA, commonly referred to as "concurrency," which provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development <u>at the time the development is available for occupancy and use</u> without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12) (emphasis added). Under the GMA, public facilities include domestic water systems. RCW 36.70A.030(12). Thus, the GMA requires provision of adequate water supplies *at the time of occupancy and use*, rather than at preliminary or even final plat approval. Also consistent with the GMA, the City has adopted specific concurrency regulations for all public facilities and services, including water. YMC

15.40.010 defines "concurrency" as "a determination that the facilities necessary to serve a proposed land development are in place or planned for and properly funded with a reasonable expectation that the facilities will be in place at the time needed to preserve adopted levels of service" (emphasis added). Yelm's specific concurrency requirement for water requires that "improvements necessary to provide city standard facilities and services are present or are on an approved and funded plan to assure availability in a time to meet the needs of the proposed development." *See* YMC 15.40.020.B.2.b (emphasis added). The GMA's definition of concurrency, the City's definition of concurrency, and the City's specific concurrency requirements for water all support the City's determination that "appropriate provisions" are made for potable water supplies when findings show there is a plan in place that provides a reasonable expectation that potable water supplies will be adequate and available at the time needed.[72]

Evidence of available Ecology-approved water rights is not even required at the building permit stage, which occurs later than both preliminary plat approval and final plat approval. RCW 19.27.097 requires a showing of "evidence of an adequate water supply for the intended use of the building" prior to the issuance of a building permit. RCW 19.27.097 explicitly provides that such evidence can be shown in a

[72] The conditional approval of the Tahoma Terra Subdivision assures that potable water supplies must be adequate and available long before *occupancy* of any homes in the development, the time when a demand/need for water actually arises.

number of alternate ways: (1) "a water right permit from the department of ecology," (2) "a letter from an approved water purveyor stating the ability to provide water," or (3) "another form sufficient to verify the existence of an adequate water supply." Knight's urged interpretation is inconceivable given RCW 19.27.097, which does not even require that Ecology-approved water rights must be shown at the late stage of building permit approval.

The City's condition and interpretation is in full compliance with the Subdivision Act, the YMC, the GMA, and RCW 19.27.097. The City's interpretation of the requirements of the Subdivision Act is statutorily entitled to deference. *See* 36.70C.130(1)(b); *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007) (recognizing that a reviewing body "will give great deference to an agency's interpretation of its own properly promulgated regulations 'absent a compelling indication that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority'" because the agency has the expertise and insight from administering the regulation that the reviewing body does not). No authority supports Knight's position that specific findings of available Ecology-approved water rights in place must be a condition of preliminary or final plat approval. This Court should reject that position.

If this Court were to condition preliminary plat approval on the requirement of a showing of Ecology-approved water rights in hand prior to final plat approval, this Court would be improperly exercising a

legislative function. The Washington legislature has not required such a condition (as explained above) and the Yelm Hearing Examiner could not require such a condition. *See, e.g., Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008) (quasi-judicial decision makers have no authority to establish specific land use regulatory requirements on local governments that have not been legislatively enacted). Only the legislature can amend the requirements of the Subdivision Act to require what Knight urges.

Knight's urged interpretation is not only not the law, it contravenes the GMA. The GMA mandates that cities such as Yelm accommodate growth to meet projected population increases. *See* RCW 36.70A *et seq.* Under Knight's argument, the City would be forced to deny subdivision approvals unless it had available Ecology-approved water rights in hand at a time *before* water is actually needed. Such a condition would essentially place a moratorium on development even when the City has implemented a plan providing a reasonable expectation that adequate water will be available to serve development at the time demand for water actually arises. The Examiner recognized this, stating:

> Determining that the City will not have sufficient water to serve [the Tahoma Terra Subdivision at issue] essentially imposes a moratorium upon building throughout the City. Such decisions are within the jurisdiction of the legislative body.[73]

[73] AR: 10/9/07 Report and Decision, Finding 21.

Knight's proposed condition would force the City to abdicate its responsibilities to accommodate growth under the GMA. Only the legislature can amend the GMA to limit the City's obligation to accommodate growth.

c. The superior court's Conclusion of Law #5, a nullity on appeal, was erroneous.

No legal authority supports the superior court's entry of findings of fact and conclusions of law in this LUPA appeal. Tahoma Terra incorporates the City's briefing in this appeal in support of this proposition, and adopts its arguments as Tahoma Terra's own. This Court should reject all the findings and conclusions. This Court should specifically reject Conclusion of Law #5 on the additional grounds that the issues it addresses were beyond the jurisdiction of the superior court and it incorrectly states the law.

Because final plat approval was not before the superior court, the superior court should not have reached any issue concerning the standards for final plat approval. Conclusion of Law #5 purports to state the necessary showing of "appropriate provisions" for potable water at the *future* time of *final* plat approval, stating:

> RCW 58.17.110 and YMC 16.12.170 make clear that Yelm must make findings of "appropriate provisions" for potable water supplies by the time of final plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently and to-be-approved subdivisions. A finding of "reasonable expectation" of potable water based upon Yelm's historical

> provision of potable water would be insufficient to satisfy this requirement.[74]

The Tahoma Terra Subdivision was granted only *preliminary* plat approval. Tahoma Terra has not applied for final plat approval. No record has been established for final plat approval. The local jurisdiction had not addressed findings required for final plat approval. Final plat approval and its applicable standards were not part of the administrative or LUPA actions. The superior court exceeded its authority to address them in Conclusion of Law #5.

The superior court's Conclusion of Law #5 contravened the principles enunciated by this Court in *Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002), regarding the scope of a LUPA appeal. As this Court said, only final determinations by the highest level of the local authority are subject to judicial review under LUPA, explaining:

> In reviewing the statutory framework of LUPA, we note that the Legislature has carefully defined "land use decision" in terms of a *final* determination by the relevant body or officer with the highest level of authority to make the determination. RCW 36.70C.020(a). This legislative choice of words must mean something. We conclude that the most reasonable meaning to give to this legislative choice is to conclude that courts should generally defer review of decisions involving the use of land until such decisions are final--that is when the highest body or officer has finally acted.

---

[74] CP 1641.

Lu, *supra*, 110 Wn. App. at 100. *See also* RCW 36.70C.130(1) (LUPA relief available concerning only "the final decision" at issue). Because this LUPA appeal only concerned a preliminary plat approval, the superior court should have concerned itself only with that preliminary plat approval. Pronouncement of the requirements of a future process for future final plat approval went beyond its jurisdiction.

In the *Lu* case, this Court decided whether declaratory relief was appropriate to reach an issue that was not before the courts under LUPA. *Id.* at 100. This Court cautioned that premature judicial review of land use decisions before the local jurisdiction has reached a final decision is "premature judicial intrusion" inconsistent with LUPA. *Id.* at 101. Here, Knight never attempted to seek declaratory relief under the Uniform Declaratory Judgments Act, RCW 7.24 *et seq.*, which requires specific elements to establish a justiciable controversy, none of which could have been shown. *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994) ("Absent these elements...the court 'steps into the prohibited area of advisory opinions.'"). The superior court had no jurisdiction to enter Conclusion of Law #5.

The substance of Conclusion of Law #5 is also legally incorrect. The superior court improperly held the City must have available Ecology-approved water rights to serve the proposed Tahoma Terra Subdivision, previously approved subdivisions, and all existing development prior to final plat approval for the Tahoma Terra Subdivision. As previously explained, no law or other authority supports this conclusion. As also

previously explained, by entering Conclusion of Law #5, the superior court improperly exercised a legislative function. Conclusion of Law #5 was not only impermissibly entered, it misstates the law.

2. The City's decision is supported by substantial evidence and correctly applies the law to the facts.

This Court should affirm the conditional approval of the Tahoma Terra Subdivision. The uncontroverted evidence on the record establishes Tahoma Terra has already made appropriate provisions for potable water. Knight did not and cannot sustain her burden of showing the City's preliminary conditional approval of the Tahoma Terra Subdivision is not supported by substantial evidence and is a clearly erroneous application of the law to the facts.

Under LUPA, factual findings are upheld if they are supported by "substantial evidence, [which] is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (quotations omitted). Inferences are viewed in a light most favorable to the party that prevailed in the highest forum exercising fact finding authority—in this case, Tahoma Terra. *Id.* The review process is two-fold: the reviewing body must first determine if the findings of fact are supported by substantial evidence in the record, and if so, whether those findings of fact support the conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Legal conclusions will be overturned only if they are "clearly

erroneous," which means that the reviewing body is left with "the definite and firm conviction that a mistake has been committed." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

This Court should outright affirm the Examiner's and City's conditional approval of Tahoma Terra's preliminary plat application. The undisputed evidence on the administrative record conclusively establishes that Tahoma Terra has already met the Examiner's condition of providing "a potable water supply adequate to serve the development." Nothing regarding adequate potable water remains to be done at final plat approval and at issuance of the building permit regarding. The evidence in the record moots this issue as to the Tahoma Terra Subdivision.

The record evidence shows the total amount of water rights conveyed by Tahoma Terra to the City is at least 455.57 afy. Even when using Knight's calculation of demand in ERUs, that amount is sufficient to serve the full build out of all approved development within the Tahoma Terra MPC, including the Tahoma Terra Subdivision at issue, plus an additional 718 ERUs. Moreover, Ecology has already approved the transfer of 232.66 afy of the water rights Tahoma Terra conveyed to the City. Thus, the City can currently serve the full build-out of all approved development within the Tahoma Terra MPC, the Tahoma Terra Subdivision at issue, and 49 additional single-family homes with the water rights provided by Tahoma Terra.

Even in the face of this substantial evidence, Knight argued below that it is "pure speculation" to assume the City will acquire sufficient water rights to serve the Tahoma Terra Subdivision at the time needed.[75] To the contrary, Tahoma Terra has already provided more water than it will demand with the building of homes on all approved lots to date within the Tahoma Terra MPC, including the subdivision at issue here. This is not speculation. It is a fact.

Knight attacks all of this evidence by arguing that the Examiner erroneously relied on the City's evidence regarding the current and future availability of water to serve the proposed subdivisions. Knight essentially complains the Examiner should have given more weight to her evidence than to the City's evidence. Credibility and weight determinations are not subject to review on appeal. *Gogerty v. Dep't of Insts.*, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967). The Examiner properly considered all of the evidence and found the evidence presented by the City regarding its current and future water rights provided sufficient basis to support his decision. This finding is supported by substantial evidence and should be upheld along with the decision.

Moreover, RCW 82.02.020 precludes the imposition of regulatory requirements that go beyond the direct impacts of a development. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002). Because Tahoma Terra has *already* provided the City with a

[75] CP 677.

potable water supply adequate to serve the direct water consumption impacts arising from the full build out and occupancy of the Tahoma Terra Subdivision, imposing water right burdens on Tahoma Terra that far exceed these impacts is a clear violation of *Isla Verde* and RCW 82.02.020.

Because Tahoma Terra has already met the conditions at issue in this appeal, the preliminary plat approval of the Tahoma Terra Subdivision should be affirmed outright.

D. This Court should award Tahoma Terra its attorneys' fees and costs incurred on appeal if it substantially prevails.

If Tahoma Terra substantially prevails before this Court, it is entitled to attorney fees and costs pursuant to RCW 4.84.370(1). The Regulatory Reform Act entitles a party who prevails in all stages of a challenge to a land use decision to recovery of its reasonable attorney fees and costs on appeal. RCW 4.84.370(1). This statute, entitled "Appeal of land use decisions -- Fees and costs," provides for an award of reasonable attorneys' fees and costs to the substantially prevailing party on appeal if that party (a) prevailed or substantially prevailed before the City, and (b) prevailed or substantially prevailed in all prior judicial proceedings. RCW 4.84.370(1); *see also Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 973 P.2d 1078 (1999) (attorneys fees and costs awarded to developer in appeal of land use decision by opponents to development). To make an award to Tahoma Terra under this statute, this Court must find that Tahoma Terra was the substantially prevailing party before the City of

Yelm, and also that Tahoma Terra was the substantially prevailing party before the superior court. This Court should so find.

Tahoma Terra substantially prevailed before the City of Yelm. Knight opposed issuance of preliminary plat approval to Tahoma Terra before the Yelm Hearing Examiner.[76] The Examiner granted preliminary plat approval on December 7, 2007.[77] The Yelm City Council affirmed that approval on February 12, 2008.[78] Knight then appealed, but won no substantial relief before the superior court. Tahoma Terra, therefore, also substantially prevailed in the only prior judicial proceeding.

"The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties." *Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). Knight achieved no substantive relief before the superior court. In her LUPA petition Knight raised multiple challenges to the preliminary plat approval.[79] At the conclusion of the superior court proceedings, the only relief entered was a re-wording of the condition imposed by the Hearing Examiner to affirm a meaning with which all parties agreed. The meaning of the condition was a non-disputed issue. The trial court reversed in name only, awarding Knight no relief that differed from the outcome before the City. The only conclusion, therefore, is that Tahoma Terra was the substantially prevailing party before the superior court.

---

[76] AR: See, e.g., 8/10/07 Letter from Keith Moxon to the Yelm Hearing Examiner.
[77] AR: 12/7/07 Decision on Reconsideration.
[78] AR: 2/12/08 City of Yelm Resolution No. 481.
[79] CP 13 – 16.

This Court should award Tahoma Terra attorney fees and costs for this appeal under RCW 4.84.370(1).

V. CONCLUSION

This Court need not reach the merits of the preliminary plat approval of the Tahoma Terra Subdivision. The City of Yelm determined that Knight lacked standing to appeal the preliminary approval. Because Knight never appealed that standing determination, this Court should dismiss her LUPA petition. Moreover, Knight never established standing under the YMC or LUPA. This failure also requires the dismissal of her LUPA petition.

Should this Court reach the merits, it is undisputed that Tahoma Terra has conveyed sufficient water rights to the City, and Ecology has approved the transfer of sufficient water rights, to serve the Tahoma Terra Subdivision. The record evidence conclusively demonstrates Tahoma Terra has made "appropriate provisions" for potable water supplies, as required by RCW 58.17.110. This Court should affirm the conditional approval of Tahoma Terra's preliminary plat application. No ground under RCW 36.70C.130 supports reversal of that conditional approval.

Respectfully submitted this 19th day of February, 2009.

Curtis R. Smelser, WSBA 17318
Averil B. Rothrock, WSBA 24248
Philip T. Kasin, WSBA 35389
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339
Attorneys for Appellant Tahoma Terra

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

JZ KNIGHT,

Petitioner,

vs.

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

Respondent.

NO. 38581-3-II

PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
09 FEB 19 PM 3:50
STATE OF WASHINGTON
BY
DEPUTY

On this 19th day of February 2009, I caused to be served the Opening Brief of TTPH 3-8, LLC (Tahoma Terra) on the following parties by the method so indicated.

Keith Moxon
GordonDerr LLP
2025 First Ave., Ste. 500
Seattle WA 98121-3140
E-mail: *kmoxon@GordonDerr.com*
Attorney for: Petitioner, J Z Knight

[ ] By United States Mail
[X] By Legal Messenger
[ ] By Facsimile
[ ] By E-mail

Thomas McDonald
Cascadia Law Group
606 Columbia St. N.W., Ste. 212
Olympia WA 98501
E-mail: *tmcdonald@cascadialaw.com*
Attorney for: Associate Counsel for JZ Knight

[ ] By United States Mail
[X] By Legal Messenger
[ ] By Facsimile
[ ] By E-mail

ORIGINAL

Richard L. Settle Roger Pearce Foster Pepper LLP 1111 Third Ave Ste 3400 Seattle, WA 98101-3299 Telephone: (206) 447-8980 Facsimile: (206) 749-2011 E-Mail: settr@foster.com pear@foster.com	[ ] By United States Mail [X] By Legal Messenger [ ] By Facsimile [ ] By E-mail
Clark McGowan c/o Trinity Land Development LLC 310 – 29th St. N.E. Puyallup WA 98372 Pro Se, for Windshadow II Townhomes LLC	[X] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [ ] By E-mail
Bryce H. Dille Campbell, Dille, Barnett, Smith & Wiley, 317 S. Meridian Puyallup WA 98371 *E-mail: bryced@cdb-law.com* *calston@cdb-law.com* Attorney for: Wyndstone & Regent Mahan LLC	[X] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [ ] By E-mail
Alison Moss Dearborn & Moss, PLLC 2183 Sunset Ave. S.W. Seattle WA 98116-2146 *E-mail: amoss@dearbornmoss.com* Attorney for Respondents Windshadow, LLC, Elaine C. Horsak, and Richard E. Slaughter	[X] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [ ] By E-mail
Kathleen Callison Callison Law Offices 802 Irving St. S.W. Tumwater WA 98512-6343 E-mail: callison@callisonlaw.com Attorney for City of Yelm	[X] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [ ] By E-mail

Christopher W. Keay
Johnson, Graffe, Keay, Moniz & Wick,
2115 N. 30th St., #101
Tacoma WA 98403-3396
E-mail: ckeay@jgkmw.com
Attorney for Respondent Petra Engineering, LLC

[X] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By E-mail

Jack Long
c/o Pacific Frontier LLC
111 5th Street
Auburn WA 98002
E-mail: jacklong@pacificfrontierllc.com
Pro Se for Jack Long and Samantha Meadows, LLC

[X] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By E-mail

Maia D. Bellon
Assistant Attorney General
Ecology Division
2425 Bristol Court SW, 2nd Floor
Olympia, WA 98502
E-mail: maiab@atg.wa.gov
Attorney for Department of Ecology

[X] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By E-mail

Dated this 19th day of February, 2009.

SCHWABE, WILLIAMSON & WYATT, PC

Averil B. Rothrock

Curtis R. Smelser, WSBA #17318
Averil Rothrock, WSBA #24248
Philip T. Kasin, WSBA #35389
Attorneys for TTPH 3-8, LLC ("Tahoma Terra")