

King  
Snohomish  
none

No. 63524-7

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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DONNA and FRED BRESKE, wife and husband and the  
marital community composed thereof,

Petitioners/Appellants,

v.

CITY OF EDMONDS, a Washington municipal  
corporation,

Respondent.

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BRIEF OF RESPONDENT CITY OF EDMONDS

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**I. INTRODUCTION**

This Land Use Petition Act appeal was originally commenced by Petitioners/Appellants Donna and Fred Breske as a challenge to a City of Edmonds Hearing Examiner decision. After the Snohomish County Superior Court affirmed the examiner's decision, the Breskes appealed to this Court. The Breskes now concede that the hearing examiner's original determination should stand, but they nevertheless seek vacation of the superior court's decision—purportedly due to concerns regarding the preclusive effect of the court's findings and conclusions.

This Court should deny the Breskes' request and reject the instant appeal. The superior court's findings and conclusions were legally correct and factually supported by the administrative record. More fundamentally, it is well-established that the Court of Appeals in a LUPA proceeding stands in the shoes of the superior court and limits its review to the underlying land use decision of the local agency itself. Any findings and conclusions entered by the trial court are considered surplusage and are disregarded for purposes of appellate review. The preclusive effect, if any, of these findings upon the Breskes' future claims and/or development proposals is not properly before this Court and is ultimately an insufficient grounds for vacating the superior court's decision. As a matter of law, the

Breskes' abandonment of their challenge to the hearing examiner's decision should terminate this appellate proceeding. The Court of Appeals is respectfully requested to deny the Breskes' appeal and to award the City attorneys' fees pursuant to RCW 4.84.370.

## **II. STATEMENT OF THE CASE**

### **A. Historical Background.**

1. **History of Lot 1.** The present appeal arises out of the Breskes' attempt to develop a vacant parcel commonly known as Lot 1 of the Plat of Preview Homes Westgate Village ("Lot 1"). *CP 104, 137.* The Westgate Village plat is located within 0.7 miles of Shell Creek, a salmonid-bearing stream that has experienced visible stream bank erosion. *CP 105, 575.* When stormwater runoff overflows from Lot 1 it ultimately migrates to Shell Creek, potentially causing erosion, sedimentation, pollution, flooding and degradation of fish and wildlife habitat. *CP 109, 1069, 1071, 1077.*

The Westgate Village plat was approved by Snohomish County in 1961 and subsequently annexed into the City of Edmonds. *CP 105, 228, 213, 619-21.* The plat contained a dedication granting Snohomish County and its successors a perpetual right to drain all graded roads within the plat "over and across any such lot or lots where water might take a natural

course”. *CP 213*. The dedication also stated that “[n]o land drainage. . . shall be blocked from draining along its natural course.” *CP 213*.

Lot 1 is a relative low point with respect to the surrounding properties within the Westgate Village plat, and it functions as a natural drainage repository for the area. *CP 105, 623, 1069-70*. The parcel was also designated by the original subdivider, Bjorn Thuesen, as the plat’s stormwater retention facility. The drainage system for Westgate Village consisted of four catch basins which collected surface water flows from within the plat and discharged them onto Lot 1. *CP 105, 230, 1069*. Installation of this drainage infrastructure was an express condition of final development approval for the plat. *CP 871, 217, 236, 246, 247, 1069, 1071*. This condition of approval was never appealed or otherwise modified.

Periodic field investigations have confirmed that Lot 1 continues to serve as a drainage facility for the surrounding properties in conformance with the plat’s original design. *CP 228, 357, 359*. In response to inquiries and requests by the previous owner(s) of the lot, the City has consistently maintained that any private development of the site must address the property’s historic and designated drainage function. *CP 215, 217-18, 220-24, 226, 272-73, 275*.

In 2002 the City of Edmonds Public Works Department constructed an emergency overflow mechanism and connected it to the original storm drainage system of the Westgate Village plat. *CP 106-07, 610, 1051-52, 1060.* The limited purpose of the emergency overflow system was to prevent damage to adjacent properties during extreme flooding events; it was neither designed nor intended to provide general drainage for the Westgate Village plat. *CP 106-07, 1052.* Operation of the emergency system is triggered, and the system receives storm flows from the surrounding plat, only under rare circumstances when Lot 1 becomes severely saturated. *CP 106-07, 285, 1076-77.* Storm flows continue to enter Lot 1 notwithstanding the 2002 emergency improvements. *CP 107, 285, 359, 608.*

**2. Historical valuation of Lot 1.** Snohomish County real estate tax records indicate that the value of Lot 1 has historically been assessed at a *de minimus* \$1,000 level, underscoring the property's designation and/or function as a storm drainage facility as opposed to a readily developable building site. *CP 542-68, 1069.* Snohomish County maintained the assessment at \$1,000 until the property was purchased by the Breskes in 2007, when the County's valuation of the lot was suddenly revised upward to \$200,000. *CP 570.*

3. **Purchase of Lot 1 by the Breskes.** Lot 1 was acquired by the Breskes' company, 9330 LLC, in 2007. *CP 128, 148.* Prior to purchasing the property, the Breskes contacted the City and requested a meeting to discuss their development plans. *CP 1071-72.* During the subsequent on-site meeting, the Assistant City Engineer personally explained the history of Lot 1 and its function as a storm water retention area for the surrounding plat. The Engineer further informed the Breskes of the storm drainage regulatory standards that would govern any future development of the property—i.e., that the Breskes would be required to ensure the post-development drainage function of Lot 1 would be at least equivalent to the degree of retention and infiltration presently being provided by the parcel (i.e., “no net increase” in storm runoff). *CP 433, 1072-73.*<sup>1</sup> The Breskes proceeded with their purchase despite the City's warnings regarding local stormwater requirements and the constrained development potential of the site.

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<sup>1</sup> The applicable provision of the City's stormwater ordinance is ECDC 18.30.060(A)(1)(a), which provides that “[a]ll development sites less than one acre that discharge directly or indirectly to a stream shall be required to limit the peak rate of runoff to the predeveloped condition two-year, 24-hour design storm, while maintaining the predeveloped condition peak runoff rate for the 10-year, 24-hour and 100-year, 24-hour storms.” *CP 206.* This provision was construed by City staff, the hearing examiner and the superior court as imposing a “no net increase of drainage runoff” standard with respect to new development. *CP 7, 107-08, 879, 919, 1049-50.*

**B. Building Permit Applications for Lot 1.**

1. **First permit application.** The Breskes filed their first building permit application with the City on February 28, 2007, seeking authorization to construct a new single-family residence on Lot 1. *CP 249-52*. During engineering review of the proposal, the City informed the Breskes that in order to ensure off-site flows consistent with the pre-developed condition of the property, they would be required to provide detention for the existing runoff from the other lots within the plat that were currently draining onto Lot 1. *CP 254-56*.

Based on their opinion that the City's 2002 improvements were adequately sized to convey all stormwater runoff from the Westgate Village plat, the Breskes proposed to cap Lot 1's connection to the Westgate Village plat's existing drainage system. The practical effect of this proposal was to divert all flows from the surrounding neighborhood to the City's stormwater system, which in turn eventually discharges into Shell Creek. In compensation for the environmental impacts of their proposal, the Breskes offered a mitigation payment to fund future Shell Creek restoration efforts. *CP 108, 674-77*.

In January 2008 the Breskes submitted a "Retention/Infiltration Sizing Report". The report depicted a sub-surface retention/infiltration

vault along the north property line of Lot 1 and a single-family residence elevated on pin piles in order to preserve the property's storm water infiltration capacity. *CP 369-86*. The City indicated that, with minor revisions, this proposal would have been approved. *CP 1051, 1078-79*. The Breskes, however, concluded that the combined retention/infiltration facility was not economically viable because it would increase their construction costs. *CP 391*.

The Breskes subsequently submitted a document entitled "Shell Creek Sub-Basin Analysis and Offer to pay Shell Creek Mitigation Fees," prepared by Petitioner Donna Breske, and again offered to pay "mitigation fees" in lieu of installing an on-site detention facility. *CP CP 389-406*. The City rejected this proposal, reiterating the code's "no net increase" requirement and explaining that mitigation fees were not a viable option under the City's stormwater regulations. *CP 356-60*.

Despite repeated warnings from the City, the Breskes allowed their first building permit application, which had already been extended once before at the Breskes' request, to expire on February 28, 2008. *CP 296, 425-29*.

**2. Second permit application.** The Breskes submitted a second building permit application to the City under protest on April 1,

2008. *CP 447-56*. Under this proposal, the Breskes abandoned their previous design for a combined retention/infiltration system and instead proposed a storm drainage system addressing only the *new* impervious surface their project would add to Lot 1. *CP 447-56*. The design did not address the offsite drainage that currently enters the property, or the site's role as a historic and natural drainage point for the Plat of Westgate Village. *CP 502*. The practical result of this design was to divert all stormwater flows from the Westgate Village plat to the City's storm system—and Shell Creek—via the City's 2002 emergency overflow improvements. *CP 873, 1071*. The City rejected this proposal.

**C. Administrative Appeal Proceeding and Hearing Examiner Decision.**

The Breskes appealed the City's determination to the City of Edmonds Hearing Examiner, who conducted an open-record appeal hearing on July 17, 2008 and August 5, 2008. *CP 154-58, 865*. The hearing examiner issued her Findings, Conclusions and Decision on August 26, 2008, rejecting the Breskes' appeal. *CP 865-82*. Based upon the evidence submitted, the hearing examiner found that Snohomish County, the City of Edmonds and the original developer of the Westgate Village subdivision had all regarded Lot 1 as the designated drainage

facility for the plat. *CP 879*. The examiner construed the City's stormwater regulations as unambiguously prohibiting new residential development from causing any net increase of storm runoff. *CP 879*. Applying these standards to the Breskes' project, the examiner concluded that "development of Lot 1 is required to address its historical drainage function within the Plat of Preview Homes Westgate Village." *CP 879*.<sup>2</sup>

**D. LUPA Appeal and Superior Court Decision.**

The Breskes appealed the hearing examiner's decision by filing a Land Use Petition Act (LUPA) petition in Snohomish County Superior Court pursuant to Chapter 36.70C RCW. *CP 1219-31*. After briefing and oral argument, Judge Eric Z. Lucas issued an oral bench ruling affirming the hearing examiner's decision on March 19, 2009. *CP 13-22*. Judge Lucas subsequently directed counsel to prepare a final order based upon his oral ruling, which in turn was formally entered on April 23, 2009. *CP 9-12*. The Breskes then appealed to this Court.

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<sup>2</sup> In response to a motion submitted by the Breskes, the examiner issued a Decision on Reconsideration on September 26, 2008, revising a few factual findings but otherwise reaffirming the substance and conclusion of the original decision. *CP 916-23*.

### III. ARGUMENT

#### A. Standard of Review.

“Under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1) has been met.” *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The six LUPA standards are as follows:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1) (emphasis added). The court's review is confined to the record created during the administrative proceedings below. RCW 36.70C.120(1); *CROP v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001).

The standard of review under LUPA is deferential. "RCW 36.70C.130(1) reflects a clear legislative intention that. . . court[s] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2005) (internal punctuation omitted).

The Breskes' LUPA appeal focused primarily upon the hearing examiner's interpretation of the City's codified stormwater regulations and their application to Lot 1. As such, the appeal implicated primarily subsections (b) and (d) of RCW 36.70C.130(1). Construction of a local ordinance presents a question of law which is subject to *de novo* review by the Superior Court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Under this standard, courts will not reverse a local government's land use decision unless it finds that the decision was clearly erroneous. *Mason v. King County*, 134 Wn. App. 806, 810, 142 P.3d 637 (2006). "A decision is clearly erroneous only

when the court is left with the definite and firm conviction that a mistake has been made.” *T-Mobile*, 123 Wn. App. at 24. The same test applies to whether the challenged land use decision was a clearly erroneous application of the law to facts pursuant to RCW 36.70C.130(1)(d). *See, e.g., Citizens to Preserve Pioneer Park L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001).

The hearing examiner’s factual findings are reviewed for substantial evidence pursuant to subsection (c) of RCW 36.70C.130(1). *Cingular*, 131 Wn. App. at 768. “Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005). “A reviewing court must be deferential to factual determinations made by the highest forum below that exercised fact-finding authority.” *Citizens*, 106 Wn. App. at 474. The court must also “review the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority.” *Nagle*, 129 Wn. App. at 709. Accordingly, all reasonable inferences must be drawn in favor of the City as the prevailing party below.

**B. The Superior Court's Findings and Conclusions are Not Properly Before the Court of Appeals.**

The applicable standard and scope of review dictate the outcome of this appeal. The thrust of the Breskes' argument is that the superior court entered an excessively broad final order which overstepped the permissible judicial remedies under LUPA, and issued inappropriate "declarations of rights" that could jeopardize the Breskes' future claims and/or development plans. *Brief of Appellant at 1, 9-10*. Critically, however, the Breskes have formally abandoned their challenge to the underlying decision of the hearing examiner. *Brief of Appellant at 2*. As a matter of law, this concession should terminate the Court of Appeals' review of this case.

**1. The superior court's findings and conclusions are legally irrelevant in a LUPA appeal.** "On review of a superior court land use permit decision, [the Court of Appeals] stand[s] in the same shoes as that court." *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 6, 103 P.3d 802 (2004). The Court of Appeals likewise "review[s] the administrative decision on the record of the administrative tribunal, not the superior court record." *Storedahl*, 125 Wn. App. at 6; *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 125, 186 P.3d 357

(2008); *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). To the extent that the trial court enters any findings or conclusions at all, they are simply ignored on appeal:

Where, as here, the superior court is required to serve in an appellate capacity to an administrative action but issues findings of fact and conclusions of law, this court simply disregards such findings and conclusions as surplusage.

*Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 230 n.3, 54 P.3d 213 (2002).

While the superior court in the present matter clearly was not *required* to enter findings and conclusions, it certainly was not prohibited from doing so. No reported Washington decision supports the novel theory advanced by the Breskes—i.e., that an appellate court should vacate a trial court’s LUPA decision merely because the losing party disagrees with the lower court’s findings. To the contrary, Washington law is clear that the Court of Appeals should ignore any findings or conclusions entered by the superior court. Washington courts in LUPA proceedings have flatly rejected litigants’ attempts to focus upon the decision of the superior court rather than the underlying land use decision. *See, e.g., Holder v. City of Vancouver*, 136 Wn. App. 104, 108 & n.2, 147

P.3d 641 (2006).<sup>3</sup> In this context, “the conclusions of the trial court are surplusage and do not require further analysis.” *Van Sant v. City of Everett*, 69 Wn. App. 641, 651, 849 P.2d 1276 (1993).

The Breskes have abandoned their challenge to the underlying land use decision of the City’s hearing examiner. *Brief of Appellant at 2*. By implication, they have likewise abandoned any objection to the affirmation of that decision by the superior court, a disposition clearly authorized by statute. *See* RCW 36.70C.140. Because the Breskes “no longer contest that decision”, *Brief of Appellant at 2*, there is simply nothing left for the Court of Appeals to review. This Court’s consideration of the instant matter should terminate with that acknowledgment.

**2. The preclusive effect of the superior court’s findings and conclusions is not properly before the Court of Appeals.**

An appellate court’s sole function in a LUPA appeal is to determine whether the underlying land use decision was correctly decided. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 151 Wn. App. 601, 609, 215 P.3d 956 (2009). Likewise, because the Court of Appeals stands in the

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<sup>3</sup> To the extent that a party seeks to appeal any *non*-LUPA rulings of the trial court, the party must comply with the procedures and standards for seeking discretionary review under RAP 2.3(b). *Holder*, 136 Wn. App. at 108. The instant appeal, however, was formatted as a continuation of the Breskes’ LUPA challenge. The Breskes have not cited, much less expressly sought review under, RAP 2.3(b).

shoes of the superior court for this purpose, *Mason v. King County*, 134 Wn. App. 806, 809, 142 P.3d 637 (2006), the appellate court's decision is necessarily limited to granting the relief authorized by LUPA: it may affirm, reverse or remand the challenged land use decision. RCW 36.70C.130; RCW 36.70C.140. *Whatcom County Fire District*, 151 Wn. App. at 609-10. Modification or vacation of the *superior court's* decision is beyond the scope of the appellate court's role in this context. And speculative considerations regarding the potential future application of claim and/or issue preclusion arising from the trial court's order are irrelevant to the Court of Appeals' review.

The doctrines of issue preclusion and claim preclusion (collectively known as *res judicata*) are intended to prevent repetitious litigation and provide binding resolution of disputes. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987); *DeTray v. City of Olympia*, 121 Wn. App. 777, 785, 90 P.3d 116 (2004). These doctrines apply to land use decisions at both the administrative and judicial levels. *See, e.g., Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995).

Critically, however, *res judicata* is an affirmative defense that must be asserted and proven by a defendant *in the subsequent action*. *See,*

e.g., Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L.Rev. 805, 823 (1985) (citing cases). This requirement is inherent in the doctrine itself: For either issue preclusion or claim preclusion to apply, the subject matter of the precluded claim or issue must be identical to the previously adjudicated one. *Hilltop*, 126 Wn.2d at 32; *Willapa Bay Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn. App. 417, 423, 62 P.3d 912 (2003).<sup>4</sup> It is axiomatic that this determination cannot be made unless and until the subsequent claim or issue is actually raised.

The Breskes' purported concerns regarding the preclusive effect of the superior court's order are ultimately speculative and premature. The Breskes cite no Washington authority suggesting that *res judicata* considerations may be employed *preemptively* by the losing party in civil litigation—much less that an appellate court in a LUPA proceeding should

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<sup>4</sup> Claim preclusion applies when there is an identity of: (1) issues, (2) causes of action (3) persons and parties, and (4) quality of persons for or against whom the claim is made. *Hilltop*, 126 Wash.2d at 32. Issue preclusion applies when there are: (1) identical issues, (2) a final judgment on the merits, (3) privity, and (4) the absence of injustice for the party against whom it is applied. *Willapa Bay*, 115 Wash. App. at 423. The issue to be precluded must also have been litigated and determined in the prior proceeding. *Shoemaker*, 109 Wn.2d at 508.

With respect to successive permit applications, an applicant may avoid the preclusive effect of a prior administrative determination by submitting a new or revised development proposal that resolves any deficiencies that were identified in the original application. *DeTray*, 121 Wn. App. at 789-90.

vacate the trial court's decision merely because of its potential impact on future permit applications or claims. Such requests, orphaned from any further attempt to obtain relief from the underlying land use decision and aimed purely at tactical positioning with respect to separate proceedings, are highly disfavored under Washington law. *See, e.g., Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 593-94, 191 P.3d 1282 (2008).<sup>5</sup> The Court of Appeals should accordingly reject the Breskes' argument regarding this issue.

**C. The Superior Court Correctly Construed the Westgate Village Plat Dedication Language.**

The Breskes focus at length upon a selectively quoted statement in the superior court's final order concluding that the relevant plat dedication language "gives the county a right to *have* this property for stormwater drainage." *Brief of Appellant at 14-15 (emphasis added) (citing Final Order; CP 6)*. But the surrounding context of this statement clarifies that the court's inartful use of the term "have" was not intended to refer to *ownership* of the Breskes' parcel. The very next sentence of the court's finding refers to the "*Petitioner's* property", effectively eliminating any doubt regarding this point. *CP 6 (emphasis added)*.

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<sup>5</sup> *Cf. In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005) ("Equity counsels against vacatur when the appellant has by his own act caused the dismissal of the appeal").

Moreover, as the Breskes correctly note, the City has not attempted to—and does not now—assert an outright ownership interest in the subject property by virtue of the plat dedication language. *Brief of Appellant at 15*. Nor has the City ever contended that the Breskes’ property is burdened by a “permanent servitude” and thus incapable of private development. *Brief of Appellant at 14-15*. To the contrary, the City’s consistent position has instead simply been that any development of their parcel must ensure that the rate of post-construction storm runoff does not exceed pre-development levels. *CP 303*. This standard in turn necessarily requires consideration of the property’s designated and historical role as the stormwater facility for the surrounding plat. It is the latter requirement that the Breskes have strenuously resisted throughout the development review process.

The Breskes’ arguments regarding the superior court’s allegedly overbroad construction the dedication language of Westgate Village plat are ultimately unpersuasive. *Brief of Appellant at 17-19*. As it relates to storm runoff, the relevant plat language provides as follows:

Know all men by these presents, that we, the undersigned owners in fee simple, do hereby declare this plat and dedicate to the use of the public forever all roads and ways shown thereon, with the right to make necessary

slopes for cuts or fills and install necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon. The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public road rights of way, nor shall it be blocked from drainage along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

*CP 6.*

The superior court unremarkably construed this text as: (i) not identifying, nor needing to identify, a particular lot within the plat *per se*; (ii) allowing the diversion of both right-of-way waters and runoff draining in the normal course to all such affected lots; and (iii) burdening the Breskes' parcel, which the record clearly demonstrates is the topographical low point of—and thus the natural drainage repository for—the surrounding plat. *CP 6, 105.* The court's interpretation simply tracks the unambiguous language of the plat dedication and applies it to the facts of this proceeding. There is no equitable justification for vacating this conclusion.

More fundamentally, the superior court's findings regarding this dedication language did not alter the court's core determination in the LUPA appeal, which was set forth separately:

5. Substantial evidence supports the conclusion that Lot 1 was dedicated to serve as the drainage system of the Plat of Preview Homes Westgate Village. *This conclusion is not dependent exclusively on topography of the underlying property and the language on the face of the plat itself.* It is confirmed by correspondence within the administrative record, the installation of drainage infrastructure within the plat, and the historical pattern of behavior by and between the relevant parties. There is no legal requirement that Lot 1 must be specifically identified and/or dedicated on the face of the plat for this purpose.

*CP 7 (emphasis added).* This conclusion essentially restates the hearing examiner's decision, which in turn the Breskes no longer challenge. *CP 870-71; Brief of Appellant at 2.*

**D. The Superior Court Properly Rejected the Breskes' Takings Argument.**

The Court of Appeals should also reject the Breskes' request to vacate the superior court's decision on the grounds that it improperly addressed their constitutional "takings" argument. *Brief of Appellant at 19-21.* The Breskes contend that the superior court issued an overly expansive, permanent determination of their property rights. They also

argue that the trial court's disposition of their takings theory internally conflicts with the court's determination that their claim was not ripe. *Brief of Appellant at 19-21*. Both of these assertions are without merit.

**1. The Breskes' alleged hardship is self-created.**

The Breskes argue that the superior court's order "threatens to permanently decide the Breskes' property rights based on an erroneous interpretation of the plat dedication, when all the Breskes asked for was reversal of the Hearing Examiner decision." *Brief of Appellant at 19*. But the decision to assert constitutional theories in their LUPA appeal was ultimately a calculated legal risk.

Among the numerous grounds for granting judicial relief from a local land use decision is that the decision violates the petitioner's constitutional rights, a theory that may be raised for the first time in a petitioner's LUPA appeal. RCW 36.70C.130(1)(f); *Peste v. Mason County*, 133 Wn. App. 456, 469-70, 136 P.3d 140 (2006) ). The choice to advance this argument within a LUPA proceeding is nevertheless discretionary. The Breskes *could* have confined their arguments to assertions that the challenged land use decision was factually unsupported or an erroneous interpretation of the City's regulations. *See* RCW 36.70C.130(1). They were not required—but ultimately chose—to raise

constitutional theories in their attempt to overturn the hearing examiner's decision. *CP 1229-30*. "It is a well-settled rule that a party cannot successfully complain of. . . rulings which he has invited the trial court to make." *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 10, 970 P.2d 343 (1999) (citation and internal punctuation omitted). After asserting the takings issue in their LUPA petition and extensively briefing and arguing it before the superior court, *see CP 47-52, CP 88-94, CP 1229-30*, the Breskes cannot avoid the consequences of this action by seeking vacation of the court's unfavorable determination. As explained *supra*, the preclusive effect of the superior court's decision, if any, upon any future claim the Breskes' may assert is not properly before the Court of Appeals in this LUPA proceeding. Simply put, the Breskes cannot unring the bell on this point.

**2. The superior court correctly determined that the Breskes' takings argument was not ripe.** The superior court's conclusion that the Breskes' takings argument was not ripe is both legally and factually supported. It is undisputed that no permit has been issued in the instant matter. And the City's drainage ordinance contains a variance provision allowing development applicants to obtain a full or partial waiver of otherwise applicable stormwater management requirements. *See*

adjudication. The superior court's conclusion regarding this point was correct.

**3. The superior court correctly determined that the Breskes had not demonstrated inverse condemnation or a taking.**

After consideration of the administrative record and the parties' respective arguments, the superior court disposed of the Breskes' takings theory as follows:

9. Because of the historical use of Lot 1 as a drainage facility for at least 40 years, there is no unconstitutional taking. Moreover, because the Petitioners have not exhausted their administrative remedies, their takings claim is not ripe.

10. The Petitioners have not demonstrated that the City has inversely condemned their property. There would be inverse condemnation under these circumstances but for the plat language.

*CP 7.*

The Breskes' appellate arguments against these conclusions are unavailing. First, there is no contradiction between the court's ripeness determination and its conclusion that the Breskes had not demonstrated a taking. *CP 7.* By its plain terms and the relevant context, the superior court's order simply concludes that the Breskes had failed to establish a

taking or inverse condemnation under the facts and arguments presented in the LUPA appeal. As noted above, the court was required to address this point because the Breskes themselves raised it in their LUPA petition and briefing. The superior court's ripeness determination was merely an alternative conclusion that, under these facts, the Breskes' takings argument was not yet ripe because they had not exhausted their administrative remedies. There is no inconsistency between these decisions.

Second, the administrative record in this appeal conclusively defeats the Breskes' suggestion that the City has precluded all economically viable use of Lot 1 without paying just compensation. The Breskes' revised permit application, which depicted a combined retention/infiltration system and a home constructed on pin piles, would likely have been approved by the City with minor revisions. *CP 1051, 1078-79*. The Breskes, however, opted to abandon this approach because it reduced their profit margin. *CP 391*. The City has never suggested that the subject property is incapable of private development, and has never advanced an interpretation of the Westgate Village plat dedication language to that effect. The Breskes' contention regarding this point is ultimately a red herring and should be disregarded by the Court.

Finally, the superior court's rejection of the Breskes' takings argument was legally correct. Even assuming—without conceding—that the constitutional “nexus and proportionality” standard applies in this context, the City's stormwater regulations clearly satisfy this test. The relevant inquiry asks: (1) whether there is a public problem that the condition is designed to address; (2) whether the underlying development proposal will create or exacerbate the identified problem; (3) whether the governmental condition tends to solve, or least alleviate, the problem; and (4) whether the governmental condition is “roughly proportional” to the part of the identified problem that is created or exacerbated by the proposed development. *Burton v. Clark County*, 91 Wn. App. 505, 520-23, 958 P.2d 343 (1998). “The ultimate goal is to show that the proposed condition or exaction (i.e., the proposed solution to an identified public problem) is reasonably related to all or part of an identified public problem that arises from (i.e., is created or exacerbated by) the development project.” *Id.* at 524.

First, the City has a legitimate and well-recognized public interest in preventing storm runoff from development activity. *See, e.g., Tukwila School Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 738, 167 P.3d 1167 (2007); *Storedahl Properties, LLC v. Clark County*, 143 Wn. App.

489, 492, 178 P.3d 377 (2008). Second, the Breskes' proposed development will result in additional storm runoff from Lot 1 unless properly managed. The subject property has functioned as a stormwater retention facility for the surrounding area since 1961, when the Westgate Village plat was approved. By installing impervious surface onto a presently unimproved landscape, the proposed development will eliminate—or at the very least substantially compromise—the retention and infiltration capacity of the property and result in additional runoff from the site. *CP 119-20, 300-04, 433-34 1071, 1077, 1080-81.*

Third, requiring compliance with the City's drainage standards will “tend to solve, or at least alleviate” the problem of runoff from Lot 1. *Burton*, 91 Wn. App. at 522. If the Breskes' property is developed in a code-compliant manner which ensures that the pre-development peak rate of storm runoff is not exceeded pursuant to ECDC 18.30.060(A)(1)(a), this public problem will be eliminated.

Finally, compliance with ECDC 18.30.060(A)(1)(a) is inherently proportionate to the impact of the Breskes' development. As applied to Lot 1, the City's “no net increase” drainage standard (ECDC 18.30.060(A)(1)(a)) simply requires the Breskes to ensure that their development does not result in storm runoff exceeding the predeveloped

condition of the property. *CP 206*. The constitutional proportionality requirement is inherent in this self-limiting performance standard itself, since the Breskes are required to address *only* the actual, external drainage impacts of their project. The superior court's rejection of the Breskes' takings argument was correct.

**E. Attorneys' Fees Pursuant to RCW 4.84.370.**

If the Court of Appeals concurs with the arguments above and rejects the Breskes' appeal, the City respectfully requests an award of its attorneys' fees and costs incurred in defending this appellate proceeding. RCW 4.84.370 entitles the prevailing party in a land use appeal to its appellate legal expenses if the party also prevailed at the administrative and trial court levels:

(1) [R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals. . . . of a decision by a county, city, or town to issue, *condition*, or deny a development permit involving a . . . building permit. . . . or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially

prevailing party before the county, city, or town. . . . ; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, *the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.*

(Emphasis added.)

The present matter clearly involves a local decision to “condition” a development permit—i.e., the stormwater management requirements imposed as a prerequisite to issuing the Breskes a building permit. It is likewise undisputed that the City’s administrative decision was upheld in all respects by the superior court. *CP 8*. The City is accordingly the “prevailing party” for purposes of RCW 4.84.370 and is entitled to its attorneys’ fees and costs if the Court of Appeals ultimately denies the instant appeal.

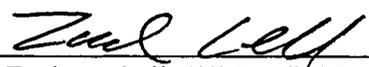
#### IV. CONCLUSION

It is fundamental that the Court of Appeals in a LUPA proceeding limits its appellate review to the administrative record and the underlying land use decision of the local agency. Any findings and conclusions

entered by the superior court are simply disregarded as surplusage for purposes of the appellate court's consideration. Because the Breskes no longer challenge the 2008 decision of the City of Edmonds Hearing Examiner or the substantive result of the superior court order affirming that decision, the trial court's findings and conclusions are simply irrelevant to this Court's determination. The preclusive effect of these findings and decisions upon future claims is an improper consideration in a LUPA proceeding and is not appropriately before the Court of Appeals. The Breskes' appeal should be rejected as a matter of law.

RESPECTFULLY SUBMITTED this 19th day of May, 2010.

OGDEN MURPHY WALLACE, PLLC.

By:   
\_\_\_\_\_  
J. Zachary Lell, WSBA #28744  
Attorneys for Respondent  
City of Edmonds

## DECLARATION OF SERVICE

I, Gloria Zak, declares as follows:

1. I am a citizen of the United States, a resident of the State of Washington, and an employee of Ogden Murphy Wallace, PLLC. I am over twenty-one, not a party to this action and am competent to be a witness herein.

2. On the 19th day of May, 2010, I provided a copy of the document to which this declaration is attached, via legal messenger, to:

Samuel A. Rodabough  
GROEN STEPHENS & KLINGE, LLP  
11100 NE 8th Street, Suite 750  
Bellevue WA 98004

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

EXECUTED this 19th day of May, 2010, at Seattle, Washington.

  
Gloria J. Zak