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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37697-1-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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MICHAEL STANZEL,

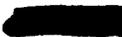
Respondent,

v.

PIERCE COUNTY, a political subdivision, and CITY OF  
PUYALLUP, a municipal corporation,

Appellant.

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RESPONDENT'S  BRIEF

---

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## **I. INTRODUCTION.**

In its appeal, the City of Puyallup seeks to overturn a decision of the Pierce County Superior Court that confirmed the right of respondent Michael Stanzel to obtain domestic water service from the City. As more fully described below, Mr. Stanzel, who owns property in unincorporated Pierce County, but within the exclusive water service area of the City of Puyallup, was denied water service by the City. Under the terms of state law and Pierce County codes, Mr. Stanzel appealed to the Pierce County Hearing Examiner to compel the City to provide water. The Examiner concluded that the City had no justifiable reason to deny water service as a matter of fact and law, but concluded that he lacked jurisdiction to rule on the matter.

Following the filing of an action under the Land Use Petition Act, RCW ch. 36.70C, the Superior Court reversed the jurisdictional conclusion of the Examiner's decision and affirmed that the City of Puyallup must provide water to the petitioner's property.

This appeal is governed by the Land Use Petition Act, RCW ch. 36.70C ("LUPA"). As a LUPA case, this matter is reviewed only on the record made before the Hearing Examiner. See RCW 36.70C.120. The record here consists of two parts. The first is the

verbatim transcript of two hearings held before the Hearing Examiner, the first on April 4, 2007 and the second on June 20, 2007. These transcripts will be referenced herein by date and page number, e.g., "Tr. June 20, p. \_\_\_." The second part of the record consists of copies of all pleadings, correspondence, and exhibits before the Hearing Examiner. These documents have been paginated and will be referenced as "Doc \_\_\_." References to the Clerk's Papers will be given the usual "CP \_\_\_\_" reference.

## **II. FACTUAL STATEMENT AND BACKGROUND.**

The background leading to this controversy is divided into four separate parts in this brief. First, respondent will describe the background of water system and coordination planning in the state of Washington in general, and in Pierce County in particular. Second, Mr. Stanzel will describe the circumstances concerning his property and the ongoing refusal of the City of Puyallup to provide to him the Certificates of Water Availability necessary for him to develop his property for legal uses under the Pierce County codes. Third, petitioner will review the proceedings before the Hearing Examiner leading to the decision on the merits of Mr. Stanzel's appeal. Finally, respondent describes proceedings before the Superior Court.

## **2.1 Water System Planning and Requirements in the State of Washington**

In 1977, the Washington State Legislature adopted the Public Water System Coordination Act, codified as Ch. 70.116 RCW (“the Act”). The legislative declaration found at RCW 70.116.010 spells out the Act’s intent:

The legislature hereby finds that an adequate supply of potable water for domestic, commercial, and industrial use is vital to the health and well-being of the people of the state. Readily available water for use in public water systems is limited and should be developed and used efficiently with a minimum of loss or waste.

In order to maximize efficient and effective development of the state's public water supply systems, the department of health shall assist water purveyors by providing a procedure to coordinate the planning of the public water supply systems.

(Emphasis supplied). Under the Act, local jurisdictions and the state Department of Health are to identify and establish, as appropriate, “Critical Water Supply Service Areas” (“CWSSA”) where “uncoordinated planning, inadequate water quality or unreliable service appear to exist.” RCW 70.116.040(1).

After a CWSSA has been established, the water purveyors within the designated area, including municipal systems, must adopt individual plans and a “Coordinated Water System Plan” (CWSP):

(2) After the boundaries of a critical water supply service area have been established pursuant to RCW 70.116.040, the committee established in RCW 70.116.040 shall participate in the development of a coordinated water system plan for the designated area. Such a plan shall incorporate all water system plans developed pursuant to subsection (1) of this section. The plan shall provide for maximum integration and coordination of public water system facilities consistent with the protection and enhancement of the public health and well-being. Decisions of the committee shall be by majority vote of those present at meetings of the committee.

RCW 70.116.050.

The Act requires that, within the CWSSAs, the service boundaries of individual water systems will be established:

(1) The proposed service area boundaries of public water systems within the critical water supply service area that are required to submit water system plans under this chapter shall be identified in the system's plan. The local legislative authority, or its planning department or other designee, shall review the proposed boundaries to determine whether the proposed boundaries of one or more systems overlap. The boundaries determined by the local legislative authority not to overlap shall be incorporated into the coordinated water system plan.

RCW 70.116.070. If a local purveyor disagrees with the boundaries established by the local government, it can appeal the decision to the secretary of the State Department of Health. RCW 70.116.070(2).

The statute also provides for the establishment of a dispute

resolution mechanism concerning the CWSP:

5) The affected legislative authorities may develop and utilize a mechanism for addressing disputes that arise in the implementation of the coordinated water system plan after the plan has been approved by the secretary.

RCW 70.116.060.

## **2.2 Coordinated Water System Planning in Pierce County.**

Pierce County was designated a CWSSA in the early 1980s. It then adopted its initial CWSP in 1988.<sup>1</sup> The plan was modified further with the most recent revisions adopted on April 24, 2001. The Pierce County CWSP was admitted into the record in these proceedings as Exhibit 10 (Doc 157). The plan is adopted into the Pierce County Code at Chapter 19D.120. The CWSP established boundaries as between the various water purveyors.

On August 29, 1994, the City of Puyallup executed an agreement with Pierce County entitled the "Standard Service Agreement Establishing Water Utility Service Boundaries," referenced herein as the "SSA." See Exhibit 11, and Doc 269-275.

The Preamble to the SSA indicates that it was entered into:

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<sup>1</sup> A full description of the history of water system planning is found in the most recent Pierce County CWSP amended in 2001. This plan was assigned Exhibit number 10 by the Hearing Examiner (Doc 157), though the whole plan was not included as a part of the record. A copy of the whole plan will be provided for the Court's use.

for purposes of identifying the external boundaries of the service area for which the water purveyor has assumed water service responsibility.

(Emphasis supplied). Doc 269. Section 1.D of the SSA provides that:

Retail Service Area shall mean the designated geographical area within Pierce County in which the undersigned water purveyor (the City of Puyallup) assumes full responsibility for providing water service to individual customers.

Doc 270. (Emphasis supplied). The City has never repudiated the SSA. Tr. June 20, page 25. As later found by the Hearing Examiner, the property of Mr. Stanzel is located within the City of Puyallup water service area and the City is “the exclusive water purveyor to this particular parcel.” Doc 7, ¶15.

As authorized by state law in RCW 70.116.060(5), the CWSP has a “Dispute Resolution Process” found at pages II-34 to II-36. See Exhibit 10. This mechanism is codified in the Pierce County Code at Section 19D.140.080 and 090. This mechanism calls for resolution of “timely and reasonable service disputes”:

1. Timely and Reasonable Disputes. Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service to these customers.

Under Pierce County Code Section 19D.140.090.A.1, the Pierce County Hearing Examiner is given authority to resolve “timely and reasonable service disputes.” Section 19D.140.080.G.

### **2.3 The Stanzel Property and Requests for Issuance of Water Availability Certificates.**

Petitioner Michael Stanzel is the owner of property located at 6224 - 114<sup>th</sup> Ave. Court East. As the Hearing Examiner found: “it is undisputed that the City of Puyallup is the exclusive water provider to this particular parcel.” Doc 7, ¶5. His property is located within the “retail service area” of the City. Mr. Stanzel’s property is not, however, within the corporate boundaries of the City. *Id.*

The Hearing Examiner found:

The [Stanzel] property is currently improved with an existing building and recreational facilities. The applicant wishes to construct and rebuild a building on his property for commercial purposes. This piece of property is subject to Pierce County zoning requirements. It is not located within the City of Puyallup. The construction would be consistent with Pierce County zoning.

Doc 7, ¶3.

Of importance here is that Mr. Stanzel already receives water service from the City of Puyallup. See Hearing Examiner decision, page 8, Doc 8. In fact there is a fire hydrant right next to Mr. Stanzel’s property as shown on the photograph of his property

at Doc 164. As the Hearing Examiner found:

The applicant is already receiving water service from the City of Puyallup for residential use. The applicant is requesting a commercial use on his property. There will be very limited improvement on the site. The increased water requirements, if any, will be very limited. This is a situation where water is already being provided and there will be no substantial increase in use levels.

Hearing Examiner Decision, Doc 10, ¶15. The City of Puyallup Comprehensive Plan, Utilities Element, shows that Mr. Stanzel's property is within the City's water service area. See Map at Doc 155 (Stanzel property shown with an "M.S." notation.) The entire Utilities Element is Exhibit 8, Doc 141-155.

The Utilities Element specially calls out the area of Mr. Stanzel's property as the "North Puyallup Sub-Area." Doc 145. The Utilities Element specifically states:

As a water purveyor, the City of Puyallup must plan for and provide an adequate level of service to present and future customers within its service area.

Hearing Exhibit 8, Doc 145. In fact, the City admitted that there are new 8 and 12-inch water lines right in front of Mr. Stanzel's property. Doc 165, and Tr. June 20, p. 25. There is also an existing City of Puyallup water meter on the Stanzel property. *Id.* Mr. Stanzel in fact pays a surcharge for water from the City, i.e., he is billed one and one-half times what would be charged if he was

within the City boundaries. Tr. June 20, page 63.

Mr. Stanzel wants to develop his property for certain commercial uses. He wants to construct a game room to allow his existing outdoor business to operate inside during the winter. To gain Pierce County building permits for his development, Mr. Stanzel has to submit a "Certificate of Water Availability" on a form provided by the Pierce County Fire Prevention Bureau. Doc 172-73. The form specifically states: "NOTE: Completion of page 2 and water purveyor signature are required." Doc 172.

Mr. Stanzel testified that he had repeatedly requested that the City of Puyallup, as the exclusive water purveyor to his property, sign the "Certificate of Water Availability" so he could apply for a building permit from Pierce County for his planned development. Tr. June 20, p. 37-38. A copy of two of his letters, dated June 25, 2004 and January 8, 2005 are found in the record as Exhibits 14 and 15 (Doc 166). Mr. Stanzel testified that he personally delivered the June 25 letter to the Utilities Department of the City of Puyallup and delivered it to Colleen Harris of the City, together with the form of the water availability letter from Pierce County that needed the City's signature. Tr. June 20, page 44. Ms. Harris refused to accept the letter:

STANZEL: Well, she said that we weren't giving out

water availability letters and she tried to slide it back to me and tell me she wasn't going to accept it.

ARAMBURU: And did you leave it on the counter?

STANZEL: Yes I did. I slid it back to her and left it on the counter.

Tr. June 20, page 45. He wrote a second letter some six months later (January 6, 2006) and still received no response other than a copy of the City of Puyallup code. Tr. June 20, page 45-46. A third letter was written directly to Development Services Director Tom Heinecke on August 9, 2006 and delivered to the City. Doc 186. Tr. June 20, page 67. Again there was no response to the letter. *Id.*

Thus the City of Puyallup has refused to provide that water availability letter on at least three separate occasions, each time without a written response, explanation or request for additional forms or information. Doc 7. The Hearing Examiner found, based on this evidence, that:

The applicant has requested numerous times that the city provide a water service availability letter to his property so that he can proceed with his commercial development.

Doc. 7, Sec. 6.

The City offered no testimony or evidence as to why it denied Mr. Stanzel the water availability letter; neither Colleen Harris nor Tom Heinecke came forward to testify.

The City attempts to support their “failure to exhaust administrative remedies claim” by focusing upon a statement by Mr. Stanzel during his testimony that it was none of the City’s business what he did with his property. See Brief at 16. Of course this statement is taken completely out of context. In fact, Mr. Stanzel testified that he went to the City with his letter (Doc 167) and

asked the other people at the other desk there to provide me with a Water Availability Letter so that I could get the church property up to code and Colleen Harris came out and said that the City isn’t providing Water Availability Letters outside the City limits anymore. Then she asked me what I was doing with the property, and I told her that it was really none of her business, I just needed a commercial Water Availability Letter and she said that if we change the use of the property from residential to commercial they were going to come out and turn off the water.

Tr. June 20, page 43. Ms. Harris outright said the City was not going to give Mr. Stanzel his water availability letter, without any request that he provide additional information. Of course, Ms. Harris also made a threat to cut off the water service if Mr. Stanzel changed the use of the property to commercial. In fact, Mr. Stanzel’s property was in Pierce County, which is outside the City’s land use jurisdiction. In any event, the property is zoned “MUD” or Mixed Use, making Mr. Stanzel’s recreational use perfectly legal.

Tr. June 20, page 56-57. Indeed, the Hearing Examiner concluded that the plan for commercial development of the property was

“consistent with Pierce County zoning.” Decision, page 7, Doc 7, Findings 3.

Pierce County will not even process Mr. Stanzel’s building permit application without the Certificate of Water Availability. Tr. June 20, page 50.

#### **2.4 Proceedings Before the Pierce County Hearing Examiner.**

Following the refusal of the City to provide water to his property, on February 12, 2007 Mr. Stanzel applied to the Hearing Examiner to compel the City to provide water. Doc 218. On March 8, 2007, the Hearing Examiner set a hearing for April 4, 2007. At that first hearing, the City of Puyallup appeared and complained that it had insufficient notice. Accordingly, the Hearing Examiner rescheduled the hearing, finally setting the same for June 20, 2007. Doc 229.

In preparation for the hearing, counsel for Mr. Stanzel requested that the City Community Development Director and the Community Services Director appear for examination by him at the hearing. See Doc 235-236, 237-38 and 243-244. A “Notice to Attend Hearing” was issued by Mr. Stanzel’s counsel for these witnesses. See Doc 247-48. But, the City refused to make either witness available for examination by Mr. Stanzel at the hearing.

Doc 4; Tr. June 20, p.3-9, and neither appeared at the Hearing.

Though the City of Puyallup appeared through counsel at both the April 4 and June 20, 2007 hearings, no witnesses were called by the City and no exhibits were offered on its behalf. Mr. Stanzel did appear at the hearing, providing testimony and some 22 exhibits. See an Exhibit list at Doc 3.

The Hearing Examiner entered his decision on July 26, 2007. Doc 1-12. He substantially agreed with Mr. Stanzel's position. He found that the City would not sign the Pierce County "Certificate of Water Availability" because the City insists that Mr. Stanzel first agree that he will annex to the City. Doc 10. However, the Hearing Examiner concluded that:

The requirement that the applicant must sign a pre-annexation agreement, is not reasonable given these circumstances.

Doc 10.

Despite this conclusion, the Hearing Examiner concluded that he could not order the City of Puyallup to provide water under his existing authority. Doc 10. Nonetheless, the Hearing Examiner concluded that:

If a court determines that the Hearing Examiner does have authority to order this type of relief, then in this particular case, the Hearing Examiner would order the City of Puyallup to provide the service given these specific facts.

Doc 10.

### **2.5. Superior Court Proceedings.**

As described in the City's brief, Mr. Stanzel filed an action in the Pierce County Superior Court challenging that portion of the Pierce County Hearing Examiner's Decision that he did not have jurisdiction. CP 1-24. The petition also requested an order that the City be required to provide water service to the Stanzel property. As described above this review was solely on the record before the Pierce County Hearing Examiner.

The City argued at the LUPA Initial Hearing before Judge Thomas Larkin on October 26, 2007, that Mr. Stanzel lacked standing because he had failed to exhaust administrative remedies. This motion was denied by the court. CP 75-76.

The court reviewed the record as described above and received briefs from the parties. Oral argument was held before the court on February 21, 2008, at which time the court rendered its oral decision. See Verbatim Report of the February 21, 2008 hearing. On April 4, 2008, Judge Larkin entered his "Order Granting Land Use Appeal and Remanding to the Pierce County Hearing Examiner for Further Proceedings." CP 118-121. In its order, the court concluded that the Hearing Examiner erred in finding that he lacked jurisdiction to require that the City of Puyallup

provide water to the Stanzel property. Order, Section II.A, CP 120. The court went on to specifically affirm the Hearing Examiner's conclusion "that Mr. Stanzel is entitled to water service from the City of Puyallup." The matter was remanded to the Pierce County Hearing Examiner for further proceedings. *Id.*

The City of Puyallup filed an appeal of the court's April 4, 2008 decision. CP 122-127.

### **III. STANDARD OF REVIEW.**

Under LUPA, the court limits its review to the record before the decision maker whose decision is under review:

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

RCW 36.70C.120. As described at page 2 of this brief, the complete record before the Hearing Examiner has been prepared and is before the Court on review.

The standards for review of the Hearing Examiner's decision are set forth in RCW 36.70C.130, as follows:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as

is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(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.

In this case, the issue presented to the Superior Court was whether the Hearing Examiner correctly construed the scope of his authority when he ruled he could not compel the City to provide water. In addition, the City argued that the Hearing Examiner erred in concluding that Mr. Stanzel was entitled to water from the city without agreeing to annexation. Thus the Court is presented with a question of whether the Examiner's ruling was "an erroneous interpretation of the law" (subsection b above), or is "a clearly erroneous application of the law to the facts" (subsection e above).

Washington caselaw makes clear that the standard for

review under LUPA of legal interpretations by local governmental decision makers is *de novo*:

This court's review of any claimed error of law in the City Council's interpretation of city ordinances is *de novo* and must accord deference to the City Council's expertise. *Isla Verde*, 146 Wn. 2d at 751, 49 P.3d 867; RCW 36.70C.130(1)(b).

*Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn. 2d 279, 290, 87 P.3d 1176 (2004). The usual statutory construction rules apply to interpretation of municipal ordinances:

We review the interpretation of a city ordinance "de novo under the error of law standard." *Hatley v. City of Union Gap*, 106 Wash. App. 302, 307, 24 P.3d 444 (2001) (citing *Peter Schroeder Architects v. City of Bellevue*, 83 Wash. App. 188, 191, 920 P.2d 1216 (1996)). The interpretation rules apply equally to municipal ordinances and statutes. *World Wide Video, Inc. v. City of Tukwila*, 117 Wash.2d 382, 392, 816 P.2d 18 (1991); 406 *City of Spokane v. Fischer*, 110 Wash.2d 541, 542, 754 P.2d 1241 (1988); *City of Puyallup v. Pac. Northwest Bell Telephone Co.*, 98 Wash.2d 443, 656 P.2d 1035 (1982).

*Eugster v. City of Spokane*, 118 Wash. App. 383, 405-406, 76 P.3d 741, 754 (Wash. App. Div. 3, 2003).

In the present case, Mr. Stanzel demonstrated that the Hearing Examiner adopted an erroneous interpretation of his authority and thus the Superior Court correctly reversed that portion of his decision.

**IV. THE CITY HAS ABANDONED ANY CLAIM THAT STANZEL WAS NOT ENTITLED TO WATER FROM THE**

**CITY BY FAILING TO PRESENT ARGUMENT THEREON  
IN ITS OPENING BRIEF.**

As described above, during the course of the hearings before the Hearing Examiner for Pierce County, the City argued that it was not obligated under state law to provide water. This position was taken in briefing before the Hearing Examiner. There the City argued that "state law does not impose a duty on the city to provide water service outside its corporate limits and therefore, the Hearing Examiner cannot compel the city to provide such service." See City's Memorandum in Opposition of Hearing and Relief Requested, Doc 256-260.

The Hearing Examiner rejected the City's argument in his final decision. Though the Examiner ruled that he did not have authority to order the type of relief granted, but said that:

If a court determines the Hearing Examiner does have authority to order this type of relief, then in this particular case, the Hearing Examiner would order the City of Puyallup to provide the service given these specific facts.

Doc 11.

The Hearing Examiner's decision was appealed to the Superior Court by Mr. Stanzel, who requested that the Hearing Examiner's decision as to his jurisdiction be reversed and that the City be ordered to provide a water availability letter to him. CP1-24.

In its final order, the Court specifically affirmed the decision of the Hearing Examiner, stating that:

B. The conclusion of the Pierce County Hearing Examiner that Mr. Stanzel is entitled to water service from the City of Puyallup is hereby affirmed, subject to meeting the usually permitting and informational standards of any applicant for comparable water within the City.

CP 119-121. Further the order stated that:

D. Petitioner Stanzel shall cooperate and supply detailed plans to the City concerning his intended project at his 6224 114<sup>th</sup> Avenue Court East property. The City shall provide water for those purposes.

*Id.*

In its opening brief, the City stated in its Assignment of Error 2(c) as follows:

2. The Pierce County Superior Court, its order entered on April 4, 2008, erred by:

.....

(c) entitling Mr. Stanzel to water service.

Brief at 5. However, this assignment of error was not reflected in the "Issues Pertaining to Assignments of Error" at page 5-6 of its brief.

In addition, there was no argument or citation of authority provided in the brief that the Superior Court erred in "entitling Mr. Stanzel to water service." The City's brief presents only two arguments: a) that Mr. Stanzel failed to exhaust administrative

remedies (page 13-20); and b) that the Superior Court erred in determining that the Pierce County Hearing Examiner had authority to require the City to provide a water availability letter to Mr. Stanzel (pages 20-24). No argument is presented that either the Hearing Examiner or the Superior Court erred in concluding that Mr. Stanzel was entitled to water service.

Washington law is very clear that:

A party abandons assignments of error to findings of fact if it fails to argue them in its brief. *Seattle Sch. Dist. 1 v. State*, 90 Wn. 2d 476, 585 P.2d 71 (1978); *Lassila v. Wenatchee*, 89 Wn. 2d 804, 809-10, 576 P.2d 54 (1978); *State v. Wood*, 89 Wn. 2d 97, 569 P.2d 1148 (1977); *Dickson v. United States Fid. & Guar. Co.*, 77 Wn. 2d 785, 787, 466 P.2d 515 (1970).

*Valley View Indus. Park v. City of Redmond*, 107 Wn. 2d 621, 630, 733 P.2d 182, 188 (1987).

In the present case the City has failed to argue, or provide legal authority, that the Hearing Examiner or Superior Court erred in concluding that Mr. Stanzel was entitled to a water availability letter under Washington law. As a result, the Court should conclude that this unchallenged finding is the law of the case.

**V. THE SUPERIOR COURT CORRECTLY DENIED THE CITY'S MOTION TO DISMISS ON GROUNDS OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.**

**5.1 Introduction.**

The City argues in its brief that the Superior Court erred in denying its motion to dismiss Mr. Stanzel's LUPA petition because he allegedly did not exhaust administrative remedies under City of Puyallup ordinances. Brief at pages 13-20. This claim should not be considered at all by the Court because the City did not request review of this ruling in its Notice of Appeal. Further, this Court should not consider the declaration of Thomas Heinecke presented by the City as it was not a part of the record before the Pierce County Hearing Examiner. Even if the Court reviews the claim, and considers the Heinecke declaration, the Superior Court correctly denied the motion as will be demonstrated herein.

**5.2 The Court Should Not Review the Denial of the City's Motion to Dismiss Because it Was Not Challenged in the City's Notice of Appeal.**

On April 4, 2008, the Superior Court entered its final appealable order in this matter. CP 118-121. On May 2, 2008, the City of Puyallup filed its Notice of Appeal to this Court. CP 122-127. In its Notice of Appeal, the City sought review only of the April 4, 2008 Order. The only attachment to the Notice of Appeal was the April 4, 2008 Order. *Id.*

However, in its brief, the City of Puyallup assigns error to the order entered by the Superior Court on October 26, 2007. Brief at

4-5. The City argues that this order denied the city's motion to dismiss on the grounds that Mr. Stanzel failed to exhaust certain administrative remedies and "thus lacked standing." *Id.* This order was never mentioned in the Notice of Appeal.

RAP 5.3(a) requires that a Notice of Appeal "(3) designate the decision or part of decision that the party wants reviewed, . . . ." In the present case, the City did not designate or refer in any manner to the order denying the City's motion to dismiss. No motion to amend the Notice of Appeal has been filed. Accordingly, the Court should not review claimed error in the October 26, 2007 order.

Such a result is also required by LUPA. Under LUPA, the failure to raise certain claims at the Initial Hearing waives the right to argue these issues:

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

RCW 36.70C.080 (Emphasis supplied). Thus standing challenges must not only be raised at the Initial Hearing, but heard by the assigned judge or be waived. A similar rule should be applied to the failure to designate the denial of the standing motion in its

Notice of Appeal. The failure of the City to designate the order denying its standing motion precludes the Court from reviewing that decision.

### **5.3 Mr. Stanzel Exhausted His City Remedies by Requesting the Water Availability Letter.**

The City now asserts that Mr. Stanzel did not exhaust his remedies because he did not follow certain application requirements. However, Mr. Stanzel did all that he was asked to do by the City.

As noted above, Mr. Stanzel repeatedly asked the City to provide a water availability letter so that he could proceed with his entirely legal, but limited development of his property. See Hearing Examiner decision, Doc 7. He submitted three letters to the City requesting such service. Doc 166-167 and 186. While the City now claims that Mr. Stanzel should have made other applications, filled out other forms, paid money and followed a hearing process, there is no proof that he was ever told to follow those procedures at the time. The City has not provided any written response to Mr. Stanzel despite his letters to the City. Indeed, Mr. Stanzel's letters of June 25, 2004 and August 9, 2006 specifically said:

If there are any problems or if this will take more than 1 week, please let me know immediately. I will require all correspondence in writing.

Doc 167, 186. To the same effect is the January 6, 2005 letter which also requests "all correspondence in writing." Doc 166.

The City claims that Mr. Stanzel should have brought his claims much earlier, though it does not raise a statute of limitation defense. However, the City admits in its brief at page 19, that: "The City did not issue a written denial of service to Mr. Stanzel, and thus, the remaining denial possibilities are an oral or de facto denial." Brief at 19. The City goes on to say that:

If any oral statement of a city official, or the fact that the City did not provide commercial water service to Mr. Stanzel was, or is construed as a denial service (sic), the Mr. Stanzel's remedy was to appeal the denial to the City's hearing examiner. But Mr. Stanzel did not seek a hearing of any kind before the City's hearing examiner.

*Id.*

However, the failure of the City to issue any kind of a written response prevents it from raising a timeliness or exhaustion claim. Washington law requires that if a denial is to trigger an obligation or deadline to act, then it must be in writing:

Neither was Mr. Harrington required to seek review of the County's interim negative communications. To trigger the statutory time limit for seeking review, an agency must file and serve a final, appealable order. RCW 90.58.180(1); RCW 34.05.542(2); *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 634, 733 P.2d 182 (1987). A letter does not meet this definition unless it clearly asserts a legal relationship and makes clear that it is the final point of the

administrative process. *Id.* A decision must be clearly cognizable as a final determination of rights. Doubts as to finality are resolved against the agency. *WCHS, Inc. v. City of Lynnwood*, 120 Wash.App. 668, 679, 86 P.3d 1169, review denied, 152 Wash.2d 1034, 103 P.3d 202 (2004).

*Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233, 1239 (2005). Note that in *Harrington* there was at least a letter; in the present case the City provided no written communication of any kind to Mr. Stanzel in response to his letters and accordingly no determination was made that his request was insufficient.

The City argues in its brief that “Mr. Stanzel declined to provide any information” about his development plans. Brief, page 8. However, no City employee testified at hearing that Mr. Stanzel was informed - verbally or in writing - that he had to follow the procedures that are now outlined.

The truth of the matter is that the City was not about to provide water to Mr. Stanzel unless he agreed to annex, with the rest of the arguments about procedure just another way to give him the “runaround.” Indeed, there is no proof that the City doesn’t have the water to serve the Stanzel property, nor are engineering or technical reasons presented as to why water cannot continue be provided to the Stanzel property.

If the City were serious about its procedures, it clearly would have responded as to what additional information was needed.

Under these circumstances, the City should not be permitted to claim a failure to exhaust administrative remedies.

#### **5.4 The City's Declaration of Tom Heinecke Should Be Stricken.**

As noted in the Hearing Examiner's decision, the City presented no witnesses at the evidentiary hearing on June 20, 2007. This was despite the efforts of Mr. Stanzel's counsel to require attendance of city staff. HE Dec., p. 4. Now the City, after the close of the hearing, seeks to interject a declaration of the very City witness (Mr. Heinecke) who refused to attend the hearing. See CP 30-31. The City wants to interject this testimony without the opportunity for cross examination by Mr. Stanzel.

The City had even asked for a continuance at the first scheduled Hearing Examiner hearing on the grounds it needed time to prepare. See Tr. April 4 at pages 1-3. At the hearing counsel for Mr. Stanzel agreed to a continuance, but only on the condition that Mr. Heinecke appear at the next hearing. *Id.* at 4. The Puyallup City Attorney responded that: "If it's necessary for them to be present they would, they would be here." *Id.*

Under these circumstances, the testimony should be

stricken, for two reasons. First, if the City wanted to make a record on these issues it had ample opportunity to do so before the Hearing Examiner and having failed to present any witnesses, waived its right to do so. Second, proceedings under LUPA are to be based on the record. As RCW 36.70C.120, dealing with the scope of review and discovery, states:

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(Emphasis supplied.)

As noted above, the City had abundant opportunity to “make a record” but chose not to do so by deliberately refusing to make Mr. Heinecke available for examination at the Hearing Examiner’s hearing. It cannot now supplement the record because the record is closed. See also *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1999), clarified on denial of reconsideration, review granted 141 Wn. 2d 1011, 10 P.3d 1071, affirmed on other grounds 146 Wn. 2d 740, 49 P.3d 867 (superior court properly denied city’s motion for reconsideration based upon

newly-proffered evidence, where the untimely proffered evidence came from sources under city's control).

Based on the foregoing, the Court should strike and not consider the Heinecke declaration nor any references to it in the City's brief.

**5.5 The Applicant Is Not Subject to the Provisions of Service Extensions Because He Is Already Connected to City Water.**

The City argues that Mr. Stanzel has not exhausted his administrative remedies because he has not submitted an application to the City under Puyallup Municipal Code (PMC) ch. 14.22.

As identified by the trial court, an application under PMC 14.22 is not required here because Mr. Stanzel is already connected to, and currently receives, City of Puyallup water. See Statement of Facts and HE Dec. at page 10, Doc 10. PMC 14.22.010 applies only to certain applicants:

all applicants for the extension/connection of water or sewer service outside the corporate limits of the city of Puyallup shall be subject to review and require approval by the city council prior to the issuance of a permit for the extension/connection of water or sewer service, except as provided in PMC 14.22.015.

(Emphasis supplied.) Since Mr. Stanzel already receives water, he does not require a "connection or extension of service."

The ordinance cited in the City's brief at pages 15-16 (Puyallup Municipal Code section 14.02.150) also does not require an existing customer to reapply for water service unless there is a "material change" in the service:

(3) A customer making any material change in the size, character or extent of the equipment or operations for which the city's service is utilized shall immediately file a new application for additional service. A change in a customer's service which requires the installation of a different or additional meter, when made at the customer's request, shall be made by the city at the customer's expense.

Puyallup Municipal Code section 14.02.150. The City never did argue that the new uses on the Stanzel property constituted a "material change." Further, the Hearing Examiner concluded in his decision (Doc 10) that:

There will be very limited improvement on the site. The increased water requirements, if any, will be very limited. This is a situation where water is already being provided and there will be no substantial increase in use levels."

As such, there is no basis to conclude that Mr. Stanzel did not comply with the city's requirements such that his action should be dismissed for failure to exhaust administrative remedies. What Mr. Stanzel is requesting is a "water availability letter" so that he may use his commercial property for commercial use, all consistent with Pierce County codes. The City is trying to use this requirement to

exact from Mr. Stanzel his commitment to annex to the city, which, as is his right, he does not want to do.

Nor is there a dispute here concerning whether the City has sufficient capacity to serve the area. Not only is service already being provided, the City already has large water lines serving the area as noted in a memo from City staff (the same Mr. Heinecke that offers a declaration here) that was admitted in evidence at the Hearing Examiner hearing. Exhibit 13 (Doc 165). The memo says, referring to Mr. Stanzel's adjacent property:

As mentioned above the property is within our UGA (Urban Growth Area) and water service area. There are existing, relatively new, 8- and 12-inch City of Puyallup water lines presently serving this area.

Thus the City of Puyallup already serves the Stanzel property and the connections are in place. The City's ordinance regarding new water service or extension of service does not apply.

**5.6. Given the City's Ordinance and Position Taken Regarding Annexation, an Application to the City Is a Futile Act.**

In its brief the City argued that Mr. Stanzel should be run through the City's application process and further that Mr. Stanzel should pay substantial fees (\$2500) to make such an application.

However, such an application would be futile because the precondition for an application is that the applicant must agree to

annexation. As PMC 14.22.010 states

Applicants must demonstrate that they have initiated or are part of an ongoing annexation process which would bring the property that is subject to a utility extension/connection application into the Puyallup city limits.

(Emphasis supplied). The Hearing Examiner correctly concluded that Mr. Stanzel is not willing to sign or agree to annexation.

The Hearing Examiner also correctly notes that a preannexation agreement is not reasonable here:

In this particular case, requiring the applicant to execute a pre-annexation agreement to receive water from the City is not reasonable because this is not an extension or significant expansion of water service.

HE Dec. at page 9, §5, Doc 10. In addition, the Pierce County code (§19D.140.100) addresses the subject of a pre-annexation agreement as “not necessary for the provision of timely and reasonable service within a purveyor’s exclusive water service area boundary.”

The City has never backed off the requirement for pre-annexation agreements in this matter or in others. In these circumstances, Washington law does not require an exhaustion of administrative remedies:

Washington law does not require exhaustion of remedies where exhaustion of remedies would be a futile act. Exhaustion of administrative remedies will not be required where resort to those procedures

would be futile. See *Washington Local 104, Boilermakers v. International Bhd. of Boilermakers*, 33 Wn. 2d 1, 203 P.2d 1019 (1949).

*Zylstra v. Piva*, 85 Wn. 2d 743, 745, 539 P.2d 823 (1975).

Exhaustion is not required where the very controversy rests on the interpretation of the underlying contract:

Here, remedies prescribed by either the bargaining act or the contract in question would have been futile where the controversy centers on the applicability of the act and the validity of the contract.

*Id.*

In the present case, the futility is not based on subjective assertions of the litigant, but on the independent review of the Hearing Examiner who confirms that the City will not agree to provide water service without a pre-annexation agreement. See HE Dec. at page 7, § 6.

The City's insistence on compliance with its regulations is also futile because the City is not going to provide a water availability letter without a pre-annexation agreement. Indeed, the undisputed evidence is that the City refused to accept Mr. Stanzel's request for a water availability letter because he was told that "the City isn't providing Water Availability Letters outside of city limits anymore." Tr. June 20, page 43. It is without purpose to send Mr. Stanzel through a path which results only in needless delay and

expense. The City is not entitled to dismissal on the grounds of failure to exhaust administrative remedies.

**5.7 The Doctrine of Exhaustion of Remedies Does Not Apply Here.**

In ordinary course, the doctrine of exhaustion of administrative remedies applies where the litigant has failed to utilize available administrative procedures. However here, as the Hearing Examiner describes, Mr. Stanzel has followed the procedures set forth in the Pierce County Code for resolution of water service disputes. The City does not argue that there are other venues of appeal to challenge the denial of service by the City.

The exhaustion of remedies doctrine applies where an agency has clearly defined mechanisms for providing relief. See *Smoke v. City of Seattle*, 132 Wn. 2d 214, 224, 937 P.2d 186 (1997). The final action under the Pierce County Code for resolution of water service disputes is a decision of the Pierce County Hearing Examiner. Indeed Pierce County Code Section 19D.140.090(F)(2) specifically calls for referral of disputes to the “Pierce County Hearing Examiner for final resolution” of disputes under the Water System Plan. (Emphasis supplied.) See HE Dec. page 8, § 2.

The Hearing Examiner is directed by the code to apply the

Timely and Reasonable Service Criteria in the Coordinated Water  
System Plan:

G. Hearing Examiner Review. Disputes referred to the Hearing Examiner shall be processed according to the provisions of Pierce County Code Chapter 1.22 as a Non Land Use Matter. Decisions by the Hearing Examiner shall be final and conclusive and must be supported by substantial evidence based on the record and the Timely and Reasonable Service Criteria contained in CWSP-Appendix C.

Pierce county code 19D.140.090. The Timely and Reasonable Criteria are set forth at Doc 182-185. Thus the resolution of whether the City must serve the Stanzel property is under the jurisdiction of the Pierce County Hearing Examiner, not internal city procedures.

Accordingly, City code is not a remedy that needs to be exhausted; under the Coordinated Water System Plan, the City's refusal to provide water service is reviewable by the Pierce County Hearing Examiner. In this case, the City has "refused to provide that water availability letter" after "numerous" requests by Mr. Stanzel. HE Dec. page 7, § 6. The City does so because they believe Mr. Stanzel should be required to agree to annex to the city. The City has taken its position and the correctness of that decision is appropriately litigated as a part of this review. Accordingly, no dismissal was appropriate on this basis.

**5.8 Conclusion: Claims of Lack of Standing Based on Alleged Failure to Exhaust Remedies were Properly Rejected by the Superior Court.**

For the reasons stated herein the Superior Court correctly determined that standing was properly established by Mr. Stanzel under LUPA and that decision should be affirmed.

**VI. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE HEARING EXAMINER HAD THE AUTHORITY TO ORDER THE CITY OF PUYALLUP TO PROVIDE A CERTIFICATE OF WATER AVAILABILITY TO MR. STANZEL.**

As described above, the Hearing Examiner has the authority under the Pierce County Code and the Court to resolve what are termed "Timely and Reasonable Disputes." See Section 19D.140.090. The "Timely and Reasonable Criteria" are set forth in Appendix C to the CWSP and were included as Exhibit 21 to the hearing. See Doc 182-185. Under "Issues Subject to Appeal under the Timely and Reasonable Process" set forth in Appendix C is the following:

Issues subject to review are limited to the following:

.....  
Annexation provisions imposed as a condition of service, provided existing authorities of City government are not altered by the CWSP, except where a Service area agreement exists between a city and a County, or as are specifically authorized by Chapter 70.116.

Accordingly, under the CWSP, the propriety of annexation

conditions are appropriate issues before the Hearing Examiner, with the clear authority to remove the conditions when, as here, such conditions are contrary to law.

The plain language of the provisions for timely and reasonable service appeals was to provide a remedy for retail customers of a utility for inappropriate actions of a water purveyor. In reviewing the municipal code at issue, the court should follow standard rules of statutory construction:

Generally, we interpret the ordinance "to best advance" the municipality's legislative purpose. *State v. C.J.*, 148 Wash.2d 672, 685, 63 P.3d 765 (2003) (citing *Morris v. Blaker*, 118 Wash.2d 133, 143, 821 P.2d 482 (1992)). We begin our analysis with a plain meaning interpretation of the language on the face of the ordinance and closely related legislation in light of the municipality's underlying legislative purposes. See *Wash. Public Ports Ass'n v. Dep't of Revenue*, 148 Wash.2d 637, 645, 62 P.3d 462 (2003); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002); *Wagg v. Estate of Dunham*, 146 Wash.2d 63, 73, 42 P.3d 968 (2002). Further, we interpret the ordinance in its entirety, reviewing all provisions in relation to each other. See *In re Detention of Williams*, 147 Wash.2d 476, 490, 55 P.3d 597 (2002).

*Eugster v. City of Spokane*, 118 Wn.App. 383, 406, 76 P.3d 741, 755 (Wn.App. Div. 3, 2003).

As described above, the Pierce County Hearing Examiner concluded that the City of Puyallup had no legal or factual justification for denying Mr. Stanzel a Certificate of Water

Availability. Indeed, at the hearing, the City did not even bother to present witnesses or evidence in support of its position. The City did not argue that it was short of water or that it was impossible (or even difficult) to serve the Stanzel property. In fact, as described above, the uncontested testimony is that the city has large water pipes right in front of the Stanzel property, out of which Mr. Stanzel is already provided water. See Doc 164 (photographs) and Doc 165.

The Hearing Examiner concluded the reason the City refuses to sign Mr. Stanzel's Certificate of Water Availability is that it demands that he first agree to be annexed by the City. As the Hearing Examiner said:

Initially the issue is whether the requirement that a pre-annexation agreement be signed prior to obtaining water on this particular parcel is appropriate. If it is appropriate, then the applicant would be required to sign it and then go through the process of applying for water service through the City. The Pierce County Code does not require a potential customer to sign a pre-annexation agreement.

Doc 9 (§ 4). The Hearing Examiner cited Pierce County Code Section 19D.140.100 in support of this decision. *Id.*

Under the circumstances of this case, state law and the Pierce County Code make clear that the Hearing Examiner erred in not exercising his authority to compel the City to provide a

Certificate of Water Availability to the Stanzel property.

The question of whether a local government can compel a customer to agree to annex in order to get water service is specifically addressed in the Pierce County CWSP and Pierce County Code. The Pierce County Code concludes, in addressing the specific needs of the public in the essential matter of water service for residential and commercial purposes, that trading water for an annexation agreement is not in the public interest:

19D.140.100 Pre-Annexation Agreement as a Condition of Service.

Pre-annexation agreements were not contemplated in the designation of exclusive water service area boundaries by the Water Utility Coordinating Committee at the time of service area boundary designation and furthermore are not necessary for the provision of timely and reasonable service within a purveyor's exclusive water service area boundary.

Therefore, a requirement that a potential customer enter into a pre-annexation agreement or a waiver of any other statutorily or constitutionally granted right as a condition of service may be challenged as unreasonable through the dispute resolution process.

(Ordinance. 96-93S § 1 (part), 1996)

(Emphasis supplied).

If the City wants to annex properties, it can do so in the usual statutory manner of getting persons to sign petitions or by holding an election. Our Supreme Court, in a recent annexation case, has emphasized that annexation is a matter of agreement between the local government and potential annexees:

The long-established statutory scheme for annexation as a matter of agreement between Redmond and the new citizens does not give authority to the BRB to force annexation on unwilling property owners. As previously noted, the moving party here, King County, has no such authority-indeed no authority at all to propose this annexation. Local government, as well as boundary review boards, must comply with the statutory process. Due process considerations support this conclusion.

*Interlake Sporting Ass'n, Inc. v. Washington State Boundary*

*Review Board. for King County*, 158 Wn. 2d 545, 556, 146 P.3d

904 (2006). In fact, there was an election in 2005 in the area of Mr.

Stanzel's property asking whether the residents wished to annex to

the City. The voters rejected annexation to the City by about 60

percent majority. Tr. June 20, p. 46.

In the present circumstances, the Hearing Examiner has the authority to review challenges to a requirement for a pre-annexation agreement. At pages 24-26 of its Brief, the City seems to argue that the Pierce County Hearing Examiner has only limited authority under state law and local ordinances. However, in fact the Pierce County Council has given their Hearing Examiner very broad authority to act. Indeed, the Hearing Examiner has specific authority to impose reasonable conditions by Pierce County Code Section 19D.140.090:

H. Boundary Line Adjustment Based Upon  
Determination of Untimely or Unreasonable Service.

If the Hearing Examiner finds that a purveyor is unable or unwilling to provide timely or reasonable service within its exclusive water service area boundary, the Hearing Examiner shall readjust the purveyor's boundaries to an area which the purveyor will be able and willing to provide service and/or impose reasonable conditions pursuant to Pierce County Code subsection 1.22.080 C., to ensure timely and reasonable service. The Hearing Examiner's determination on readjustment of a water service area boundary and/or imposition of reasonable conditions shall be supported by substantial evidence in the record.

(Emphasis supplied)

As stated in Pierce County Code 1.22.080:

D. Decision of Hearing Examiner. When acting upon any of the above specific applications or appeals, the Examiner shall have the power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions.

(Emphasis supplied). As the court will note, this is a broad and expansive authority for the Hearing Examiner to act. Limited only by whether the conditions are "reasonable," the Hearing Examiner can apply such vague provisions as "goals and policies" of "relevant plans." Such "relevant plans" of course include the provisions of the Pierce County Coordinated Water System Plan and its stated policy to assure domestic water be provided to all

customers that can reasonably be served. Rather than a contained and limited approach to his jurisdiction, the Hearing Examiner is given substantial discretion.<sup>2</sup>

Interestingly, though the City challenges whether the Hearing Examiner can act, it does not challenge the reasonableness of the requirement that the City supply water to Mr. Stanzel.

At page 25 of its brief, the City argues that the Code does not specifically give authority to a Hearing Examiner to require a municipality to supply water. However, as the foregoing subsections of the Pierce County Code indicate, the Hearing Examiner has jurisdiction over 20 different types of land use matters and 13 different types of non-land use matters. Pierce County Code 1.22.080.B. It would be unwieldy for the Code to

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<sup>2</sup> Note that the only parties permitted in “timely and reasonable disputes” are the water purveyor and the “existing or potential customer.” See Pierce County Code 19D.140.090.A.1:

1. Timely and Reasonable Disputes. Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service to these customers.

spell out each separate remedy for each separate matter under the Hearing Examiner's jurisdiction. Accordingly, the code grants broad discretion to assure that matters under the Hearing Examiner's jurisdiction meet the goals and policies of applicable plans. It is hard to imagine a broader grant of authority to act.

The Pierce County Code sets up a dispute resolution system specifically for disputes between customers and water purveyors in Pierce County. These disputes solely involve questions of whether a water purveyor, like Puyallup, should supply a customer with water. The concept that a decision maker cannot address the very issue presented to him is an illogical reading of state law and local ordinances. This dispute resolution system explicitly calls for the Pierce County Hearing Examiner to decide these issues.

Given the statutory and County code framework what relief should then be granted by the Hearing Examiner? Mr. Stanzel has shown that he has no other source of water. As the Hearing Examiner found:

It is also undisputed that the applicant cannot reasonably receive water from any other source. A private water tank would be cost prohibitive for this particular parcel of property. The nearest other water purveyor is over 3/4 mile away and cannot provide water service to this site. This is not an extension of water service because this particular property is already being serviced by the City of Puyallup.

Doc 7-8. This conclusion was based in part on the testimony of Pierce County Staff at the hearing. Tr. June 20, page 24. As the Staff explained at the hearing, "if service is denied by the City of Puyallup then Mr. Stanzel doesn't have an option for water service." Tr. June 20, page 26. The relief of changing service area boundaries to allow another purveyor to serve Mr. Stanzel is impossible because, as the Examiner found, no other purveyor is available. A letter to that effect from the adjacent water district is Exhibit 19. Doc 176. Curiously the City, as far back as 1998, refused to remove Mr. Stanzel's adjacent property from its service area because:

As mentioned above, the property is within our UGA and water service area. There are existing, relatively new, 8- and 12-inch City of Puyallup water lines presently serving this area. To remove this location from our water service area would create a very odd "island," well within our boundary. Any outside water purveyor would literally cross our water lines to provide fire flow and day-to-day usage flows.

It is our opinion that this location should remain within our water service area.

Doc 165.

Thus, if Mr. Stanzel cannot get water from the City, which has been given a "monopoly" to serve this area, Mr. Stanzel cannot get water for his legal commercial development at all.

Obviously, if a challenge to the pre-annexation agreement

as a condition to water service is permitted, then the appropriate relief is the striking of that condition. If the condition is stricken, then the City has identified no other limitations or restrictions to providing water to the Stanzel property.

The Hearing Examiner clearly and unequivocally agreed that Mr. Stanzel is entitled to water from the City. The Superior Court correctly ruled that the Hearing Examiner's legal interpretation of his jurisdiction was legally incorrect. That decision should be affirmed by this court.

## **VII. CONCLUSION.**

This appeal has a surreal quality to it. Mr. Stanzel is within the City's exclusive water service area and already receives City water. He has no other reasonable options for an essential element of residential and commercial use of his property, i.e., potable water.

On the other hand, the City has been given a monopoly by the Coordinated Water System Plan. The City brazenly attempts to hold this essential public commodity hostage to its insistence that Mr. Stanzel agree to annex to the City, a proposition that has already been rejected by the residents of the area.

The Hearing Examiner substantially agreed with petitioner Stanzel that the City should provide him water service. However,

petitioner has demonstrated to the Superior Court that the Examiner's interpretation of his authority was in error and that, under the circumstances of this case, an order compelling the City to provide water service is appropriate.

This Court should affirm the decision of the Superior Court.

DATED: OCTOBER 2, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Aramburu". The signature is written in a cursive style with a horizontal line underneath the name.

J. Richard Aramburu

WSBA 466

Attorney for Respondent Michael Stanzel

DECLARATION OF SERVICE

The undersigned declares as follows:

On the date last below written copies of the foregoing document were sent for service on counsel of record herein as follows:

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DIVISION II  
08 OCT -3 AM 11:13  
STATE OF WASHINGTON  
BY M  
DEPUTY

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

DATED at Seattle, WA this 2<sup>nd</sup> day of October, 2008.

  
Kathleen McLemore