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DIVISION II

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No. 38857-0-II

STATE OF WASHINGTON  
BY 

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COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

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City Of Puyallup, a municipal corporation, Appellant,

vs.

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

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BRIEF OF APPELLANT CITY OF PUYALLUP

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## Table of Contents

<b>I. INTRODUCTION</b> .....	4
<b>II. ASSIGNMENTS OF ERROR</b> .....	5
<b>A. Assignments of Error</b> .....	5
<b>B. Issues Pertaining to Assignments of Error</b> .....	6
<b>III. STATEMENT OF FACTS</b> .....	8
<b>A. Mr. Stanzel's Property and Business</b> .....	8
<b>B. Mr. Stanzel Fails to Submit an Application for Service and Refuses to Describe His Proposed Development</b> .....	9
<b>C. The Hearing Examiner Declines to Order Puyallup to Provide Water Service</b> .....	11
<b>D. Mr. Stanzel Commences a Land Use Petition Action</b> .....	11
<b>E. The Superior Court Reverses the Hearing Examiner</b> .....	11
<b>F. The Hearing Examiner Issues a Decision on Remand</b> .....	12
<b>G. Mr. Stanzel Submits an Application to the City</b> .....	12
<b>H. The Examiner Relieves Mr. Stanzel of the Annexation Requirement</b> .....	13
<b>I. The City Commences a Land Use Petition Action</b> .....	14
<b>J. The Court Dismisses the City's Petition</b> .....	14
<b>IV. ARGUMENT</b> .....	15
<b>A. Standard of Review</b> .....	15
<b>B. The Superior Court's Dismissal Effectively Prevented Submission of the Certified Record from the Hearing Examiner</b> .....	16
<b>C. Mr. Stanzel's Motion to Dismiss was an Unauthorized Pretrial Motion</b> .....	20
<b>D. The Examiner Based His Decision on Inaccurate Facts</b> .....	22
<b>1. Mr. Stanzel Did Not Satisfy the City's Usual Permitting Requirements</b> .....	22
<b>2. Mr. Stanzel Provided New Substantive Information About His Proposed Development</b> .....	26
<b>E. The Doctrine of Res Judicata Did Not Bar the City's Land Use Petition Action</b> .....	28
<b>F. The Hearing Examiner Failed to Apply Puyallup's Code Requirements for Water Service</b> .....	30
<b>V. CONCLUSION</b> .....	35

## Table of Authorities

### Cases

<i>Abbey Road Group, LLC v. City of Bonney Lake</i> , 141 Wash.App. 184, 192, 167 P.3d 1213 (2007).....	16, 19
<i>DeTray v. City of Olympia</i> , 121 Wash.App. 777, 785, 90 P.3d 1116 (2004).....	28
<i>Hilltop Terrace Homeowner’s Association v. Island County</i> , 126 Wash.2d 22, 31, 891 P.2d 29 (1995).....	28
<i>HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services</i> , 148 Wash.2d 451, 468, 61 P.3d 1141 (2003) .....	15, 16, 19
<i>Milestone Homes, Inc. v. City of Bonney Lake</i> , 186 P.3d 357, 361 (2008) .	16
<i>MT Development, LLC v. City of Renton</i> , 140 Wash.App. 422, 165 P.3d 427 (2007).....	34
<i>Suquamish Indian Tribe v. Kitsap County</i> , 92 Wash.App. 816, 827, 965 P.2d 636 (1998).....	20
<i>Sylvester v. Pierce County</i> , 148 Wash.App. 813, 822, 201 P.3d 381 (2009).....	16, 19
<i>Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima</i> , 122 Wash.2d 371, 382, 858 P.2d 245 (1993).....	34

### Statutes

RCW 36.70C.....	passim
RCW 36.70C.040(2) .....	17
RCW 36.70C.080.....	passim
RCW 36.70C.080(1) .....	21
RCW 36.70C.080(2) .....	16
RCW 36.70C.080(3) .....	17
RCW 36.70C.080(4) .....	17, 21
RCW 36.70C.110.....	18, 20
RCW 36.70C.110(1) .....	18
RCW 36.70C.130.....	6, 27

### Other Authorities

Ordinance No. 2777 .....	10
PCLR 1(a)(10) .....	18
PMC 14.02.150 .....	23, 24
PMC 14.02.240 .....	31
PMC 14.22 .....	24, 25, 32, 33
PMC 14.22.010 .....	25, 32
PMC 14.22.011 .....	24, 25
PMC 14.22.020 .....	32, 33
PMC 14.22.020(5) .....	32

PMC 14.26.070 .....32

**Rules**

CR 12 ..... 14, 20, 21

CR 56 ..... 14, 20, 21

RAP 10.3(a)(5)..... 19

RAP 18.14.....21

RAP 9.10.....20

## **I. INTRODUCTION**

In June of 2004, Michael Stanzel asked the City of Puyallup for a commercial water availability letter. The City asked Mr. Stanzel about his plans for his property. Mr. Stanzel told the City “it was really none of [the City’s] business, [he] just needed a commercial water availability letter.” Despite his desire for commercial water service, Mr. Stanzel did not submit an application for water service that satisfied the form and content requirements of Puyallup’s municipal code. Nor did he otherwise describe his proposed project to the City. Rather, he litigated his water service demand before the Pierce County hearing examiner and superior court.

Eventually, in September of 2008, for the first time in more than four years, Mr. Stanzel described his proposed project in an application to the City: An 8,000 to 9,000 square foot game room facility with restrooms and a kitchen. Mr. Stanzel provided a proposed site plan and architectural elevation that shows that the game room facility is a new building and entirely separate from any other building.

Under Puyallup’s municipal code, Mr. Stanzel’s proposed game room facility must have its own new connection to the Puyallup water system. In addition, Puyallup’s municipal code requires Mr. Stanzel to agree to annex his property into the City.

Mr. Stanzel declined to agree to annex his property, and again

sought relief from the hearing examiner.

In December of 2008, in response to the request for relief, the Pierce County deputy hearing examiner required Mr. Stanzel to satisfy only the City's technical and utility requirements for water service. Furthermore, the deputy hearing examiner determined that Mr. Stanzel did not have to agree to annex his property as a condition of receiving water service, and ordered the City of Puyallup to issue a water availability letter to Mr. Stanzel.

The City of Puyallup filed a land use petition in December of 2008. In January of 2009, even before the initial hearing and submittal of the administrative record, Mr. Stanzel moved the superior court to dismiss the City's petition. Despite the fact that Mr. Stanzel had, for the first time, described his proposed project in an application to the City in September of 2008, the court ruled that the issue regarding the City's requirement for annexation as a precondition to water service had previously been decided and was res judicata. The superior court granted Mr. Stanzel's motion to dismiss.

## **II. ASSIGNMENTS OF ERROR**

### ***A. Assignments of Error***

1. The Pierce County Superior Court erred when it entered its January 30, 2009 Order Granting Defendant Stanzel's Motion For Dismissal.

2. The Pierce County Hearing Examiner erred when it entered its December 10, 2008 Supplemental Decision on Remand.

***B. Issues Pertaining to Assignments of Error***

1. Mr. Stanzel filed an uncharacterized motion for dismissal only twenty-one days after the City of Puyallup filed its land use petition, and the court granted the motion only thirty days after the City filed its land use petition. The scheduled RCW 36.70C.080 initial hearing has not yet occurred, and the hearing examiner had not yet, and still has not, submitted a certified copy of the record for judicial review to the superior court. Under RCW 36.70C, did the superior court err by hearing Mr. Stanzel's dismissal motion before the initial hearing and before the certified record had been submitted to the court? (Assignment of Error 1.)

2. The Pierce County deputy hearing examiner's December 10, 2008 Supplemental Decision on Remand is based on his inaccurate summary of facts and mischaracterization of the arguments of the City. Contrary to his summary, (a) Mr. Stanzel has not satisfied all of the City's usual permitting requirements; and (b) Mr. Stanzel provided new and substantive information about his proposed development. Under RCW 36.70C.130, is the deputy examiner's decision insufficiently supported by evidence that is substantial when viewed in light of the whole record before the court? (Assignment of Error 2.)

3. In September of 2008, for the first time in more than four years, Mr. Stanzel described his proposed project in an application to the City: A new 8,000 to 9,000 square foot game room facility, separate from any other building, with restrooms and a kitchen. Of course, given the timing, Mr. Stanzel had not provided this information to the superior court when it issued its April 4, 2008 Order Granting Land Use Appeal and Remanding to the Pierce County Hearing Examiner for Further Proceedings. In the order, the superior court did not rule the issue of annexation. Under the doctrine of res judicata, did the superior court err when it ruled that the issue regarding the City's requirement for annexation as a precondition to water service had previously been decided and was res judicata? (Assignment of Error 1.)

4. In September of 2008, for the first time in more than four years, Mr. Stanzel described his proposed project in an application to the City: A new 8,000 to 9,000 square foot game room facility, separate from any other building, with restrooms and a kitchen. The City presented this new information to the Pierce County hearing examiner, and showed the examiner that Puyallup's municipal code requires the proponent of such a project to agree to annex as a condition of receiving water service. Despite this showing, the examiner determined that Mr. Stanzel did not have to agree to annex his property. Under RCW 36.70C and the Puyallup

Municipal Code, is the deputy hearing examiner's decision a clearly erroneous application of the law to the facts? (Assignment of Error 2.)

### **III. STATEMENT OF FACTS**

#### **A. Mr. Stanzel's Property and Business**

Respondent Michael Stanzel owns real property at 6224 114th Avenue Court East, in Pierce County, Washington. VT 31.<sup>1</sup> Mr. Stanzel refers to this property as the church property. VT 31. The church property contains a church building, paintball fields and a shed. VT 32.

To operate his business throughout the year, rather than just seasonally, Mr. Stanzel wants to build a game room and install additional restrooms. VT 37, 70. The purpose of the game room would be to allow people to come indoors out of bad weather. VT 70. While inside the game room, patrons could use the facility to have a birthday party, and get something to eat, like a hamburger. VT 70. Mr. Stanzel believes that even during bad weather, patrons will ride his go-carts or play a round of putt-putt golf on his course for a while, and then come indoors, into his game room. VT 70. Mr. Stanzel envisions an indoor facility like Gameworks. VT 70.

The church on Mr. Stanzel's church property receives residential

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

water service. VT 37. Mr. Stanzel wants commercial water service so that the church can be renovated to meet code so that it can be used for church services. VT 37. Mr. Stanzel also wants commercial water service so that he can add the game room that he envisions, as well as additional restrooms. VT 37. He also wants commercial water service for any other buildings that he plans to build, but does not identify or describe these buildings. VT 37.

**B. Mr. Stanzel Fails to Submit an Application for Service and Refuses to Describe His Proposed Development**

Despite his desire for commercial water service, Mr. Stanzel did not submit an application for water service that satisfied the form and content requirements of Puyallup's municipal code to the City. He also failed to engage in a pre-application conference, failed to pay an application fee, and failed to submit to a city council approval review. In fact, his requests for service were informal at best. They lacked any information about his proposed development projects, and Mr. Stanzel declined to provide any such information.

According to Mr. Stanzel, on June 25, 2004, he asked the Puyallup utilities department for a water availability letter so that he could get the

church property up to code. VT 43. CAR 167.<sup>2</sup> Mr. Stanzel claims that Colleen Harris told him that the City was not providing water availability letters outside the city limits anymore. VT 43. (Ms. Harris's alleged statement was true. The City was prohibited from granting permits for or extending water or sewer service outside its corporate boundaries by Ordinance No. 2777. CP 126-130.) According to Mr. Stanzel, Colleen Harris asked him what he was doing with the property, and Mr. Stanzel told her "it was really none of their business, [he] just needed a commercial Water Availability Letter"<sup>3</sup>. VT 43. Mr. Stanzel claims that Ms. Harris told him that if he changed the use of the property from residential to commercial, then they were going to turn the water off. VT 44.

Mr. Stanzel submitted a letter wherein he asked for a fire flow and/or water service availability letter to the Development Services Department of Puyallup on January 6, 2005. VT 45. CAR 166. According to Mr. Stanzel, the City responded by mailing a copy of the Puyallup Municipal Code to him. VT 46. Based on his review of the code, Mr. Stanzel concluded that the City was refusing service if there was not an annexation in the area in the first place, or an active annexation going on,

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<sup>2</sup> References herein to the administrative record, which is entitled, "Certified Administrative Record", will be abbreviated as "CAR". The administrative record is filed in case number 07-2-11228-1 and is part of the record in Court of Appeals No. 37697-1-II, a related appeal, but for the reasons set forth below is not yet a part of this appellate record.

<sup>3</sup> Mr. Stanzel provided the information about his property and business, set forth above, in his testimony before the hearing examiner on June 20, 2007, almost three years after his June 25, 2004 interaction with Ms. Harris.

and that he also had to sign an annexation agreement. VT 46. Mr. Stanzel is opposed to annexing his property into the City of Puyallup. VT 47.

**C. The Hearing Examiner Declines to Order Puyallup to Provide Water Service**

After Mr. Stanzel asked the Pierce County hearing examiner to order the City to provide water, the deputy examiner heard the merits of Mr. Stanzel's motion for an order compelling the City of Puyallup to provide water service on June 20, 2007. CAR 2, 15. After another hearing, the deputy hearing examiner issued his decision on July 30, 2007. CAR 1. Therein, the deputy hearing examiner denied Mr. Stanzel's request to compel the City of Puyallup to provide water service. CAR 10, 23. The deputy hearing examiner reasoned that he did not have authority to grant that specific relief. CAR 10, 23. However, the examiner allowed Mr. Stanzel to seek alternative sources of water and/or be removed from Puyallup's service area. CAR 10, 23.

**D. Mr. Stanzel Commences a Land Use Petition Action**

On August 17, 2007, Mr. Stanzel filed a land use petition action. CP 168. He asked the superior court to direct the Pierce County hearing examiner to require the City of Puyallup to provide him with water service and a water availability letter. CP 168.

**E. The Superior Court Reverses the Hearing Examiner**

A hearing on Mr. Stanzel's petition occurred February 21, 2008. CP 168. On April 4, 2008, the Pierce County Superior Court reversed the hearing examiner and ruled that the hearing examiner has the power to require the City of Puyallup to provide water service to Mr. Stanzel's property. CP 136, 168. The court ruled that Mr. Stanzel is entitled to water service from the City, "subject to Mr. Stanzel meeting the usual permitting and informational requirements of any applicant for comparable water service within the City." CP 135, 168. The court ordered Mr. Stanzel to "cooperate and supply detailed plans to the City concerning his intended project at his 6224 114<sup>th</sup> Avenue Court East Property." CP 136, 168. The court also ruled that the hearing examiner has the power to determine the reasonableness of the conditions that the City may impose for service. CP 136, 168. The court remanded the matter to the hearing examiner for further proceedings. CP 137, 168.

**F. The Hearing Examiner Issues a Decision on Remand**

On May 13, 2008, the deputy hearing examiner issued a decision on remand which essentially reiterated the rulings of the Pierce County Superior Court's April 4, 2008 order.

**G. Mr. Stanzel Submits an Application to the City**

Mr. Stanzel submitted an application for water service and a water availability letter to Puyallup in August of 2008. CP 141, 142. In

September of 2008, Mr. Stanzel provided additional information in response to the City's notice of incompleteness and request for additional information. CP 144-149. For the first time in more than four years, Mr. Stanzel described his proposed project to the City: An 8,000 to 9,000 square foot game room facility with restroom and kitchen facilities. CP 151-161. Mr. Stanzel provided a proposed site plan and elevation that shows that the game room facility is a new building and entirely separate from the existing church or any other building. CP 158-161. Although Mr. Stanzel provided additional information, he declined to agree to annex his property. CP 142.

#### **H. The Examiner Relieves Mr. Stanzel of the Annexation Requirement**

Mr. Stanzel again sought relief from the hearing examiner. CP 8. In response to the request for relief, on December 10, 2008, the deputy hearing examiner erroneously required Mr. Stanzel to satisfy only the City's technical and utility requirements for water service. CP 10. Furthermore, the deputy hearing examiner erroneously determined that Mr. Stanzel did not have to agree to annex his property as a condition of receiving water service, and erroneously ordered the City of Puyallup to issue a water availability letter to Mr. Stanzel. CP 10. Moreover, the deputy hearing examiner erroneously failed consider the City's codified annexation

requirement in light of the new and only substantive information provided by Mr. Stanzel about his proposed project, i.e., that it would be a new 8,000 to 9,000 square foot game room facility with restroom and kitchen facilities, entirely separate from the existing church or any other building. CP 10.

Rather, the deputy hearing examiner concluded that the proposed development was consistent with Mr. Stanzel's previous testimony, and the annexation issue had "already been ruled upon." CP 10.

#### **I. The City Commences a Land Use Petition Action**

The City sought review of examiner's decision. On December 30, 2008, the City of Puyallup filed a land use petition. CP 1.

#### **J. The Court Dismisses the City's Petition**

On January 21, 2009, before the initial hearing, and before the administrative record had been submitted, Mr. Stanzel filed a motion for dismissal of the City's petition. CP 13. Mr. Stanzel contended that the issue of the City's requirement for annexation as a precondition for water service had previously been decided and was res judicata. CP 13, 16-20.

The City objected to Mr. Stanzel's motion to dismiss, contending that Mr. Stanzel failed to properly cite to a rule as a basis for the motion, or otherwise characterize the motion as a motion for summary judgment (CR 56) or motion for failure to state a claim upon which relief can be granted (CR 12). CP 163. The City further contended that RCW 36.70C does not

create a unique LUPA pretrial motion, and that Mr. Stanzel had scheduled the motion before the initial hearing. CP 163, 164.

In addition, the City argued that the doctrine of res judicata did not bar the City's land use petition because the subject matter of previous litigation differed substantially from its current petition. CP 173-178. RP 14-17. Specifically, the City argued that because Mr. Stanzel described his proposed project to the City for the first time in more than four years, in September of 2008, neither the superior court or the hearing examiner could have determined in previous litigation or rulings that Mr. Stanzel should or should not be required to annex his property. CP 173-178. RP 14-17.

The superior court ruled that the issue regarding the City's requirement for annexation as a precondition to water service had previously been decided and was res judicata. CP 186. The superior court granted Mr. Stanzel's motion to dismiss. CP 185, 186.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Under the Land Use Petition Act (LUPA), RCW 36.70C, an appellate court stands in the shoes of the superior court and limits its review to the record before the hearing examiner. *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wash.2d 451, 468, 61 P.3d 1141 (2003). *Sylvester v. Pierce County*, 148 Wash.App. 813, 822,

201 P.3d 381 (2009). *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wash.App. 184, 192, 167 P.3d 1213 (2007). An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court. *HJS Development*, 148 Wash.2d at 468. See *Milestone Homes, Inc. v. City of Bonney Lake*, 186 P.3d 357, 361 (2008) (noting that under LUPA, the Court of Appeals reviews the land use decision on the basis of the administrative record, not the superior court's record or decision.)

An appellate court reviews questions of law de novo to determine whether a land use decision was supported by fact and law. *HJS Development*, 148 Wash.2d at 468. *Milestone*, 186 P.3d at 361. *Abbey Road Group*, 141 Wash. App. at 193.

**B. The Superior Court's Dismissal Effectively Prevented Submission of the Certified Record from the Hearing Examiner**

In a land use petition action, an initial hearing must be scheduled to address jurisdictional and preliminary matters. RCW 36.70C.080 (1). The parties in a land use action must note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. RCW 36.70C.080(2). In fact, 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(3) In addition, the other purpose of an initial hearing is to enter an order that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits. RCW 36.70C.080(4). The complete text of RCW 36.70C.080 is as follows:

**Initial hearing.**

(1) Within seven days after the petition is served on the parties identified in RCW 36.70C.040(2), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW 36.70C.040(2).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(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.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

The timing of the initial hearing is controlled by RCW

36.70C.080(1): The initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties.

The timing is further governed by Pierce County Local Rules pursuant to PCLR 1(a)(10). The sections of the PCLR case schedule that apply to the initial hearing and certified record are as follows:

**LUPA CASE SCHEDULE**

CASE EVENT	DEADLINE
Petition for Review of Land Use Decision Filed and Schedule Issued (RCW 36.70C.040)	
...	
Initial Hearing on Jurisdictional and Preliminary Matters (FRIDAYS ONLY) (RCW 36.70C.080)	40 days after Petition is filed
DEADLINE to file Certified Copy of Local Jurisdiction Record (RCW 36.70C.110)	<del>30</del> 45 days after Initial Hearing

The submittal timing of the certified record on review is controlled by RCW 36.70C.110(1): The local jurisdiction must submit to the court a certified copy of the record for judicial review of the land use decision within forty-five days after entry of an order to submit the record. Pierce County Local Rules also govern. As noted in the PCLR case schedule above, the deadline to file the certified record is forty-five days after the initial hearing.

Given the foregoing rules, the initial hearing in this case would not

have occurred until February 13, 2009, and the deadline to file the certified record would have been March 10, 2009. But, as noted above, the superior court dismissed the City's land use petition on January 30, 2009.

Consequently, this appeal lacks a certified record on review from the local jurisdiction. (Portions of the record before the hearing examiner informally became part of the land use petition action record. These were document attached to declarations for the January 30, 2009 hearing. CP 26-161.)

The lack of a certified record on review from the local jurisdiction is problematic for two reasons. First, under the Land Use Petition Act, RCW 36.70C, an appellate court stands in the shoes of the superior court and reviews the record before the hearing examiner. *HJS Development, Inc*, 148 Wash.2d at 468. *Sylvester*, 148 Wash.App. at 822. *Abbey Road Group, LLC*, 141 Wash.App. at 192. Without a certified record from the Pierce County hearing examiner, this Court cannot stand in the shoes of the superior court and review the record from the local jurisdiction.

Second, under RAP 10.3(a)(5), references to the record must be included for each factual statement in the statement of the case. Without a certified record from the Pierce County hearing examiner, the City cannot fully provide references to the record that was before the Pierce County hearing examiner. Please recall that the deputy hearing examiner relied on an earlier part of the record to make his decision when he concluded that the

proposed development was consistent with Mr. Stanzel's previous testimony, and the annexation issue had "already been ruled upon." CP 10.

Accordingly, the City requests that this matter be remanded to the superior court to enable the Pierce County hearing examiner to submit the certified record to the superior court. Alternatively, pursuant to RAP 9.10, the City requests that the Court of Appeals direct the Pierce County hearing examiner to prepare the certified record pursuant to RCW 36.70C.110 and transmit it to the Court of Appeals to supplement the record on appeal. The relevant portion of RAP 9.10 is as follows:

If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits or administrative records and exhibits certified by the administrative agency, or (2) correct, or direct the supplementation or correction of, the report of proceedings.

**C. Mr. Stanzel's Motion to Dismiss was an Unauthorized**

**Pretrial Motion**

RCW 36.70C does not create a unique pretrial motion. *Suquamish Indian Tribe v. Kitsap County*, 92 Wash.App. 816, 827, 965 P.2d 636 (1998). In fact, there is nothing in the statute to suggest that motions do not include CR 12 motions or summary judgment motions under CR 56. *Suquamish*, 92 Wash.App. at 827.

In this case, Mr. Stanzel failed to properly cite to a rule as a basis for

his motion to dismiss, or otherwise characterize the motion as a motion for summary judgment (CR 56) or motion for failure to state a claim upon which relief can be granted (CR 12). However, Mr. Stanzel's uncharacterized motion clearly sought full disposition of the petition action, i.e., dismissal. Consequently, the timing of the motion was contrary to the statutory scheme of RCW 36.70C. The first motions contemplated by RCW 36.70C are motions based on jurisdictional and procedural grounds, and affirmative defenses. RCW 36.70C.080(1) and (2). They must be noted for the initial hearing. RCW 36.70C.080(1) and (2). The only exception is that a motion to allow discovery may be brought sooner. RCW 36.70C.080(1). The final hearing is a hearing or trial on the merits. See RCW 36.70C.080(4). Given this scheme, Mr. Stanzel's motion should have been noted no sooner than the initial hearing, and no later than the hearing on the merits.

Despite Mr. Stanzel's failure to properly cite to a rule as a basis for his motion to dismiss, or otherwise characterize his motion, Mr. Stanzel's motion to dismiss was a probably, in effect, a motion for summary judgment under CR 56 or analogous to a motion on the merits under RAP 18.14. In either case, he substantially ignored the procedural requirements that would have provided the City with a full and fair opportunity to defend against the motion. Accordingly, the Court of Appeals should rule that the

superior court erred by hearing Mr. Stanzel's dismissal motion before the initial hearing and remand the matter for re-instatement of City's land use petition action.

**D. The Examiner Based His Decision on Inaccurate Facts**

**1. Mr. Stanzel Did Not Satisfy the City's Usual Permitting Requirements**

Mr. Stanzel failed to submit an application with required form and content to the City. In addition, Mr. Stanzel failed to participate in a pre-application conference and pay an application fee. Moreover, Mr. Stanzel failed to submit to a review before the city council and obtain its approval.

**a. Mr. Stanzel Failed to Submit an Application with Required Form and Content to the City**

Puyallup's code required Mr. Stanzel to submit an application for water service. The application form and content requirements are:

- (1) Each applicant for service shall be required to sign, on a form provided by the city, an application which shall set forth:
  - (a) Date of application;
  - (b) Name and social security number of applicant;
  - (c) Location of premises to be served;
  - (d) Size and location of water service;
  - (e) Date applicant will be ready for service;
  - (f) Whether the premises have been heretofore supplied with water by the city or its predecessors;
  - (g) Purposes for which water service is to be used, including the number of dwelling units, if any, being served;
  - (h) Address to which bills are to be mailed or delivered;
  - (i) Whether the applicant is the owner or tenant of, or agent for the premises and if tenant, the name of the property owner;

(j) Such information as the city may reasonably require[.]

PMC 14.02.150.

To apply for commercial water service, Mr. Stanzel claims to have submitted a letter, dated June 25, 2004, to the City, and did submit a letter dated January 6, 2005 to the City. CAR 166, 167.<sup>4</sup> The June 25, 2004 letter does contain a date, Mr. Stanzel's name, the location of the premises for which he wants service, and a statement that the property was currently being served by Puyallup's water utility. CAR 167. But, the letter otherwise fails to satisfy the form and content requirements of PMC 14.02.150. Specifically, the letter is not a form provided by the City, and it is unsigned. The letter lacks the social security number of Mr. Stanzel; the size and location of water service; the date Mr. Stanzel will be ready for water service; the purpose for which the water service is to be used, including the number of building units being served, if any; and the address to which bills are to be mailed or delivered. CAR 167.

Mr. Stanzel's January 6, 2005 letter has similar deficiencies. The letter is not a form provided by the City. CAR 166. The letter lacks the social security number of Mr. Stanzel; the size and location of water service; the purposes for which water service is to be used, including the

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<sup>4</sup> The June 25, 2004 letter (CAR 167) lacks a received stamp from Puyallup's Development Service, and is unsigned by Mr. Stanzel. The January 6, 2005 letter (CAR 166) contains a received stamp from Puyallup's Development Services, and is signed by Mr. Stanzel.

number of dwelling units being served, if any; and the address to which bills are to be mailed or delivered. CAR 166.

Mr. Stanzel did not otherwise supply the information required by the application content provisions of PMC 14.02.150, especially information concerning the purposes for which the requested water service would be used. In fact, when Colleen Harris asked him what he was doing with his property, Mr. Stanzel told her “it was really none of their business, [he] just needed a commercial Water Availability Letter”. VT 43.

**b. Mr. Stanzel Failed to Participate in a Pre-application Conference and Pay an Application Fee**

Puyallup’s code required Mr. Stanzel to participate in a pre-application conference, and pay an application fee. PMC 14.22.011. The relevant text of PMC 14.22.011 is:

Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of the application fee is to ensure the recovery of city costs and expenses associated with the review of the application and drafting or preparing any utility extension agreement, including but not limited to actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review, prepare and analyze the application and any proposed extension agreement. The application fee shall be a minimum of \$2,500, with additional charges due depending upon estimated reasonable city costs and expenditures in review of the application. Disputes in the fee amount charged by the city shall be resolved by appeal to the hearing examiner. All applicants shall deposit the application fee with the city before the application will be processed. The application fee shall be applied towards actual expenses and

costs of the city. Any unencumbered application fees in excess of \$2,500 shall be refunded to the applicant upon written request of the applicant within 60 days after granting or denial of the permit. . . .

PMC 14.22.011. The essential requirements of PMC 14.22.011 are as follows:

- a. An applicant must participate in a pre-application conference before his or her application will be accepted by the City.
- b. At the conference, the City and applicant must establish an application fee. The minimum application fee is \$2,500.
- c. The applicant must deposit the application fee with the City before his or her application will be processed.

Mr. Stanzel did not participate in pre-application conference. He and the City did not establish an application fee, and Mr. Stanzel did not pay an application fee to the City.

**c. Mr. Stanzel Failed to Submit to a Review Before the City Council and Obtain its Approval**

Puyallup's code required Mr. Stanzel to submit to review before the City Council and obtain its approval for commercial water service. PMC

14.22.010. The relevant text of PMC 14.22.010 is as follows:

It shall be the policy of the city of Puyallup that 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 . . . . The decision of the city council shall be a discretionary, legislative act. If approval is granted by the city council, it shall be in the form of [a] utility extension agreement approved by the city attorney.

PMC 14.22.010.

Mr. Stanzel did not present an application for commercial water service to the City Council for review; Nor has the Council approved or denied an extension or connection of water service to Mr. Stanzel's property.

## **2. Mr. Stanzel Provided New Substantive Information About His Proposed Development**

From 2004 through the summer of 2008, the only time that Mr. Stanzel provided information about his proposed project was during his June 20, 2007 testimony before the deputy hearing examiner. A complete summary, taken from Mr. Stanzel's testimony, is as follows:

Mr. Stanzel wants to build a game room and install additional restrooms. VT 37, 70. The purpose of the game room would be to allow people to come indoors out of bad weather. VT 70. While inside the game room, patrons could use the facility to have a birthday party, and get something to eat, like a hamburger. VT 70. Mr. Stanzel believes that even during bad weather, patrons will ride his go-carts or play a round of putt-putt golf on his course for a while, and then come indoors, into his game room. VT 70. Mr. Stanzel envisions an indoor facility like Gameworks. VT 70.

Mr. Stanzel provided no further information about his proposed project to the City until September of 2008. CP 144-149. In August of 2008, he finally submitted an application for water service and a water availability letter to the City. CP 141-142. The application was incomplete, and thus, in September of 2008, Mr. Stanzel provided additional information in response to the City's notice of incompleteness and request

for additional information. CP 144-161. In stark contrast to his 2007 testimony before the hearing examiner, Mr. Stanzel described his proposed project to the City in detail: An 8,000 to 9,000 square foot game room facility with restroom and kitchen facilities. CP 151-161. Mr. Stanzel also provided a proposed site plan and an architectural elevation that show that the game room facility is a new building and entirely separate from the existing church or any other building. CP 158-161.

In this case, Mr. Stanzel failed to submit an application with required form and content to the City. In addition, Mr. Stanzel failed to participate in a pre-application conference and pay an application fee, and he certainly declined to annex his property. Moreover, Mr. Stanzel failed to submit to a review before the city council and obtain its approval. Yet strangely, the hearing examiner concluded that Mr. Stanzel had satisfied all of the City's permitting requirements. In addition, Mr. Stanzel provided new and substantive information about his project to the City. But the hearing examiner minimized the scale of the project, and concluded the proposed development was consistent with Mr. Stanzel's previous testimony.

Under RCW 36.70C.130, the deputy examiner's decision was not supported by evidence that is substantial when viewed in light of the whole record before the court. Accordingly, the Court of Appeals should find that

the hearing examiner's findings were not supported by substantial evidence and were in error.

**E. The Doctrine of Res Judicata Did Not Bar the City's Land Use Petition Action**

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

Subject matters are not identical if they differ substantially. *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786. Thus, for example, a second land use application may be considered if there is a substantial change in circumstances or conditions relevant to the application **or a substantial change in the application itself**. (Emphasis added.) *Hilltop*, 126 Wash.2d at 32. *DeTray*, 121 Wash.App. at 786.

In this case, the deputy hearing examiner issued his first decision on

July 26, 2007. Although the deputy hearing examiner made a series of findings and conclusions, he issued a very narrow decision. Specifically, the deputy hearing examiner decided only as follows:

DECISION:

The request of the applicant to compel the City of Puyallup to provide water service is denied because the hearing examiner does not believe that he has authority to grant that specific relief. The applicant is allowed to seek alternative sources for water and/or the removed from the city of Puyallup's service area if desired.

Thus, he did not relieve Mr. Stanzel of his obligation to comply with the City's annexation requirement. CP 173.

In Mr. Stanzel's 2007 land use action that followed, the City and Mr. Stanzel litigated only the issue regarding the authority of the hearing examiner to compel the City of Puyallup to provide water service. CP 174. Nowhere in its oral decision on February 21, 2008 or in its written order, dated April 4, 2008, did the court address or rule on any requirements or conditions of water service, including, and especially, the issue of annexation. CP 174. In fact, the only statement from the court regarding annexation in its February 21, 2008 oral decision was ambiguous: "You don't have to agree with the City and their policies and whether an annexation is an issue or not." CP 135, 136.

As noted above, the doctrine of res judicata will only bar assertion of a claim in a subsequent land use action when it is the same claim that has been previously asserted. Res judicata occurs when a prior judgment has a

concurrence of identity in four respects, one of which is subject matter. In this case, no judgment of this court, or any other, has ruled on the issue of annexation. In addition, the City and Mr. Stanzel did not litigate the annexation issue in the land use action filed by Mr. Stanzel in 2007. Even if this action has similarities to previous matters, the subject matter cannot be identical if it differs substantially. Thus, this land use action has no concurrence of identity with respect to subject matter to any other judgment, case or decision.

Accordingly, the Court of Appeals should rule that the superior court erred when it ruled that the issue regarding the City's requirement for annexation as a precondition to water service had previously been decided and was res judicata.

**F. The Hearing Examiner Failed to Apply Puyallup's Code Requirements for Water Service**

The deputy hearing examiner, in his December 10, 2008 decision, expressly decided that Mr. Stanzel did not have to comply with Puyallup's annexation requirement. Unfortunately, the hearing examiner failed to properly consider the only substantive information about the proposed project that Mr. Stanzel had ever submitted to the City. Please recall that in September of 2008, for the first time in more than four years, Mr. Stanzel actually described his proposed project to the City: A new 8,000 to 9,000

square foot game room facility with restroom and kitchen facilities—  
entirely separate from the existing church or any other building.

The hearing examiner also failed to consider two of Puyallup's code requirements: First, PMC 14.02.240 requires that separate buildings on the same premises or on adjoining premises be served through separate service pipes and meters, and prohibits the piping system from being interconnected. The full text of PMC 14.02.240 is as follows:

14.02.240 Service to separate premises and multiple units, and resale of water.

(1) Number of Services to Separate Premises. Separate premises under single control or management will be supplied through separate individual service pipes and meters unless the city elects otherwise.

(2) Service to Multiple Units on Same Premises. Separate houses, buildings, living or business quarters on the same premises or on adjoining premises, under a single control or management, will be served through separate service pipes and meters to each or any unit and the piping system from each service will be independent of the others, and not interconnected.

(3) Resale of Water. Except by special agreement with the city, no customer shall resell any of the water received from the city, nor shall such water be delivered to premises other than those specified in such customer's application for service.

If the deputy hearing examiner would have considered Puyallup's code requirements, then he would have been compelled to conclude that Mr. Stanzel's proposed game room is governed by PMC 14.02.240(2). It is a separate building on the same premises as the church, and both are under the control of Mr. Stanzel. Thus, the game room would require its own new connection, i.e., pipes and meter, to the Puyallup water system.

Second, PMC 14.22 governs connections to, or extensions of, water or sewer service outside Puyallup's city limits. PMC 14.22.010 (. . . all applicants for the extension/connection of water or sewer service outside the corporate limits of the city of Puyallup . . .). Property owners that seek connections to Puyallup's water system must comply with various conditions. PMC 14.22.020. These conditions include a specific requirement that applicants for city water service agree to annex their property into the City. PMC 14.22.020(5). The full text of PMC 14.22.020 is as follows:

14.22.020 Permit issuance for outside city connection.

Permits or approvals for connections to city sewer or water utility service may be issued only upon the written application of the property owner and subject to the following terms and conditions:

- (1) The applicant must be within the city of Puyallup urban growth area and shall first obtain city council approval as required by PMC 14.22.010.
- (2) The applicant for any such permit shall attach to the application a construction permit duly issued to the applicant or their contractor by the appropriate county and/or political subdivision for the construction of a side sewer and/or water service.
- (3) The applicant or their licensed contractor shall agree to pay a monthly sewer and/or water service charge in strict compliance with the specifications of the city governing the construction and maintenance of side sewers and/or water services.
- (4) The applicant shall agree to pay monthly sewer and/or water service charges for sewer and/or water service in an amount computed at twice the charge for residents of the city; further, any connection fees and/or system development charges, including without limitation those detailed in PMC 14.26.070, shall also be at twice the charge to residents of the city. Upon annexation, monthly rates shall be reduced to those applicable to customers located within the city limits.
- (5) The applicant shall agree to annex to the city of Puyallup

at such time the city desires to annex the property for which water or sewer service has been extended.

If the deputy hearing examiner would have considered Puyallup's code requirements, he would have been compelled to conclude that Mr. Stanzel's application is governed by PMC 14.22.020(5). He is an owner of property outside Puyallup's city limits. And, he is an applicant that is seeking water service for his new 8,000 to 9,000 square foot game room. Accordingly, he, like every other landowner that is similarly situated, must agree to annex his property as a condition of service.

Unfortunately, rather than engaging in any analysis, the deputy hearing examiner merely decided that the "issue of whether Mr. Stanzel must agree to annex his property prior to obtaining a water availability letter has already been ruled upon." But, it could not have already been ruled upon. The deputy hearing examiner's ruling concerning annexation would have occurred in his July 2007 decision. Mr. Stanzel first provided substantive information about his proposed project in September of 2008, more than a year after the deputy hearing examiner's purported ruling concerning annexation. Consequently, in July of 2007, the hearing examiner did not know that Mr. Stanzel's proposed building would be 8000 to 9000 square feet and would contain a kitchen and bathrooms. He also did not know that the game room facility would be a stand-alone structure—entirely separate from the existing church or any other building.

Thus, he could not have properly ruled that the game room would not require its own connection to the Puyallup water system, and that Mr. Stanzel would not be required to agree to annex his property into the City.

In addition, if the deputy hearing examiner had properly considered Washington law that addresses annexation requirements as a condition of service, then he would have been compelled to conclude that Puyallup's annexation requirement is, as a matter of law, reasonable. In 1993, the Washington State Supreme Court ruled that requiring applicants to agree to annex as a condition of receiving utility service is valid and proper. *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 382, 858 P.2d 245 (1993). And in 2007, the Washington State Court of Appeals reiterated that an exclusive provider of a utility service may impose reasonable conditions of service, such as requiring an agreement to annex, and these conditions are not limited to those that relate to the capacity of the utility to provide such service. *MT Development, LLC v. City of Renton*, 140 Wash.App. 422, 165 P.3d 427 (2007).

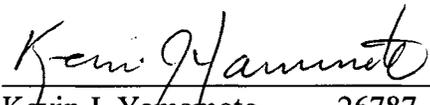
Under RCW 36.70C and the Puyallup Municipal Code, the deputy hearing examiner's decision was clearly erroneous application of the law to the facts. Accordingly, the Court of Appeals should reverse the decision of the examiner.

**V. CONCLUSION**

Based on the foregoing, the City of Puyallup respectfully requests that the Court of Appeals reverse the superior court and hearing examiner.

Respectfully submitted,

Dated: May 8, 2009

  
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FILED  
COURT OF APPEALS  
DIVISION II

No. 38857-0-II

09 MAY 11 AM 8:41  
STATE OF WASHINGTON  
BY                       
DEPUTY

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

CITY OF PUYALLUP, a municipal  
corporation,

No. 38857-0-II

Appellant,

DECLARATION OF SERVICE

vs.

MICHAEL STANZEL and PIERCE  
COUNTY, a Washington State political  
subdivision,

Respondents.

I, Kevin J. Yamamoto, declare that on the 8th day of May, 2009, I caused a true  
and correct copy of:

- Brief of Appellant, and
- Verbatim Transcript of Proceeding, January 30, 2009

to be served on the following in the manner indicated below:

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

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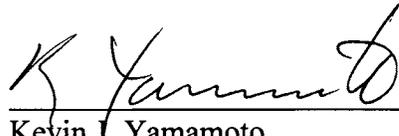
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28

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

32  
33  
34 Dated: May 8, 2009



35 Kevin J. Yamamoto 26787  
36 Senior Assistant City Attorney