

NO. 38857-0-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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DIVISION II  
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CITY OF PUYALLUP,  
Appellant,

v.

MICHAEL STANZEL and PIERCE COUNTY, a political subdivision,  
Respondents.

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 BRIEF OF RESPONDENT MICHAEL STANZEL

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ORIGINAL

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## 1. INTRODUCTION

In this appeal, the City of Puyallup seeks to relitigate claims already conclusively decided by this Court in its recent decision in *Stanzel v. City of Puyallup*, 150 Wn.App. 835, 209 P.3d 534 (June 16, 2009) (*Stanzel I*). There this Court held that the Pierce County Hearing Examiner and Superior Court correctly ruled that Mr. Stanzel was entitled to water service from the City of Puyallup for his modest commercial venture (a new game room) without first agreeing to annexation. Now, the City is back again with the same argument, i.e. that it can legally require Mr. Stanzel to annex to the city as a condition to water service. See Issue 3, City's Brief at 7. The reprise of these already decided claims is barred by *res judicata* and now by the plain language of *Stanzel I*.

The City's arguments that procedural defects require reversal are legally insufficient and only a ruse to camouflage its underlying attempt to relitigate matters already clearly decided.

The Court should affirm the Hearing Examiner and Superior Court and should also award attorney fees and costs. Such relief is appropriate under both the specific statute requiring appellate attorney fees in an unsuccessful LUPA challenge, but also because the City's attempt to raise already decided issues is frivolous.

## **2. COUNTERSTATEMENT OF FACTS**

### **2.1 Facts Related to First Appeal (*Stanzel I*)**

On June 16, 2009, a panel of this court entered its decision in *Stanzel I*. In that case the Court held as follows:

Accordingly, we hold that the hearing examiner, in this fact pattern, had authority to place a reasonable condition on the City such that it would not require Stanzel to sign a pre-annexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider.

*Stanzel I* at 853. The facts of *Stanzel I* are set forth in the Court's opinion and will not be repeated here.

### **2.2 Facts Related to Second Appeal (*Stanzel II*).**

After Judge Larkin's April 4, 2008 trial court decision in *Stanzel I* (and after the Notice of Appeal was filed), the Pierce County Hearing Examiner considered the court's remand order and on May 13, 2008 entered a Decision on Remand. See CP2 59-62.<sup>1</sup> That decision reaffirmed the Hearing Examiner's and Superior Court's rulings that Mr. Stanzel "is entitled to water service from the City of Puyallup." *Id.* No appeal or challenge was ever taken from that decision.

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<sup>1</sup> CP2 refers to the Clerk's papers filed in this appeal, distinguishing them from the Clerk's papers filed in *Stanzel I*.

However, the City did file in this Court a "Motion for Stay of Enforcement of Superior Court Decision in Land Use Petition Action Pursuant to RAP 8.1(b)(3)". That motion, made in *Stanzel I*, is found at CP2 103-111. Among the claims of injury raised by the City was that if there was not a stay, the City "may be forced to . . . (2) provide water service to Respondent Stanzel in absence of his full compliance with the City's application procedures . . . ." CP2 110. That motion was denied by this Court.

Thereafter, on August 7, 2008, Mr. Stanzel submitted plans to the City that described what construction was intended that would use City water, using the form provided by the City. CP2 141. After four years of trying, this was the first time that the City actually processed Mr. Stanzel's requests. As acknowledged in *Stanzel I*, when Mr. Stanzel gave the City a letter requesting the water availability letter on June 24, 2004, he was told that "the City was no longer providing water availability letters for property outside its city limits" and the responsible official "attempted to slide the letter back to Stanzel, stating she would not accept it." 150 Wn.App. at 839. In 2005, another letter was sent to the City requesting the water availability letter, this time directed to the public works director Tom Heinecke, but "again, the City did not

respond.” *Id.*

The City, this time responding now only through its lawyer, Mr. Yamamoto, stated that Mr. Stanzel’s application was incomplete (CP2 63-68), stating as its first point:

You indicate in your application that an agreement to annex your property into the City does not accompany your application. You also decline to agree to annex your property into the City at such time as the City desires annexation to occur by striking through a portion of the application. Please reverse your declination by agreeing to annex your property into the City at such a time that the City desires annexation to occur. Also please complete the Covenant to Annex Real Property with Power of Attorney that accompanies this letter, and return it to the City.

CP2 63 (letter of September 2, 2008, emphasis supplied). The Covenant and Power of Attorney contained provisions such that by signing the same, the City would become “attorney in fact” for Mr. Stanzel, with “all power and authority to effectuate annexation of the Property to the City. . . .” CP2 67.

On September 22, 2008, Mr. Stanzel responded to the September 2, 2008 letter from the City. CP2 69-79. In addition to providing detailed information regarding the proposal, Mr. Stanzel stated:

requiring a Power of Attorney related to annexation is plainly in violation of the terms of the orders of both the Superior Court and the Pierce County Hearing

Examiner. Thus, if you do not withdraw the demand for the Power of Attorney within 5 days of receipt of this letter, we shall file motions for contempt with the Superior Court seeking specific enforcement of these orders as well as damages and attorney fees.

CP2 70. The City did not raise any design or technical issues with the September 22, 2008 submissions by Mr. Stanzel, but sent an e-mail on September 26, 2008 that stated that “one of the permitting requirements is that applicants agree to annex their property.” CP2 80.

Given the refusal of the City, on October 15, 2008, Mr. Stanzel then applied to the Hearing Examiner to enter further orders compelling the City to issue the water availability letter as ordered by the Superior Court.<sup>2</sup> CP2 29-33. On October 23, 2008 the Hearing Examiner asked the City for a response. CP2 82. The City filed its response on October 31, reiterating its argument that an agreement to annex was required as a precondition to water service to Mr. Stanzel. CP 84-90. The City did not ask for an evidentiary hearing, nor did it present any affidavits or documents which might be considered evidence at this time; no questions were

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<sup>2</sup> In its decision in *Stanzel I*, the trial court remanded the matter to the Hearing Examiner for further proceedings, including the power to determine the reasonableness of conditions the city may impose on providing water service. That order is at CP2 54.

raised about the size of the proposed buildings. The City's response to the Hearing Examiner repeated the now familiar refrain:

Requiring an agreement to annex is reasonable as a matter of law. Accordingly, the hearing examiner should require Mr. Stanzel to agree to annex as a condition of receiving water service from the City of Puyallup.

CP2 90.

On December 10, 2008, the Hearing Examiner entered his "Supplemental Decision on Remand." The Hearing Examiner stated that "[t]he City again argued that an annexation agreement was required by Mr. Stanzel." CP 92-94. The Examiner then ruled that:

[Mr. Stanzel's] proposed development is consistent with what has been previously testified to by the applicant. The City does not specify any other information required by the applicant.

*Id.* Further, the Hearing Examiner ruled that the City's rehash of the annexation argument would not be permitted:

The issue of whether Mr. Stanzel must agree to annex his property prior to obtaining the water availability letter has already been ruled upon. No annexation agreement is required.

The City is required to issue a water availability letter within ten (10) days of the date of this Decision.

*Id.*

The City outright refused to comply with the Hearing Examiner's order and issue the water availability letter within the Hearing Examiner's deadline. After the December 20, 2009 deadline passed, counsel made a demand for the letter for Mr. Stanzel; the City continued to refuse to act. CP2 118-19. In an e-mail of December 24, 2008, the City's attorney responded, claiming that:

As you well know, the Superior Court did not rule that Mr. Stanzel may disregard the City's annexation requirement. In fact, given the posture of the case, the superior court never addressed the annexation issue.

CP2 118.<sup>3</sup> In summary the City stated:

The hearing examiner's decision is contrary to law, and thus, the City will file a separate LUPA petition to challenge the hearing examiner's decision that your client does not have to comply with Puyallup's annexation requirement.

CP2 118.

On December 30, 2008 the City then filed its own Land Use Petition under a new Pierce County Cause Number (CP2 1-12).

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<sup>3</sup> However, when the City filed a Petition for Review of this Court's decision in *Stanzel I*, the City said that: "The [Superior] court ruled that Mr. Stanzel is entitled to water service. CP 119, RPB 25." See Appendix 1 (w/o attachments) hereto, Petition for Review at page 10.

The City still did not issue the water availability letter as ordered, but did not ask for an stay or injunction as specifically allowed by LUPA under RCW 36.70C.100 (“A petitioner . . . may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review.”). A request for a stay would have required the City to demonstrate that it “is likely to prevail on the merits” and that “without the stay the party requesting it will suffer irreparable harm; . . . .” *Id.*

In the first section of its land use petition, the City asserted that:

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.

CP2 2. In the “Request for Relief” section of its petition (CP2 6-7) the City again argued that Mr. Stanzel must agree to annex before the City will give him water service, saying:

Accordingly, the superior court should reverse the decision of the deputy hearing examiner and require Mr. Stanzel to agree to annex as a condition of receiving water service from the City of Puyallup.

CP at 6-7.

On January 19, 2009, Stanzel moved for enforcement of the

court's remand order and dismissal of the new land use petition by the City on grounds that the question of an annexation precondition to water service had already been decided by the Superior Court and the Hearing Examiner. CP2 13-25.

The motion before the Court was supported by a declaration that supplied all pertinent documents before the Hearing Examiner. CP2 26-119.

The City opposed the motion and filed a response. CP2 162-182. The City argued that:

Mr. Stanzel wants a water availability letter and water service from the City of Puyallup, but does not want to comply with a mandatory condition of service, namely Puyallup's annexation requirement.

CP2 181. The City went on to say that:

Rather, Mr. Stanzel wants to obtain a special privilege, namely water service outside the City's limits without agreeing to annex his property.

CP2 181. The City concluded its response to the motion with the imperious statement that:

Accordingly, the City will provide a water availability letter and water service to Mr. Stanzel if he complies with all of Puyallup's requirements for water service, including the requirement that he agree to annex his property.

There was nothing here about being concerned at all about the size of the building or any technical requirements.

On January 30, 2009, a hearing was held on Mr. Stanzel's motion. The verbatim transcript of the hearing is found in the record as Appendix E to the Opposition of Respondent Stanzel to Motion to Continue Argument and Consolidate Appeal filed on February 28, 2009.

As may be seen from the transcript, the court emphatically and unequivocally reaffirmed its prior ruling that annexation was not required (just as the Hearing Examiner had done). This is clear from the brief exchange between Judge Larkin and Mr. Yamamoto, counsel for the City in referring to the decision in the first case:

The COURT: Well, it was my intent to give him the water without annexing his property to the City of Puyallup, wasn't it?

MR. YAMAMOTO: Yeah.

THE COURT: Yeah it was. So that is my intent. So what? Do you expect me to change that today?

This bothers me. It bothers me a lot. We had this discussion. You know what I said to you at the end of the case as well. So I am going to make it clear: He doesn't have to annex to get water. Okay? The Hearing Examiner got the message, didn't he or she? Yeah, and didn't require it. And so here we are, and that bothers me.

Transcript at page 13. Thereafter, the Court also entered an order dismissing the new action on grounds of *res judicata*. CP2 185-186. This decision is the basis for the City's new appeal.

After the notice of appeal was filed by the City on February

13, 2009, it moved in this Court to consolidate the pending appeal in *Stanzel I* with the new appeal in *Stanzel II*, but this motion was denied by this Court's Commissioner on March 3, 2009. The City filed its brief in *Stanzel II* on March 31, 2009. As noted above, a panel of this court filed its opinion in *Stanzel I* on June 16, 2009.

Respondent Stanzel brought a motion on the merits, which was partially denied by an order of the Commission on September 22, 2009. However the Commissioner did rule that: "The court has a sufficient record on which to base the present review." Ruling Denying Motion on the Merits at page 7.

### **3. ARGUMENT**

#### **3.1 Standard of Review Under LUPA**

This is an appeal under the Land Use Petition Act, RCW ch. 36.70C. (LUPA). LUPA sets the standard of review for review of land use decisions in RCW 36.70C.130. The standards under LUPA are deferential to the expertise of the Hearing Examiner, i.e. relief can only be granted if the petitioner bears the burden of proving:

(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; or

(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;

RCW 36.70C.130. The clearly erroneous test involves applying the law to the facts; under that test, the Court of Appeals determines whether it is left with a definite and firm conviction that a mistake has been committed. *Cingular Wireless, LLC v. Thurston County* 131 Wn. App. 756, 129 P.3d 300 (2006), amended on reconsideration. For purpose of review under Land Use Petition Act (LUPA), “substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Id.*

The application of the substantial evidence test under LUPA is deferential:

“[S]ubstantial evidence” is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn. 2d 740, 751-52, 49 P.3d 867 (2002). This factual review is deferential, requiring us to view all the evidence and reasonable inferences “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority ...” *Freeburg v. Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (quoting *State v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

*Peste v. Mason County*, 133 Wn. App. 456, 477, 136 P.3d 140 (2006).

In LUPA’s “clearly erroneous” review of the Hearing

Examiner's decision, his decision is also given deference:

The clearly erroneous test under standard (d) involves applying the law to facts. RCW 36.70C.130(d); *Cingular Wireless*, 131 Wn. App. at 768, 129 P.3d 300. Under that test, we determine whether we are left with a definite and firm conviction that a mistake has been committed, even though there is evidence to support a finding. *Wenatchee Sportsmen Ass'n*, 141 Wn. 2d at 176, 4 P.3d 123; *Cingular Wireless*, 131 Wn. App. at 768, 129 P.3d 300. Here we are also deferential to factual determinations by the highest forum below that exercised fact finding authority. *Pioneer Park*, 106 Wn. App. at 473, 24 P.3d 1079.

*Peste, supra*, at 477.

### **3.2 The Decision in *Stanzel I* Controls and Requires Affirmation of the Hearing Examiner and Trial Court.**

As may be seen, the City of Puyallup has been dogged in its position that Mr. Stanzel must annex to the City before it will give him water. As demonstrated above, this argument was made to the Hearing Examiner and Superior Court in *Stanzel I*. This Court in *Stanzel I* has now affirmed those decisions and determined, under the specific facts of this case, that Mr. Stanzel does not have to annex to receive his water availability letter. In *Stanzel II* the persistence continues and identical arguments are made.

Both the Hearing Examiner and Superior Court have ruled that the question of whether Mr. Stanzel was entitled to water from

the City without annexation had already been decided in *Stanzel I*.

On remand, the Hearing Examiner concluded that:

1. Michael Stanzel is entitled to water service from the City of Puyallup, subject to him meeting the usual permitting and informational requirements of any applicant for comparable water service within the city.

CP2 60. He went on to say that:

It is not anticipated that any further hearings will be necessary. Any disputes can be submitted in writing and all parties will be allowed to comment.

CP2 61. Accordingly, the matter was *res judicata*.

Under the doctrine of *res judicata*, relitigation of previously decided issues is precluded: "Resurrecting the same claim in a subsequent action is barred by *res judicata*." *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995). As stated in *Hilltop Terrace*: " 'The law of *res judicata* ... consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, and not more than once.' " 126 Wn.2d at 30, (quoting 4 Kenneth C. Davis, *Administrative Law Treatise* § 21:9, at 78 (2d ed.1983)). See also *DeTray v. City of Olympia*, 121 Wn. App. 777, 785, 90 P.3d 1116, 1120 (2004) ("In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim

in a subsequent land use application.”) The application of the doctrine applies if four criteria are met:

Under the doctrine of *res judicata*, or claim preclusion, “a prior judgment will bar litigation of a subsequent claim if the prior judgment has ‘a concurrence of identity with [the] subsequent action in (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.’ ”

*In re Coday*, 156 Wn. 2d 485, 500-01, 130 P.3d 809 (2006)

(quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn. 2d 759, 763, 887 P.2d 898 (1995)).

In the present case, all criteria are met. The subject matter is identical, indeed the present case arose from the remand to the Hearing Examiner. The cause of action, asserting that Mr. Stanzel must agree to annexation as a precondition to receiving water service, is the same and of course the parties and the “quality of the persons” are identical.<sup>4</sup>

Further, the apparent argument of the City is that the

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<sup>4</sup> In addition, even if the *res judicata* does not apply, the City did not appeal or challenge in any manner the “Decision on Remand” issued by the Hearing Examiner on June 13, 2008. See CP2 60-61 attached hereto as Appendix 2 to this brief. This decision determined that Mr. Stanzel was entitled to water service: “The City of Puyallup is required to provide water service subject to reasonable conditions.” CP2 60. The failure to appeal or challenge that decision means it is final and not subject to further review.

annexation requirement is a part of the “usual permitting and informational requirements of any applicant for water service within the City” which Mr. Stanzel is required to meet. Of course, “an applicant for water service within the City” would not be required to agree to annex for the self-evident reason that such person is already in the City. This nonsensical argument defies the clear rulings of both the Superior Court and the Hearing Examiner. Both clearly ruled that annexation cannot be required as a precondition for water service to Mr. Stanzel’s property. As the Hearing Examiner pointed out in his July 26, 2007 decision (CP2 34-44), such a condition is unreasonable because the City already provides water service to the Stanzel property:

The City of Puyallup also agreed in 1994, in the Standard Service Agreement establishing water utility service area boundaries, that the City would provide water service to this particular piece of property. The City actually has provided water to this property. The requirement that the applicant must sign a preannexation agreement, is not reasonable given these circumstances.

CP2 42.

The Court should refuse the latest attempt by the City to deny water service to Mr. Stanzel and dismiss its improper LUPA action.

The City, however, argues in its brief at page 29 that:

Nowhere in its oral decision on February 21, 2008 or 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.

However, as specified above, a panel of this Court has specifically affirmed the trial court and Hearing Examiner, holding that the Hearing Examiner had the authority, and did rule, that Mr. Stanzel did not have to agree to annexation to receive water from the City.<sup>5</sup>

The City's assignments of error and the issues pertaining thereto focus on claimed error of the Hearing Examiner and the Superior Court in not requiring Mr. Stanzel to annex to the city in return for the provision of water service. See Brief at 7. As described above, the only relief that was requested in the Land Use petition filed by the City in *Stanzel II* was an order that Mr. Stanzel must annex to the City. See CP2 at 6-7.

No matter the prior dispute, and issues regarding *res judicata*, a panel of this Court has conclusively decided these issues. In general, *Stanzel I* clearly states that the *raison d'être* of the City's continuing litigation, that Mr. Stanzel cannot receive water service without agreeing to annexation, was decided against

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<sup>5</sup> As noted above in footnote 3 herein at p. 7, the City has represented to the Supreme Court that "the [Superior] Court ruled that Mr. Stanzel is entitled to water service." See Appendix 1.

the City. The Court's holding cannot be more clear:

Accordingly, we hold that the hearing examiner, in this fact pattern, had authority to place a reasonable condition on the City such that it would not require Stanzel to sign a pre-annexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider.

150 Wn. App. at 853.

The *Stanzel I* decision also specifically addresses other points raised by the City's *Stanzel II* brief, as follows.

1. The City argues at page 34 of its brief that the cases of *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn. 2d 371, 382-83, 858 P.2d 245 (1993) and *MT Dev., LLC v. City of Renton*, 140 Wn. App. 422, 428, 165 P.3d 427 (2007) support an annexation condition to water service. However, the panel in *Stanzel I* specifically reviewed these cases and concluded that they do not apply because Mr. Stanzel already receives water service from the City. 150 Wn. App. at 852.

2. In its brief the City cites numerous provisions of its own water ordinance in support of its position. See pages 23-25 and 31-33. However, most of these provisions are specifically discussed in the *Stanzel I* decision at 150 Wn. App. at 841-46. The *Stanzel I* court concluded that Mr. Stanzel was not required to

comply with city codes because the procedure under the Pierce County Code “provides a forum for Stanzel to dispute the City’s failure to provide him with a water availability letter as a reasonable service dispute.” 150 Wn. App. at 848.

3. The City states that there was new information provided by Mr. Stanzel about his building plans, including the size of the proposed game room. See Brief at 26-28. However, as found in *Stanzel I*, Mr. Stanzel’s property is in Pierce County, not Puyallup. As the local permitting agency, it is Pierce County that regulates land use; the City cannot regulate land use outside its borders.

This is made clear in a case cited by the City:

Because the city's zoning authority ends at its borders, the requirement that applicants for sewer service outside city limits must comply with the city's “land use dimensions” is unlawful. The trial court erred in failing to grant a writ ordering the city to issue a certificate of sewer availability. We remand for issuance of the writ.

*MT Dev., LLC v. City of Renton*, 140 Wn. App. 422, 429-430, 165 P.3d 427 (2007). Similarly here, the City may be concerned about the size of the game room, but its “land use dimensions” are beyond the authority of the City to control.

4. The *Stanzel I* decision specifically dealt with the issue of whether the game room and other improvements were substantial.

150 Wn. App. at 845-46. The Court concluded:

Substantial evidence supports the hearing examiner's decision that Stanzel's proposed changes do not constitute an extension and were not material changes in the size, character, or extent of necessary city services.

150 Wn. App. At 846. As the Court makes clear in its decision, Mr. Stanzel fully explained his desire to construct "a new game room", with restrooms and kitchen facilities. *Id.*

In his most recent decision, the Hearing Examiner affirms these conclusions:

The City argues that Mr. Stanzel's expansion is much more than anticipated and that new pipes and meters will have to be installed. It is undisputed that Mr. Stanzel has submitted all of the City's usual permitting and informational requirements. The proposed development is consistent with what has previously been testified to by the applicant. The City does not specify any other information required by the applicant.

CP2 94.

The City says that it was not aware that the game room would be 8000-9000 square feet in size until recently. Brief at 13. However, since the City cannot regulate land use outside city boundaries, its concern about the game room has only to do with water consumption, not its size. Indeed, after Mr. Stanzel filed his application with the City, it asked for the "purposes for which the

water service will be used in the facility.” CP2 145. Mr. Stanzel provided detailed information in response describing that all of the water service (sinks and restrooms) would use only a modest 664 gallons per day. CP2 154. The City never asked for more information or verification of these figures, never disputed the accuracy of this information, never submitted any declarations or other materials from expert witnesses or city staff that the information submitted was inadequate; it was the City Attorney who did all the talking for the City. The City’s consistent, insistent and persistent demand was that Mr. Stanzel agree to annex as a condition to receiving water service.

As shown above, the Hearing Examiner concluded that what Mr. Stanzel described was consistent with prior testimony. In the first hearing, the City’s own comprehensive water plan was entered into evidence (Exhibit 8), showing that the City has more than 16,000,000 gallons available on a daily basis to serve its customers. CP 151. The new water consumption for Mr. Stanzel’s game room (664 gallons), is only .004% of the city supply, and is completely insignificant. The arguments about the size of the facility are nothing more than a stalking horse for the City’s relentless demands that Mr. Stanzel agree to annex to the city.

In summary, the question of whether Mr. Stanzel was entitled to a water availability letter without annexing was decided in the trial court in *Stanzel I*. The same judge confirmed in *Stanzel II* that these issues were *res judicata*. The recent decision of this court in *Stanzel I* affirms the decision. The City's present appeal, with the now endless reprise of the same issues, must be dismissed and the decisions of the Hearing Examiner and the trial court affirmed.

**3.3 Claims That the Administrative Record Is Required for Review Were Not Presented to the Trial Court; In any Event, the Administrative Record is Before the Court.**

The City claims the trial court erred because it did not have the full administrative record before it in making its decision to dismiss and that this failure was error. Brief, 16-20. Part of the point of the motion to dismiss on *res judicata* grounds was that there was no reason to consider the whole administrative record because the issue raised by the City in its LUPA petition had already been decided.

At the outset, this inadequacy issue was not presented to the trial court. The City did argue that LUPA did not normally allow the motion and that it should be treated as a summary judgment motion. However, the issue of the inadequacy of the record was

not raised below and accordingly cannot be considered now.

When issues are not raised before the trial court, then they cannot be raised before the Court of Appeals. See *Stanzel I*, 150 Wn. App. At 852, citing *In re Marriage of Sacco*, 114 Wn. 2d 1, 5, 784 P.2d 1266 (1990). Further, in the decision on the Motion on the Merits of September 22, 2009, this Court's Commissioner concludes that: "This court has a sufficient record upon which to base its present review." See page 7.

In fact, as the Commissioner concluded, the administrative record is before the Court. There was no evidentiary hearing or exhibits presented before the Hearing Examiner, and none requested by the City in its submission to him. CP 162-182. There City presented no evidence, such as declarations or exhibits; the City attorney only provided argument. There are no hearings that require preparation of a verbatim record. In fact, all of the written submissions before the Hearing Examiner were presented to the trial court:

- a) the Hearing Examiner's decision on remand (May 14, 2008), CP2 60-61;
- b) Mr. Stanzel's request for relief (October 15, 2008), CP2 29-80;

- c) the City's response (October 31, 2008), CP 84-90;
- d) the Hearing Examiner's decision of December 10, 2008, CP2 92-94.

As the December 10, 2008 decision makes clear, the foregoing requests and responses were the only materials before the Hearing Examiner that could comprise the administrative record on review. See CP2 93.

There is no error here.

### **3.4 Mr. Stanzel's Motion to Dismiss Was Not an Unauthorized Pretrial Motion**

At pages 20-22 of its brief, the City argues that the motion on which the trial court based its dismissal was an "unauthorized motion." This is loosely based on two arguments, neither of which has merit.

First, the City claims that the dismissal motion could only be brought at the "initial hearing" required of any LUPA action, which is to be set between 35 and 50 days from filing. RCW 36.70C.080. The Civil Rules for Superior Court apply to LUPA actions "to the extent that the rules are consistent with this chapter." RCW 36.70C.030(2). Our court has held that the initial hearing does not create a unique motion:

The Screens contend that this statute creates a

unique LUPA pretrial motion. But there is nothing in the statute to suggest that “motions” do not include CR 12 motions or summary judgment motions under CR 56(c). Rather, the statute seems to require simply that any motions based on jurisdictional or procedural issues be made at an initial hearing.

*Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 827, 965 P.2d 636 (1998). See also RCW 36.70C.030(2) that applies the civil rules to LUPA actions.

The point of the statute is to make sure these procedural motions are made early in the proceedings before the record is prepared and the court begins its review in earnest. The timing of the initial hearing is to allow the defendant time to prepare any procedural motions it may have. The early holding of a hearing to dismiss on grounds that *res judicata* applies does not violate the intent of the rule. Indeed, the City - the moving party and petitioner - has not claimed any prejudice because the motion to dismiss was heard on January 30, 2009, instead of February 13, 2009, when the City says it should have been heard. Brief at 19. It would be ironic indeed that a defendant in a LUPA case would have a favorable decision reversed because a hearing was held early, when LUPA itself has the purpose of establishing “expedited appeal procedures. . .” RCW 36.70C.010.

Our court has held that the doctrine of substantial

compliance does not apply to filing deadlines and service requirements of LUPA:

The court rejected their arguments, concluding that the doctrine of substantial compliance does not apply to LUPA's service and filing requirements because "LUPA provides unequivocal directives" regarding such requirements. *Id.* at 599, 972 P.2d 470. In reaching this conclusion, the court cited *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997), where Division One of this court affirmed the trial court's dismissal of a LUPA appeal because attempted service of the LUPA petition occurred 20 minutes after the auditor's office closed. *Id.* at 713, 943 P.2d 341. Thus, under these cases, filing deadlines and service on the proper parties are jurisdictional requirements. See also *Witt v. Port of Olympia*, 126 Wn. App. 752, 756, 109 P.3d 489 (2005) (service of LUPA petition on an intern rather than the statutorily required person divested the superior court of jurisdiction because the service requirements of RCW 36.70C.040(5) require strict compliance).

*Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 37-38, 184 P.3d 1278, 1281 (2008). However, the same rule does not apply to the procedure for an initial hearing:

While it is well established that statutory procedural requirements must be met in order for a superior court to exercise its appellate jurisdiction, cases standing for this proposition have involved statutory procedural requirements for filing and service of the appeal. The directive of RCW 36.70C.040(2) that a land use petition is barred unless timely served and filed comports with this general rule. However, RCW 36.70C.080(1) is a scheduling statute analogous to procedures provided in the civil rules, not statutory procedures required to invoke the appellate

jurisdiction of a superior court. Furthermore, unlike RCW 36.70C.040, the statute does not state that a land use petition is barred if a party fails to note the initial hearing within seven days. Like the Court of Appeals in *Quality Rock*, we will not elevate this procedural requirement, even though it is a statutory procedural requirement, to a jurisdictional threshold requirement.

*Conom v. Snohomish County*, 155 Wn. 2d 154, 161-162, 118 P.3d 344, 347 - 348 (2005). Thus the doctrine of substantial compliance applied to LUPA outside of service and filing requirements:

“Conversely, when filing and service deadlines are not at issue, the doctrine of substantial compliance applies.” *Keep Watson Cutoff Rural v. Kittitas County*, *supra*, 145 Wn. App. at 38.

Thus the hearing of a motion by a LUPA defendant two weeks early is not a ground for reversal of the trial court’s decision.

In fact, the basic relief requested by the City in its LUPA petition was that Mr. Stanzel should be required to annex to the City as a precondition to receiving water service. Here is what the City requested:

Accordingly, the superior court should reverse the decision of the deputy hearing examiner and require Mr. Stanzel to agree to annex as a condition of receiving water service from the City of Puyallup.

CP at 6-7. Since that issue had already been decided by the trial court in *Stanzel I* (now affirmed on appeal), a motion based on the

pleadings was entirely appropriate.

Second, the City claims that this motion should have been treated as a summary judgment motion. Brief at 21-22. But, no new facts were presented other than those before the Hearing Examiner and the exchanges of correspondence between the parties. See pages 22-23 of this brief. The core issue before the Court was whether the claims of the City found in its complaint, i.e. that annexation should be a condition of water service, had been previously decided and were *res judicata*. That issue was decided by the Court as a matter of law.

Our Courts have adopted clear rules as to when a motion should be treated as a summary judgment motion:

While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6). See *Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009, review denied, 82 Wn. 2d 1011 (1973). In such a case, the presentation of extraneous evidence would be immaterial. *Loger*, at 924, 509 P.2d 1009. In *Loger*, the trial judge considered matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute. *Loger*, at 926, 509 P.2d 1009.

*Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 121, 744 P.2d 1032, 1046 (1987). The documents that were received and put into evidence were nothing more than the documents before the Hearing Examiner and exchanges between the parties. In any event, LUPA is very clear that the Court could only consider the matters before the Hearing Examiner; the court's review "is confined to the record created by the quasi-judicial body or officer, . . ." except for circumstances not applicable here. RCW 36.70C.120.

Based on the foregoing, the doctrine of substantial compliance applies, which allows this Court to affirm the trial court where a mere technical error does not result in prejudice. *Merseal v. State Department of Licensing*, 99 Wn. App. 414, 422, 994 P.2d 262 (2000). As noted above, the doctrine of substantial compliance applied to LUPA cases. *Keep Watson Cutoff Rural v. Kittitas County, supra*, 145 Wn. App. At 38.

Given the circumstances, the completeness of the record presented and the restriction against further evidence imposed by LUPA, the trial court correctly ruled on Stanzel's dismissal motion.

**4. RESPONDENT STANZEL SHOULD BE AWARDED HIS APPELLATE ATTORNEY FEES**

**4.1 RCW 4.84.370 Requires Award of Appellate Attorney Fees if Stanzel Prevails**

Under Washington law, a prevailing party in LUPA actions may recover attorney fees under RCW 4.84.370, which provides:

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals ... of a decision by a county ... to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit ...; and

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

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

Thus where a party prevails before all levels of review, attorney fees are required under the statute:

Under RCW 4.84.370, reasonable attorney fees and costs are to be awarded to the prevailing party or substantially prevailing party on appeal. The City prevailed in front of the hearing examiner and at the superior court. It also prevails in front of this court.

Thus, we award reasonable attorney fees and costs to the City, upon compliance with RAP 18.1.

*Pavlina v. City of Vancouver*, 122 Wn. App. 520, 533, 94 P.3d 366 (2004).

The Hearing Examiner's decision to grant Mr. Stanzel the water availability letter is a "land use decision" under RCW 4.84.370 because it meets the statutory definition:

1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, the City brought a LUPA action and only a land use decisions are appealable under LUPA.

(Emphasis supplied).

In fact, one need look no farther than the petition filed in this action to determine that this is a "land use decision." The City's initial pleading in this matter is called a "LAND USE PETITION (RCW 36.70C.070)." CP2 1. The very first sentence of the City's "Land Use Petition" states:

The City of Puyallup, petitions the Pierce County Superior Court for judicial review of a land use decision of the Pierce County deputy hearing examiner, . . .

(Emphasis supplied) Thus there is no question that this is an appeal of a land use decision.

The City may argue that Mr. Stanzel was not the substantially prevailing party because the court deferred resolution of Mr. Stanzel's requests for sanctions and for an order issuing the water availability letter. However, the court did not rule against Mr. Stanzel on those issues but only held them pending resolution of the appeal. Further, the fundamental ruling on the land use petition was clear; it was dismissed on *res judicata* grounds. CP2 186.

There is also no question that respondent Stanzel has prevailed before the Hearing Examiner and the Superior Court. Accordingly if Mr. Stanzel prevails before this court, then the statutory prerequisites are met and appellate attorney fees should be awarded.

**4.2 Attorney Fees Should Be Granted under RAP 18.9(a) Because the City's Appeal Was Frivolous.**

As described herein, the City's appeal raised issues already decided by the Hearing Examiner and the trial court in *Stanzel I*. Both the Hearing Examiner and the trial court unequivocally stated that these issues could not be raised again, but the City persisted in pursuing this appeal. Now, the decision in *Stanzel I* makes clear that the City cannot force Mr. Stanzel to annex as a precondition to

receiving water from the city. The City's marathon litigation is to use municipal resources to wear down a single, private property owner seeking water services for a completely legal venture to force him to annex against his will.

Under these circumstances, the City's appeal was, and is, frivolous and the court should award attorney fees. The standard to be applied is set forth in a recent Court of Appeals decision:

RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." RAP 18.9(a).

"Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)), review denied, 164 Wn. 2d 1037, 197 P.3d 1186 (2008). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007), review denied, 162 Wn. 2d 1009, 175 P.3d 1092 (2008).

*Kinney v. Cook*, 150 Wn.App. 187, 195, 208 P.3d 1 (2009).

This Court has recently awarded fees for a frivolous appeal in *Spice v. Pierce County*, 149 Wn. App. 461, 468, 204 P.3d 254 (2009). There this Court held that there is no relief it could provide

because “the issues they raise are not properly before us.” *Id.*

Here, the issues of the annexation precondition for water service were already conclusively decided by both the Hearing Examiner and the trial court and are not properly a part of a second appeal. Indeed, during the colloquy between the trial court and counsel for the City in *Stanzel II*, counsel admitted that the court had ruled on the annexation issue, yet the City persisted with its appeal.

The Court should award appellate attorney fees because this is a frivolous action.

## **5. CONCLUSION.**

In *Stanzel I*, the Hearing Examiner, trial court and this Court ruled that, under the circumstances of this case, requiring Mr. Stanzel to annex to the City as a precondition to water service was unreasonable. Notwithstanding these clear rulings, the City filed a second appeal seeking to raise these issues again. All of this appears intended to make water service for Mr. Stanzel so difficult and so expensive that he will relent and annex to the city.

Under these circumstances, the decision of the Hearing Examiner and the trial court should be affirmed. Further, the Court should award attorney fees to Mr. Stanzel under RCW 4.84.370

and/or under RAP 18.9(a).

DATED: OCT. 22, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. 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 Stanzel

# Appendix 1

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[Signature]*

No. 37697-1-II

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

Michael Stanzel, Respondent

v.

Pierce County, a political subdivision, Respondent,

and

City of Puyallup, a municipal corporation, Petitioner.

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PETITION FOR REVIEW

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Appendix 1

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**A. IDENTITY OF PETITIONER**

The City of Puyallup asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

The Published Opinion, under Case No. 37697-1-II, filed on June 16, 2009, and the Order Denying Motion to Reconsider, filed on August 19, 2009. A copy of the Published Opinion is in the Appendix at pages A-1 through A-18. A copy of the Order Denying Motion to Reconsider is in the Appendix at pages A-19 through A-20.

**C. ISSUES PRESENTED FOR REVIEW**

Whether a Washington State municipality can require potential and existing water customers who are outside of the city's corporate limits, but inside the city's water service area, to comply with its local water utility service regulations, including requirements that potential customers (a) submit an application for water service that satisfies the form and content requirements of the municipality's code, (b) engage in a pre-application conference, (c) pay an application fee, (d) submit to a approval review, and (e) agree to annex to the municipality at a later date, as a condition of

receiving city water, when the municipality acts as a designated water service purveyor with the exclusive right to provide public water service to the water service area?

2. Pierce County has given its hearing examiner “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.” PCC 1.22.080.D. Does this “power to attach any reasonable conditions” enable the hearing examiner nullify Puyallup’s lawfully enacted water service regulations, including the requirement that applicants for water service connections or extensions agree to annex their property into the City?

#### **D. STATEMENT OF THE CASE**

##### **1. 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

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<sup>1</sup> The Pierce County Superior Court Clerk sent the administrative verbatim reports of proceedings to the Court of Appeals under separate cover without page designations. CP 129. Thus, 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”.

refers to this property as the church property. VT 31. The church property contains a church building, paintball fields and a shed. VT 32.

Mr. Stanzel's church property receives residential 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 a game room, 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. In fact, he simply notes that "[he] also intends to construct additional buildings on the site." CP 6.

## **2. 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. 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

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<sup>2</sup> The Pierce County Superior Court Clerk sent the administrative record to the Court of Appeals under separate cover without page designations. CP 129. Thus, references herein to the administrative record, which is entitled, “Certified Administrative Record”, will be abbreviated as “CAR”.

<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.

not an annexation in the area in the first place, or an active annexation going on, 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.

### **3. Mr. Stanzel Fails to Timely Pursue Administrative**

#### **Remedies**

Despite the City's alleged refusal to provide a water availability letter to Mr. Stanzel in June of 2004 and January of 2005, Mr. Stanzel never sought a hearing before the City of Puyallup hearing examiner. In fact, Mr. Stanzel delayed seeking any redress for either twenty-two or twenty-eight months, namely, until October 17, 2006. Strangely, rather than commencing his own action, Mr. Stanzel simply brought a motion for an order compelling the City of Puyallup to provide water service in a case before the Pierce County hearing examiner where he was not a party. CAR 39. (The parties to the case were the City of Puyallup and Plexus Investments, LLC. CAR 39.) Pierce County and the City opposed Mr. Stanzel's motion on jurisdictional and other grounds. CAR 205-208 and 187.

Just as strangely, the Pierce County hearing examiner waived or excused Mr. Stanzel's procedural irregularities. CAR 8, 21. Specifically, the deputy hearing examiner concluded that the applicant did not need to

go through the normal dispute resolution process because in a previous decision issued on January 12, 2006 in the Plexus Investments, LLC/Spice matter, the Hearing Examiner stated that properties located outside the City of Puyallup, yet in the City's exclusive water service provider area, could go directly to the examiner for resolutions of disputes. CAR 8, 21. The deputy hearing examiner's conclusion had a consequence, perhaps unintended: It allowed Mr. Stanzel to bring a LUPA action when the period for timely filing of such an action would have expired months ago.

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

The deputy Pierce County hearing 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.

#### **5. Mr. Stanzel Commences a Land Use Petition Action**

On August 17, 2007, Mr. Stanzel filed a land use petition action. CP 1. 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 11.

**6. The Superior Court Denies Puyallup's Motion to Dismiss for Failure to Exhaust Administrative Remedies**

The City of Puyallup moved the superior court to dismiss Mr. Stanzel's land use petition because he failed to exhaust his administrative remedies, and thus lacked standing. CP 25-29. Specifically, the City contended that Mr. Stanzel failed to submit an application, failed to pay an application fee, failed to submit to a review and approval process before the City Council, and then failed to seek redress or remedy for any of his claims with the City's hearing examiner. CP 25-29.

On October 26, 2007, the Pierce County Superior Court denied the motion. CP 75, 76. RP-A 16.<sup>4</sup> The court ruled that because Puyallup's municipal code should be strictly construed, it only applied to new connections. RP-A 16. Although Mr. Stanzel never submitted an application for water service that satisfied the form and content requirements of Puyallup's municipal code to the City, and failed to

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<sup>4</sup> The verbatim report of proceedings is comprised of two transcripts. The first is from an October 26, 2008 hearing, and is abbreviated as "RP-A". The second transcript is from a February 21, 2008 hearing, and is abbreviated as "RP-B".

engage in a pre-application conference, failed to pay an application fee, and failed to submit to a city council approval review, the court reasoned that Mr. Stanzel's property<sup>5</sup> was already connected to the City's water supply, and thus, dismissal would require Mr. Stanzel to go through another process with the City. RP-A 16.

### **7. The Superior Court Reverses the Hearing Examiner**

A hearing on Mr. Stanzel's petition occurred 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—despite an absence of any such authority in the Pierce County Code. CP 119. RP-B 26. The court ruled that Mr. Stanzel is entitled to water service. CP 119. RP-B 25. 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 119. RP-B 26. The superior court remanded the matter to the hearing examiner for further proceedings. CP 119. RP-B 28.

### **8. The City Appeals**

The City appealed the ruling of the superior court to the Court of Appeals on May 2, 2008. CP 122-127. The City contended that Mr. Stanzel failed to exhaust his administrative remedies, and thus, lacked

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<sup>5</sup> The court did not clarify what it meant by "property". Puyallup's code requires each building on a property to have a separate water connection. PMC 14.02.240.

standing to bring an RCW 36.70C land use petition, and that the hearing examiner did not have authority to order the City to provide water service. Brief of Appellant, 5, 6.

### **9. The Court of Appeals Affirms the Superior Court**

On June 16, 2009, the Court of Appeals issued its Published Opinion in response to the City's appeal. The Court concluded that Mr. Stanzel did not need to exhaust his administrative remedies with the City, i.e., comply with Puyallup's application process and obtain review before Puyallup's hearing examiner, and held that the Pierce County hearing examiner "had authority to place a reasonable condition on the City such that it would not require Mr. Stanzel to sign a pre-annexation agreement." PO 12, 18.<sup>6</sup>

### **10. The Court of Appeals Issues a Split Decision on Reconsideration**

On July 6, 2009, the City asked the Court of Appeals to reconsider its Published Opinion. Appellant City of Puyallup's Motion for Reconsideration of Decision Terminating Review and Motion to Stay Opinion, 1-16. On August 19, 2009, a majority of the Court of Appeals panel denied the City's motion. Order Denying Motion to Reconsider, 1. But, Judge Armstrong dissented as follows:

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<sup>6</sup> References to the Court of Appeals June 16, 2009 Published Opinion in this matter will be abbreviated as "PO".

Michael Stanzel has succeeded in obtaining a hearing examiner's decision that he is entitled to [a] commercial permit for his property. The superior court affirmed this finding and also ruled that the hearing examiner had the authority to order the City to provide commercial water use for Stanzel's property. We have now affirmed these rulings although Stanzel never filed the required application with the City for this use. If he had, the application would have described his proposed use with specific information that would have allowed the City to evaluate Stanzel's request. Although the City may not have the authority to deny Stanzel's application on the grounds that his property was not being annexed to the City, that does not excuse Stanzel from complying with the City's application procedure so the City can evaluate the impact of Stanzel's proposed use and effect, if any, on other city water users. I would reverse the trial court's decision, vacate the hearing examiner's findings, and require Stanzel to follow the City's application procedure.

Order Denying Motion to Reconsider, 1, 2.

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

##### **1. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court of Washington.**

The Court of Appeals ruled that Mr. Stanzel did not have to comply with Puyallup's application process, which includes a requirement that an applicant must agree to annex his or her property as a condition of receiving water or sewer service. This ruling conflicts with a longstanding decision of the Supreme Court, namely, 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).

**2. The decision of the Court of Appeals is in conflict with other decisions of the Court of Appeals.**

As noted earlier, the Court of Appeals ruled that Mr. Stanzel did not have to comply with Puyallup's application regulations, which include a requirement that an applicant must agree to annex his or her property as a condition of receiving water or sewer service. This ruling conflicts with decisions of the Court of Appeals:

- An exclusive provider of a utility service may impose reasonable conditions of service, such as requiring an agreement to annex, and conditions that may be imposed 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);
- A municipality may condition providing utility services to property lying outside its city limits on the property owners signing annexation covenants. *Vine Street Commercial Partnership v. City of Marysville*, 98 Wash.App. 541, 550, 989 P.2d 1238 (1999);
- A city may contractually require a covenant to annex as a condition of providing water service. A requirement for a covenant to annex that is given by a landowner in exchange for water service from a city is not arbitrary, capricious or contrary to

public policy. *People for the Preservation and Development of Five Mile Prairie v. City of Spokane*, 51 Wash.App. 816, 821, 822, 755 P.2d 836 (1988); and

- A city that extends the supply of water outside its corporate limits by contract may refuse to increase the supply of water for failure of the user to comply with city regulations. *Brookens v. City of Yakima*, 15 Wash.App. 464, 465-467, 550 P.2d 30 (1976).

**3. This matter involves a significant question of law under the Constitution of the State of Washington.**

The Court of Appeals ruled that Pierce County hearing examiner “had authority to place a reasonable condition on the City such that it would not require Mr. Stanzel to sign a pre-annexation agreement.” PO 12, 18. And, the Court of Appeals affirmed the superior court, which ruled that the hearing examiner has “the power to determine the reasonableness of the conditions that the City may impose for providing water service to [Mr.] Stanzel.” CP 119. RP-B 26.

Under the Washington Constitution, “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” Wash. Const. Art. XI, § 11. Hearing examiners, which are creatures of statute, only have the power to hear and decide issues that the county

legislative authority believes should be reviewed and decided by the hearing examiner. RCW 36.70.970(1). RCW 36.70.970 provides no other power to hearing examiners, including the authority to compel a municipality to provide water service or a water availability letter. Under the Pierce County Code, the hearing examiner only has

“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.”

PCC 1.22.080.D. This limited power does not include the power to nullify Puyallup’s constitutionally enacted water service regulations, including the requirement that applicants for water service connections or extensions agree to annex their property into the City.

**4. This matter involves an issue of substantial public interest that should be determined by the Supreme Court.**

There are approximately 281 cities and towns in the State of Washington. City Profiles, Municipal Research and Services Center of Washington, <http://www.mrsc.org/cityprofiles/citylist.aspx>. Many of these municipalities provide some form of utility service to customers inside and outside corporate limits. In addition, there are currently 28 public utility districts (PUDs). Of those, 23 provide electricity, 19 provide

water or wastewater services, and 13 provide local access to broadband telecommunications services. Frequently Asked Questions, Washington Public Utility District Association, <http://www.wpuda.org/pud-faqs.cfm>.

Cities, towns, counties and PUDs that provide utility services have a substantial interest in their ability to administer and regulate the utility services that they provide. Not only should they be able to establish reasonable and lawful regulations that govern conditions of service, but they should be confident that their governing authority will not be usurped by a lone, unelected county examiner who likely lacks the education, training, experience or technical expertise to properly evaluate applications for utility service.

#### **F. CONCLUSION**

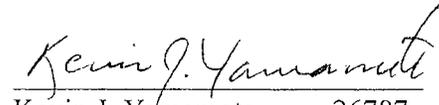
If review is granted, the City of Puyallup respectfully requests that the Supreme Court reverse the Court of Appeals and require Mr. Stanzel to comply with the City's application procedure.

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Respectfully submitted,

Dated: September 18, 2009



Kevin J. Yamamoto 26787

Senior Assistant City Attorney

Attorney for City of Puyallup

City of Puyallup

333 South Meridian

Puyallup, WA 98371

253-841-5598

# Appendix 2

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

DECISION ON REMAND

CASE NO.: Resolution of a Water Service Dispute Involving Michael Stanzel and the City of Puyallup

APPLICANT: Mr. Michael Stanzel  
2510 96<sup>th</sup> Ave Court East  
Edgewood, WA 98371

AGENT: Richard Aramburu  
Attorney at Law  
Suite 209, College Club Building  
505 Madison Street  
Seattle, WA 98104

DECISION:

In a July 26, 2007 decision, this Hearing Examiner concluded that he lacked jurisdiction to make a condition that would require the City of Puyallup to provide water to the property of Michael Stanzel. A Land Use Petition Appeal (LUPA) was filed by Michael Stanzel. That appeal was heard by the Honorable Thomas P. Larkin, Pierce County Superior Court Judge. Judge Larkin issued a decision on April 4, 2008 granting the appeal and remanding the case to the Pierce County Hearing Examiner. Based on that decision, the following are the conditions and conclusions of law. If any findings or conclusions are inconsistent with the following additional and/or changed conclusions are being issued:

1. Michael Stanzel is entitled to water service from the City of Puyallup, subject to him meeting the usual permitting and informational requirements of any applicant for comparable water service within the city.
2. The City of Puyallup is required to provide water service subject to reasonable conditions. If there is a dispute over the reasonableness of the conditions imposed by the City of Puyallup, then that matter shall come

before the Hearing Examiner. It is not anticipated that any further hearings will be necessary. Any disputes can be submitted in writing and all parties will be allowed to comment.

3. Michael Stanzel shall cooperate and supply detailed plans to the City concerning his intended project at his 6224 114<sup>th</sup> Ave. Ct. E. property. The City shall provide water for those purposes. If Michael Stanzel seeks to further develop his property, he is not automatically entitled to do so. He may need to make a further request of the City for additional water service.

ORDERED this 13th day of May, 2008.



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MARK E. HURDELBRINK  
Deputy Hearing Examiner

TRANSMITTED this 13th day of May, 2008, to the following:

**APPLICANT:** Mr. Michael Stanzel  
2510 96<sup>th</sup> Ave Court East  
Edgewood, WA 98371

**AGENT:** Richard Aramburu  
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Kevin Yamamoto  
City of Puyallup  
330 Third Street SW  
Puyallup, WA 98371

PIERCE COUNTY PLANNING DIVISION  
PIERCE COUNTY CODE ENFORCEMENT

PIERCE COUNTY DEVELOPMENT ENGINEERING  
PIERCE COUNTY UTILITIES DEPARTMENT  
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT  
FIRE PREVENTION BUREAU  
PIERCE COUNTY PARKS AND RECREATION  
PIERCE COUNTY COUNCIL



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DECLARATION OF SERVICE

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

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:

By first class mail:

David B. St.Pierre  
Deputy Prosecuting Attorney  
Pierce County Prosecutors Off. Civil  
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Kevin Yamamoto  
Puyallup City Attorney  
330 Third Street SW  
Puyallup WA 98371

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 22<sup>nd</sup> day of October 2009.



\_\_\_\_\_  
Carol Cohoe