

No. 84831-9

SUPREME COURT OF
THE STATE OF WASHINGTON

JZ KNIGHT,
Petitioner,

v.

CITY OF YELM and TTPH 3-8, LLC,
Respondents.

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BRIEF OF *AMICUS CURIAE*
CENTER FOR ENVIRONMENTAL LAW & POLICY

Rachael Paschal Osborn, WSBA No. 21618
Center for Environmental Law & Policy
25 W. Main, Suite 234
Spokane, WA 99201
509-209-2899

David L. Monthie, WSBA No. 18772
DLM & Associates
519 75th Way N.E.
Olympia, WA 98506
360-357-8539

Attorneys for *Amicus Curiae*
Center for Environmental Law & Policy

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A. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Center for Environmental Law & Policy (“CELP,” pronounced “kelp”) submits this brief to highlight the relationship between land use planning and decision-making and water resource planning and management processes at the local government level, in order to address the public policy objective of promoting meaningful citizen input in those processes. CELP has a long and committed history of involvement with the protection and management of our state’s water resources. There is little doubt that in many, if not most, areas of this state, water resources are subject to increasing demand and water supplies are increasingly over-appropriated. Careful management and prudent decisions regarding water resources will ensure that growth and economic development may occur while water resources are protected for the preservation and improvement of aquatic habitat and other public values.

This case demonstrates that clarity is needed regarding the obligations of local governments to ensure that a proposed land use development properly addresses water availability requirements at the preliminary plat stage in a manner consistent with the state’s water resource and land use laws. A decision in this case that allows and encourages citizen participation in local land use decisions and in superior court review of those decisions is critical to ensure that CELP and the

public may meaningfully engage in land use decisions affecting Washington's valuable water resources. This *amicus* brief also addresses, *inter alia*, substantive legal issues arising from the nexus between land use and water resources laws which are inherently implicated in the Court's review of the standing and attorney fees issues on appeal. These substantive issues are also presented in Respondents' supplemental briefing. See Supp. Brief of TTPH 3-8, LLC ("Tahoma Terra") at 14; Supp. Brief of City of Yelm at 7-10.

CELP is *amicus curiae* in a proceeding currently pending before this Court, *Kittitas County, et al v. Eastern Wash. Growth Mgt. Hrgs. Bd.*, Dckt. No. 84187-0, in which issues of local government land use planning authority and management of water resources overlap with issues in this case. In accordance, with RAP 10.6(b), CELP has concurrently filed a motion for leave to file this brief, which further describes CELP's longstanding interest in and familiarity with these issues.

B. STATEMENT OF THE CASE

CELP adopts and incorporates by reference the Statement of the Case set forth in Petitioner Knight's Petition for Review at pp. 2-7 and Knight's Supplemental Brief at pp. 3-5.

C. BACKGROUND

This case arises from five proposed residential developments in the City of Yelm (“City”) that collectively would have added an additional 568 service connections to the City’s existing 2135-connection water system. City’s Supp. Br. at p. 1. At the time, the City was already pumping quantities in excess of its authorized water rights to supply its growing population. Knight’s Supp. Br. at App. A. The City was not maintaining records of water connections and was unable to track previously approved development projects that were entitled to additional water connections.¹ CP 685, 729. The City’s 2002 water system plan did not include any effective strategy for accommodating the large increase in demand on its water supply represented by the new developments and acknowledged the uncertainty of acquiring future water rights. CP 699-702. In fact, the City’s 2002 water system plan noted that acquisition of significant new future water rights will be “increasingly difficult, if not impossible,” CP 702, a situation that has not changed.²

¹ The City water plan also failed to acknowledge other previously approved developments. See Department of Ecology’s *amicus* brief in Superior Court, explaining that at least 393 water connections attributed to previously approved plats within the Tahoma Terra development were not accounted for in the City’s estimate of future water demand. CP 1482-98.

² Washington presently has a statewide backlog of approximately 7,000 pending water right applications. Wash. Dept. of Ecology, 2010 Report to the Legislature and Governor: Water Resources Program Functions and Funding Structure at 3

Despite the inadequacy of its current water supply, the City planning staff recommended approval of the five preliminary plats without any finding of water availability. CP 742-53. Following public hearings on the plat applications, the City Hearing Examiner, relying on a letter from the water system engineer describing the potential for obtaining new water rights, accepted the City's argument that it had shown a "reasonable expectancy" of providing water for these five plats and therefore met the statutory requirement for "appropriate provisions" for potable water supply under state law and City code. CP 1270, 1274, 1283.

The Hearing Examiner's final decision included a condition of approval allowing the City to avoid the water availability requirement until "final plat approval and/or prior to the issuance of any building permit." CP 1284. This condition created the possibility that the developer and the City's water utility would not need to meet the water availability requirement until after individual lots were sold and the owners requested building permits.³

The City contends that it is not required to have in hand at the time of preliminary or final plat approval the water rights necessary to supply

(Sept. 2010), located at URL: <http://www.ecy.wa.gov/pubs/1011022.pdf> (last visited April 28, 2011).

³ The building permit reference derived from the separate provision under RCW 19.27.097 that applicants must provide proof of an adequate water supply for any new building requiring potable water.

water to the new developments, VRP (10/1/08) at pp. 40-43; CP 1203-04, and that the water adequacy requirement of RCW 58.17.110 may be satisfied by simple assertion that a plan exists to pursue water rights to be obtained at an unspecified future date. CP 721-22. The City also contends that the “reasonable expectation” standard for assessing water adequacy is sufficient even in the context of illegal water use. CP 724-26, 731-41, 1203-05.

The Yelm City Council approved the “reasonable expectation” standard adopted by the Hearing Examiner and allowed compliance with that standard to be delayed until the issuance of building permits. CP 25-28. Petitioner JZ Knight (“Knight”) appealed to Thurston County Superior Court. CP 9-24. Knight argued that the City failed to comply with the requirement in RCW 58.17.110 and Yelm Municipal Code to make factual findings of water availability prior to preliminary plat approval. *Id.*

Knight’s concerns arose from her position as the holder of senior water rights that she submitted were adversely affected by the City’s unlawful withdrawal of water and its failure to demonstrate that substantial new water supplies were available to serve the developments. *Id.*; CP 585-610. The Department of Ecology (“Ecology”) appeared as *amicus curiae* in superior court, contending that the “appropriate

provision” terminology set forth in RCW 58.17.110 requires a level of reliability which, at a minimum, means that water supply is legally available. CP 1482-98. Ecology also argued that the “and/or” condition allowing water availability findings to be deferred until the time of building permit approval failed to comply with the requirements of RCW 58.17.110. *Id.*

The Superior Court reversed the City’s decision approving the five plats and ordered that the condition of approval be modified to require that the applicant provide “a potable water supply adequate to serve the development” at final plat approval. CP 1636-45. The parties to this case appeared to reach agreement prior to the entry of the Superior Court’s judgment that this rewording of the condition of approval (from “and/or” to “and also”) is an accurate interpretation of RCW 58.17.110. VRP (10/1/08) at pp. 30-33; CP 1207, lines 3-9. Nonetheless, the City and one developer appealed the Superior Court decision to the Court of Appeals to argue that Knight lacked standing under the Land Use Petition Act, Ch. 36.70C RCW (“LUPA”), to appeal to Superior Court. City Court of Appeals Br. at pp. 25-32; Tahoma Terra Court of Appeals Br. at 22-32.

The Court of Appeals, construing the parties’ apparent agreement to the change in approval language ordered by the Superior Court to have essentially rendered the issue moot, concluded that Knight could no longer

prove any “direct” injury from the City’s approval of the five plats, and therefore lacked LUPA standing. *JZ Knight v. TTPH 3-8, LLC*, Dekt. No. 38581-3 (Court of Appeals, Div. II, Apr. 13, 2010) (“Decision”) at 12. This determination ignored evidence regarding the City’s ongoing pattern of unlawful withdrawals of water in violation of its water rights and evidence that such unlawful withdrawals harmed Knight’s senior water rights. Knight’s Supp. Br. at App. A; CP 585-610. The Court of Appeals reversed the Superior Court and dismissed the case. *Id.* at 13. At the same time, the Court awarded the City and its co-appellant attorneys fees under RCW 4.84.370, despite the fact that Knight had prevailed in Superior Court. *Id.* at 14.

Knight has raised an important public policy issue with regard to assuring meaningful and adequate review of water supply plans at the time of subdivision review and approval. Knight persuaded all parties that her position regarding the timing of water availability determinations for preliminary and final plats is the correct interpretation of the law. This Court should confirm that understanding, and support and encourage public participation in land use processes by reversing the Court of Appeals with regard to both the question of standing and the award of attorneys fees.

Pages 8-14 Stricken per
Commissioner's 5-9-11 letter.

4. Allowing Knight to pursue her case would not open the door to a parade of interventions by parties without legitimate interests in land use decisions.

The City asserts that reversing the Court of Appeals conclusion that Knight lacked standing would open the door to a potentially endless parade of parties intervening in land use decisions with no legitimate purpose. City Supp. Br. at pp. 7-8. But the facts here do not support the exaggerated supposition that someone residing a great distance from the proposed subdivisions with no legitimate concern about the water source could challenge the City's water adequacy determinations for subdivision approvals.

CELP urges the Court to avoid the harsh and narrow standing requirement for which the City argues, which would effectively bifurcate water resource and land use management in contravention of state policy. See RCW 43.27A.090(9), (10) (directing Ecology to cooperate with and assist local agencies in water resource-related activities); RCW 90.54.090 (requiring local governments to comply with requirements of instream flow protection statutes). Protection of water resources is a legitimate aim of the GMA mandate for water adequacy determinations and is consistent with state laws that call for integrated resource management.

5. RCW 4.84.370 must be applied to protect the rights of Washington citizens to file LUPA appeals in Superior Court.

CELP supports Knight's arguments against the award of attorney fees under RCW 4.84.370 as set forth in Knight's Petition for Review (pp. 16-20) and in Knight's Supplemental Brief (pp. 16-20). As a citizen organization acting to protect the public interest in preserving and protecting water resources, CELP urges this Court to protect the rights of Washington citizens to file one LUPA appeal in Superior Court without risk of being subject to an award of attorney fees. This interpretation of RCW 4.84.370 follows, first, from a plain reading of the statute. It is also essential in order to ensure that erroneous land use decisions may be corrected by timely judicial review, and to protect the rights of Washington citizens to participate in and advocate proper planning and management of our state's water resources.

As demonstrated in the *Kittitas* case currently before the Court, the legal connections between land use decisions and water supply is a contentious arena, yet critical to the proper management of Washington's water resources. The award of attorney fees against a successful LUPA petitioner will chill citizen participation in land use planning processes and create a barrier to robust discussion of water management and supply issues just where it counts. This would be a poor public policy outcome,

particularly at a time when water resources are under increasing stress due to population and economic growth, endangered aquatic species habitat requirements, and climate change impacts on water supplies. Careful planning and decision-making in the land use context is absolutely essential to ensure protection for and prudent use of Washington's water resources at all levels of government, and most particularly by local land use agencies. CELP urges the Court to reverse the Court of Appeals ruling on attorney fees in this matter.

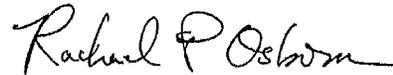
E. CONCLUSION

JZ Knight effectively won her case in Thurston County Superior Court when she persuaded all parties to agree that water adequacy for land use planning decisions must be shown no later than the time of final plat approval. But, the erroneous decision of the Court of Appeals has undermined that achievement. This Court should take the opportunity presented in this case to clarify and strengthen the important land use-water resources nexus mandated by the state Growth Management Act decision requirements. Citizens and state agencies responsible for water resource management and planning need clear judicial guidance on this issue. This Court can and should provide that guidance, and should

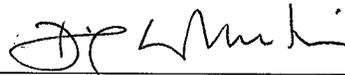
further ensure that citizens have full opportunity to participate in land use processes that affect public water resources.

DATED this 29th day of April, 2011.

Respectfully submitted,



Rachael Paschal Osborn, WSBA No. 21618
Center for Environmental Law & Policy
25 W. Main, Suite 234
Spokane, WA 99201
509-209-2899



David L. Monthie, WSBA No. 18772
DLM & Associates
519 75th Way N.E.
Olympia, WA 98506
360-357-8539

Attorneys for *Amicus Curiae*
Center for Environmental Law & Policy