

No. 84831-9

(COA No. 38581-3-II)

SUPREME COURT OF
THE STATE OF WASHINGTON

JZ KNIGHT,
Petitioner,

v.

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

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DAVID R. CARPENTER
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SUPPLEMENTAL BRIEF OF PETITIONER

Keith E. Moxon
WSBA No. 15361
GORDONDERR LLP
2025 First Avenue, Ste 500
Seattle, WA 98121
Telephone: (206) 382-9540
Facsimile: (206) 626-0675

Michael B. King
WSBA No. 14405
CARNEY BADLEY SPELLMAN P.S.
701 Fifth Avenue, Ste 3600
Seattle, WA 98104
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Petitioner

TABLE OF CONTENTS

I. SUMMARY INTRODUCTION..... 1

 A. Standing Under the Land Use Petition Act, RCW
 Ch. 36.70C..... 1

 B. Attorney Fees Under RCW 4.84.370..... 2

II. SUPPLEMENTAL STATEMENT OF THE CASE..... 3

III. ARGUMENT..... 5

 A. Knight Has LUPA Standing Under RCW
 36.70C.060(2)..... 5

 1. Knight meets the prejudice element of
 LUPA standing. 6

 2. A judgment will redress Knight’s injuries..... 12

 3. The Court of Appeals wrongly decided
 Knight’s LUPA standing based on post-
 LUPA appeal evidence. 13

 4. The City’s and TT’s approach to Knight’s
 standing is inconsistent with LUPA standing
 law. 15

 B. Attorney Fee Awards Were Erroneously Imposed
 on Knight. 16

 1. Knight prevailed on all issues litigated in
 superior court. 17

 2. Knight did not appeal beyond superior court. 18

 3. The Court of Appeals reversed the superior
 court on LUPA standing, which confirms
 that Knight prevailed in superior court. 19

 4. The superior court did not uphold the City’s
 plat approval decision. 19

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990)	18
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002)	6, 7
<i>Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i> , 528 U.S. 167, 120 S.Ct. 693 (2000)	10
<i>Gig Harbor Marina v. City of Gig Harbor</i> , 94 Wn.App. 789, 973 P.2d 1081 (2000)	18
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004)	16
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	18
<i>J.L. Storedahl & Sons, Inc. v. Cowlitz County</i> , 125 Wn.App. 1, 103 P.3d 802, (2004)	20
<i>Mountain Park Homeowners Ass'n. v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	15
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997).....	17
<i>SAVE v. City of Bothell</i> , 89 Wn.2d 862, 576 P.2d 401 (1978)	10
<i>Schmidt v. Cornerstone Invs., Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990)	17
<i>State v. Watson</i> , 155 Wn.2d 574, 122 P.3d 903 (2005).....	15
<i>Summers v. Earth Island Institute</i> , 555 U.S. ___, 129 S.Ct. 1142 (2009).10	
<i>Suquamish Indian Tribe v. Kitsap County</i> , 92 Wn.App. 816, 965 P.2d 636 (1998)	6
<i>Thornton Creek Legal Defense Fund v. City of Seattle</i> , 113 Wn.App. 34, 52 P.3d 522 (2002)	16
<i>United States v. S.C.R.A.P.</i> , 412 U.S. 669, 93 S.Ct. 2405 (1973)	10

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975).....10

Statutes and Court Rules

RCW 36.70C.060(2).....1, 6

RCW 36.70C.060(2)(a)6

RCW 36.70C.1408

RCW 4.84.3701, 2, 3, 17, 18, 19

RCW 58.17.0808

RCW 58.17.0908

RCW 58.17.1101, 2, 7, 9, 11, 15

RCW 58.17.110(2)12, 13, 16

RCW Ch. 36.70C.....1

Miscellaneous

YMC 16.12.33012

YMC Ch. 16.128

I. SUMMARY INTRODUCTION

This case presents an opportunity for the Court to clarify Washington law regarding two important land use issues: (1) the right of an “aggrieved or adversely affected” person to challenge an erroneous local land use decision -- in this case, a preliminary plat approval that allowed the City of Yelm to avoid compliance with the water availability requirements of RCW 58.17.110; and (2) the “3 strikes” rule of RCW 4.84.370, an attorney fee provision that protects a party who prevails in superior court and does not appeal any issue to the Court of Appeals.

A. Standing Under the Land Use Petition Act, RCW Ch. 36.70C.

The Land Use Petition Act, RCW Ch. 36.70C (“LUPA”) gives any “aggrieved or adversely affected” person access to the courts to appeal a land use decision. RCW 36.70C.060(2). This statute allows access to the courts for a person who presents evidence of actual, specific injuries that are ongoing. The Court of Appeals erroneously concluded that Petitioner JZ Knight lacked standing. The Court of Appeals (1) ignored compelling and undisputed evidence in support of Knight’s standing and (2) decided standing based on facts and circumstances that arose only after Knight had achieved success in superior court.

This Court should preserve the right to judicial review of land use decisions under LUPA for parties, such as Knight, whose protected interests are impaired by a land use decision. Knight provided expert testimony *that was not refuted* and other evidence showing that the City’s failure to comply with RCW 58.17.110 (to assure adequate potable water supplies before preliminary plat approvals) injured Knight’s senior water

rights. If such evidence is insufficient for LUPA standing, then no citizen will be able to protect their water rights or other property interests against wrongful deprivation by local land use decisions. Moreover, Knight's LUPA appeal resulted in a superior court order requiring the City to modify its decision to comply with RCW 58.17.110, yet the Court of Appeals reasoned that Knight had no standing because the success she achieved in superior court addressed her water rights injuries. On that basis, the Court of Appeals reversed the very ruling that protected those rights. Such a Kafkaesque result cannot be allowed to stand.

B. Attorney Fees Under RCW 4.84.370.

The Court of Appeal's LUPA standing error was compounded by its decision to impose an award of attorney fees against Knight under RCW 4.84.370. No Washington court has ever awarded attorney fees under RCW 4.84.370 against a party who prevailed on every issue litigated in superior court and did not appeal further. Nevertheless, the Court of Appeals concluded that the two parties who lost on every issue in superior court had "substantially prevailed" and that Knight should pay their attorney fees and costs.

The Court of Appeal's award of attorney fees in such circumstances is contrary to the plain meaning of RCW 4.84.370 and is contrary to every Washington appellate court decision applying this statute. The erroneous application of this attorney fees statute unfairly harms Knight, the party who prevailed on *every* issue litigated in superior court. It will also undermine the statutory right of every "aggrieved or adversely affected" person to appeal an erroneous land use decision in superior court under

LUPA. Those persons who file a LUPA appeal in superior court should not have to fear a retaliatory attorney fee claim in the court of appeals.

The statutory right to file a LUPA appeal in superior court will be chilled unless RCW 4.84.370 is applied as intended by the legislature and this Court. No fees should be awarded by a court of appeals unless a party has prevailed in all prior administrative and judicial appeals. If this “3 strikes” protection of RCW 4.84.370 is undermined, parties who lose land use cases in superior courts will be encouraged to file retaliatory appeals, not to challenge the merits of superior court decisions as LUPA envisions, but solely to seek an award of attorney fees.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Knight presented evidence to the City’s Hearing Examiner in five public hearings in July of 2007 showing that the City lacked an adequate water supply to serve its existing water connections. CP 731-41; AR 7/23/07 Moxon letter and attachments¹. She objected that the City had not made any required finding of adequate water to serve five proposed plats totaling 568 residential units near Knight’s property. CP 666-68, 731-41. No one challenged Knight’s standing or her right to participate in the proceedings before the Examiner.

Despite Knight’s objections, the Examiner approved the plats and imposed an “and/or” condition, which allowed the water availability finding to be deferred until the time of building permit approvals. CP 1284. Knight appealed this decision to the Yelm City Council. AR

¹ Documents in the Administrative Record filed by the City are not page numbered. Documents are referenced by date.

12/17/07 Appeals; CP 105-09. She argued that the “and/or” condition was an unlawful avoidance of the City’s statutory obligation under RCW 58.17.110 to make a written water availability finding *before preliminary plat approval*. CP 107 (¶¶ 5-6). She presented detailed facts to the City Council in support of her status as an “aggrieved person,” including the location of her property near the five plats, the City’s ongoing water rights “deficit,” the City’s unlawful withdrawal of water from the same aquifer that serves Knight’s six Department of Ecology-approved wells and domestic water system, and the direct impairment to Knight’s senior water rights. CP 115-16.

The Yelm City Council approved the five preliminary plats and affirmed the Examiner’s “and/or” condition of approval. CP 25-28. The Council’s decision stated that Knight was not an “aggrieved person.” CP 26 (¶ 3). However, the Council proceeded to decide all of the substantive issues raised in Knight’s appeal. CP 26-28.

Knight filed a LUPA appeal in Thurston County Superior Court and again alleged detailed facts to show her standing to appeal the five plats. CP 11-13. In response to summary judgment motions filed by the City and Tahoma Terra (“TT”) (CP 540-59), Knight submitted three declarations, including one by an expert hydrogeologist, describing the City’s ongoing unlawful withdrawal of water in excess of its water rights, the City’s inability to provide water to previously approved but not constructed development, the additional water demand attributable to the five proposed plats, and the adverse effect on her senior water rights caused by the City’s unlawful use of water and failure to obtain Ecology

approval of additional lawful water rights. CP 585-642.

The superior court denied the summary judgment motions and upheld Knight's standing under LUPA. CP 443-46; CP 659-60. After a hearing on the merits of Knight's LUPA appeal, Judge Wickham entered a final judgment concluding that the City's "and/or" condition of approval was legally erroneous. He reversed the City's approval of the five preliminary plats, ordered that the "and/or" condition be modified, granted Knight's request for written notice of final plat proceedings for the five plats, and remanded the plats to the City. CP 1636-45.

The City and TT appealed all issues decided by the superior court. Knight did not appeal any aspect of the superior court decision.

The Court of Appeals reversed the superior court's summary judgment ruling on Knight's standing and did not reach any other rulings of the superior court. Despite expressly reversing the superior court's decision, the Court of Appeals concluded that the City and TT had "substantially prevailed" in superior court. It then awarded fees and costs to the City and TT and denied Knight's motion for reconsideration. The City and TT filed cost bills claiming over \$200,000 for attorney fees and costs allegedly incurred in the Court of Appeals. City and TT Cost Bills. Knight filed objections to the cost bill and filed a Petition for Review by this Court, which was granted on November 2, 2010.

III. ARGUMENT

A. Knight Has LUPA Standing Under RCW 36.70C.060(2).

The Legislature has established a four-part LUPA standing test for an "aggrieved or adversely affected" person:

(a) **The land use decision has prejudiced or is likely to prejudice that person;**

(b) That person's asserted interests are among those the local jurisdiction was required to consider when it made the land use decision;

(c) **A judgment in that person's favor would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and**

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060(2) (emphasis added).

In this case, only two elements are at issue: the prejudice element of subpart (a) and the substantial relief element of subpart (c).

1. Knight meets the prejudice element of LUPA standing.

This Court has analyzed the prejudice element of LUPA standing in only one case. In *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), this Court confirmed two "general principles" regarding the prejudice requirement of RCW 36.70C.060(2)(a). First, "[i]n general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Nykreim*, 146 Wn.2d at 934-35, quoting *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App. 816, 829-30, 965 P.2d 636 (1998). Second, "[A] party need not show a particular level of injury in order to establish standing' to bring an action under LUPA." *Id.*, quoting *Suquamish*, 92 Wn.App. at 832.

In *Nykreim*, this Court found that intervenors lacked standing under LUPA because (1) they had only an "abstract interest of the general public in having others comply with the law," (2) they had conceded their "sole interest" was "to preserve the protections of the zoning in the[ir] district," and (3) they had failed to allege "more specific injuries adversely affecting

them or their property.” *Nykreim*, 146 Wn.2d at 935. None of these factors bar Knight’s standing. Knight’s standing is not based on a general or abstract interest in having the City comply with state laws applicable to preliminary plat approvals. Knight owns property in close proximity to the proposed plats, and she alleged specific adverse impacts to her constitutionally protected property interests – her senior water rights in the local aquifer and Thompson Creek. CP 585-642.

The City, TT, and the Court of Appeals focused on the “threatened” or “likely to prejudice” aspect of LUPA standing. They ignored clear evidence that at the time of the City’s approval of these five plats, the City was pumping water in excess of its lawful water rights without Ecology approval and without the Ecology-required mitigation to protect the rights of Knight and other holders of senior water rights. CP 601-02 (¶ 5), CP 613-14 (¶ 6-8), CP 1484-86, App. A. The City’s unlawful withdrawal of water impaired Knight’s senior water rights, because she was deprived of the protection of her senior water rights afforded by Ecology’s process for approving *lawful* water withdrawals by the City. Knight’s standing evidence clearly established that her injuries were not threatened or potential – they were actual, existing injuries in fact. *Id.* The City had committed and was continuing to commit unlawful acts by approving preliminary plats without addressing the water availability requirements of RCW 58.17.110. *Id.*

In particular, the City’s “and/or” condition of plat approval allowed the City to avoid the state law requirement to make written findings of water availability before approving preliminary plats. RCW 58.17.110.

Moreover, RCW 58.17.080 and .090 require public notice and public hearings for all preliminary plats. With such notice, persons such as Knight with specific interests at risk can review the local authority's written findings regarding the availability of a potable water supply to serve a proposed plat. The City's "and/or" condition erroneously allowed water availability findings for these plats to be made entirely outside of, and contrary to, the specific public notice and public hearing requirements applicable to all preliminary plats.²

The Court of Appeals restored the unlawful "and/or" condition and terminated the special notice requirement that the superior court ordered to protect Knight in future proceedings for these plats. This leaves Knight's specific injuries unabated. First, it is undisputed that public notice and public hearings are not required and are not provided by the City of Yelm for either final plat approvals or building permit approvals, so the statutory protections required by the legislature for preliminary plats will not be available to Knight when water availability findings are deferred until either final plat or building permit approvals. YMC Ch. 16.12 (PFR App. D). Second, there is *no* evidence in the record that the City has ever made any written finding of water availability for any preliminary plat, final plat, or building permit, so Knight has no reasonable assurance that the City will make water availability findings for final plats or building

² Although Knight ultimately agreed that water availability findings could be made for these plats at final plat approval, she did so *only* based on the important condition that she would receive notice and an opportunity to comment on the future proceedings. VRP 11/7/08, pp. 23-25. The Superior Court properly imposed this condition pursuant to RCW 36.70C.140. *Id.*

permits.³ Finally, offering Knight the alternative of appealing future final plats or building permits based on the City's failure to make water availability findings is not an effective or meaningful alternative to the protections afforded Knight under the public notice and public hearing requirements for preliminary plats under RCW 58.17.110. Unless the Court of Appeals decision is reversed, Knight will have *no* notice of the City's final plat or building permit approvals. Even if she were provided notice of building permit approvals, it is not reasonable or fair to expect her to file 568 separate LUPA appeals of individual building permits to accomplish what she achieved in *one* LUPA appeal of these five preliminary plats.

The City argues that recognizing Knight's standing to challenge these five plats "would radically expand standing" and would allow any person with senior water rights to challenge "any water-using development or activities many miles away ... even though injury to such senior water rights would be extremely unlikely and speculative." City Ans. to PFR at 10. These alarmist contentions have no basis in fact or law. Knight's standing to challenge the City's failure to comply with the clear requirements of RCW 58.17.110 for these five plats is *not* "far beyond the well-established limitations of Washington State and federal standing doctrine" as alleged by the City. *Id.* Knight's standing is well within LUPA standing as recognized and applied by this Court and federal

³ The City conceded that it does not maintain any records of building permit water connections. CP 632. Accordingly, it has no ability to effectively regulate building permit approvals based on water availability, thus rendering worthless any promise made by the City to determine water availability at the time of building permits.

courts.⁴

Knight established that the City was exceeding its Ecology-approved water rights to the detriment of her senior water rights and that such harm would continue based on the City's unlawful approval of the five plats. CP 585-642, 1482-98; App. A. The evidence of the City's unlawful water withdrawal was confirmed by Ecology's amicus brief in support of Knight's LUPA appeal. CP 1482-98.⁵ Moreover, all of the evidence

⁴ In *SAVE v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978), this Court affirmed that standing "to challenge government actions threatening environmental damage is firmly established in federal jurisprudence." *Id.* In reviewing the "injury in fact" element of the standing test, this Court confirmed that there must be an allegation that a person "will be specifically and perceptibly harmed by the action." *Id.*, citing *United States v. S.C.R.A.P.*, 412 U.S. 669, 93 S.Ct. 2405 (1973). This Court noted that the "central concern" of federal courts is that "a specific and perceptible injury" be alleged" and that a person with an interest that is "only speculative or indirect may not maintain an action." *Id.*, citing *Warth v. Seldin*, 422 U.S. 490, 514, 95 S.Ct. 2197 (1975). This Court then held that "direct and specific harm" was "adequately alleged" regarding the proposed construction of a shopping center near the homes of the organization's members. *Id.* at 868. Knight's standing is consistent with the principles recognized and applied by this Court in *SAVE*.

The City's reliance on *Summers v. Earth Island Institute*, 555 U.S. ___, 129 S.Ct. 1142 (2009), City Ans. to PFR at 10, is unavailing. The United States Supreme Court in *Summers* reaffirmed that "the traditional role of Anglo-American courts ... is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 1148. The Court observed once again that a plaintiff must "'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Id.* at 1149 quoting *Warth v. Seldin*, 422 U.S. at 498-499 (emphasis in original). Finally, the Court reiterated that a plaintiff:

must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Id. at 1149, citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693 (2000).

Knight easily satisfied these requirements.

⁵ Ecology's amicus brief was filed over vigorous objections by the City and TT. CP 265-86, 385-96. Ecology's brief confirmed that the City of Yelm (1) had overstated its water

presented by Ecology, Knight, and Knight's expert regarding the City's ongoing unlawful water withdrawals and the adverse effects on Knight's wells and water rights *was not refuted* either by the City or TT. This evidence established the specific and direct harm caused to Knight's senior water rights by the City's unlawful water withdrawals, including the additional water demand attributable to the five plats. CP 585-642, 1482-98; App. A.

Knight thus sufficiently alleged -- indeed, *proved* -- a personal stake in the City's unlawful approval of these five plats based on the "and/or" condition of approval, which allowed water supply determinations to be deferred until building permit approval, with the result that the City's unlawful water withdrawals and harm to Knight's water rights would continue unabated. The superior court's confirmation of Knight's standing was fully consistent with every formulation of the standing doctrine set forth by federal and Washington state courts.

If the detailed evidence presented by Knight regarding the direct impairment of her senior water rights and the loss of her right to receive public notice of water availability findings for proposed plats under RCW 58.17.110 is not sufficient to allow Knight to challenge a preliminary plat approval, then it is unlikely that any person will ever have standing to appeal any preliminary plat approval in Washington. Denying a citizen

rights by 112 acre-feet per year, (2) had been exceeding its Ecology-approved water rights, (3) had failed to account for the water demand attributable to 363 residential units of previously-approved development, and (4) did not have adequate water rights to meet the demand that would be generated by the 568 units of new development in the five proposed preliminary plats. CP 1482-98.

the right to file a LUPA appeal despite specific evidence, including undisputed expert testimony, regarding present and imminent injury attributable to preliminary plat approvals will effectively prevent judicial review of any plat approval in Washington that fails to comply with RCW 58.17.110(2). The result will be to protect not only unlawful plat approvals that lack written findings regarding water availability, but also plats that lack required written findings regarding drainage, streets, parks, schools, and other provisions for the public health, safety and general welfare. RCW 58.17.110(2).⁶

2. A judgment will redress Knight's injuries.

TT argues that a judgment in Knight's favor will not redress the injuries alleged by Knight because courts have no authority to "determine the status or content of the City's water rights." TT Ans. to PFR at 14. This is a disingenuous argument. The City is *required* to make a written finding regarding the availability of potable water prior to preliminary plat approval. RCW 58.17.110(2). By reviewing the parties' evidence regarding the availability of potable water – current and projected water rights – a superior court does not adjudicate water rights. It simply

⁶ Knight urges this Court to consider the specific harms to the general public, in addition to Knight's specific injuries, that will arise if Knight's LUPA standing is not protected and if the "and/or" condition is allowed to stand. For example, allowing water availability findings to be made at the time of building permit approval means that building lots will be subdivided and sold without requiring evidence of water availability at the time of final plat approval. Because Yelm's subdivision code *guarantees* that lots within a final plat will have the right to a water connection hook-up for five years, YMC 16.12.330 (PFR App. D), innocent purchasers of final platted lots will reasonably assume that potable water necessary to obtain a building permit is available. In the likely event that adequate water is not available, however, the value of such lots will be lost and innocent purchasers will be harmed – precisely the result that state subdivision laws are intended to prevent.

conducts a review of factual evidence regarding compliance with the water availability requirement of RCW 58.17.110(2). Moreover, the superior court decided Knight's LUPA appeal in her favor by ruling that the "and/or" condition was legally erroneous. It did not decide the sufficiency of the City's proof of water availability required for final plat approval. TT's argument that Knight's LUPA appeal involved an adjudication of water rights is without merit.

3. The Court of Appeals wrongly decided Knight's LUPA standing based on post-LUPA appeal evidence.

The Court of Appeals erroneously denied Knight standing by relying on the City's and TT's "agreement" to make water availability findings for final plat approvals, but not later. Decision at 12. However, this agreement did not exist at the time Knight filed her LUPA appeal. It arose only *after* Knight filed her LUPA appeal, and it arose only *after* Knight prevailed against repeated attempts by the City and TT to dismiss Knight's appeal. Only when it became clear that the superior court would reach the merits of Knight's case did the City and TT reverse their previous positions and concede that the "and/or" condition should be corrected to require proof of water availability for final plat approvals.⁷

The Court of Appeals failed to consider the facts relevant to Knight's standing *at the time she filed her LUPA appeal*. It failed to consider the

⁷ Prior to Knight's LUPA appeal of the unlawful "and/or" condition, both the City and TT contended that the Examiner's "and/or" condition of approval was proper and that water availability determinations were not required until the time of building permit approval. Respondent Knight's Amended Brief in Court of Appeals, pp. 36-39. Only after Knight filed her LUPA appeal did the City promise to comply with Knight's demand that the City make water availability findings prior to plat approvals as required by state subdivision law, not at the time of building permit approvals. CP 1207.

undisputed facts of existing injury to Knight's senior water rights and failed to reach the only reasonable conclusion that could be derived from these facts – that Knight was harmed by the City's unlawful water withdrawals (App. A) and that she would continue to be harmed by the unlawful "and/or" condition of approval for these five plats, which allowed the City to avoid proof of water availability until the time of building permit approvals.

At the time of Knight's LUPA appeal, there was *no* agreement among the parties regarding any issues raised in Knight's LUPA appeal. The City was exceeding its water rights, approving new development projects without water availability findings, and asserting that water availability was not required until the time of building permit approvals.⁸ These are the facts relevant to standing that the Court of Appeals should have considered. It failed to do so. By relying on the "agreement" regarding the "and/or" condition (which arose only *after* Knight filed her LUPA appeal), the Court of Appeals achieved a result that cannot survive scrutiny under Washington law – it allowed a LUPA petitioner's standing to be defeated by the very success she achieved by bringing her LUPA appeal in superior court.⁹

⁸ For example, in its briefing to the City Council, City staff insisted that water availability could be determined at final plat "or" building permit issuance. AR (Community Development Department Memo to Council, 1/7/08 p. 4). After Knight's appeal was denied by the City Council, the City continued to allow plats and other developments to defer water availability until the time of building permit approvals. CP 1499-1507 (PFR App. F).

⁹ The Court of Appeals also failed to apply the correct standard of review in deciding Knight's standing, which compounded its failure to consider Knight's evidence of standing. The Court of Appeals ignored the fact that the superior court's decision on Knight's LUPA standing was made in response to summary judgment motions brought

Moreover, any concession on the part of Knight pertaining to deferral of the water availability determination until final plat approval was specifically conditioned upon her right to receive notice and an opportunity to comment, which the City is required to provide for all preliminary plats under RCW 58.17.110. The Court of Appeals decision denied Knight this right.

4. The City's and TT's approach to Knight's standing is inconsistent with LUPA standing law.

The City and TT have consistently contended that Knight lacked standing to file her City Council administrative appeal and her superior court LUPA appeal because she failed to provide factual "evidence" of injury in fact during public hearings before the City's Hearing Examiner. TT Ans. to PFR at 5; City Ans. to PFR at 7; TT Op. Br. at 15, 24; CP 49, 137-41, 216. No legal authority supports such a harsh evidentiary test for a person's standing to appeal land use decisions in Washington. The superior court properly rejected the City's and TT's arguments that Knight was required to submit a declaration or affidavit presenting proof of a specific injury in fact at the first public hearings on these five plats in order to preserve her right to file administrative or judicial appeals.¹⁰

by TT and the City. CP 540-59. As the non-moving party, Knight was entitled to have all facts and reasonable inferences from those facts regarding standing viewed in the light most favorable to her. *Mountain Park Homeowners Ass'n. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). It appears the Court of Appeals was "detoured" by its erroneous reliance on an "agreement" that was reached among the parties *after* Knight's LUPA appeal had been filed. Decision at 12.

¹⁰ Even if Knight had not presented substantial evidence of specific injuries in fact resulting from the City's unlawful decision, Washington courts favor standing in cases involving issues of substantial public importance. This Court has determined that "traditional standing to bring a lawsuit is not an absolute bar to a court's review where an important issue is at stake." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005),

B. Attorney Fee Awards Were Erroneously Imposed on Knight.

Attorney fee awards in land use appeals are authorized under RCW 4.84.370(1):

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific ... plat ... or similar land use approval or decision.

However, any award of attorney fees under this statute is subject to three limitations, two of which the Court of Appeals failed to apply in this case.

First, a prevailing party seeking an award of fees (before the court of appeals or this Court) must have been "the prevailing party or substantially prevailing party in all prior judicial proceedings." RCW 4.84.3870(1)(b). The City and TT did *not* prevail in superior court, because they lost on every issue that was litigated in court.

Second, a county, city, or town that prevails at the court of appeals is entitled to a fee award only "if its decision is upheld at superior court and on appeal." Here, the City's approval of the five plats was *not* upheld by

citing *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) (when an issue "is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture," we will "take a 'less rigid and more liberal' approach to standing." Similarly, the standing requirement has been treated liberally when it is in the parties' best interests to resolve the substantive underlying issues. *See, e.g., Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 48, 52 P.3d 522 (2002). Certainly, the rights of citizens to challenge unlawful land use decisions involving important public policy issues such the specific health, safety, and general welfare requirements of preliminary plat approvals under RCW 58.17.110(2), including issues such as the availability of an adequate potable water supply, are of "substantial public importance" and therefore should warrant a fair and reasonable application of the standing doctrine to enable resolution of the underlying issues.

the superior court. The judgment expressly provided that Knight's LUPA petition was "granted" and the City's approval of the five plats was "reversed." CP 1644.

The Court of Appeals therefore erred by awarding fees and costs to the City and TT. Knight prevailed in superior court. The City and TT did not. The City's decision was not "upheld" by the superior court, it was *reversed* and modified to address the only condition of the City's plat approval challenged by Knight -- the unlawful "and/or" condition of approval. The City and TT thus were not entitled to an award of fees under RCW 4.84.370.

1. Knight prevailed on all issues litigated in superior court.

This Court has set forth the general rule regarding who is a prevailing party for purposes of an award of attorney fees: "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997), citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). "If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties." *Id.* Under this test, it is clear that Knight "wholly prevailed" in superior court because she received an affirmative judgment entirely in her favor. The superior court granted *no* relief to the City and TT. Knight prevailed against the City's and TT's attempts to dismiss her LUPA appeal based on standing, succeeded on every issue litigated on the merits of her appeal, and obtained all of the relief she sought in superior court. The fact that the

City and TT appealed the superior court's decision on every issue decided by that court should have resolved any question as to whether Knight prevailed.

2. Knight did not appeal beyond superior court.

This Court has expressly held that "parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005).¹¹ That one opportunity is the appeal to superior court, and only when a party appeals *beyond* superior court is it potentially liable for paying attorney fees under RCW 4.84.370. *Habitat Watch*, 155 Wn.2d at 413, 415, 416; *Gig Harbor Marina v. City of Gig Harbor*, 94 Wn.App. 789, 801, 973 P.2d 1081 (2000). Here, Knight not only prevailed in superior court, she did not appeal beyond that court and should be free of the risk of having to pay attorney fees to the parties who did appeal, consistent with *Habitat Watch* and every single case, except the Decision, that has considered RCW 4.84.370.¹²

¹¹ There is no merit to the City's assertion (City Ans. to PFR at 13-14) that this Court is barred from applying its prior opinion that RCW 4.84.370 authorizes an award of attorney fees only against a party who appeals beyond superior court. Having accepted review of the RCW 4.84.370 attorney fee award, this Court can and should consider all authority and argument relevant to the proper interpretation of that statute, regardless of whether they were presented identically in the lower court. *Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990).

¹² A Westlaw search on November 19, 2010, located 120 published and unpublished decisions, including the Decision, which cite RCW 4.84.370. In every case where fees were awarded--except for the Decision--the party liable for paying its opponent's fees was an appellant, cross-appellant or petitioner in the court that imposed the fees, never solely a respondent.

3. The Court of Appeals reversed the superior court on LUPA standing, which confirms that Knight prevailed in superior court.

The only issue decided by the Court of Appeals was Knight's LUPA standing, on which it reversed the superior court's decision. For this reason alone, the Court of Appeals erred in finding that the City and TT had prevailed in superior court. No authority was cited by the Court of Appeals, and none has been cited by the City or TT, in support of an award of attorney fees under RCW 4.84.370 where the Court of Appeals decided only one issue, and it reversed the superior court on that issue. In these circumstances, the plain language of RCW 4.84.370 bars an award of attorney fees.

4. The superior court did not uphold the City's plat approval decision.

The only rationale offered by the Court of Appeals in support of its award of attorney fees to the City and TT consists of one sentence:

Although the trial court remanded for modification of the examiner's condition, it ultimately upheld the City's decisions to grant the preliminary subdivision approvals. Decision at 14.

This rationale fails to recognize that the Examiner's unlawful condition of approval (the "and/or" condition) was an important substantive issue and was the *only* substantive issue regarding the City's plat approval decision that was challenged by Knight, litigated on the merits, and decided by the superior court. Upholding an award of fees to parties who lost on *every* issue litigated in superior court would effectively nullify the clear statutory language of RCW 4.84.370. To require that a LUPA petitioner must invalidate an entire land use decision in superior court or face an award of attorney fees would seriously chill the right of all

persons to file good faith LUPA appeals in superior court. LUPA appeals frequently involve challenges to only specific conditions or requirements of land use decisions,¹³ and RCW 4.84.370 has never been applied to require invalidation of an entire land use decision to determine prevailing party status. This Court should continue to protect the rights of property owners, applicants and aggrieved persons to file LUPA appeals that challenge unlawful conditions in land use decisions without facing the risk of an attorney fees award.

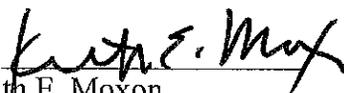
IV. CONCLUSION

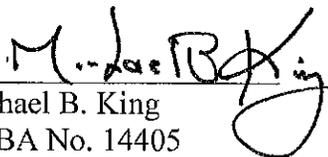
For the reasons set forth above, Knight respectfully requests that this Court reverse the Decision and reinstate the judgment of the superior court.

RESPECTFULLY SUBMITTED this 2nd day of December, 2010.

GORDONDERR LLP

CARNEY BADLEY SPELLMAN P.S.

By: 
Keith E. Moxon,
WSBA No. 15361
Attorney for Respondent

By: 
Michael B. King
WSBA No. 14405
Attorney for Respondent

¹³ See, e.g., *J.L. Stordahl & Sons, Inc. v. Cowlitz County*, 125 Wn.App. 1, 103 P.3d 802, (2004) (County imposed additional conditions on special use permit in response to citizen appeal; superior court and court of appeals affirmed the conditions; citizens were prevailing parties at all three levels of review and were awarded attorney fees and costs under RCW 4.84.370).

APPENDIX A

Summary of City of Yelm Water Rights and Water Demand

(in acre-feet per year – “AFY”)

Year	Water Rights¹	Water Demand²	Water Surplus (Deficit)
2001	564.00	656.00	(92.00)
2002	564.00	674.00	(110.00)
2003	564.00	639.00	(75.00)
2004	564.00	661.00	(97.00)
2005	564.00	642.00	(78.00)
2006	719.66	766.00	(46.34)
2007	719.66	801.00	(81.34)
2008	796.66	847.00	(50.34)
2009	796.66	895.00	(98.34)
2010	796.66	946.00	(149.34)
2011	796.66	1,000.00	(203.34)
2012	796.66	1,057.00	(260.34)

¹ Water rights for 2001-2005 are based on Department of Ecology records and exclude 112 AFY (“non-additive”) water rights erroneously claimed by the City of Yelm. CP 1484, lines 11-12. Water rights for 2006-2012 are based on Department of Ecology records of approved water rights for the City of Yelm and include the “Dragt” water rights (155.66 AFY) approved by the Department of Ecology in December 2006. CP 620-22; 1484 (line 13) - 1485 (line 1). However, virtually all of the 155.66 AFY “Dragt” water rights are committed to 463 units of previously approved Tahoma Terra development. CP 1486 (lines 5-16).

Water rights for 2008-12 include the Golf Course water rights (77 AFY) approved by the Department of Ecology in March 2008 (after the City of Yelm’s approval of five preliminary plats in February of 2008). CP 1485 (lines 10-14).

² Water demand is based on post-hearing evidence submitted to the City Hearing Examiner by City of Yelm in support of five preliminary plats totaling 568 residential units of new development. CP 1324.

1 connection requires 109,500 gallons of water per year (300 gpd x 365 days per year = 109,500
2 gallons per year). One ERU at a rate of 300 gpd totals 0.34 acre feet per year (ac-ft-yr). In
3 order to serve 568 new residential units alone, the City of Yelm will need to supply additional
4 potable water in the amount of 190.87 ac-ft/yr.³

5 The record before the Court in this matter demonstrates that at the time of the Hearing
6 Examiner's decisions, the City of Yelm held primary (additive)⁴ water rights authorizing use of
7 a total of 719.66 ac-ft/yr. Petitioner's Br., Ex. C. It is Ecology's position that the City's use of
8 the 676 ac-ft/yr figure in City of Yelm's Response to Petitioner JZ Knight's Opening Brief
9 (City's Br.) at 19 represents inclusion of its 112 ac-ft/yr *non-primary* (non-additive) water
10 right. Petitioner's Br., Ex. C; *See* Declaration of Yelm City Administrator Shelly Badger
11 (Badger Decl.) ¶ 28, Ex. C. Therefore, the City's actual primary water rights held from 2001-
12 2005 only equates to 564 ac-ft/yr (676 ac-ft/yr - 112 ac-ft/yr (non-additive) = 564 ac-ft/yr
13 (additive)). *Id.* The record reflects that Ecology recently approved the City's applications for
14 changes and transfers of existing water rights adding an additional 155.66 ac-ft/yr of primary
15 water rights to the City's supply. Respondent TTPH 3-8, LLC's Opening Brief (TTPH's Br.)
16 Exs. 5-7. Thus, the City's total primary water right supply increased in 2006 from 564 ac-ft/yr
17
18
19
20
21

³ 568 homes x 300 gpd x 365 days per year = 62,196,000 gallons of water per year. 62,196,000 gallons
22 per year equals 190.87 ac-ft-yr.

⁴ "Additive" water rights are also known as "primary" water rights. *See generally Schuh v. Ecology*, 100
23 Wn.2d 180, 184-185, 667 P.2d 64 (1983). "Non-additive" water rights have also been referred to as
24 "supplemental" or "alternate" water rights. *Id.* Non-additive water rights are allowances for water to be used
25 either from a different point of withdrawal or diversion or from an alternative water supply, in exchange and not
26 in excess, of an underlying primary water right. *Id.* For example, if a primary water right has a river diversion
point that receives heavy silt and sediment during spring run-off, that water right holder would have the option to
cease diverting river water, in exchange for using a "non-additive" groundwater well right during the spring run-
off period. The City of Yelm has one "non-additive" water right (i.e., not primary) in the amount of 112 ac-ft/yr,
therefore, that water right is not included in the City's portfolio of additive, primary water rights.

1 to 719.66 ac-ft/yr (564 ac-ft/yr + 155.66 ac-ft/yr = 719.66 ac-ft/yr).⁵ *Id.*

2 The City of Yelm's usage records show that the amount of water used by the City in
3 recent years exceeds its 719.66 ac-ft/yr primary water right allocation. Petitioner's Br. Ex. B
4 (Attachment A). For example, in 2006, the City of Yelm used 766 ac-ft/yr of water, which
5 exceeded the City's legal limit by 46.34 ac-ft/yr (766 ac-ft/yr - 719.66 ac-ft/yr = 46.34 ac-
6 ft/yr). *Id.* Thus, based on the City's most current usage records (766 ac-ft/yr), the City lacks
7 any capacity for new uses. The record shows that the City of Yelm does not hold primary
8 water rights authorizing use of 910.53 ac-ft/yr (719.66 ac-ft/yr primary rights + 190.87 ac-ft/yr
9 additional need for new subdivisions = 910.53 ac-ft/yr).

10 To the City's credit, Ecology acknowledges that the City of Yelm has recently
11 acquired, and Ecology has approved (on March 6, 2008—after the record in this matter was
12 closed) for municipal supply 77 ac-ft/yr of additional primary water rights.⁶ Badger Decl., ¶
13 15. This additional primary water right brings the City's total portfolio of primary water rights
14 to 796.66 ac-ft/yr. Even if this additional 77 ac-ft/yr of primary water could be considered by
15 the Court in this matter, the amount of water needed to cover these additional residential units
16 far exceeds the City's current holdings of 796.66 ac-ft/yr. This is because 910.53 ac-ft/yr (the
17 total water need including the new 568 residential units) minus 796.66 ac-ft/yr (Yelm's current

18
19 ⁵ It is unfortunate the City believes it has not received consistent information from Ecology about the
20 amount of its water rights. However, more recently, Ecology has been *very clear* with the City that Groundwater
21 Certificate No. 3561-A (G2-*04924C) represents a non-primary (non-additive) right of 112 ac-ft/yr, which cannot
22 be included in the City's primary water rights. See Badger Decl. ¶ 28, Ex. C (the City's acknowledgement of
23 Ecology's position that the 112 ac-ft/yr non-additive water right is not a primary right). Thus, in 2006-2007, the
24 City only held 719.66 ac-ft/yr of primary water rights, not 831.66 ac-ft/yr as the City would represent (City's Br.
25 at 16) to this Court. Petitioner's Br., Ex. C (letter dated August 20, 2007 by Ecology's Hydrogeologist Tammy
26 Hall). Ecology's calculation of the City's water rights is not a "challenge" to the "validity" of the City's rights,
but an assessment of the amount of water rights held by the City, as granted by Ecology. Further, the April 26,
2002 letter written by Ecology employee Jill Walsh to the Department of Health in relation to the City of Yelm's
Water System Plan describing the City's rights as being "currently limited to 676 acre-feet per year" made no
distinctions about whether these water rights were primary or non-additive or both. Even if the 676 ac-ft/yr figure
used by Ms. Walsh could be read to have inadvertently added the primary portion of the City's water rights (564
ac-ft/yr) to the non-additive portion of the City's rights (112 ac-ft/yr), Ecology has since informed the City that it
considers Groundwater Certificate No. 3561-A (G2-*04924C) to represent a non-additive right for 112 ac-ft/yr.
Petitioner's Br., Ex. C; Badger Decl. ¶ 28, Ex. C.

⁶ This recently acquired and changed water right was previously associated with the Tahoma Valley Golf
and Country Club water right.

1 quantity of primary water rights including the recently acquired 77 ac-ft/yr water right) equals
2 a 113.87 ac-ft/yr deficit. However, because this matter is a record review, it appears that the
3 Court's review of the potable water supply determinations made below for the preliminary
4 subdivision approvals is confined to the 719.66 ac-ft/yr primary water right figure.

5 In addition, Ecology understands that the first phase of the Tahoma Terra developments
6 (Tahoma Terra Phase 1), which already received final subdivision approval from the City of
7 Yelm prior to the date of the preliminary subdivision approvals at issue in this matter, have yet
8 to fully hook-up to the City's municipal supply. TTPH Br. at 5, 6, 15. The City of Yelm has
9 issued subdivision approvals for 463 new residential units, of which only 90 have received
10 building permits to date. *Id.* Assuming homes have been built on those 90 lots and they are
11 connected to the City's water supply, 373 Tahoma Terra Phase 1 residential units have not
12 been connected to the City's municipal supply. *Id.* This means that there will be additional
13 demand on the City of Yelm's potable water supply as new building permits are issued by the
14 City for the remainder of the 373 residential units that previously received final subdivision
15 approval. Because this additional demand has yet to be realized as part of the entire water
16 supply demand, the City of Yelm's water deficit is further exacerbated.

17 Finally, the City of Yelm's preliminary subdivision approvals under appeal to this
18 Court all include a similar provision stating the following:

19 The applicant must provide a potable water supply adequate to serve the
20 development at final plat approval and/or prior to the issuance of any building
permit except as model homes as set forth in Section 16.04.150 YMC.

21 See TTPH's Br., Ex. 15.⁷ This provision allows the determination of appropriate provisions for
22 potable water supply to be made at *either* the time of final plat approval, or at the later building
23 permit stage.

24 _____
25 ⁷ Although there were five separate hearing examiner decisions on reconsideration (all under appeal in
26 this matter), Ecology will also cite to the Tahoma Terra Phase II Decision on Reconsideration (dated December 7,
2007) as a representative copy of all of the Hearing Examiner's decisions that are at issue in this case. TTPH's
Br., Ex. 15..

CERTIFICATE OF SERVICE

On this 2nd day of December, 2010, I caused to be delivered in the manner indicated below a true and correct copy of (1) Supplemental Brief of Petitioner JZ Knight; and (2) Certificate of Service to the following:

Supreme Court of the State of Washington
PO Box 40929
Olympia, WA 98504-0929

- By United States Mail
- By Messenger
- By Facsimile (253-593-2970)

Mr. Richard L. Settle
Mr. Patrick J. Schneider
Mr. Roger A. Pearce
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Attorneys for Appellant City of Yelm

- By United States Mail
- By ABC Legal Messenger
- By Facsimile (253-593-2970)
- By E-mail

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Mr. Curtis R. Smelser
Mr. Averil B. Rothrock
Colin Jeffrey Folawn
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 Fifth Avenue, Suite 3010
Seattle, WA 98101-2330
Attorneys for Appellant TTPH 3-8, LLC

- By United States Mail
- By ABC Legal Messenger
- By Facsimile (253-593-2970)
- By E-mail

Ms. Kathleen Callison
LAW OFFICE OF KATHLEEN CALLISON PS
802 Irving Street SW
Tumwater, WA 98512
Attorney for Appellant City of Yelm

- By United States Mail
- By Messenger
- By Facsimile
- By E-mail

Michael B. King
Carney Badley Spellman, P.S.
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010

- By United States Mail
- By Messenger
- By Facsimile
- By E-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on December 2nd, 2010.

A handwritten signature in cursive script, appearing to read "Amanda Kleiss-Acres".

Amanda Kleiss-Acres, Declarant