IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PUYALLUP, a municipal corporation, Appellant, v. MICHAEL STANZEL and PIERCE COUNTY, a Washington State political subdivision, Respondents.	No. 38857-0-II UNPUBLISHED OPINION

Van Deren, C.J. — A Pierce County hearing examiner ordered the city of Puyallup (City) to issue a water availability letter to Michael Stanzel without requiring him to annex his property to the City. The City appeals the superior court's dismissal of its challenge to the hearing examiner's decision under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The City argues, among other things, that the superior court erred by dismissing the petition in ruling that it was barred by res judicata before reviewing the certified administrative record.[1] We agree, and we, therefore, reverse and remand for further proceedings at the superior court.

FACTS[2]

[1] The City also makes substantive LUPA arguments that the hearing examiner's decision was not supported by substantial evidence and constituted an erroneous application of the law to the facts. But we do not have the administrative record on appeal and do not reach any LUPA issues. We deny the City's motion to direct the hearing examiner to prepare the certified record for our court.

[2] This is the second appeal regarding Stanzel's quest for water service. In June 2009, we issued

Stanzel owns real property in unincorporated Pierce County, Washington, that is not part of the City of Puyallup. This property contains a church building, paintball fields, and a shed. It receives water service from the City because it sits within the City's water distribution zone. *Stanzel v. City of Puyallup* (*Stanzel* I), 150 Wn. App. 835, 838, 209 P.3d 534 (2009) *review denied*, 168 Wn.2d 1018 (2010).

Stanzel wants to build a separate indoor game room on the property. Before Pierce County will process his request for permits for that project, Stanzel must obtain a water availability letter from the City. *Stanzel* I, 150 Wn. App. at 838-39. Under the Puyallup Municipal Code (PMC), a property owner must agree to annex his property to the City before the City will provide a water availability letter. Former PMC 14.22.010 (2002); *see Stanzel* I, 150 Wn. App. at 839, 844. The City refused to provide Stanzel with a water availability letter because he would not consent to annexation. *Stanzel* I, 150 Wn. App. at 840.

Stanzel brought a motion before a Pierce County hearing examiner seeking to compel the City to provide him a water availability letter "as part of a separate case involving one of Stanzel's neighboring properties." *Stanzel* I, 150 Wn. App. at 840. The hearing examiner denied Stanzel's request, determining that the City's annexation requirement was unreasonable but that a hearing examiner lacked authority to compel the City to provide service. *Stanzel* I, 150 Wn. App. at 840. On August 17, 2007, Stanzel filed a LUPA petition, asking the superior court to direct the hearing examiner to compel the City to provide his requested water service and related water availability letter. The superior court ruled that the hearing examiner had authority to compel the

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an opinion providing the background facts, and we need not repeat them in this opinion, save for details relevant to the present appeal. *Stanzel v. City of Puyallup* (*Stanzel* I), 150 Wn. App. 835, 209 P.3d 534 (2009), *review denied*, 168 Wn.2d 1018 (2010).

City to provide water service to the property "subject to Mr. Stanzel meeting the usual permitting and informational requirements of any applicant for comparable water service within the City" and remanded for further proceedings before the hearing examiner. Clerk's Papers (CP) at 69 (internal quotation marks omitted). The superior court also required Stanzel to cooperate and supply detailed plans to the City for his intended project.

The City appealed the superior court's order and our commissioner denied a stay of the underlying proceedings. *Stanzel* I, 150 Wn. App. at 841. While the appeal was pending, the parties and hearing examiner continued to act, but a certified administrative record of those proceedings has not been prepared and we do not have the record on appeal. Instead, the parties filed with us copies of the petitions, motions, and declarations they filed in superior court about what occurred before the hearing examiner.[3]

We gather from these documents that, on May 13, 2008, acting under remand from the superior court, the hearing examiner issued a decision concluding:

> 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. . . .
> 3. Michael Stanzel shall cooperate and supply detailed plans to the City concerning his intended project at his 6224 114th 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.

[3] While we do not base our holding on information in those documents, we recite information contained in those documents for illustrative purposes. *See* former RCW 36.70C.130(1) (1995); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

CP at 60-61.

In August 2008, Stanzel submitted an application to the City for extension or connection of water or sewer service outside city limits. The City notified Stanzel that his application was incomplete and requested additional information as well as his agreement to annex his property to the City.

In September, Stanzel provided a detailed description of the planned construction: an 8,000 to 9,000 square foot building on the church property, separate from the existing church, to house a game room, restrooms, and commercial kitchen facility. The City responded that the proposed separate building required separate service pipes and meters and that this, in turn, would require a separate connection to the City's water system as well as annexation of the property to the City.

On December 10, 2008, the hearing examiner issued a supplemental decision:

> 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. Mr. Stanzel is going to be required to satisfy all technical and utility requirements, but he is entitled to a water availability letter. 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.

CP at 10.

On December 30, 2008, the City filed a LUPA petition seeking judicial review of

the hearing examiner's supplemental decision.[4] Before the statutory initial hearing, during which the trial court would normally order the parties to file the certified administrative record, Stanzel filed a motion to dismiss, arguing that res judicata precluded the City's LUPA petition. Stanzel also filed a number of documents supporting his motion, including the hearing examiner's supplemental decision and prior decisions by the superior court and hearing examiner.

The City objected to Stanzel's motion, arguing that he failed to properly cite to a rule as a basis for the motion or otherwise characterize the motion as either a CR 56 motion or a CR 12(b)(6) motion. The City also objected to Stanzel improperly scheduling the motion before the initial LUPA hearing, and unsuccessfully argued that Stanzel had introduced new evidence before the hearing examiner on remand and that the City was entitled to relief from the hearing examiner's December 10, 2008, decision. Before holding the initial hearing or reviewing a

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[4] The City sought relief in its LUPA petition for the following:

> A. The deputy hearing examiner's decision appears to contain a summary of proceedings and arguments of the parties. If the summary is intended to be the equivalent of findings of fact, then the City assigns error. The summary is inaccurate:
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> 1. The City's arguments are accurately set forth in its October 31, 2008 letter;
> 2. Mr. Stanzel has not satisfied all the City's usual permitting requirements;
> 3. Mr. Stanzel provided new substantive information about his proposed development; and
> 4. The City did specify its requirements for service.
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> B. The deputy hearing examiner erroneously required Mr. Stanzel to satisfy only the City's technical and utility requirements for water service.
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> C. 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.
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> D. The deputy hearing examiner erroneously ordered the City of Puyallup to issue a water availability letter to Mr. Stanzel.

CP at 3-4.

certified administrative record, the superior court granted Stanzel's motion to dismiss based on res judicata.

In our published opinion filed June 16, 2009, we affirmed the superior court's April 4, 2008, ruling that the hearing examiner had the authority to require the City to furnish a water availability letter to Stanzel without requiring annexation. *Stanzel* I, 150 Wn. App. 838. Based on the facts before both us and the hearing examiner in the case as it existed before the remand from the trial court, we noted that the hearing examiner found that Stanzel's proposed game facility would not substantially increase the amount of water used by the property. *Stanzel* I, 150 Wn. App. at 846. We held 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 preannexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider." *Stanzel* I, 150 Wn. App. at 853, 847 (the Pierce County Code permits a reasonableness challenge to this annexation requirement) (emphasis added).

The City appeals the superior court's order dismissing its LUPA petition.

ANALYSIS

I. Standard of Review

LUPA governs judicial review of land use decisions. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). We review de novo whether res judicata bars further land use petitions. *DeTray v. City of Olympia*, 121 Wn. App. 777, 784, 90 P.3d 1116 (2004).

II. Dismissal Without Administrative Record

The City maintains that the superior court erred by dismissing the petition on res judicata grounds before reviewing the certified administrative record from the remand proceedings.[5] We agree.

A land use petition requires the superior court to sit in a limited appellate capacity and review the administrative record. *See* former RCW 36.70C.130(1); *HJS Dev., Inc.*, 148 Wn.2d at 468; *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 596-97, 972 P.2d 470 (1999). "In order to prevent repetitious litigation and provide binding answers, the res judicata doctrine bars reasserting the same claim in a subsequent land use application." *DeTray*, 121 Wn. App. at 785.

We employ a four part test for res judicata, requiring "'identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.'" *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995) (quoting *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)). The subject matter is not identical if there is "a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself." *Hilltop Terrace*, 126 Wn.2d at 33. This analysis necessarily turns on a review of the administrative record. *See Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004);

[5] Citing *Stanzel* I, Stanzel contends that the City failed to preserve this argument at the superior court and cannot now raise it for the first time on appeal. 150 Wn. App. at 851-52; *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 596-97, 972 P.2d 470 (1999); *see Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 826, 965 P.2d 636 (1998). But the superior court here was acting in an appellate capacity, and RAP 2.5(a) only addresses claims of error not raised in the "trial court." *See* RAP 1.1(a). In any event, we have discretion to review this straightforward error. *See Roberson v. Perez*, 156 Wn.2d 33, 39, 42, 123 P.3d 844 (2005).

Hilltop Terrace, 126 Wn.2d at 33-34.

When there are significant changes to the proposal that are "relevant to and resolve the disputed conditions in" the application, there is no identity of subject matter and, therefore, no res judicata bar. *DeTray*, 121 Wn. App. at 789. Our supreme court, in *Hilltop Terrace*, held that there was no res judicata bar because "[t]he second application for the conditional use permit substituted a fundamentally different kind of structure." 126 Wn.2d at 33-34. The changes made in *Hilltop Terrace* addressed the issues that were the basis of the previous ruling. These changes in the application were the center of the ruling on res judicata. *Hilltop Terrace*, 126 Wn.2d at 32-34; *see DeTray*, 121 Wn. App. at 789.

Here, without the benefit of the certified administrative record, the superior court ruled that there was an identity of subject matter from the remand proceedings. The court relied on documents that Stanzel submitted with his motion to dismiss. Stanzel argues that the superior court did not need the administrative record because the parties presented no new evidence to the hearing examiner.

But the City's petition alleges, among other things, that Stanzel provided new substantive information about his proposed development that the hearing examiner failed to consider. Accordingly, the City argues, our prior holding in *Stanzel* I—the City's annexation requirement was unreasonable because Stanzel's proposed development would not substantially increase the amount of water use by the property—was based on different facts and does not preclude the City's current LUPA petition. *See* 150 Wn. App. at 853.

The City is correct. Our previous ruling affirmed the hearing examiner's decision that annexation was not a reasonable requirement because Stanzel's proposed changes did not

substantially increase the amount of water used by the property. *Stanzel* I, 150 Wn. App. at 846. The basis of the City's instant LUPA petition is that Stanzel has submitted new evidence showing that his proposed changes would substantially increase water used by the property.[6] If the City's allegations are true, they may amount to a substantial change in Stanzel's proposal that undermines reliance on the factual basis of our prior ruling, thus defeating res judicata for lack of identity of subject matter. *See Hilltop Terrace*, 126 Wn.2d at 33; *DeTray*, 121 Wn. App. at 789. But, without the certified administrative record, it is not possible for us or the superior court to properly determine the truth of the City's allegations.

We remand to the superior court with directions to review the certified administrative record before ruling on Stanzel's motion to dismiss.

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[6] The City stated its argument before the superior court:

> [THE CITY]: It is impossible, Your Honor, for either the Hearing Examiner or you to have actually ruled that annexation could not be a requirement, and that is because the argument that they have brought forward is the property receives water, but the property is not the question. Puyallup's code is based on whether or not a new building occurs. If there's a new building to be built, then that building must obtain a new connection. . . . [H]e wants to build an entirely separate building, a new building, an 8- to 9,000-square-foot building, a game room that is not part of the church.
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> . . . .
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> [THE CITY]: . . . So the first time that [Stanzel] told us what he was doing, Your Honor, is in September 2008. Your order was April 2008, and they acknowledged that is the first time that they ever told us. That is the first time that they told us that he's going to build a separate 8- to 9,000-square-foot building. It doesn't have anything to do with the church, it is not going to be connected to the church, not going to be a renovation. It's a totally new building.

Report of Proceedings at 14-15. These arguments are repeated on appeal.

III. Attorney Fees and Costs

Stanzel requests fees for the cost of his response, as provided under LUPA.[7] RCW 4.84.370(1). Stanzel also requests sanctions, claiming that the City's appeal is frivolous. RAP 18.9(a).

We hold that the City's appeal has merit and deny Stanzel's request for sanctions under RAP 18.9. But fees may be available under LUPA should Stanzel prevail on remand. RCW 4.84.370(1). Therefore, should the superior court find, after reviewing the certified administrative record, that Stanzel is the prevailing party "in all prior judicial proceedings," it may award fees to Stanzel, including fees and costs for this appellate proceeding. RCW 4.84.370(1).

Reversed and remanded for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Bridgewater, J.

Hunt, J.

[7] The attorneys' fees statute provides, in relevant part, that

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

RCW 4.84.370(1).