IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JZ KNIGHT, Respondent, v. CITY OF YELM; WINDSHADOW, LLC; ELAINE C. HARSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS, LLC; TTPH 3-8, LLC; Appellants.	No. 38581-3-II UNPUBLISHED OPINION

Penoyar, A.C.J. — TTPH 3-8 (Tahoma Terra) and the City of Yelm appeal, arguing that the trial court erred by denying their motion to dismiss JZ Knight's Land Use Petition Act (LUPA)[1] petition and their subsequent motion for summary judgment. They argue that Knight failed to (1) establish standing under both the Yelm Municipal Code (YMC) and LUPA and (2) assign error to the Yelm City Council's determination that she lacked standing under the YMC to appeal the hearing examiner's decisions granting preliminary subdivision approvals. They also argue that the trial court erred by remanding the examiner's "condition," by entering findings of fact and conclusions of law, and by imposing additional notice requirements on the City. Both parties argue that they are entitled to attorney fees and costs. We affirm the challenged preliminary subdivision approvals, reverse the trial court, dismiss Knight's LUPA petition for lack of standing, and award attorney fees and costs to the City and Tahoma Terra.

[1] Chapter 36.70C RCW.

FACTS

I. Hearing Examiner

In 2007, five separate applicants applied for preliminary subdivision approvals with the City.[2] One of the applicants, Tahoma Terra, sought to subdivide approximately 32.2 acres into 198 single-family residential lots.

On July 23, 2007, the hearing examiner held public hearings on the five subdivision applications. Knight, who owns property near the proposed subdivisions,[3] opposed all of the subdivision applications. She argued that the applicants and the City failed to establish that: (1) appropriate provisions had been made for potable water supplies to serve the subdivisions; (2) the subdivisions complied with the water availability requirements of the Comprehensive Plan and the Water System Plan; and (3) the proposed water supply was adequate and available to serve the subdivisions concurrently with development.

On October 9, after considering the parties' post-hearing submissions, the examiner conditionally granted preliminary subdivision approvals in five decisions. In his decisions, the examiner determined:

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[2] Three of the applicants, including Tahoma Terra, sought preliminary plat approval under chapter 16.12 YMC. The other two sought binding site plan approval under chapter 16.32 YMC. The five proposed subdivisions would add a total of 568 new residential units to the City's existing 2,135 residential units. The water availability requirements under both processes are identical. YMC 16.12.170, YMC 16.32.065. Tahoma Terra is the only applicant who now appeals.

[3] Knight's property is located approximately 1,300 feet from the closest of the proposed subdivisions. She owns a surface water right from Thompson Creek, which traverses her property. Knight also operates a domestic water system that is authorized to use groundwater for potable water requirements under a water right certificate. The aquifer from which Knight draws water is also the supply source for the City's wells. Additionally, Thompson Creek is in hydraulic continuity with the City's wells.

> At preliminary binding site plan [or preliminary plat] approval, an applicant must show a reasonable expectancy that the water purveyor (in this case the City) will have adequate water to serve the development upon final [plat] approval.
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> . . . .
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> The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a "reasonable expectation" that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final building site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology [DOE] and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Projected Water Demand," which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand.
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> . . . .
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> Courts and the legislature have not required applicants to show water availability at the time of preliminary plat/binding site plan approval, but only that the City or other purveyor has a reasonable plan to provide such service. In the present case, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights.

Clerk's Papers (CP) at 1268, 1270, 1275; Administrative Record (AR) (Oct. 7, 2007) Office of the Hearing Examiner City of Yelm Report and Decision, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PDR-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

Knight subsequently moved for reconsideration of the examiner's decisions, requesting that he add a requirement that provisions for water be made prior to final subdivision approval. The examiner denied Knight's motion on December 7, 2007.

The examiner, however, added three findings and a new condition to his previous decisions. He found the following:

> 1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the

> record establishes the water rights from the Dragt farm have been conveyed to the City and approved by [DOE]. Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.
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> 2. While State law and the [YMC] require potable water supplies *at final plat approval and building permit approval*, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by [Knight's counsel] in his response are beyond the Examiner's authority and interfere with the City's ability to manage [its] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

CP at 1283 (emphasis added); AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

The examiner then added the following condition to each of the preliminary subdivision approvals:

> The applicant must provide a potable water supply adequate to serve the 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.

CP at 1284 (emphasis added).; AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

II. City Council

Knight subsequently appealed the examiner's preliminary subdivision approvals to the City Council, which denied her consolidated appeals based on lack of standing:

> JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, *Knight is not an aggrieved person with standing to appeal the Examiner's decision to the City Council*. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council *contingently decides* Knight's appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.

CP at 26 (emphasis added). On February 12, 2008, the City Council passed Resolution No. 481, affirming the examiner's individual findings and conclusions.

III. Superior Court

Knight next filed a LUPA petition in Thurston County Superior Court, again challenging the City's preliminary subdivision approvals. In her petition, however, Knight did not specifically assign error to the City Council's decision that she lacked standing to appeal the examiner's decisions or that she was not an "aggrieved person" under the YMC.[4]

In April 2008, Tahoma Terra and the City joined two other respondents in their motion to dismiss Knight's petition on the grounds that she had failed to appeal the City Council's dispositive decision that she lacked standing and that she also lacked standing under the YMC and LUPA. The trial court denied their motion without prejudice. The respondents then moved for summary judgment, again arguing that Knight lacked standing to (1) appeal the examiner's

[4] Knight argues, however, that she challenged the entire City Council decision and that her petition contained "detailed allegations" demonstrating that she had standing. Resp't's Br. at 13.

decision to the City Council under the YMC, and (2) seek judicial review of the City's decisions under LUPA. The trial court again denied their motion. The parties then submitted briefing on the merits.

Knight made two assertions: (1) that a finding that appropriate provisions have been made for potable water at the preliminary plat approval stage requires the City to condition preliminary approval on a determination of water availability at the final plat approval stage rather than the building permit stage and (2) that a determination of water availability at the final plat approval stage must be based on available and DOE-approved water rights currently held by the water purveyor (in this case, the City) sufficient to serve all demand, including all approved but not yet constructed developments and pending development applications. Tahoma Terra and the City did not dispute Knight's first argument, and they asserted that the examiner's decision reflected this legal interpretation.[5] As for Knight's second assertion, Tahoma Terra argued that it had no basis in the law and that the record demonstrated that it had already made appropriate and adequate provisions of potable water for its proposed subdivision.

On October 1, 2008, the trial court held a hearing on Knight's petition. Six days later, it issued a letter opinion in Knight's favor, granting her petition. It subsequently adopted her proposed judgment, findings of fact, and conclusions of law, to which the City and other respondents objected. Conclusion of law 5 provided:

RCW 58.17.110 and YMC 16.12.170 make clear that [the City] must make

[5] Knight argues that the appellants agreed to amend the condition at the trial court. The record confirms this. *See* Report of Proceedings (RP) (Oct. 1, 2008) at 58 ("We would be perfectly happy with striking the "and/or" or simply striking the "/or," . . . . I believe all of us agreed to that."); CP at 1641 (Knights proposed conclusion of law 4 stating that the parties "have agreed that it is appropriate to amend the [condition's] language" by removing the word "/or.").

findings of "appropriate provisions" for potable water supplies by the time of final

> plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable water based upon [the City's] historical provision of potable water would be insufficient to satisfy this requirement.

CP at 1641.[6]

In its order, the trial court "reversed"[7] the matter and remanded the examiner's condition of preliminary plat approval with instructions to strike the word "or" and insert the word "also" as follows:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and . . . *also* prior to the issuance of any building permit . . . .

CP at 1644 (emphasis in original).

The trial court also imposed new notice requirements on the City. It ordered the City to provide Knight with notice of the following: any application for final subdivision approval of any of the five subdivisions; any proposed findings by the City pertaining to "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final

[6] We discuss the requirements of RCW 58.17.110 and YMC 16.12.170 in more depth below.

[7] Both appellants characterize the trial court's ruling as a reversal on "the undisputed issue of whether a determination of water availability [has] to be made both at the final plat approval and building permit stages" because it remanded for modification when "the meaning remained the same." Appellant's (Tahoma Terra) Br. at 20.

subdivision approval; and any city council hearing to consider final subdivision approval for any of the five subdivisions.[8] CP at 1645. Tahoma Terra and the City now appeal.

ANALYSIS

I. Standard of Review

LUPA governs judicial review of land use decisions. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693, 49 P.3d 860 (2002). "By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction." *Benchmark Land Co.*, 146 Wn.2d at 693 (quoting *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001)).

LUPA authorizes the superior court to reverse a land use decision if the party seeking relief shows that:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
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> (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;
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> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
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> (d) The land use decision is a clearly erroneous application of the law to the facts;
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> (e) The land use decision is outside the authority or jurisdiction of the body or

[8] On appeal, the City emphasizes that its "primary concern and reason for appealing" is the trial court's imposition of special notice requirements for any future applications for future subdivision approvals and its entry of findings and conclusions. Appellant's (City) Br. at 2. It contends that, in its findings and conclusions, the trial court "purported to decide what water rights are held by the City and issued an advisory opinion that the City must make certain showings of water rights at final subdivision approval." Appellant's (City) Br. at 2. The City argues that these findings and conclusions are nullities on appeal, outside the trial court's jurisdiction, and contrary to the statute's plain meaning.

> officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(a)-(f).

Judicial review of any claimed error under subsection (b) is de novo but we must accord deference to the City's expertise. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); RCW 36.70C.130(1)(b). Under subsection (c), we must uphold the City's decision if there is evidence in the record that would persuade a fair-minded person of the truth of the statement asserted, and we must consider all evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless, LLC, v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006); former RCW 36.70C.130(1)(c). Under subsection (d), we must determine whether we are left "with a definite and firm conviction that a mistake has been committed." *Cingular Wireless, LLC*, 131 Wn. App. at 768; RCW 36.70C.130(1)(d).

In reviewing an administrative decision, we sit in the same position as the superior court. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Furthermore, when reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Finally, we review questions of law de novo.

HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

II. Standing

The appellants argue that Knight lacked standing to appeal the examiner's decision to the City Council under the YMC and that she similarly lacks standing under LUPA.[9] Knight responds that the City's decisions will injure her senior water rights and that any "further groundwater withdrawal by the City will adversely impact the flow of groundwater that supports [her] wells and the flow of Thompson Creek where she has surface water rights." Resp't's Br. at 9. Knight claims that, even before approving the subdivision at issue in this case, the City's water use had already exceeded the total use amount determined by DOE. If the City "uses or commits water use to developers and future homeowners before [DOE] approves a water right for the City," she contends, her existing water rights are "jeopardized." Resp't's Br. at 26-27. The appellants' argument that Knight lacks standing to challenge the City's decisions is persuasive.

Under YMC 2.26.150, any "aggrieved person" or agency of record may appeal a hearing examiner's final decision to the City Council. Similarly, under RCW 36.70C.060(1), standing to bring a LUPA petition is limited to (1) the applicant and the property owner to which the land use decision is directed or (2) another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is "aggrieved or adversely affected" within the meaning of this section only

[9] The appellants devote a portion of their briefs to the argument that the trial court should have dismissed Knight's LUPA petition for failure to assign error to the City Council's "dispositive conclusion" that she lacked standing to appeal under RCW 36.70C.070. Appellant's Br. (Tahoma Terra) at 21. Additionally, Tahoma Terra argues that by failing to present evidence that she was "aggrieved" to the examiner, Knight foreclosed the opportunity to appeal his decisions under chapter 2.26 YMC. Appellant's (Tahoma Terra) Br. at 24. The appellants' argument that LUPA's procedural requirements act to bar her petition are unpersuasive; therefore, the foregoing analysis will examine the merits of the standing issue.

when (1) the land use decision has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those the local jurisdiction was required to consider when it made the land use decision; (3) 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 (4) the petitioner has exhausted his or her administrative remedies to the extent the law required. RCW 36.70C.060(2). The City construes both the YMC and LUPA as requiring the same thing.

To satisfy LUPA's "aggrieved or adversely affected" standing requirement, objectors must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision; in other words, objectors must show that they "personally will be 'specifically and perceptibly harmed' by the proposed action." *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 47-48, 52 P.3d 522 (2002) (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992)).

Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to herself. *Trepanier*, 64 Wn. App. at 383. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier*, 64 Wn. App. at 383. Pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected. *Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994).

As Tahoma Terra correctly notes, in order to establish standing under LUPA, Knight must demonstrate that: (1) the preliminary subdivision approvals have or are likely to prejudice her; (2) the interest she asserts is among those that the City was required to consider when it granted the preliminary subdivision approvals; (3) a judgment in her favor would substantially eliminate or

redress the alleged prejudice; and (4) she has exhausted her administrative remedies to the extent the law required. *See* RCW 36.70C.060(2)(a)-(d). Knight argues that the land use decisions at issue in this case are likely to prejudice her. She has not, however, demonstrated that she will be "specifically and perceptibly harmed" by the preliminary subdivision approvals themselves. *Thornton Creek Legal Def. Fund*, 113 Wn. App. at 48. Moreover, she fails to show that a judgment in her favor would substantially eliminate or redress the alleged prejudice. Therefore, Knight lacks standing to challenge the preliminary subdivision approvals at this time.

At this time, Tahoma Terra has not obtained final plat approval and has not submitted building permit applications. RCW 58.17.150(1) requires that Tahoma Terra provide adequate potable water to serve the subdivision for those applications. Recognizing this, the examiner conditioned preliminary approval on Tahoma Terra's ability to do so. Although his condition contained the now disputed "and/or" language, the record demonstrates that all parties understood and agreed that this condition required this showing at both final plat approval *and* building permit approval.[10] No one disputes this on appeal. Therefore, if Tahoma Terra cannot demonstrate its ability to provide an adequate supply of potable water at that time, the City cannot and will not grant final plat approval or issue building permits. If this occurs, then Knight will suffer no injury. If, on the other hand, there is adequate water supply at that time, then

[10] Furthermore, the examiner's finding reflected this: "While State law and the [YMC] require potable water supplies *at final plat approval and building permit approval*, the Examiner has added a condition of approval requiring such." CP at 1283 (emphasis added).

Knight will suffer no injury. As Tahoma Terra notes, the preliminary subdivision approvals therefore do not necessarily lead to the impacts Knight alleges.[11]

The City correctly argues that if we were to find that Knight had standing, we would first be required to presuppose a series of future events that may not ultimately occur. Furthermore, it would require us to agree with Knight's contention that, absent the trial court's judgment, she will not receive notice of any final plat or building permit approvals and will thus be unable to obtain judicial review of these decisions. Knight's alleged injuries are simply too remote to confer standing; the trial court should have granted the appellants' motions on this basis. Therefore, we affirm the challenged preliminary subdivision approvals, reverse the trial court, and dismiss Knight's LUPA petition for lack of standing.

III. Attorney Fees

Finally, the City and Tahoma Terra argue that if they prevail on appeal, they are entitled to attorney fees and costs under RCW 4.84.370(1). Knight responds that their request "borders on the frivolous." Resp't's Br. at 55. She contends that the trial court did not uphold the City's decisions; rather, it "expressly" reversed and remanded those decisions. Resp't's Br. at 56.

RCW 4.84.370(1) provides that we shall award reasonable attorney fees and costs to the prevailing party or substantially prevailing party on appeal of a decision by a county, city, or town 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

[11] Tahoma Terra also contends that even "[u]sing Knight's calculations," the City has "more total water rights" than necessary to serve its subdivision. Appellant's (Tahoma Terra) Br. at 29-30. Moreover, it notes, under RCW 90.03.380(1), DOE will not approve transfers or changes in water rights unless it finds that the transfers or changes will not detrimentally impact existing water rights.

or decision. We shall award and determine the amount of reasonable attorney fees and costs 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 under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
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> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
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> (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*.

RCW 4.84.370 (emphasis added).

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. Therefore, the appellants' argument that they substantially prevailed below is persuasive. Because we affirm the City's decisions, we also grant the appellants' requests for reasonable attorney fees and costs.

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.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.