No. 84831-9

J.M. JOHNSON, J. (dissenting)—JZ Knight does not have standing in this case under the Yelm Municipal Code (YMC) or the land use petition act (LUPA), chapter 36.70C RCW. All holders of water rights within the same water basin do not automatically have standing to oppose proposed economic development in their area. Here, it is proposed that Knight be allowed to bring suit to block remote residential development with no impact on her water rights. The hearing examiner found that the city of Yelm (City) obtained sufficient water rights from the Nisqually Golf and Country Club, the Dragt farm, and the McMonigle farm. Furthermore, the City is pursuing additional water rights for the Tahoma Terra (TTPH 3-8, LLC) project and has a reasonable expectation of acquiring these rights before final plat approval. I would affirm the decision of the Court of Appeals dismissing Knight's LUPA petition for lack of standing and would award attorney fees.

Thus, I respectfully dissent.

A. Standing

YMC 2.26.150 and LUPA, RCW 36.70C.060(2), define standing similarly and require either a "person aggrieved" or a person "aggrieved or adversely affected." Under LUPA, this requires a showing of injury-in-fact resulting from a land-use decision. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934, 52 P.3d 1 (2002). In other words, the standing requirement will be met through a demonstration by the plaintiff that he or she "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) (internal quotation marks omitted) (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 him or herself." *Trepanier*, 64 Wn. App. at 383. "If the injury is merely conjectural or hypothetical, there can be no standing." *Id.*

Here, the hearing examiner merely provided preliminary plat approval for the Tahoma Terra development. The examiner granted this approval on

the condition that the City "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." Clerk's Papers (CP) at 1562. Knight has based standing on a speculative possibility that there may be an infringement of her senior water rights at some point in the future. This mere possibility is not only unlikely but also insufficient to confer standing because the hearing examiner found that the City obtained water rights from the Nisqually Golf and Country Club, the Dragt farm, and the McMonigle farm. Furthermore, the City is pursuing additional water rights for the Tahoma Terra project and will acquire these rights before final plat approval. As a result, Knight can only show that her injury is conjectural or hypothetical, rather than immediate, concrete, and specific.

The majority argues that adjacent property owners generally have standing under LUPA and compares the current case to a Court of Appeals decision in *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (1998). There, evidence indicated that adjacent landowners would be affected by a large, predicted increase in traffic. *Id.* at 831. Here, however, the City has made a good faith showing of acquiring the necessary

water rights, and the findings of the hearing examiner confirm that Knight's senior water rights will remain unaffected by the Tahoma Terra development. In making this comparison with *Suquamish*, the majority relies on a particular reading of the Yelm City Council's Resolution 481. Majority at 19. According to the majority, the amended findings of fact on the part of the city council essentially removed the condition of the hearing examiner requiring actual proof of an adequate potable water supply at the final plat approval stage. *Id.* at 19-20.

By indicating that the City complied with RCW 58.17.110, however, the city council was merely stating that "[t]he exact quantity of water rights that the City currently holds . . . is immaterial because the City presented evidence, upon which the Hearing Examiner reasonably relied . . . ." CP at 28. The city council was affirming the decision and condition of the hearing examiner. Actual possession of sufficient water rights was not required at the preliminary plat approval stage. The Court of Appeals decision dismissing the case for lack of standing should be affirmed.

B. Attorney Fees

The majority also believes that Tahoma Terra and the City are not

substantially prevailing parties at the superior court stage of litigation because their legal position was not improved from one level of review to the next. Majority at 21-23. This legal interpretation of substantially prevailing parties, however, is based from a Court of Appeals decision in *Benchmark Land Co. v. City of Battle Ground*, 94 Wn. App. 537, 551, 972 P.2d 944 (1999), *aff'd on other grounds*, 146 Wn.2d 685, 49 P.3d 860 (2002). We are not bound by the outcome or reasoning in *Benchmark*, and a sensible reading of RCW 4.84.370 would allow an award of attorney fees when the superior court merely remands to the city council for purposes of making a slight modification to an "and/or" condition.

Instead, the determination of substantially prevailing parties should focus on which party prevails on the major issues of the case. As noted by the Court of Appeals in this case, "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." *Knight v. City of Yelm*, noted at 155 Wn. App. 1027, 2010 WL 1454096, at *7. Thus, an award of attorney fees on behalf of Tahoma Terra and the City would be appropriate, and we should affirm the Court of Appeals on this issue.

Conclusion

I would uphold the Court of Appeals in dismissing Knight's LUPA petition for lack of standing and award attorney fees to Tahoma Terra and the City. Knight has hypothesized a conjectural or hypothetical infringement to her senior water rights. She has not demonstrated an interest that is sufficiently particularized to differentiate her from all resident water users in the same water basin. Yelm City Council's Resolution 481 did not preclude later review of the City's evidence of an adequate water supply at final plat or permit stages.[1] Thus, I respectfully dissent.

[1] The superior court's remand for minor modification of the "and/or" condition does not negate the award of attorney fees to a substantially prevailing party under this analysis.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Gerry L. Alexander