

IN THE COURT APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHARLES and BILLYE GAYE LAWRENCE, a marital community,

Petitioners,

vs.

PRIVATE CAPITAL, LLC, a Washington Corporation doing business in Washington, SHANE MCGUFFIN, the applicant, and CITY OF CAMAS, a municipal corporation,

Respondents.

APPELLANTS' REPLY BRIEF

John S. Karpinski, Attorney for Appellants
2612 E. 20th Street
Vancouver, WA 98661
360-690-4500
WSBA #13142

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DIVISION II
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I. INTRODUCTION.

The Applicants and the City do not wish the Court to take anything more than a superficial review of this case. This is because a review of the specifics of the facts and the law show clear error.

Here, on the tree issue, the Respondents want the Court to ignore the error of law standard, and how the City/Applicants reading of the law eliminates the words “preserve” and “existing” out of the “shall *preserve existing* significant trees” in Camas Code. Nor do the Respondents want the Court to realize, in their zeal to show “every reasonable effort” was made to save the trees, that the alleged “groves” of trees “protected” contain as little as one tree, and 109 of the 136 “significant” trees are proposed to be cut.

On the improper procedure issue, the Combined Brief wants you to ignore that Camas Code specifically limits the Camas City Council to the “Planning Commission Record”, as the Camas City Council twice took evidence outside of that record. The Combined Brief also cites “invited error” as a justification for these defects, without mentioning that we never asked for a limited remand on just the illegal information topics in the first case. Nor, do they even try to explain how the concept of “invited error” could apply at all to our closing arguments, where an attorney identifies a defect and that now somehow “invited” the other side to bring in additional

new factual evidence outside of the record to rebut that closing argument.

Invited error?

In regard to the adequacy of the Findings, the Combined Brief takes the unique position that LUPA has repealed the *Weyerhaeuser v. Pierce Co.*, 124 Wn.2d 26, 873 P.2d 498 (1994) standard for adequacy of Findings, Combined Brief at 23, with no law or fact to back that up.

Again, we ask the Court of Appeals to look into the details of the facts and law here. These details show clear error.

II. THE CITY OF CAMAS ERRED WHEN IT CONCLUDED A DEVELOPER COULD “PRESERVE EXISTING SIGNIFICANT TREES” UNDER CMC 17.19.030A(2) BY CUTTING THEM DOWN AND REPLACING THEM WITH SAPLINGS?

In our Opening Brief on this Assignment of Error, we presented four issues. They are:

- Issue 1. Camas Code Requires Making “Every Reasonable Effort” Shall Be Made to ‘Preserve Existing Significant Trees”.
- Issue 2. Developer Here Proposes to Cut 80% of the “Significant” Trees.
- Issue 3. Camas Erroneously Construes “Preserve Existing Significant Trees” to Allow Cutting These Trees and Replanting with Saplings.
- Issue 4. Reviewing Court Gave Too Much “Deference” to Camas’ Erroneous Interpretation under LUPA.

A. STANDARD OF REVIEW - ERROR OF LAW.

In our Opening Brief we indicated that, in Issue #4:
Reviewing Court Gave Too Much “Deference” to Camas’ Erroneous Interpretation under LUPA.

The Applicant/City reply focused on the substantial evidence test. Respondents’ Brief at 8. However, the vast majority of our case alleges an erroneous interpretation of law under RCW 36.70C.130(b).

Initially, the combined brief of the City and the Applicant (hereinafter “Combined Brief”) properly states the tests under LUPA, RCW 36.70C, for determining legal error, erroneous application of law to facts, and factual error. Combined Brief, pages 6 - 8. However, the Respondents err here in trying to solely apply the “substantial evidence” test to the tree issue, when it is clear that the main issue involving the tree removal is not a factual dispute, but rather a determination of whether or not Camas Code standards were met, as shown in Section B, infra. Therefore, it is the error of law test as to whether the City misinterpreted its law in allowing, for example, the Applicant to “preserve existing significant trees” by chopping them down and replacing them with seedlings.

The construction of a statute is a question of law and is reviewed *de novo*. *McTavish v. City of Bellevue*, 89 Wn.App. 561, 564, 949 P.2d 837

(1998). When a statute is unambiguous, construction is not necessary and the plain meaning controls. *McTavish, supra*, at 565. This was not denied by the Applicant/City. We also noted that absent ambiguity, however, there is no need for the agency's expertise and deference is inappropriate. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Because municipal ordinances are the equivalent of a statute, they are evaluated under the same rules of construction. *McTavish, supra*, at 565.

This also was not denied. Finally, we noted that it is beyond question that the City is bound by the ordinances as written. *See, e.g., Dykstra v. Skagit County*, 97 Wn.App. 670, 677, 985 P.2d 424 (1999) (local government entity's prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases), *review denied*, 140 Wn.2d 1016, 5 P.3d 8 (2000). Again, the Combined Brief does not deny this.

B. CITY COUNCIL MISINTERPRETED LAW.

1. City Failed to “Preserve Existing” Trees as Required by Code.

In our Opening Brief we showed:

- Issue 1. Camas Code Requires Making “Every Reasonable Effort” Shall Be Made to ‘Preserve Existing Significant Trees”.
- Issue 3. Camas Erroneously Construes “Preserve Existing Significant Trees” to Allow Cutting These Trees and Replanting with Saplings.

CMC 17.19.030A2 says:

2. Vegetation. In addition to meeting the requirements of CMC Chapter 18.31, Tree Regulations, every reasonable effort shall be made to preserve existing significant trees and vegetation, and integrate them into the land use design. (Emphasis added.)

This is an avoidance standard the City/Applicant used like a mitigation code. This Code contains “shall”, therefore it is mandatory.

The use of the word “shall” in a zoning ordinance creates a presumption in favor of a duty and against conferring discretion. *Crown Cascade, Inc., v. O’Neal*, 100 Wn.2d 256, 668 P.2d 585 (1983). Real Property Deskbook at 97-17.

The Code thus requires 1) every reasonable effort, 2) to preserve existing trees, 3) to preserve existing vegetation, and 4) incorporate existing trees and vegetation into land use design.

First, it is clear that Camas erroneously construed the Code because it allows mitigation (i.e. replanting of existing significant trees that were cut down), as compliance of “preserving existing significant trees” under the ordinance. As the City concluded, and the Combined Brief states:

“Although the City required Private Capital to retain seven groves of significant trees *and plant 102 additional trees*. Even that condition of approval does not meet the requirements of CMC 17.19.030 as construed by the Lawrences”. Combined Brief at 11.

The City’s Brief goes on to say: “In the City’s judgement, that plan, which actually increased the number of trees on site, satisfied the requirement of Private Capital “make every reasonable effort... to preserve existing trees”. Cite omitted. Combined Brief at 11.

One simply cannot “preserve” an “existing” tree by cutting it down! “Preserve” is defined as “To keep safe from injury, harm or destruction: Protect”. Merriam-Webster’s Dictionary. The tree is not “preserved” and it is certainly no longer “existing” when it is cut down. It is not protected from harm; it is dead. There is no ambiguity here.

The City’s reading of that section entirely ignores the words “preserve” “existing” from the Code. Codes must be read harmoniously to give effect to all of their parts.

“A court attempts to construe a zoning code so that each part is given effect with every other part; each provision is construed harmoniously in relation to the others. *Jones v. King County*, 74 Wn.App. 467, 874 P.2d 853 (1994); *State ex rel. Catholic Family & Children’s Servs. v. City of Bellingham*, 25 Wn.App. 33, 605 P.2d 788 (1979).” Real Property Deskbook at 97-16.

Therefore, it is legal error of the City to allow cutting and replanting to “preserve” “existing” trees.

2. Facts Do Not Support “Every Reasonable Effort” to “Preserve” “Existing Significant Trees” Were Made.

In our Opening Brief we showed in Issue #2:

Issue 2. Developer Here Proposes to Cut 80% of the “Significant” Trees.

In our Opening Brief, we point out the Applicant is cutting, by their own count, 109 of the 136 “significant” trees on the site.¹ Instead the City/Applicant proudly points out that it is saving “seven groves of significant trees”. Combined Brief at 10 and 11. How many trees are in some of these “groves” according to Applicant? At least one of the alleged “groves” is only one tree, one “grove” is only three trees. See, CP 182, attached in the Appendix. These are “groves”??? This is 7 units of trees saved, 17 total trees out of the 136 significant trees. That 109 trees is a loss rate of over 80% and remember that is just for the “significant” trees.

Is saving this small smattering of trees and cutting down the forest “making every reasonable effort” to preserve existing significant trees and integrated into the land use design? Is there a specific Finding stating how this is “every effort”? The answer simply is no.

¹Administrative Record, D.3.a, Revised Tree Survey of October 18, 2006.

Similarly, there is no substantial evidence in the record, and no finding that “every” reasonable effort was made to preserve these existing trees. As CP 183 (attached and in the Appendix) shows, not a building envelope was reduced to save trees. Nor were even all of the trees outside of the building envelopes saved. *Compare*, CP 182 to CP 183. See, Appendix. Also, please note that the building envelopes shown on CP 183 are oversized building envelopes. The project’s lot sizes averages 9,623 square feet², although the zoning of the site can be as small as 7,000 square feet. CP 131. According to Code, the building envelopes can be much smaller, as small as 1,600 square feet.³ Thus, there is no evidence in the record that Applicant made “every reasonable effort to preserve” the significant trees, as literally dozens of these trees could have been saved merely by agreeing to save the trees outside of the proposed building envelopes, and dozens more could be saved by reducing the size of the building envelopes.

But the Applicant notes with some pride that they will add “over 100 trees” to the Hancock Springs development, replanting 102 trees to replace

²Administrative Record, F6, page 5.

³See Opening Brief, footnote 26 for a minium building envelope.

the 109 removed⁴; slightly over a 1 to 1 ratio of trees replaced to trees cut.

Is this adequate mitigation if mitigation is even allowed? Under Camas

Municipal Code 17.19.030(f)(2) states:

2. The city council finds that the existing mature landscaping of trees, and shrubs provide oxygen, filter the air, contribute to soil conservation and control erosion, as well as provide the residents with aesthetic and historic benefits. For these reasons, the city encourages the retention of existing trees that are not already protected as significant trees under the Camas Municipal Code. Generally, the city may allow the tree requirements under subsection (F)(1) of this section to be reduced at the request of the developer, by a ration of two new trees in favor of one existing tree, provided such trees have been identified on approved construction plans. (Emphasis added.)

So existing Camas Code says a “non-significant” tree is worth two saplings, why is killing 80 significant existing trees worth only 102 new saplings? Even as a mitigation plan (and CMC 17.19.030(A)(2) is not a mitigation ordinance), it is inadequate. Clearly, this decision of compliance is an error of law, clearly erroneous application of law to fact, and lacks substantial evidence.

III. CAMAS CITY COUNCIL TWICE TOOK EVIDENCE OUTSIDE OF THE RECORD PRESENTED TO THE PLANNING COMMISSION IN VIOLATION OF CAMAS CODE AND THE *MARANANTHRA MINING V. PIERCE CO.*, 59 WN.APP 795, 801 P.2D 985 (1990) LINE OF CASES.

⁴CP 170, Without waiving our objection, Administrative Transcript at 134, lines 19 & 20.

Camas and the Applicants take an interesting approach to justify the City Council's repeated illegal acceptance of improper evidence outside of the record. First, they go out of their way to ignore the provisions of Camas Code that limits the City Council review to information "presented" to the Camas Planning Commission, CMC 18.55.180. Second, they even try to retro-actively amend the record, by saying things like: "[T]he motion should obviously have not included the phrase "introduced into the record"". Combined Brief at 15. It appears the City and the Applicants are trying to cover up the procedural infirmities, and then justify the behaviors as legal.

A. CAMAS CODE LIMITS CITY COUNCIL TESTIMONY TO THAT "PRESENTED TO THE PLANNING COMMISSION".

First, City Code precludes the City Council from taking outside of the Planning Commission record evidence/testimony in making a decision. This is spelled out twice in Camas City Code.

1. Camas Code limits City Council Testimony to That "Presented to the Planning Commission".

a. CMC 18.55.180 describes the City Council review process for Type III Applications:

F) The City Council, in a closed record meeting, considers the Planning Commission record and makes the final decision on the matter. The City Council may approve, with conditions, deny, or remand the matter for further specific consideration. (Emphasis added.)

b. In addition, the Camas Municipal Code, CMC 18.55.200C provides as follows:

C) Type III - Planning Commission Recommendations Are Not Appealable. However, any party may submit written arguments “based on the record” to refute the Planning Commission recommendation no later than 7 days prior to the City Council meeting on the matter. (Emphasis added.) (Camas Response Brief at page 4) CMC 18.55.200C.

2. “Final Decision Making Argument” Irrelevant.

The Applicant/City replies that the City was acting as a “final decision-maker” and not in an appellate capacity. Combined Response Brief at 12. This is irrelevant for this violation. In addition, RCW 36.70B.020(1) provides that City Codes may allow “no” or “limited new information” is also not relevant here as Camas has, by Code, chosen to allow NO new information.⁵

B. CAMAS CITY COUNCIL ILLEGALLY TWICE TOOK TESTIMONY NOT “PRESENTED TO PLANNING COMMISSION”.

1. Camas City Council Twice Accepted New Information Not Before Planning Commission.”

In our Opening Brief, we showed that: Camas City Council Illegally Twice Took Testimony Not “Presented to Planning Commission”.

⁵Besides the limited new information in LUPA cases are usually related to evidence on appearance of fairness challenges.

a) First Error.

At the end of the first Planning Commission hearing, Applicant, apparently unhappy that it could lose a developable lot, introduced copious new evidence into the record before the City Council, including, but not limited to, new expert testimony on wetlands, hydrology, water quality and wildlife habitat from Mr. Bieger, more Washington Fish and Wildlife testimony, new information from Department of Ecology, and new information regarding the Washington Fish and Wildlife Report. CP 156.⁶

At the first City Council Hearing, the Council, accepted new evidence from the applicant and remanded this case to the Planning Commission to review only the applicant's new information, and only hear these issues. The City Council's Transcript says:

Hancock Springs Preliminary Plat:

Dennis: With that, any questions of staff: I would... we have had, I think, appeals from both sides on this decision. You guys have received information, some of which in talking with out City Attorney, was deemed as adding to the record and this is a closed hearing. We should only be considering the record from the Planning Commission. So if counsel wishes to consider the information that has been brought forward, I would ask that council consider remanding this back on that specific... those specific issues to the Planning Commission. Questions from council?

⁶See also, Administrative Record C.1.e (primary source).

Female: If that be the case, then I would make that motion that it be remanded back to the Planning Commission for reconsideration of the new information that has been introduced into the record.

Female: Second

Dennis: Wow! You guys all... It's been moved by Kufeldt-Antle, seconded by Dietzman that the Hancock Springs Preliminary Plat be remanded back to the Planning Commission for consideration of the additional information brought forward on the wetlands. I believe that is the new information that was brought forward. And habitat. All those in favor. (All ayes) Opposed? (No nays). Thank you. (Transcript at 86 - 87) CP 152-3⁷, emphasis added.

This Council acceptance of new evidence not before the Planning Commission to the benefit of the applicant and to the burden of Lawrence continued at the second City Council hearing.

b) Second Error.

The City Council at their second meeting of January 17, 2006, accepted new expert testimony from applicant's geotech, *in the middle of deliberations*, and allowed Applicant's geotech to directly contradict his study's hydrological conclusions on whether wet weather construction should be allowed. Compare CP 156 with CP 194⁸

Of course, no right to cross examination was granted to us on this dramatic contradiction in this geo-hydrological testimony either.

⁷Administrative Record, Administrative Transcript at 86-87 (primary source).

⁸Administrative Record, Administrative Transcript at 137 (primary source).

Both of these actions violated the law to the detriment of Lawrence.

RCW 36.70C.130(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;

2. Remands Based on Acceptance of Illegal Evidence are Illegal.

The Applicant/City has a number of replies.

They argue that Camas Code specifically allows remands. We agree. But, remands are not allowed which were procured by the introduction of improper evidence, just to allow that illegal evidence to be submitted.⁹ The Combined Brief at 15 says: “[a] remand for “reconsideration of the new information that has been **introduced into the record.**” (emphasis added) The motion should obviously have not included the phrase “introduced into the record.” The City’s efforts to sanitize the record failed. The City may not rewrite history here. The remand was procured by evidence outside of the Planning Commission record, for the express purpose of putting it into

⁹See, *Marananthra Mining v. Pierce Co.*, 59 Wn.App 795, 801 P.2d 985 (1990), *North/South Airpark Association v. Dale Haagen, et al.*, 87 Wn.App 765, 942 P.2d 1068 (1997), *State ex rel. Lige & Wm. B. Dickson Co. v. Pierce Co.*, 65 Wn.App 614, 829 P.2d 217, *rev. den.* 120 Wn.2d 1008 (1992), *State v. County of Pierce*, 65 Wn.App 614, 829 P.2d 217 (1992).

the record. This violates Camas Code and was an illegal procedure under LUPA.

3. Invited Error Not Factually or Legally Applicable Here.

Next, the combined forces claim “invited error”. Combined Brief at 17, citing *Casper v. Esteb Enterprises, Inc.*, 119 Wn.App. 759 (2004); *JDFG Corp. Of the International Raceway, Inc.*, 97 Wn.App. 1 (1999); *Prater v. City of Kent*, 40 Wn.App. 639 (1985). However, we did not invite this limited remand, nor can our closing argument be considered a request for testimony *in the middle of deliberations*. This case is thus unlike any of the three cases cited where the invited error doctrine was imposed against the bad actor, not us, the victim.

4. Adding New Evidence in the Middle of Deliberations is Improper.

The combined forces claim adding new evidence *in the middle of deliberations* was proper under Camas Code’s closed record proceeding rules. It is not. They claim the geotech’s changed recommendation is okay because it was “limited and consistent” with the prior report. Combined Brief at 18. The prior report recommended dry weather conditions for all work. CP 35. The City staff wrote up a condition making all of Redmond’s recommendations a condition, but made it for construction of the houses, not

of the subdivision's roads and excavation¹⁰ When we, in closing argument, tried to get the condition for all work, Mr. Allbright jumped up and testified against his own recommendation. *Compare* CP 35 with Administrative Transcript 137.

C. THE ILLEGAL TESTIMONY/PROCEDURE WAS NOT HARMLESS ERROR - PROJECT FAILS TO MEET STANDARDS FOR HYDROLOGICAL SAFETY.

In our Opening Brief we point out the uncontested geo-hydrological problems on the site. These include:

At the Planning Commission hearing, Mr. Lawrence testified that an underground stream goes through his property now, and parts run through the middle of his home, and this much excavation next door could make his home unliveable. CP 108. This presence of subsurface water flows was confirmed by applicant's wetland expert, who confirmed "high rate of underground flows in the subsurface" caused springs on the site. CP 49. The Wetlands Report also noted an excavated drainage system "intercepting groundwater throughout the site." CP 50

Applicant's geotech testified the site was very wet, even the non-wetland portions. They stated at CP 35.

¹⁰Administrative Record, F6, page 11.

“The primary feature of concern at the site is the moisture sensitivity of the underlying sandy and silty clay silt subgrade soil materials.” (Emphasis added.)

The site is so wet that:

“...we recommend that all planned structural improvement areas for residential homesites and/or pavements be stripped and cleared of any... vegetation, topsoil materials,... present at the time of construction. In general, we envision that about 12 to 18 inches of topsoil stripping may be required to remove existing topsoil materials”. Id.

Why is the expert’s proposing to strip almost the entire site of existing vegetation and topsoil? Their experts say:

The primary feature of concern at the site is the moisture sensitivity of the underlying sandy and clayey silt subgrade soil materials. CP 35 Emphasis added.

“In regard to the moisture sensitivity of the underlying sandy and clay silt subgrade soils, these soils can rapidly deteriorate under wet and/or inclement weather conditions”. CP 35.

Please note these soils will all be removed and disposed of. CP 35. Of course, this impact is not disclosed in the Environmental Checklist.

Applicant’s experts, Redmond, asked for the following Conclusions and Recommendations in their report.

In this regard, we recommend that all aspects of the site grading and foundation preparation work be scheduled for the drier summer months which are typically June through September. Id. (Emphasis added.)

We recommend the Redmond & Associates be retained to provide construction monitoring and testing services during all site earthwork and foundation excavation operations. CP 39.

The developer, apparently unhappy with this recommendation, got another geotech report from Ash Creek Associates.¹¹ The City staff made following Redmond's recommendations a condition of approval, but wrote it down for house instead of "all aspects."

Applicant and the City agree that RCW 58.17.110 and Substantive SEPA require adequate drainage-ways and geo-hydrological safety. Combined Brief at 20-21. But the Combined Brief says the geo-hydrological found here was safe, not citing the Redmond Report submitted with their Application, but a later Ash Creek report. Combined Brief at 21, Appendix A, Ash Report.

However, a careful review of the Ash report shows it is even more adamant about the necessity of dry weather work, and extended periods of dry weather work, than the prior report. Ash says:

"It is strongly recommended that site preparation, earthwork/grading, paving, and utility work be conducted during extended periods of warm, dry weather, typical of

¹¹See Combined Brief footnote 40, regarding Ash Creek Report, Appendix A to Combined Brief, which was apparently omitted from the record. We cite that here. We use this cite without waiving our standing objection to the second hearing.

summer through early fall months.” Ash Report, *Id.*, at 2, emphasis added.

“Because of the moisture-sensitive, near-surface soils and the potential for encountering shallow perched groundwater during the wet months, Ash Creek Associates strongly recommends that site grading and utility trenching be conducted during extended periods of relatively dry weather conditions.” Ash Report, *Id.* at 8, emphasis added.

Also, this report shows there is “no factor for error” (no “safety factor”) on key components of the engineering calculations. Ash Report at 12 & 13.

“These pressures represent our best estimate of actual pressures that may develop and do not contain a factor of safety.” Ash Report, *Id.*, at 12.

The Ash Report also noted:

“[I]t is typical for groundwater levels to rise a number of feet during the wet season, approaching ground surface elevations during particularly wet years.” Ash Report, *Id.*, at 2, emphasis added.

Limiting remand to Applicant’s issue on first City Council hearing and allowing Applicant’s geotech to contradict his own report, in the middle of council deliberations, and without cross-examination, was prejudicial.

IV. CITY OF CAMAS ERRED IN FAILING TO MAKE ADEQUATE FINDING FOR FACTUALLY CONTESTED ISSUES UNDER *WEYERHAUESER, ET AL.*

Here, we challenge that Camas failed to provide sufficient Findings of Fact, Conclusions of Law, or analysis to provide a basis for a contested

decision under *Weyerhaeuser v. Pierce Co.*, 124 Wn.2d 26, 873 P.2d 498 (1994). “Findings” appear only after the City saw our lawsuit and withdrew its decision. CP 98¹². Many of the “findings” in the City’s 2nd “final decision” are really conclusions of law and the resolution contains no “savings” clause. See “Findings” #14.¹³

We appeal each of these Findings of Fact as not supported by substantial evidence. We hereby object to Findings #5, 6, 7 regarding procedure (See Assignment of Error 2), #14 and 17 on the tree issue (See Assignment of Error 1), 15, 16, and 18 on the hydrogeological issue (See Assignment of Error 2, Issue 3). Although some of the wetland findings were inaccurate, since we prevailed on that issue, we are not objecting to erroneous findings here.

The original draft Staff Report called for denial, CP 134, and the Final Staff Report appears to have been politically changed for approval. For a good example of the changes made, see CP 138.

A. WEYERHAUESER APPLIES.

The purpose of Findings is to, as *Weyerhaeuser* states, provide a basis for the contested decision.

¹²Administrative Record, B3, *compare* to AD (original sources).

¹³Administrative Record, AB.

...The purpose of findings of fact is to ensure that the decisionmaker “has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved” and the appellate court “may be fully informed as to the bases of his [or her] decision when it is made.”

...Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an “indefinite, uncertain, undeterminative narration of general conditions and events”, are not adequate.

...The findings and conclusions are clearly inadequate to determine the basis for the hearing examiner’s decision upholding the adequacy of the EIS. While a finding recites that the project is a private project, there is no clue as to the basis for that conclusion. There is also no way to tell how the hearing examiner concluded the EIS was adequate - he never addressed whether the EIS contains a proper discussion of alternatives to the proposed site, as required, yet that issue involves a major challenge to the adequacy of the EIS.

Weyerhaeuser at 35, 36, 37. For example, how does the applicant cutting down approximately 80% of the significant trees on the site, and apparently not moving a single building envelope smaller to save a tree, meet the City’s standards to make “every” reasonable effort to “preserve existing” significant trees and vegetation? See Finding #14.¹⁴ Again, the Findings do not describe why an 80% loss is acceptable, much less meet the “every” or “preserve existing” tests. *Id.*

¹⁴Administrative Record AB.

Nor did the Findings reconcile the hydrological issues on the site that caused Applicant to have to hire a second geotech to refute his first geotech, much less refuting the geotech hired by Petitioner in this case. Is there “unusual subsurface hydrological phenomena known as “piping” going on on-site? CP 50. One of applicants experts says yes, one says no. Aren’t major underground water flows in this site something to be looked at very completely? Where is the Finding on that? And their geotech will apparently contradict their own testimony for the asking. Compare CP 156 with Administrative Transcript 137.¹⁵ Build or no build in wet weather? How was that important issue resolved? How were the discrepancies between these three hydrological experts’ studies resolved? There is no Finding that describes that. Thus, the Findings were inadequate under *Weyerhaeuser*.

B. LUPA DOES NOT REPEAL WEYERHAUESER.

The Combined Brief makes the extraordinary argument that *Weyerhaeuser* is no longer good law in Washington. Combined Brief at 23 - 24. This is because it allegedly does not fit any of LUPA’s grounds for relief. *Id.* Here, the failure to produce adequate Findings are simultaneously violations of RCW 36.70C.130(1)(a) Unlawful Procedure; (1)(b) Erroneous

¹⁵ Administrative Transcript pages 134 - 136 (primary source) and Administrative Transcript page 137 (primary source).

Interpretation of Law; (1)(c) Not Substantial Evidence; and (1)(d) Clearly Erroneous Application of Law to Fact.

C. ERROR NOT HARMLESS.

The error is not harmless here because it is a deficient record for judicial review - *Weyerhaeuser v. Pierce Co.*, 124 Wn.2d 26, 873 P.2d 498 (1994) and *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978).

V. THE CITY/APPLICANTS ARE NOT ENTITLED TO ATTORNEYS FEES

The first and major reason why the City/Applicants should not be entitled to attorneys fees is that we believe our claims here are meritorious therefore we prevailed at this level.

However, assuming arguendo, that this Court fails to see the merit in our positions, we still do not believe the Applicants and the City are entitled to fees.

We believe procedurally and substantively that an award of fees should not be made. First, Lawrence was the prevailing party before the City. At the City level, the biggest issue was trying to save the wetlands on the site. That was the issue was won by Lawrence. Lawrence was able to reduce the wetland fill from 0.47 acres to 0.09 acres, a 81% reduction. See, Appendix 3 and 4 for wetland fill before and after. The developer also lost two lots

they originally objected to¹⁶, but later acquiesced to when it looked like it was the best deal they could get. Since we were the procuring cause of saving the wetlands, we were a prevailing party and thus neither the City nor the Applicant are entitled to fees under RCW 4.84.370(1).

Procedurally, we do not believe the request for fees was adequate under RAP 18.1(b). The basis for the claim was not adequately plead. In addition, the City did not properly request attorneys fees under the local government provision of RCW 4.84.370(2), it only requested fees under 4.84.370(1), so it lost its ability to get fees.

VI. CONCLUSION.

Lawrence has at all times made good faith arguments to protect not only his private property rights, but also the public interest. His defense of the public interest has resulted in the greater public good by preserving over 80% of the site's wetlands. Now, we hope this Court can add to that list of accomplishments by reversing the City's determination that you can "preserve existing" trees by cutting them down. If the City does not like that law, they can simply repeal it, amend it or reword it. But they cannot ignore it. *Dykstra v. Skagit County, supra*. If the City wants to change its procedures, they can do that legislatively, but not in the middle of this case.

¹⁶Administrative Record C3 (Attached as Appendix 5).

No matter what, the City must enter into Findings adequate to resolve the key issues in this case which were not done here. Despite their claims to the contrary, LUPA has not repealed the requirement of adequate Findings.

Therefore, Lawrence should be deemed the prevailing party and Camas' approval of this project should be reversed.

DATED this 13th day of August, 2007.



John S. Karpinski, WSBA #13142
Attorney for Appellants Lawrence

Lawrence Crt App Reply Brief Fnl.081307.wpd

APPENDIX TABLE OF CONTENTS

1. Tree Plan with alleged “groves”. CP 182
2. Tree Plan with building envelopes superimposed. CP 183
3. Wetland fill originally proposed. CP 63
4. Reduction in wetland fill after Lawrence. CP 181
5. Howsley letter objecting to wetland reduction. Administrative Record, C3.

ATTACHMENT #4A

COMMON NAME
BIG LEAF MAPLE
BITTER CHERRY
DOUGLAS FIR
NATURALIZED BIRCH
CASCARA
NATURALIZED HOLLY
UNKNOWN
WESTERN RED CEDAR

ED IN THIS REPORT IS BASED
 FILED BY MACKAY AND SPOSITO, INC.,
 COMPLETED IN OCTOBER 2004.
 ND SPOSITO, INC.

- 12 — TREE D.A.B.
- ③ — TREE SPECIES, SEE KEY
- 4 — TREE CONSERVATION ZONE
SEE REPORT TEXT

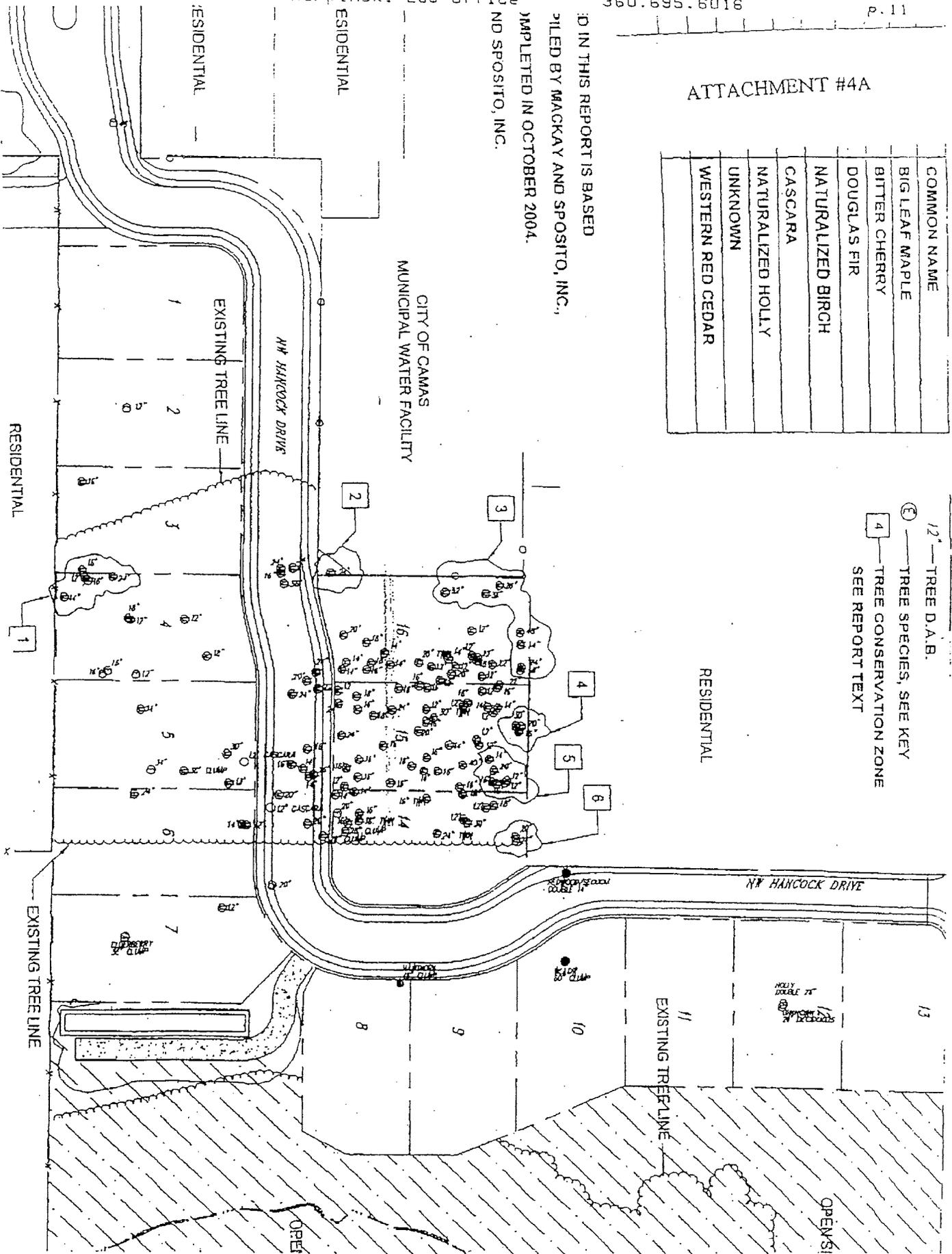
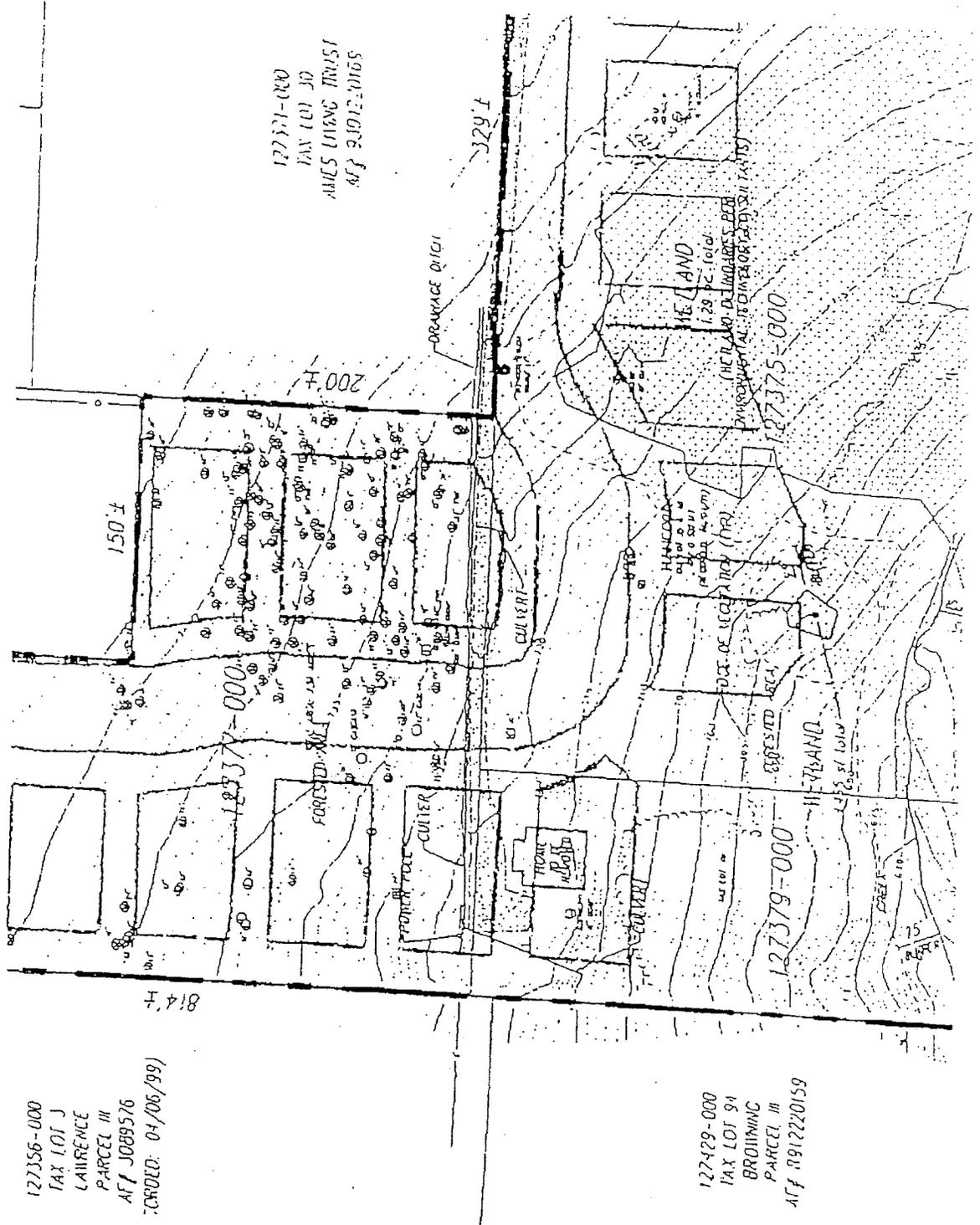
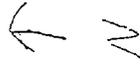


Exhibit "D"

ATTACHMENT #4B



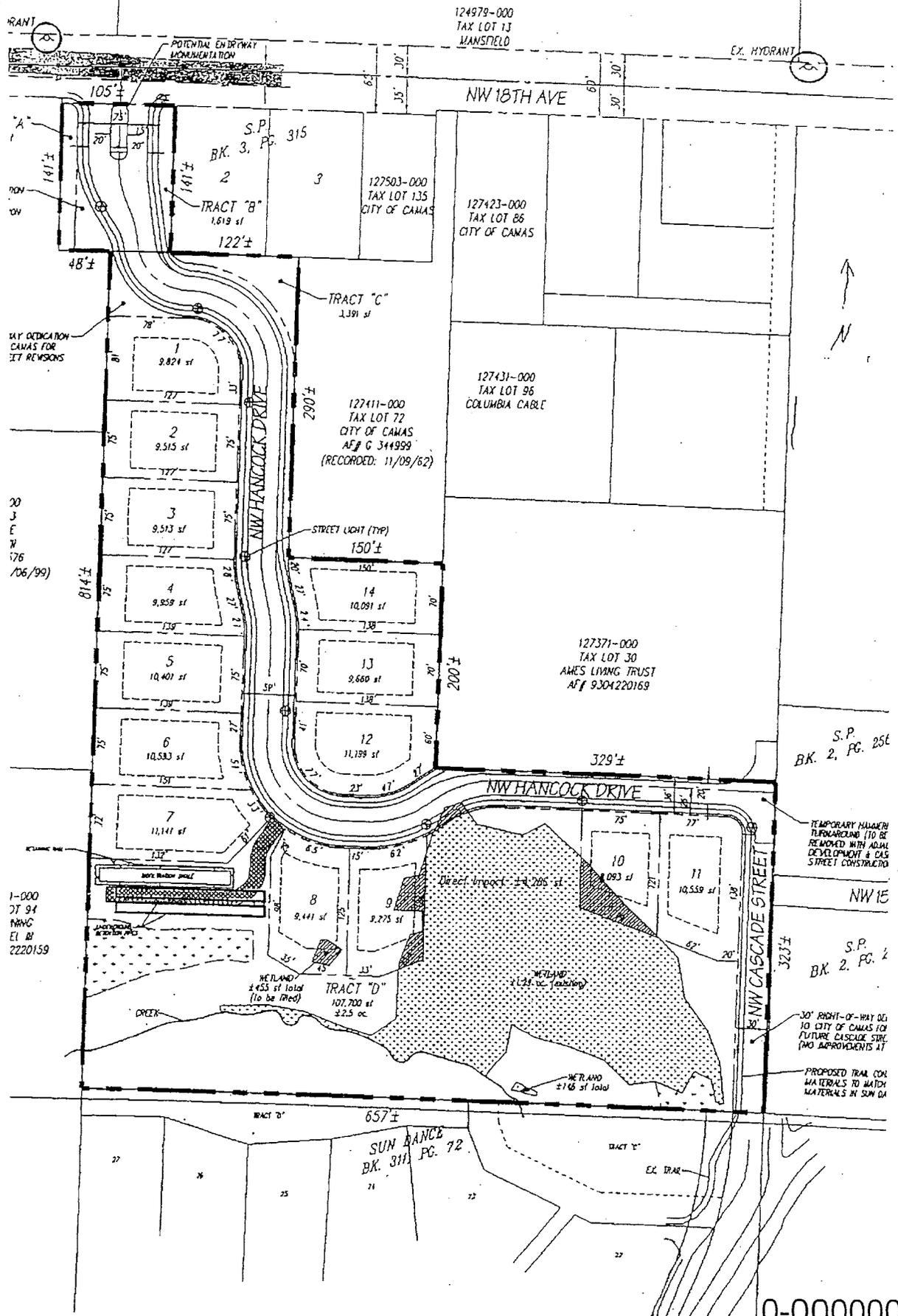
127371-000
 TAX LOT 30
 AMES LIVING TRUST
 AFF 93012-00165

127356-000
 TAX LOT J
 LAURENCE
 PARCEL III
 AFF 1089576
 DATED: 01/06/99)

127429-000
 TAX LOT 94
 BRUININC
 PARCEL III
 AFF 991222059

0-000000183

ATTACHMENT #3



Received 1/10/06
for city council
submission

Miller Nash LLP
www.millernash.com
500 E. Broadway, Suite 400
Vancouver, WA 98660-3324
Mailing address:
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

James D. Howsley
Admitted in Washington and Oregon
james.howsley@millernash.com
(360) 619-7021 direct line
(503) 289-2643 from Portland

3400 U S Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
(206) 622-8484
(206) 622-7485 fax

January 9, 2006

The Honorable Paul Dennis
Mayor
City of Camas
City Hall - 616 N.E. 4th Avenue
Post Office Box 1055
Camas, Washington 98607-0055

COBY

Subject: Hancock Springs Subdivision

Dear Mayor Dennis and Members of City Council:

Our office represents Private Capital, LLC in regards to the proposed Hancock Springs subdivision. The purpose of this letter is a formal request to amend the recommendation of the planning commission based upon the planning commission's erroneous interpretation of the CMC. This request is made accordance with CMC 18.55.200.

Procedural History

The planning commission held a hearing on October 18, 2005, taking testimony on the proposed subdivision and SEPA determination. During this hearing Mr. Karpinski, representing Charles and Billy Gaye Lawrence, advanced a SEPA appeal with eleven allegations. Our office submitted a detailed response to the Lawrence appeal discussing the lack of a factual or legal basis for each allegation. And in support of the City's and our response the planning commission dismissed the Lawrence SEPA appeal and upheld the SEPA determination issued by the City.

Planning commission did insert an extra condition into the mitigated determination of non-significance. We believe the planning commission erred when they fabricated this condition basing their decision on factual misunderstandings and misinterpretations of the CMC. Our team believed the basis for the planning commission recommendation stemed from a staff report which inadvertently neglected to mention several factual and legal arguments advanced on Private Capital's behalf.

We requested that council review the recommendation by planning commission that the subdivision reduces the proposed subdivision by two lots. This request was made in

accordance with CMC 18.55.200. Council held a meeting on November 21, 2005 in which it voted to remand the hearing to the planning commission for additional discussion related to wetland and habitat issues. Planning Commission held a hearing on December 20, 2005 where they approved a fourteen lot subdivision removing two lots from Hancock Springs. At that hearing the planning commission decided that council would make an interpretation of the code as to whether wetland fills are allowed.

We believe the planning commission recommendation is inconsistent with the intent of the code and overreaches the intent of state law and the CMC. We believe there is ample evidence in the record to support the following positions.

We have set out for you briefly our rationales and factual justifications for our position and request that you consider the relief we have suggested.

I. Staff's Interpretation of the Wetlands Ordinance Overreaches.

A. Wetland Fills Are Allowed Under the Camas Municipal Code.

We believe that staff recognizes a paradox within the existing ordinance. Yet staff continues to interpret the wetlands ordinance in a manner that would seemingly prevent any sort of impact to wetland areas despite evidence in the record that supports an applicant's position.

The root of the paradox continues to stem from the intent section of CMC 18.31.050 which states "[i]t is in the intent of these regulations that adverse impacts to wetlands and wetland buffers shall be avoided except where it can be demonstrated that such impacts are unavoidable and necessary or that all reasonable economic uses of the property would be denied." And the paradox is completed by the provision that "[t]o the extent possible, the possible, the applicant shall coordinate implementation of these standards and regulations with any required review and approval processes required by state and/or federal agencies with jurisdiction." CMC 18.31.050(E). This paradox is complicated because you have different government agencies retaining jurisdiction over wetlands depending on whether the wetlands are isolated or not. Camas legal counsel advised the planning commission that the intent section is there as a guide and that for the actual mechanics regarding wetlands fills are in the rest of the ordinance. Why would the code provide the opportunity for mitigation if fills are not allowed?

When wetlands are not isolated, as this wetland proposed for fill is, the U.S. Army Corps of Engineers ("Corps") maintains jurisdiction over that wetland. These powers are granted from the Clean Water Act and subsequent federal court decisions over the scope of the Clean Water Act. The Corps maintains experts here locally to determine impacts that development activities pose to wetlands. When development activities propose fill within jurisdictional wetlands, the Corps requires an analysis of the existing functions and values of the impacted wetlands. And performance measures require the mitigation to be designed to offset these losses

of functions and values. Our experts believe we will meet the requirements set forth by the Corps.

Returning to the paradox, it is complicated further by the simple fact that the CMC contemplates mitigation as a means to reduce or limit impacts. Specifically CMC 18.31.040 states:

"Mitigation" means the use of any combination or all of the following activities:

1. Avoid impacts to environmentally sensitive areas by not taking a certain action or parts of an action;
2. Minimize impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or taking affirmative steps to avoid or reduce impacts;
3. Rectifying the impact by repairing, rehabilitating, or restoring the affected environmentally sensitive area;
4. Reducing or eliminating the impact over time by reservation and maintenance operations during the life of the development proposal;
5. Compensating for the impact by replacing or enhancing environmentally sensitive areas, or providing substitute resources.

But staff would like council to ignore this language that contemplates impacts to the functions and values to wetlands and ways to mitigate those impacts for a strict interpretation of the word "avoid." We believe "avoid" means to avoid impacts to the functions and values of the wetland buffer or wetland. To believe anything else would be poor public policy. Staff's interpretation would lead to extreme difficulty for the City to get a wetland fill permit. For instance, undertaking a road or utility project would require that the City design those public works projects to meander around the wetlands creating highly inefficient, cost prohibitive and potentially dangerous delivery of public services. Another example would have staff preventing a large employer from undertaking fill activities, even though they had permits from the Corps, because they did not avoid the wetland areas. Mitigation exists to ensure no net loss of wetland functions and values.

Staff's position is illogical given the code and public policy reasons for allowing impacts. This position is exacerbated further because the Corps retains jurisdiction over the wetlands. So while the Corps allows fill activity in the wetland, if an applicant meets the mitigation ratios, staff's position would have the City forcing a stricter approach to wetland impacts. Respectfully Camas does not maintain a resident wetlands expert such as Brent Davis at Clark County. The reason Camas has CMC 18.31.050(E) as a provision is to defer to the

agencies that maintain experts to determine whether a fill is warranted or not. We believe this question should come down to objective scientific criteria for the functions and values, not an assessment of one word taken out of context.

We return you to the experts. Our experts demonstrated that mitigation activities will improve the functions and values of the wetlands by maintaining the same water quality functions, improving flood storage capacity and improving habitat conditions through plantings. In addition, the original fill proposal was scaled down approximately 21.3%, this will be discussed in a later section of this letter.

B. Department of Ecology Guidance Suggests Impacts to Category IV Wetlands Do Not Need to Be Avoided.

We believe that staff and the planning commission misinterpreted the Camas Municipal Code ("CMC") regarding wetlands. Staff, the Planning Commission, and even Mr. Lawrence have focused in on one word in the ordinance without understanding the context. This word is "avoid".

In our letter dated October 31, 2005, we set forth a detailed discussion regarding what we believe is the intent of the ordinance, which is the protection of functions and values of wetlands. To further support our legal opinion, we previously submitted an authoritative regulatory document from the Washington Department of Ecology entitled "How Ecology Regulates Wetlands." We refer you to this previous submittal in the record. This document addresses the issue of impacts, such as in our case, of category IV wetlands. Page 13 of this document speaks to wetland mitigation and sets forth a sequence of six steps, five of which are found in CMC 18.31.040. And what we find even more compelling is an analysis that follows that bolsters our consistent position that the term "avoid" is speaking to impacts to functional values. Ecology states that it takes the position that "lower quality wetlands (*Category 4 wetlands in our rating system*) usually do not warrant the first step of avoiding the impact altogether." Page 13 (emphasis in original). Ecology's position is that Category IV wetlands functions and value can easily be replaced through mitigation.

The wetlands that will be impacted in this subdivision are Category IV. If the Corps and Ecology approve the impact because the functions and values can be replaced, the City should allow the impact. But the Planning Commission would have the City impose a stricter standard even though every authoritative document seems to allow impacts.

Our client reduced the impacts and proposed fill by 21.3%. We believe the design of the project satisfies the intent of the code.

If mitigation can maintain or improve the functions and values of the wetland as in this case, a finding of compliance with the intent of code is warranted. We respectfully submit that staff and Mr. Lawrence are continuing to obfuscate the true meaning of the intent section

which as GMA provides is to avoid impacts to the functions and values of a critical area, such as a wetland.

II. Planning Commission Misunderstood the Importance of Functions and Values as it Relates to Wetlands.

The Growth Management Act (GMA) mandates that local jurisdictions adopt development regulations protecting critical areas.¹ Yet GMA and its body of case law recognize that impacts to the critical areas will happen. In recognition that impacts will occur, GMA requires local jurisdictions to maintain the integrity of the functions and values of the impacted critical areas. This concept is illustrated through the recent requirement that critical areas comport with "best available science."

Council is in the process of adopting new critical area regulations to comport with "best available science" which some argue absolutely bars to impacts to critical areas.² But the "best available science" requirement seeks not to bar impacts to critical areas, as this would be poor public policy, rather to "protect the functions and values of critical areas."³ Understanding the functions and values of wetlands, potential impacts to those functions and values and mitigation measures to replace the functions and values for impacts becomes a factual determination for the experts.

Prior oral and written testimony provided by the Resource Company and Environmental Technology Consultants demonstrate the existing functions and values of the wetland proposed for fill onsite is considered low. The Resource Company, in an attached memorandum, briefly explains the existing and proposed functions and values of the wetlands onsite. In summary of the Resource Company testimony, we believe impacts to the wetlands onsite can be mitigated in such a way that the mitigated wetlands will perform higher functions and values compared to the existing conditions of the wetland.

Quite simply when the ordinance is speaking about impacts to wetlands, it is speaking to the impact to the functions and values of the wetland buffer or wetlands. What is particularly troubling to our experts is that staff ignored evidence of improved functions and values in their staff report. We respectfully submit that our expert has demonstrated that the functions and values will improve as a result of our activities onsite.

We therefore believe that the proposed fill activities are consistent with state and local law regulating critical areas.

¹ RCW 36.70A.060(2) and 36.70A.172(1).

² RCW 36.70A.172.

³ "In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations *to protect the functions and values* of critical areas...." RCW 36.70A.172. [Emphasis added].

III. Hancock Springs' Design Minimizes Impacts by Reducing Lot Size and Configuration.

Finally, we respectfully take issue with the findings in the staff report that the applicant failed to propose alternative designs for Hancock Springs. Private Capital submitted a letter to the staff on September 6, 2005, describing steps taken to minimize impacts to the wetland area. The size and scope of the lots surrounding the wetlands were reduced. And the wetland fill activity reduced approximately 21.3% from .47 acres of fill in the original submittal sent to the City on February 7, 2005, to .37 acres of fill in the revised submittal on August 19, 2005. And it is noted in the September 6 letter that we demonstrated steps reducing impacts to the functions and values of wetlands including reducing the intensity of the numbers of lots on the property given the zoning.

The configuration of the lots provides cross circulation from Cascade to NW 18th Avenue. Having the development's internal road connect to these arterials is of importance to the City. Not allowing lots to front that road is poor planning and it reduces the incentive to develop the road in the first place. We believe that the proposed configuration is in the City's interest. We also believe that the reduction in wetland fill mentioned above and the proposed mitigation measures will improve the functions and values of the wetlands onsite and will allow the road to be constructed which furthers the City's interest for traffic circulation.

We ask that the council find that the applicant did submit alternative designs and has proposed measures reducing the direct impacts to the wetland areas. And that through mitigation there will be an overall improvement of the functions and values to the wetlands onsite.

IV. Requested Relief.

We respectfully request that council grant our following requests on this matter. First, we request that council determine that we demonstrated that the proposed fill activity will improve the functions and values of the wetlands as demonstrated by our expert testimony. We believe that the activities will meet the standards set forth by the experts at the Corps.

Secondly, we ask that council find that Hancock Springs did have alternative designs and that the preliminary plat before you is a reflection of the reduced impacts to wetlands areas over the site.

Third, we ask that you overturn the planning commission recommendation that the proposed fill be reduced by two lots in accordance SEPA mitigated determination of non-significance. This would approve the subdivision as shown by the applicant in its August 19, 2005 submittal.

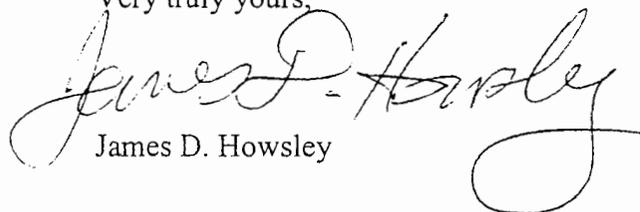
In the alternative to the absolute removal of the planning commission condition, we would propose that Hancock Springs may plat, but not develop lots 10 and 11 unless and until the Corps, the Department of Ecology and the City approve a mitigation plan for those lots. The net result would be that if the Corps approves the fill activities, as proposed by the applicant in the August plan, that the City will defer to the Corps expertise on this matter and approve the fill consistent with the regulating agency. We ask that applicant be allowed to proceed with the development of the project without the grading of lots 10 and 11 until the Corps approval is granted to the applicant. The net result would be that the development of lots 10 and 11 would occur upon an evaluation of the experts that the mitigation meets the Corps scheme for maintaining functions and values of the wetland. We would also be willing to submit to a timeline to receive the appropriate federal, state and local permits.

We believe this is a fair compromise and shows good faith by the applicant and good faith by the City that the proposed fill activities will not occur until the functions and values are maintained. We would be willing to help the City draft a condition as part of the mitigated determination of non-significance that achieves this objective.

V. Conclusion

We respectfully request that you grant our requested relief. We plan on attending the Council hearing if you wish to entertain questions for clarification of this letter and intended request. We thank you in advance for your careful deliberation of this request.

Very truly yours,



James D. Howsley

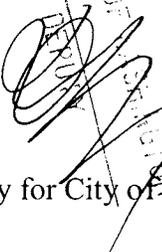
cc: Client
Brian Bieger
Shawn MacPherson, Esq.
John Karpinski, Esq.
Monte Brachmann
Phil Bourquin
Sarah Fox

CERTIFICATION OF SERVICE

I hereby certify that I served the foregoing Appellants' Reply Brief upon the following listed attorneys on the date noted below:

James D. Howsley, WSBA #32442
Jeffrey Lindberg, WSBA #32444
500 E. Broadway, Suite 400
Vancouver, WA 98660
360-619-7021
FAX 360-694-6413
james.howsley@millernash.com
jeff.lindberg@millernash.com

Attorneys for Respondent Private Capital LLC

STATE OF WASHINGTON
BY  DEPUTY CLERK
07 AUG 15 PM 2:11
COURT REPORTER
JENNIFER L. HARRIS

Attorney for City of Camas

Jeffrey S. Myers, WSBA #16390
Law Lyman Daniel Kamerrer et al
PO Box 11880
Olympia, WA 98508-1880
360-754-3480
FAX (360) 357-3511
jmyers@lldkb.com

Attorney for City of Camas

Shawn R. MacPherson, WSBA #22842
430 NE Everett St
Camas, WA 98607-2115
360-834-4611
FAX 360-834-2608
cityattorney@ci.camamas.wa.us

by the following indicated method or methods:

- by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorneys as shown above the last-known office address of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.
- by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, on the date set forth below.
- by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the attached confirmation report.

Law Offices of John S. Karpinski
2612 E. 20th Street
Vancouver, WA 98661
360/690-4500
FAX 360/695-6016

1 ■ by sending a full, true and correct copy thereof via **e-mail** to the attorneys at the attorneys'
2 last-known office e-mail address listed above on the date set forth below.

3 DATED this 13th day of August, 2007.

4
5 
6 DIANE M. KARPINSKI
7 Legal Assistant to
8 John S. Karpinski,
9 Attorney for Petitioner

10 Lawrence Crt App Cert of Service Reply Brief.081307.wpd