

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 41361-2-II

KS TACOMA HOLDINGS, LLC,

Appellant,

v.

SHORELINES HEARINGS BOARD, et al.

Respondents.

KS TACOMA'S REPLY BRIEF

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I. INTRODUCTION

KS Tacoma, which owns the upscale boutique Hotel Murano, has a corporate interest in enforcing the view, aesthetic, and land use provisions of the Shoreline Management Act. Views from the hotel rooms as well as the use, character, and aesthetics of the neighborhood in which the hotel is located are fundamental elements of the reputation and desired character of the hotel itself. At the very heart of the corporate interest of a high-end, boutique hotel, such as the Hotel Murano, is an interest in the views from the hotel and an interest in the aesthetics and land use of the neighborhood in which it is located.

KS Tacoma and its owners, guests, and employees will suffer concrete injury to its aesthetic and view interests caused by a dramatic change in the character of architecture and aesthetic proposed by Hollander in contrast to the existing aesthetic of the shoreline. Similarly, the generic limited-service branded hotel, which contains no residential element, will undermine the mixed-use, residential, and high end commercial community setting. Far from “bald assertions” as characterized by respondents, the injuries that will be suffered by KS Tacoma, its owners, employees, and guests are specific and concrete.

II. ANALYSIS AND AUTHORITY

A. KS Tacoma Can Assert View, Land Use, and Aesthetic Injuries

It is well established that corporations can assert an interest in personal types of injuries to establish standing in cases that involve environmental statutes. *See* Opening Brief of KS Tacoma Holdings, LLC (hereinafter “KS Tacoma Opening Brief”) at 24-27. Multiple courts from multiple jurisdictions (including the Shorelines Hearings Board) all agree on the basic premise that corporations can assert personal, non-economic interests to establish standing. *Id.*

In addition, there is no dispute that aesthetics, views, and land use interests are within the “zone of interests” of the Shoreline Management Act. *See* KS Tacoma Opening Brief at 20-23. Therefore, a corporation that alleges injury to view, aesthetic, or land use interests has alleged interests that are embraced by the SMA.

Respondents present a number of arguments regarding a corporation’s right to assert non-economic injuries that are not only internally inconsistent and illogical, but they are not supported by the case law. Each of those arguments is addressed below.

1. Environmental interests alleged for purposes of standing can be connected to the financial bottom-line of a corporation

Respondents argue that because KS Tacoma's interests in view, aesthetics, and land use are related to its financial bottom line, KS Tacoma cannot allege these injuries to establish standing. Brief of Respondent Hollander Investments, Inc. (hereinafter "Hollander Response") at 26; City of Tacoma's Response Brief (hereinafter "Tacoma Response") at 20. That is not the case.

Federal courts have ruled overwhelmingly in cases involving environmental statutes that a connection of non-economic interests to the financial interests of a corporation does not preclude the corporation from having standing. Cases brought under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, *et seq.*, are instructive on this issue because (1) the test for standing under NEPA is exactly the same as the test for standing under the SMA and, (2) economic interests have been held as not within the zone of interests to be protected or regulated by NEPA or the Shoreline Management Act (SMA). *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct.

1361, 31 L.Ed.2d 636 (1972); *Alexander v. Port Angeles*, SHB No. 02-027 and SHB No. 02-028 (Summary Judgment, Mar. 12, 2003).¹

In *United States v. 18.2 Acres of Land*, 442 F. Supp. 800 (E.D. Cal. 1977), the plaintiffs challenged defendant Diamond International Corporation's standing to raise counter-claims based on NEPA because defendant's claimed interests were connected to its economic interests. *Id.* at 806. The Court stated:

Pure altruism is not a prerequisite to standing to sue under NEPA. As another court appropriately said with regard to this very point: "True, the plaintiffs are not primarily devoted to ecological improvement, but they are not on this account disqualified from seeking to advance such an interest. No group has a monopoly on working for the public good."

Id., quoting *National Helium Corporation v. Morton*, 455 F.2d 650, 655 (10th Cir. 1971). The Court continued:

Were this Court to adopt the government's contention that defendant be denied standing because its NEPA concerns are

¹ In its Opening Brief, KS Tacoma pointed out that the Court of Appeals has ruled that economic interests of a corporation engaged in land development and shoreline construction in the City were within the zone of interests of the local Shoreline Master Program and, therefore, the Shoreline Management Act. *See Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 864, 103 P.3d 244 (2004).

Hollander attempted to distinguish *Biggers* on the grounds that the subject petitioner, a family owned business, was directly and adversely affected by the moratorium on shoreline development, while Hollander contends that KS Tacoma suffers no comparable injury. Hollander Response at 27. To the contrary, KS Tacoma's hotel, the Hotel Murano, will be directly and adversely affected by the approval of this development as is explained in detail in Petitioner's Opening Brief and elaborated upon herein in Section D below.

economically motivated, then the universe of legitimate NEPA plaintiffs would be severely constricted. Any profit-making corporation, for example, would be faced with a Catch-22 proposition of satisfying the “injury-in-fact” prong of the standing test, which would seem to require an economic motivation, while at the same time demonstrate that its interests are not economically motivated to satisfy the “zone of interest” prong. The Court declines the invitation to pose such obstacles in the path of environmental litigation and finds that defendant has standing.

Id. at 806.

In *Monarch Chemical Works, Inc. v. Exxon*, 452 F. Supp. 493 (D. Neb. 1978), Monarch filed a lawsuit against the City of Omaha alleging a violation of NEPA. To establish standing, Monarch claimed that it would suffer from, among other things, deleterious changes in patterns of land use, population density, and traffic. *Id.* at 499. The defendants challenged Monarch’s standing by presenting “considerable evidence” that the plaintiff was motivated by business considerations rather than environmental values. *Id.* According to the defendants, Monarch’s filing of a lawsuit premised on NEPA was “nothing more than a delaying tactic.” *Id.*²

² Hollander has attempted to discredit KS Tacoma by asserting that KS Tacoma’s only goal is to delay respondent Hollander’s hotel project and thereby its entry into the Tacoma hotel market. *See* Hollander Response at 1. Hollander submitted no evidence whatsoever to support these claims. In contrast, the *Monarch* defendants presented “considerable” evidence to support similar claims and the court still found the claims irrelevant.

The Court recognized that Monarch clearly had economic interests, but held that the environmental concerns expressed were sufficient to give Monarch standing to argue the merits. The Court stated:

Even though the plaintiff has an obvious financial interest in stopping the construction of the facility, the Court is unwilling to conclude that the individuals who make up the Monarch corporation are motivated solely by protection of their own pecuniary interest and that the public interest aspect is so infinitesimal that it ought to be disregarded altogether. It is not part of our function to weigh or proportion these conflicting interests. Nor are we called upon to determine whether persons seeking to advance the public interest are indeed conscientious and sincere in their efforts. True, the (plaintiff is) not primarily devoted to ecological improvements, but (it is) not on this account disqualified from seeking to advance such interests.

Id., citing *National Helium Corp. v. Morton*, 455 F.2d 650, 655 (10th Cir. 1971).

In *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979), Hermiston Broadcasting Company owned radio broadcast facilities in Umatilla County. It brought suit under NEPA alleging that an environmental impact statement was required in connection with the execution of a power supply contract which obligated the Bonneville Power Administration to supply electrical power to a proposed aluminum reduction plant. The broadcasting company

alleged that the transmission lines to be built for servicing the plant would interfere with its broadcast. The Court stated:

The injury may be classified as economic. Nonetheless, the injury is the immediate and direct result of the building of the Alumax plant, an action that “will have a primary impact on the natural environment.” In this respect, NEPA and Hermiston and, indeed, Concerned Citizens and the Umatilla County residents share a common interest in the proposed construction of the Alumax plant in Umatilla County. Moreover, Hermiston’s injuries, unlike the Port of Astoria’s economic injuries are casually related to an act that lies within NEPA’s embrace.

Id. at 476 (citations omitted), *citing National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

2. KS Tacoma has a corporate interest in aesthetics, land use, and views

Respondents suggest, incorrectly, that case law establishes a rule requiring that environmental harm alleged by a corporation must be “related to the corporate purpose” to establish standing.³ *See* Tacoma Response at 18; Hollander Response at 28-29. In direct contradiction to their other claim that the views, land use, and aesthetic interests are directly related to KS Tacoma’s corporate interest (through its financial bottom line), respondents

³ There is no rule requiring that the asserted injury be related to a corporation’s purpose for a corporation to establish standing. It is not important to belabor this point, however, because the injury asserted by KS Tacoma clearly has a direct relation to the corporation’s purpose.

claim on the pages that follow that the views, aesthetics, and land use interests are not related to KS Tacoma's corporate purpose. The truth of the matter is that KS Tacoma's interests in aesthetics, land use, and views are directly related to its corporate purpose.⁴

A corporation, such as KS Tacoma, formed to provide hotel services, has a clear corporate interest in enforcing the view, aesthetic, and land use provisions of the SMA. This is especially true for a high-end boutique hotel. The character, land use, and aesthetics of the Hotel Murano's surroundings are "assets" of the Hotel. Just as Mobil Oil Corporation has an interest in protecting oil reserves (even ones it does not yet own), the owner of the Hotel Murano has an interest in protecting the character of the neighborhood in which it is located. Just as a shrimping company has an interest in the preservation of shrimp, the company running the Hotel Murano has an

⁴ Even if KS Tacoma's interests were not related to its corporate purpose, it could still establish standing. It is not the character of the plaintiff that defines whether that plaintiff has standing, it is the injury alleged. The analogies that Hollander provides at page 28 of its Response Brief are useful to demonstrate this point. An environmental group alleging standing to appeal a decision to grant a restaurant liquor license may be successful with its standing argument if that group proves that its office is located near the restaurant and an increase in patrons' drinking at a restaurant would cause increased trash, noise, and other injury to them. The mere fact that they are an environmental group with a mission of protecting the environment does not foreclose them from having standing if they can assert an injury-in-fact within zone of interests of the statute at issue.

The same is true for a group formed to protect voting rights challenging an environmental regulation. If that group can demonstrate that the environmental regulation in question injures it in some specific way, perhaps by limiting its ability to put up signs near a

interest in protecting the aesthetics of the hotel's surroundings. Views from the hotel rooms as well as the use, character, and aesthetics of the neighborhood in which the hotel is located are fundamental elements of the reputation and desired character of the hotel itself. Harm to aesthetics, harm to views, harm to land use in the neighborhood constitutes harm to the hotel's corporate interests.

3. Courts have not created a hierarchy of interests for purposes of meeting the zone of interests test

The City's suggestion that some environmental interests, such as view, aesthetics, or land use are not within the zone of interests for a corporation because they are given a lesser level of protection by the SMA than others, *see* Tacoma Response at 19, finds no support whatsoever in case law. Interests are either within the zone of interests of a statute or they are not within the zone of interests of a statute. There is no hierarchy among interests mentioned in case law concerning the zone of interests test. There is no rule that corporations who allege an injury that is ecological can be considered within the zone of interests, while those who claim injury to view or land use interests cannot.

voting facility (as a land use regulation might), the group would have standing.

Not surprisingly, the City provides no citation to any case law for this argument. The City states only that “it would appear” that the SMA does place a higher level of protection on certain interests above others, citing “the list found in RCW 90.58.020.” *Id.* That is a general list found in the legislative findings of the statute with no reference whatsoever to standing. The idea of relying on that language to override well-established case law indicating that views, aesthetics, and land use are within the zone of interest of the Shoreline Management Act is entirely without merit.

B. KS Tacoma Is Legally Authorized to Assert the Rights of its Owners, Employees, and Guests Based on Organizational Standing

As established in Plaintiff’s Opening Brief, KS Tacoma is legally authorized to assert the rights of its owners, employees, and guests based on organizational standing. Respondents overlook the evidence that was submitted regarding impacts to KS Tacoma’s owners, employees, and guests. Howard Jacobs and Mark Van Cooney each submitted affidavits on these issues. AR 156-175.

Howard Jacobs is one of the owners of KS Tacoma. AR 156. He testified that he visits the Hotel Murano multiple times per month and enjoys the views of the Thea Foss Waterway from the hotel. AR 158. He also runs

along the shoreline during the early morning hours past the development site and enjoys the views and aesthetics of the shoreline. *Id.*

Mark Van Cooney is an employee of the Hotel Murano. AR 174. He testified that the guests of the hotel enjoy an unobstructed and unique view of the waterway from the Hotel Murano and they also enjoy the views when they walk around the neighborhood and near the shoreline. AR 174. He also testified that the guests use and enjoy the Thea Foss Waterway shoreline in a number of ways, including biking, running, walking, and sight-seeing along the waterfront. *Id.* The guests also spend time walking throughout the area and enjoying the views of the waterway near the shoreline. AR 175.

With respect to the first element of the test, Hollander argues that associational standing is reserved for organizations that have members and claims that KS Tacoma “has no members.” Hollander Response at 21. To the contrary, employees of a corporation can be considered its “members.” *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 292 (D.C. 1991). Furthermore, just as shareholders are members of a corporation, the owners, such as Howard Jacobs, constitute “members” of KS Tacoma Holdings.

Respondents also argue that KS Tacoma failed to demonstrate that its view, aesthetic, and land use interests are germane to its corporate purpose.⁵ But as explained above, the interests alleged are germane to its corporate purpose. A corporation, such as KS Tacoma, that is formed to provide upscale hotel services, has a corporate interest in enforcing the view, aesthetic, and land use provisions of the Shoreline Management Act. Views from hotel rooms as well as the use, character, and aesthetics of the neighborhood in which the Hotel Murano is located are fundamental elements of the hotel's reputation and desired character of the hotel itself. The hotel's corporate interest is about an experience, the view, and the surroundings – there can be no question that protecting the character and aesthetic of the neighborhood is germane to KS Tacoma's corporate purpose in running a hotel.

⁵ In its response brief, the City inappropriately references information that is outside of the record and simply attached two non-record exhibits to its brief. Absent a motion to supplement the record (which has not been made), this extra-record evidence is impermissible. The “exhibits” and the portions of the briefing discussing them should be stricken. KS Tacoma moves to strike Exhibit B and the statement in its brief that “according to information available online from the Washington Secretary of State, KS Tacoma Holdings, LLC is not even currently registered to do business in the State of Washington, the State in which the Murano employees undoubtedly reside.” Tacoma Response at 21. Not only is this inappropriately submitted to the Court, KS Tacoma has no opportunity to appropriately respond with evidence at this late stage in the closed record appeal.

This case can be distinguished from *Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F. Supp.2d 744 (E.D. Va. 2002). In that case, the Court ruled that a shopping center developer could not establish associational standing because the interests at stake in that case were not germane to the developer's organizational purposes. *Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F. Supp. at 758. The court concluded that the developer of a shopping center did not have a corporate interest in clean air and noise mitigation, among other things, because they were completely unrelated to the development of a shopping center. In stark contrast, an upscale hotel has a clear corporate interest in the land use and aesthetic of the neighborhood in which it is located because those elements are assets for the hotel.

C. The Impacts of the Entire Project Are Relevant to Standing, Not Just the Changes That Are Characterized as Revisions

Respondents' contention that KS Tacoma is attempting to collaterally attack the original shoreline substantial development permit completely misconstrues the issues raised and the relief sought in KS Tacoma's appeal.⁶

⁶ The issue concerning whether the Board should have considered the impacts of the entire project for purposes of standing is relevant only for purposes of considering the impacts to the Hotel Murano's views. The question is whether the Board should have considered injury from a one-inch difference caused by the revision or injury to the views caused by the entire proposal.

KS Tacoma is not attempting to attack the original permit. The entire discussion presented by respondents concerning finality in land use decisions and statutory/regulatory time bars is, therefore, irrelevant.

The City claimed that KS Tacoma “has not provided any meaningful specifics as to how or why the proposal was not within the scope and intent of the original permit.” Tacoma Response at 8. To the contrary, plaintiff provided the specifics in a Motion for Summary Judgment filed with the Shorelines Hearings Board. AR 334-434.⁷ A closer look at the merits of KS Tacoma’s appeal will provide insight to understand the relief that KS Tacoma would win if it were successful on the merits. The Petition for Review filed by KS Tacoma Holdings challenged the City’s decision to treat Hollander’s application for development as a revision. Revisions are allowed only if the “local government determines that the proposed changes are within the scope and intent of the original permit.” WAC 173-27-100(1). The rule states as follows:

- (1) If [the] local government determines that the proposed changes are within the scope and intent of the original permit, and are consistent with the applicable master program and the Act, local government may approve a revision.

⁷ KS Tacoma’s motion for summary judgment on the merits of this issue was not considered by the Shorelines Hearings Board.

(2) “Within the scope and intent of the original permit” means all of the following: . . .

(e) The use authorized pursuant to the original permit is not changed. . . .

WAC 173-27-100(1) & (2). The rule is, therefore, if the use authorized pursuant to the original permit is changed, then it cannot be treated as a revision and the applicant must file a new application for a new permit.

Hollander proposed a change to the original permitted project that was not “within the scope and intent” of the original permit because the use authorized pursuant to the original permit was changed. Hollander eliminated the residential dwelling units from the proposal entirely. The project changed from residential and commercial “mixed use” to a purely commercial project.⁸ Therefore, the Hollander proposal should not have gone through the truncated process reserved for minor project “revisions” pursuant to WAC 173-27-100.

If the Shorelines Hearing Board had ruled in favor of KS Tacoma, it would have ruled that the City of Tacoma erred when it approved the Hollander proposal as a revision. The Shorelines Hearings Board would have

⁸ This was a far greater change in use from a relatively minor change in another Shorelines Hearings Board case that precluded the use of a revision. *See Hayes v. Mason County*, SHB Nos. 08-021 and 08-022 (Findings of Fact, Conclusions of Law, and Order, Jan. 23, 2009).

ordered that an entirely new shoreline substantial development permit be obtained for the proposal.

If this relief is granted, the administrative process will be significantly different. KS Tacoma will have an opportunity to engage in a far more extensive public process in which it can challenge every aspect of the Hollander proposal.⁹ KS Tacoma would be allowed to present legal arguments about whether the Hollander proposal is consistent with the Shoreline Management Act and the Shoreline Master Program. With the project being treated as a revision, KS Tacoma was foreclosed entirely from challenging the project on those bases per WAC 173-27-100(8).¹⁰

Hollander argues that the original development could proceed under the original permit. That is not true. Construction activities must be commenced within two years of the effective date of a substantial development permit (with potential for “one year extension”). RCW

⁹ KS Tacoma had no objection to the prior project which it understood would include an upscale hotel, permanent residences, and high quality retail. The current proposal offers the prospect of very different land uses with correspondingly different impacts on KS Tacoma’s neighbor and KS Tacoma itself.

¹⁰ Hollander’s characterization of KS Tacoma’s discussion of WAC 173-27-100(8) as being a criticism of the “approach” misses the point entirely. *See* Hollander’s Response at 10. KS Tacoma does not criticize the “approach” of the rule, rather KS Tacoma is simply explaining that the rule contains a legal limitation. Under WAC 173-27-100(8), the scope of review for a revision is much narrower than for a regular permit. We contend the distinction has been misapplied here – with disastrous consequences for KS Tacoma.

90.58.143. The effective date of the original shoreline substantial development permit was February 26, 2007, AR 231, with a minor revision approved on March 27, 2008. Construction has not yet begun on the original permit. Moreover, Hollander is clearly not interested in building that original design and the original developer has abandoned the project.

D. KS Tacoma (and its Employees, Guests, and Owners) Will Suffer Concrete Injury-in-Fact from the Hollander Proposal

Respondents attempt to discredit KS Tacoma's allegations of injury by characterizing them as "bald assertions" with no specifics. Tacoma Response at 11 (*citing CORE v. City of Olympia*, 33 Wn. App. 677, 657 P.2d 790 (1983)). But in *CORE*, the plaintiff did literally make "bald assertions" of injury and only bald assertions. The plaintiff submitted an affidavit wherein he stated "your affiant, as a property owner in the near vicinity of the hospital, will clearly be affected by the proposed hospital expansion, although without an environmental impact statement the exact impact cannot and has not been assessed. In any event, your affiant expects that it will be detrimental and your affiant will suffer an injury-in-fact, both economic and physical." *Id.* at 681. He proceeded to submit a number of affidavits along those same lines. He did not even mention specific impacts caused by

lighting, traffic, noise, or other interests – instead he simply repeated over and over again that he would suffer an injury-in-fact without ever explaining how.

That is entirely different from this case. Here, KS Tacoma has provided specific evidence to show how it will suffer concrete and perceptible injury related to views, aesthetics, and land use caused by the Hollander proposal. KS Tacoma did not simply state that it will be injured – KS Tacoma explained the specific impacts it would suffer.

The *Alexander* case provides a good example of the level of specificity required to show standing. *See Alexander v. Port Angeles, supra*. As was provided in Plaintiff’s Opening Brief and as is explained further below, KS Tacoma provides the same level of specificity required to show standing and alleges rather similar types of injury to its interest as those accepted by the Board in the *Alexander* case.

1. The proposal will adversely impact KS Tacoma and its guests and employees’ aesthetic enjoyment of the Foss Waterway

At the very heart of the corporate interest of a high end, boutique hotel such as Hotel Murano is an interest in the aesthetics of the neighborhood in which it is located. As was explained in Petitioner’s Opening Brief, the existing aesthetic in the Thea Foss Waterway neighborhood is one of upscale

development that includes world class architectural wonders. *See* Opening Brief at 37-38. Respondents provide no evidence to the contrary. There is no dispute about the current aesthetic of the neighborhood.

Hollander proposes to build a Hilton Garden Inn and Marriott Residence Inn, both of which constitute lower end hotels that have an entirely different aesthetic. *Id.* at 38. These hotels will not have any special aesthetic qualities, but will instead be built with fake brick façade and other formulaic architecture. *Id.* The buildings will be built with the same architectural style as hotels found along a highway corridor. *Id.* It is a dramatic change from the existing aesthetic of the neighborhood. *Id.* That dramatic change in the aesthetic will cause actual, specific, concrete, and perceptible harm to KS Tacoma's corporate interest because it will undermine the aesthetic character of the neighborhood in which it is located.

The harm is redressable by a favorable decision for KS Tacoma. The design guidelines require enhancement of the waterway's visual identity. AR 173. To this end, the Urban Design Guidelines require design solutions that balance and achieve the community goals for aesthetics and that visually unify the waterway by instituting design standards for construction of the shoreline edge and the street corridors. The guidelines require that each

building utilize the characteristics of the waterfront environment and surrounding district to ensure compatibility. AR 166. It is KS Tacoma's position that these policies are being violated by the Hollander proposal.

At this stage of the litigation, for purposes of proving standing, the issue presented to the Court is not the issue on the merits. *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190 (2010). In other words, the question at this time is not whether the proposal violates the aesthetic guidelines in the Shoreline Management Plan. The questions are whether KS Tacoma has alleged specific harms with respect to aesthetics, whether aesthetics are within the zone of interests of the Shoreline Management Act, and whether the harm is redressable by a favorable opinion of the Board. The answer is yes on all three fronts.

2. The proposed land use of the shoreline will adversely impact the Hotel Murano and its owners, guests, and employees

A hotel, as a matter of its corporate interest, has an interest in the land uses of the community in which it is located. AR 158. Because the Hotel Murano is a high-end, boutique hotel, KS Tacoma has a corporate interest in being located in a mixed-use, residential, and high end commercial community setting.

The proposed hotel will adversely impact KS Tacoma's land use interests. It eliminates the prior residential component entirely and substitutes a freeway-oriented, generic hotel. Having a residential component was crucial to the character of the neighborhood. With the residential units, it was a higher end "mixed use" development, rather than a formulaic hotel. The original concept for this project (a unique, upscale, boutique hotel with residential and retail components) would have complemented the growth and creation of an upscale residential and retail neighborhood. People would want to live in the area -- people would want to buy condominiums adjacent to the upscale mixed use residential hotel that caters to neighborhood living. Residential hotels create synergy and activity that does not leave the sidewalks empty after 5:00 p.m. and on weekends and that goes beyond foot traffic in the downtown corridor during work hours. Building a generic limited service, branded hotel ultimately sets the tone that limits the viability and quality of future development in the area.

The injury to KS Tacoma's land use interests is redressable by a favorable opinion. The Thea Foss Waterway Development Plan places a strong emphasis on developing a working waterfront combined with residential, recreational, office, and retail use that will create a lively urban

environment. AR 168-169. The Development Plan indicates that private redevelopment efforts should create “a lively mixed use district for living, working, and playing.” AR 166. The Hollander proposal for generic, limited service formula hotels that are typically built along a highway corridor is inconsistent with that plan and undermines the goal of the plan to encourage living and working in that area. The condominium units adjacent to the new Hollander hotels will be less desirable and harder to fill because of the presence of the hotels on the waterfront. It will undermine potential for future upscale development and investment. All in all, it will frustrate the City’s vision to develop the shoreline with a mix of high-end residential and commercial uses.

The City acknowledges that the revision removes all of the residential units, but argues that the residential component of the development was “never central” to the project. Tacoma Response at 16. This characterization of the hotel as being “central” to the development misses the point entirely. The previous proposal was for “mixed use” that incorporated permanent residences and, therefore, would have been developed with a quality that is desirable for residential use. That mixed-use quality influences the entire development, not the number of residential units.

Respondents improperly argue the merits of KS Tacoma’s appeal rather than assess whether injury-in-fact has been alleged. For example, the City claims that if residential units on the Foss Waterway are truly responsible for that local community atmosphere, one would think that the 397 units of residential space present on either side of Site 4 on the Foss Waterway at Thea’s landing and the Esplanade Condominiums could still supply that atmosphere for KS Tacoma. Tacoma Response at 16. Obviously, KS Tacoma disagrees. Among other things, the adjacent condominiums are less likely to sell because people do not want to live adjacent to this type of hotel. But this is getting into the merits. The legal issue concerning whether the elimination of residential units is consistent with and/or undermines the goals of the Thea Foss Waterway Development Plan goes to the merits of KS Tacoma’s case and it is inappropriate to delve into the merits when considering standing.

The City’s argument that the Shoreline Master Plan serves as a “guide or blueprint to be used in making land use decisions” is misleading and incorrect. *See* Tacoma Response at 17, *citing Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007). That rule applies to Comprehensive Plans that are adopted under the Washington State Growth Management Act,

ch. 36.70A RCW, not Shoreline Master Plans. The two plans have different legal significance.

Applicants for a permit under the Shoreline Management Act must prove that the proposed development is consistent with the Shoreline Master Plan. RCW 90.58.140(7). The SMA states, without ambiguity, that a development shall not be undertaken on the shorelines of the state unless it is consistent with, among other things, the Shoreline Master Program for the area. RCW 90.58.140. This is a legal requirement – the proposal must be consistent with the Shoreline Master Plan. The Plan is not merely a “blueprint” or guide.

Hollander indicates that nothing in the original shoreline permit application or approval specifies the type or quality of the hotel. This is incorrect. The original application and permit included permanent residences. That unquestionably would have influenced the quality of the hotel because it had to be desirable quality for someone to live in permanently.

3. The views from the Hotel Murano will be adversely impacted by the Hollander development

As was established in KS Tacoma’s opening brief, the views from the Hotel Murano will be adversely impacted by the Hollander Development.

See Opening Brief of KS Tacoma Holdings at 35-36. Respondents' arguments regarding view rely entirely on the incorrect assumption that it is appropriate to look only at the change of one inch height increase in the views caused by the revision. *See* Tacoma's Brief at 12; Hollander's Brief at 36. As is explained in Section C above, that is not the appropriate approach.

For its argument, the City relies on random photographs that were submitted with no identification to explain when these pictures were taken, from where these pictures were taken, or by whom these pictures were taken. The City's claim that "all but one floor of the hotel has no view of the Foss Waterway at all," is incorrect. The view analysis submitted by KS Tacoma shows that there are views from every floor from the 19th floor up. *See* AR 285-288.

III. CONCLUSION

For the foregoing reasons, the petitioner, KS Tacoma Holdings, LLC requests that the Court reverse the decisions of the Shorelines Hearings Board in this matter, declare that KS Tacoma has standing to pursue the appeal before the Board, and remand to the Board with an order that the Board proceed to the merits of the appeal.

Dated this 5th day of May, 2011.

Respectfully submitted,

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KS Tacoma\Appeals\Reply Brief

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KS TACOMA HOLDINGS, LLC,

Appellant,

v.

SHORELINES HEARINGS BOARD, et
al.,

Respondents,

NO. 41361-2-II

DECLARATION OF
SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING) ss.

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for petitioner KS Tacoma Holdings, LLC herein. On the date and in the

manner indicated below, I caused KS Tacoma's Reply Brief to be served

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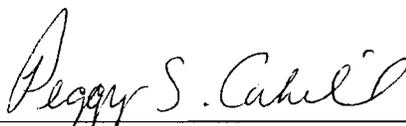
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