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**COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON**

KS TACOMA HOLDINGS, LLC,
a Washington limited liability company,

Petitioners,

vs.

SHORELINES HEARINGS BOARD, *et al.*

Respondents.

CITY OF TACOMA'S RESPONSE BRIEF

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A. INTRODUCTION

“A bald assertion of injury without supporting evidentiary facts is insufficient to support standing.”¹ Unfortunately, for appellant KS Tacoma Holdings, LLC (herein “KS Tacoma”) and its challenge to the City of Tacoma’s grant of Shoreline Permit Revision SHR2009-40000138421 (herein the “Revision”) to Hollander Investments, Inc. (herein “Hollander”), all that KS Tacoma has done to this point in these proceedings is just that—make unsupported assertions of injury that do not stand up to scrutiny.

Issues of corporate and organizational standing aside, the Shorelines Hearings Board (the “Board”), in both its original Order of Dismissal dated June 10, 2010 (the “Dismissal Order”)² and in its Order Denying Reconsideration dated July 26, 2010 (the “Reconsideration Order”),³ got it right when it stated “[t]he requisite injury to establish standing is lacking on the facts of this case.”⁴

KS Tacoma has done an admirable job of listing out various interests that could possibly, with properly plead factual support, amount to standing, but there is no substance to support that list. Without that substance, the City was left to constantly wonder about the “how” and the “why” of these alleged injuries and ultimately brought its motion to dismiss for lack of standing because no connection had ever appeared. Ultimately, the Board agreed and dismissed KS Tacoma’s appeal. Under the circumstances, that decision was correct, as the City will show here in the

¹ Anderson v. Pierce County, 86 Wn. App. 290, 300, 936 P.2d 432 (1997) *citing* CORE v. City of Olympia, 33 Wn. App. 677, 683-84, 657 P.2d 790 (1983).

² CP beginning at pg. 473.

³ CP beginning at pg. 535.

⁴ CP at pg. 539.

argument and authority below.

B. STATEMENT OF THE CASE

KS Tacoma has appealed the Shorelines Hearings Board's dismissal of its appeal of the revision (the "Revision") of City of Tacoma Shoreline Substantial Development Permit SHR2006-40000071970 (the "Original SSDP"), issued in February, 2007 by the City to David Murphy, Murphy Varey P.S., Site-4 Foss Waterway, LLC, and Hollander for development of that certain real property know as Site 4 along the Thea Foss Waterway (the "Foss Waterway") in Tacoma.

The City generally agrees with KS Tacoma's Statement of the Case,⁵ but would offer the following points of distinction and clarification.⁶ First, KS Tacoma has placed much emphasis on the Thea Foss Waterway Design and Development Plan (the "Development Plan")⁷ in its Statement of the Case. The Development Plan is indeed an element of the City's Master Program for Shoreline Development and the City's Comprehensive Plan. It would be silly for the City to refute KS Tacoma's general contention that the City desires development on the Foss Waterway to be of a high order. That said, nowhere in the Development Plan are the collocations "world class," "world renowned" or "architectural wonders" to be found.

⁵ KS Tacoma's Statement of the Case begins on page 4 of Appellant's Brief.

⁶ In doing so, the City truly only offers its additional information to help frame the issues on appeal properly and would submit that nothing in its proffered facts amounts to a material disagreement on any facts relevant to this appeal. No party has contended, to this point, that there are material factual disputes.

⁷ At the time of this writing, Appellant's designation of clerk's papers is incomplete and the City is unsure of Appellant's "AR" reference numbers that appear to indicate content in the Development Plan. The entirety of the Development Plan can be found here:

<http://cms.cityoftacoma.org/Planning/Comprehensive%20Plan/18%20->

[%20Thea%20Foss%20waterway%20Design%20and%20Development%20plan%2011-15-05.pdf](http://cms.cityoftacoma.org/Planning/Comprehensive%20Plan/18%20-%20Thea%20Foss%20waterway%20Design%20and%20Development%20plan%2011-15-05.pdf)

as a searchable PDF. The City's references to the Development plan will be to actual page numbers therein.

KS Tacoma emphasizes that the Development Plan “mandate[s]” or “expressly states” that development should encourage “living, working and playing in the same area” with inclusion of an “active marina, lots of restaurants, and places to go for breakfast.”⁸ Whether a plan of this nature can actually mandate or expressly require these things will be revisited in section C.2.(e) below, but the City does not refute that these things are desirable on the Foss Waterway.

Hotels are also desired. In fact, the desire for hotels on the Foss Waterway is mentioned in the Development Plan at least seven times.⁹ In none of these instances are modifiers such as “boutique” or “world class” used in reference to hotels. Such absence does not mean that the City would want anything less than a quality hotel on its maritime gateway, but when one thinks of “world renowned” hotels, surely the names “Marriott” and “Hilton” would at least enter the conversation. While the Original SSDP was for a primary use that could be called a “boutique hotel,” the important part of that proposal was more the hotel use than the boutique-ness thereof when weighed against the Development Plan.

Subsequent to approval of the Original SSDP without appeal, it was first revised in March of 2008 reducing the number of included residential units and increasing the number of hotel rooms. This first revision was also approved without appeal.

Beginning at page 7 of its Brief KS Tacoma makes numerous negative assertions regarding the hotels planned as part of the Revision that

⁸ Appellant’s Brief at pages 5-7.

⁹ Development Plan at pages 32, 33, 73, 94, 107, 108 and on the page immediately following the title page. These excerpts are included as Exhibit A to this Brief.

are unsupported by anything other than KS Tacoma's own subjective opinion. Such subjective opinions do not create legal standing. Again, in making these characterizations, KS Tacoma alludes to many aesthetic attributes that are not actually requirements under the Development Plan, and to many perceived flaws that are conversely not prohibited.

Lastly, the City would encourage the Court to give very close review to KS Tacoma's allegations of injury that begin in its Statement of the Case starting in Section D. on page 8 of its Brief and continue on through its charges regarding the appropriateness of handling the Hollander proposal as a revision rather than requiring a new SSDP, which conclude in Section F. Assertions are many, but support for those assertions is absent. The City will provide refutation of these assertions in the pages that follow regardless, but as will be shown herein, and as the Board already correctly found, "KS Tacoma ha[s] failed to show a concrete injury to any of th[e]se interests."¹⁰

C. ANALYSIS AND AUTHORITY

The principal issue for review in this matter is whether the Shorelines Hearings Board erred in dismissing KS Tacoma's appeal of the Shoreline Substantial Development Permit revision for lack of standing. KS Tacoma has broken that issue down into four sub-issues, each of which the City will address below, but in a slightly different order than that presented by KS Tacoma. The City will first look at KS Tacoma's contention that the Hollander proposal should not have been handled as a revision, upon which argument KS Tacoma contends that it should be

¹⁰ CP at pg. 539.

allowed to appeal the entirety of the proposed development in the form of the Original SSDP (KS sub-issue 4). The City will then examine KS Tacoma's various alleged categories of injury-in-fact (KS sub-issue 1). Following that, the City will address the issues of corporate standing (KS sub-issue 2), and organizational standing (KS sub-issue 3) in turn.¹¹

For purposes of this appeal, the standard of review is set forth in the State Administrative Procedures Act (the "APA") under which KS Tacoma appealed, namely, that in reviewing an agency order, the court shall grant relief only if the order (a) is unconstitutional, (b) is *ultra vires*, (c) is unlawful as to procedure or process, (d) shows that the agency has erroneously interpreted or applied the law, (e) is not supported by substantial evidence when viewed in light of the record as a whole, or (f) the order is arbitrary or capricious.¹² The burden of proving the invalidity of the Board's dismissal is on KS Tacoma.¹³

1. The Principle of Finality in Land Use Decisions and Statutory/Regulatory Time Bars Dictate that the Proper Scope of this Appeal is Review of the Revision Only.

KS Tacoma has assigned error to the Board's Dismissal Order apparently contending that the Board unfairly limited KS Tacoma's ability to show standing because the Board only considered aspects of the Site 4 development arising from the Revision as suitable bases upon which standing could be found. The Board's decision was correct for two

¹¹ The City would point out here that it has not been a major contributor to the discussion to date on corporate and organizational standing in these proceedings, but will address those issues here within the framework of the proceedings as argued now by the Appellant.

¹² RCW 34.05.570 at subsection (3). The City has not listed all grounds for granting relief, but rather all grounds that seem remotely applicable here.

¹³ RCW 34.05.570(1)(a).

reasons: (a) the principle of finality in land use decisions prevents KS Tacoma from collaterally attacking the Original SSDP at this time, and (b) RCW 90.58.180 and WAC 173-27-100(8) time bar any appeal of the Original SSDP well before the present action was filed.

(a) Finality in Land Use Decisions. A guiding principle behind government regulatory decisions in the land use arena is that such decisions should provide land owners certainty concerning the development of their property.¹⁴ That certainty is achieved, at least in part, through the timing requirements for appealing such land use decisions. In the Skamania County v. Columbia River Gorge Comm'n. case, the State Supreme Court went so far as to say that:

Statutory time limits on petitions for review of agency action are jurisdictional in nature. These limitations serve the "important purpose of imparting finality into the administrative process, thereby conserving administrative resources." Furthermore, timeliness requirements reflect "a deliberate congressional choice to impose statutory finality on agency orders, a choice we may not second-guess."

We have also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "if there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit."¹⁵

This quote nicely sums up about all there is to say from a case/common law standpoint on whether KS Tacoma can now appeal the

¹⁴ Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000); Skamania County v. Columbia River Gorge Comm'n., 144 Wn.2d 30, 26 P.3d 241 (2001); Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002); Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002); and Stafford v. Bainbridge Island, SHB NO. 03-010, 2003 WA ENV LEXIS 64 (2003).

¹⁵ 144 Wn.2d 30, 49, 26 P.3d 241 (2001) *internal cites omitted*.

Original SSDP that was issued in February, 2007. KS Tacoma did not appeal the Original SSDP nor did it appeal the first revision thereto which was granted in March of 2008. According to the Skamania case, neither the Board, nor this Court has jurisdiction over appeals of the Original SSDP or the March, 2008 revision at this point in time. Allowing KS Tacoma to subject the whole of the project, as embodied in the Original SSDP and the first revision, to appellate review at this late date, would be just the kind of exception the Skamania Court disallowed, and thereby an unlawful collateral attack as set forth in Nykreim¹⁶ and Wenatchee Sportsmen Association.¹⁷

The Board also took note of the fact that “KS Tacoma has failed to provide...any authority demonstrating that the proper scope of review in a revision case extends beyond the revision on appeal to the Board.”¹⁸ That has not changed with the addition of KS Tacoma’s current brief and therefore the Board’s ruling on that issue should be upheld limiting the scope of the appeal and the bases for standing to the aspects of the Revision alone.

(b) Statutory/Regulatory Time Bars. The holdings regarding finality, certainty and timeliness referenced in the above case law have been codified into the regulatory framework of the Shoreline Management Act, RCW 90.58 (the “SMA”) through the implementing regulations found in WAC 173-27-100, the section of the WAC that

¹⁶ 146 Wn.2d at 932.

¹⁷ 141 Wn.2d at 181-82.

¹⁸ CP at pg. 480.

governs revisions to permits under the SMA. Subsection (8) is the operative provision for purposes of this issue and it requires that any appeal involving a permit revision “shall be filed within twenty-one days from the date of receipt of the local government's action...” Appeals of Shoreline Substantial Development Permits (as opposed to revisions thereof) are under the same time constraint pursuant to RCW 90.58.180 and WAC 461-08-340(2)(a).¹⁹ Given those parameters, the present appeal of the Revision may have been timely, but filing it in January of 2010 does not give KS Tacoma any avenue to attack the previously decided Original SSDP or the first revision thereof. As a result, any review of shoreline development decisions at Site 4 prior to the Revision are barred.

(c) Further Refinements to Scope. In addition to its timing provision, subsection (8) of WAC 173-27-100 further defines the scope of appeal-ability for revisions to a SSDP by stating, “Appeals shall be based only upon contentions of noncompliance with the provisions of subsection (2) of this section. Subsection (2) defines what it means to be “Within the scope and intent of the original permit”—the chief criteria for getting a revision approved. While KS Tacoma has generally alleged that the Hollander proposal was not appropriately handled as a revision, it has not provided any meaningful specifics as to how or why the proposal was not “Within the scope and intent of the original permit.” In spite of such lack of specifics, the City offers the following brief answers for each factor under the requirement. Under WAC 173-27-100(2), “Within the scope and

¹⁹ Both of which essentially require that “(1) Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state (or a local government's decision granting, denying or rescinding a shoreline substantial development)... may...seek review from the shoreline hearings board by filing a petition for review within twenty-one days of the date of receipt of the decision as provided for in RCW 90.58.140(6).”

intent of the original permit" means all of the following:

(a) No additional over water construction is involved except that pier, dock, or float construction may be increased by five hundred square feet or ten percent from the provisions of the original permit, whichever is less;

(There is no over water construction in the project or the Revision at all.)

(b) Ground area coverage and height may be increased a maximum of ten percent from the provisions of the original permit;

(Ground area coverage has not changed in any appreciable manner much less ten percent.)²⁰

(c) The revised permit does not authorize development to exceed height, lot coverage, setback, or any other requirements of the applicable master program except as authorized under a variance granted as the original permit or a part thereof;

(No such requirements are exceeded by the Revision and no variances have been granted.)

(d) Additional or revised landscaping is consistent with any conditions attached to the original permit and with the applicable master program;

(Landscaping is consistent with the Original SSDP and the City's Master Program.)

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

(The mixed use development with a hotel as the primary component has not changed.)

(f) No adverse environmental impact will be caused by the project revision.

²⁰ See CP at pgs. 117, 128-131 and Exhibit C for a comparison of relevant elements between the Original SSDP and the Revision.

(No environmental impacts were found and none have been alleged.)

As much as the foregoing answers settle the issue of original scope and intent for the Revision, the real proof on the issues this appeal presents comes with an analysis of whether KS Tacoma can sustain standing by showing that it suffers any cognizable injury-in-fact as a result of the Revision.

2. KS Tacoma has Failed to Show any Cognizable Injury-in-Fact that it Suffers as a Result of the Revision and Therefore the Board’s Dismissal for Lack of Standing should be Upheld.

Because KS Tacoma is neither the owner of the Site 4 real property or the applicant of the Revision, it must show that it is an “aggrieved person” adversely affected by the City’s approval of the Revision in order to establish standing.²¹ Standing is a jurisdictional issue.²² Without standing, an appeal such as this one must be dismissed.²³

For purposes of shoreline proceedings before the Board, the principles to be applied for determining standing are the same as those applied by any other reviewing court under existing law.²⁴ As outlined by the Board in the Alexander case (with internal cites) and put into the present context, the progression of those principles is as follows:

(a) KS Tacoma must show that it is an “aggrieved person;”²⁵

²¹ RCW 90.58.180(1); *see also Nykreim*, 146 Wn.2d at 933 (2002).

²² Firefighters v. Spokane Airports, 103 Wn. App. 764, 768 (2000); *see also, Mitchell v. John Doe*, 41 Wn. App. 846, 847, 706 P.2d 1100 (1985).

²³ High Tide Seafoods v. State, 106 Wn.2d 695, 701-702, 725 P.2d 411 (1986).

²⁴ Anderson v. Pierce County, 86 Wn.App. 290, 299, 936 P.2d 432 (1997); West v. City of Olympia, SHB No. 08-013, 2008 WA ENV LEXIS 59 (November 17, 2008); Alexander v. Port Angeles, SHB Nos. 02-027, 02-028, WA ENV LEXIS 32, 3-5 (2003).

²⁵ Anderson, 86 Wn. App. At 299.

(b) In order to be an “aggrieved person,” KS Tacoma must show that it has suffered an injury in fact within the zone of interests protected by the statute in question (the SMA in this case);²⁶

(c) To show an injury in fact, KS Tacoma must allege specific and perceptible harm;²⁷ and

(d) The perceptible harm must be to the party seeking review, with that party (himself/herself, or in this case itself) actually among the injured.²⁸

The Alexander Board was faced with deciding a motion similar to what transpired below in this case. Alexander’s standing was challenged and the challenge turned into a proceeding on summary judgment. A summary judgment proceeding is not the same as a trial on the merits, and KS Tacoma was not required to prove up on the merits beyond what summary judgment requires. As already stated, however, in such a summary proceeding, bare assertions are not enough to establish an injury in fact.²⁹ Citing CR 56, the Board correctly stated that “To survive summary judgment...petitioners must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true, demonstrating that they are entitled to standing.”³⁰ The problem here is that, even in its affidavits, KS Tacoma has not provided any evidence specific facts that tie the LLC to a specific and perceptible harm, and as a result is left with nothing more than “bald

²⁶ CORE, 33 Wn. App. at 683-684.

²⁷ Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 829, 965 P.2d 636 (1998).

²⁸ Lujan v. Defenders of Wildlife, 504 U.S. 555, 563, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

²⁹ CORE, 33 Wn. App. at 683-84.

³⁰ CP at pg. 479, citing Lujan, 504 U.S. at 561, and Trepanier v. City of Everett, 64 Wn. App. 380, 383, 824 P.2d 524 (1992).

assertions of injury.”³¹

(a) The SMA Zone of Interests. The Shoreline Management Act is designed to protect a variety of hierarchical interests.³² Chief among those are environmental protection interests such as “preserv[ing] the natural character of the shoreline” and “Protect[ing] the resources and ecology of the shoreline.”³³ Secondly to these environmental concerns, interests in views, recreation, and aesthetics also appear to fall within the SMA’s “zone.” Given that these secondary areas are where KS Tacoma has alleged its injuries in fact, the City will examine each in turn.

(b) View. While perhaps not completely “conjectural or hypothetical,”³⁴ KS Tacoma’s allegation that its view will be adversely affected by the Revision,³⁵ is *de minimus* and therefore not sufficient to confer standing. The City would point out that KS Tacoma begins its argument on view by erroneously stating that its view interest is “personal and concrete.”³⁶ It is injury to a cognizable interest that must be personal and concrete, not the interest itself.

KS Tacoma’s Murano Hotel (the “Murano”) occupies a position in Tacoma’s downtown core approximately 5½ blocks to the northwest of Site 4.³⁷ Between the Murano and Site 4 are numerous existing obstructions to views of the Foss Waterway including, among other things, an elevated

³¹ Trepanier, 64 Wn. App. At 384 (*an alleged injury that is not immediate, concrete, and specific, but rather is merely conjectural or hypothetical does not grant standing*).

³² See RCW 90.58.020.

³³ Id.

³⁴ Trepanier, 64 Wn. App. at 383; West, SHB No. 08-013 at 15.

³⁵ The City limits its analysis primarily to arguing only within the aspects of the Revision based on the authority set forth in the “Scope” section above.

³⁶ Appellant’s Brief at pg. 35.

³⁷ CP at pgs. 191-196; Exhibit B to City of Tacoma’s Reply Brief.

section of Interstate 705 and the DaVita building.³⁸ To KS Tacoma’s credit at this stage, it has not claimed any obstruction to its view other than at the top floor of the hotel.³⁹ Given that, KS Tacoma’s claim that it has an “unobstructed and unique view of the Foss Waterway”⁴⁰ is at best inaccurate. All but one floor of the hotel has no view of the Foss Waterway at all. The situation presented is very much like that in Jacobs v. San Juan County⁴¹ where the Board found that even though a complaining party’s view might be “reduced” by new construction closer to the shoreline, such a reduction is not equivalent to an obstruction, and can be *de minimus*.⁴²

Surely such is the case here. What little view of the Foss Waterway the Murano has to begin with is only going to be additionally impeded by a one inch height increase in the Revision.⁴³ As the Board well stated, “the massing of the revised two tower project is actually less intrusive on views than the original design.”⁴⁴ The Revision project is entirely in keeping with the height of neighboring developments as well. At a proposed height of 97’10”, the Revision is in the middle of its two immediately adjacent neighbors—Thea’s Landing at 90 feet, and the Esplanade Condos at 100 feet.⁴⁵

It is likely not within the Board’s or this Court’s legal power to impose as a remedy that no development of Site 4 be allowed whatsoever.

³⁸ Id.

³⁹ Appellant’s Brief at pg. 36.

⁴⁰ Id., at pg. 35.

⁴¹ Jacobs v. San Juan County, SHB NO. 01-015, 2002 WA ENV LEXIS 14, 18-19 (2002).

⁴² *See also Gies v. Seattle*, SHB No. 77-10, 1977 WA ENV LEXIS 119 (1977)(*a two foot extension and blockage of 10 out of 180 degrees was a de minimus intrusion and not a significant impairment of view*).

⁴³ CP at pg. 483.

⁴⁴ Id.

⁴⁵ CP at pgs. 474-475 and 181; City’s Reply Brief at pg. 2.

What KS Tacoma is asking for in the way of remedy for its alleged view injury is unclear, but given the particularly *de minimus* nature of the actual facts, the City would submit that to the extent there is any view injury at all, the remedy is outside of the zone of ability of either the Board or this Court to address⁴⁶ and KS Tacoma has not met its burden in this regard because, once again, any support for its allegations is absent.⁴⁷

More than anything else, KS Tacoma seems to request, as its remedy, the ability to go backward and challenge the Original SSDP. The principle of finality prevents that, but the City would additionally contend that such request as a remedy fails the test for standing because it is not concrete enough on its face to know what KS Tacoma wants from the increased process, let alone know whether such intangible remedy falls within the zone of addressable remedies. There is no perceptibly affected view interest here that rises to the level of a concrete injury in fact and there is no concrete remedy requested. Standing cannot be found through KS Tacoma's view allegations.

(c) KS Tacoma's Recreational Interest will not be Affected in any Appreciable Way by the Revision. Dovetailing from the immediately previous argument on views of the Foss Waterway from the Murano Hotel, the City will next address KS Tacoma's contention that its view interests, while recreating on the Foss Waterway, are injured by the Revision. Once down in the Foss Waterway neighborhood, the City finds it highly implausible that KS Tacoma would recreate anywhere besides the water's edge or on the public esplanade.⁴⁸ Recreating in those locations are

⁴⁶ Save a Valuable Environment v. Bothell, 89 Wn.2d 862, 865-868, 576 P.2d 401 (1978).

⁴⁷ This burden is on KS Tacoma per Alexander, SHB Nos. 02-027, 02-028 (2003).

⁴⁸ The entire area along the shoreline in and around Site 4 is bordered by a 120 foot wide public esplanade that is

all that KS Tacoma has asserted to date. The City finds it difficult to believe that any injury could be sustained while recreating along the shoreline or the esplanade by replacing the current, vacant, sub-grade hole that is presently Site 4 with a hotel, even if non-boutique.

Likewise, given that the only recreational interests cited as a basis for injury are that KS Tacoma principals, employees and patrons like to jog, walk and sightsee on the esplanade, the City fails to see how filling the hole with a hotel will cause any harm. In fact, having a hotel with commercial shops and eating spots at ground level, as planned, should actually encourage such recreation. Add to that the fact that the esplanade is not going anywhere as a result of the Revision⁴⁹ and KS Tacoma's claims of recreational injury evaporate.

(d) Aesthetics. By now, it is clear that KS Tacoma sees the Hollander proposal as aesthetically unpleasant and has even offered at least one specific in that regard, namely the use of brick façade, but is that enough to grant standing? Again, the presumed basis for the aesthetic harm is the fact that "Hotel Murano guests and employees frequent the waterfront for walking, running, exercise and sightseeing."⁵⁰ In fairness, in addition to the "brick façade" complaint, "formulaic architecture" is also mentioned along with general complaints that "the Hollander proposal is completely different" than the original proposal.⁵¹ KS Tacoma then claims that there will be "specific and concrete adverse impact to KS Tacoma...,"

owned by the City of Tacoma. See CP pg. 181, City's Reply Brief before the Board, p. 2.

⁴⁹ The City of Tacoma cannot sell the esplanade according to City Charter Article IX, section 9.1 which states, "The City shall never authorize the sale or disposition of any waterfront property belonging to the City..."

⁵⁰ Appellant's Brief at pg. 37.

⁵¹ Appellant's Brief at pg. 37. The City would note that the foregoing implies that KS Tacoma was fine with the Original SSDP when coupled with the fact that KS Tacoma did not appeal the granting of that permit, and therefore should have no need to reopen the Original SSDP on appeal even if the principle of finality did not prevent such.

and implies that the Revision “is inconsistent with a variety of design guidelines in the Master Program” in areas such as “landscaping, open space, [and] location of uses within the building...”⁵²

Once again, the allegations are many, but the specific details of the harm and how it ties to KS Tacoma personally are missing. Even the design guidelines that KS Tacoma points to are only generally referenced. Without a doubt, the Tacoma Comprehensive Plan and all its constituent elements reference aesthetics. How any of those relate to the Revision as some sort of binding requirement, and how KS Tacoma is harmed by any violation thereof is still missing from this appeal.

(e) General Land Use. Last in its grouping of injury areas, KS Tacoma alleges that the land use change that removed the residential component from the Site 4 development as well as other general land use changes will cause it injury. As the City argued below, this assertion has no merit. KS Tacoma did not appeal the first revision of the Original SSDP which reduced the number of residential units from 22 to 16. The Revision does remove the remaining 16 residential units, but the residential component of this mixed use development was never central—that place was and is occupied by the hotel use. KS Tacoma laments the loss of these residential units because such loss will harm its ability to enjoy the “local community atmosphere”⁵³ engendered thereby. 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

⁵² Id.

⁵³ Appellant’s Brief at pgs. 40-41.

Esplanade Condos could still supply that atmosphere for KS Tacoma.⁵⁴ KS Tacoma makes no tie to the loss of these specific units and its claimed injury.

In its “land use” section, KS Tacoma continues its general theme that somehow the City’s approval of the Revision has violated the Development Plan and thereby should be disallowed. The City would point out to the Court that:

Comprehensive plans serve as “guide[s]” or “blueprint[s]” to be used in making land use decisions. Thus, a proposed land use decision must only generally conform, rather than strictly conform, to the comprehensive plan. A comprehensive plan does not directly regulate site-specific land use decisions.⁵⁵

That said, the City does not find anything in the Revision that is out of keeping, either generally or specifically with the Development Plan or the Comprehensive Plan, but even if that were the case, KS Tacoma cannot use the Development Plan as some kind of exacting compliance mechanism to establish standing. This is especially true when, as here, “The corporation has...failed to identify any specific require[ment that] has been omitted.”⁵⁶

3. The Board Correctly Decided the Issues of Whether KS Tacoma Could Achieve Standing on a Corporate or Organizational Basis Finding that Even if Such Links Were Allowed there was Still no Cognizable Injury in Fact.

Because the City has not championed the issues of corporate and/or organizational standing in the proceedings to this point, it would seem

⁵⁴ CP pgs. 185-186, pgs. 6-7 of the City’s Reply Brief before the Board.

⁵⁵ Woods v. Kittitas County, 162 Wn.2d 597, 613, 174 P.3d 25 (2007), citing Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997); see also Feil v. E. Wash. Growth Mgmt. Hearings Bd., 153 Wn. App. 394, 409, 220 P.3d 1248 (2009).

⁵⁶ CP at pg. 484.

somewhat inopportune to argue them overly strenuously here. The City would, however, take this opportunity to add some support and additional argument to the Board's well-reasoned decision below.

(a) Corporate Standing. The City of Tacoma highly values all its citizens whether of the usual flesh and blood variety or the corporate type. Of course, from a legal standpoint, the City understands that a limited liability company, such as KS Tacoma, is a person under the law. For purposes of establishing standing, a person, whether flesh and blood or corporate, must show that the injury complained of is personal.⁵⁷

KS Tacoma has cited numerous cases in which a corporation, as a corporation, was granted standing. All those cases still required that the asserted injury be personal to the corporation in the sense that the injury must have a relation to the corporation's purpose, such as protecting oil reserves in the case of an oil company.⁵⁸ In addition, every case cited had some form of greater environmental or health/safety aspect to the injury. KS Tacoma acknowledges this by stating that, "federal courts have held that corporations can assert a myriad of environmental interests."⁵⁹ Because no such environmental or health/safety interest is present in this case, KS Tacoma has attempted to diminish the significance that the Board placed on this critical component to achieving standing with the following:

The [Board's] language could be read to state that a corporation could only assert harm to the shoreline habitat

⁵⁷ Lujan, 504 U.S. at 563.

⁵⁸ Mobile Oil Corp. v. F.T.C., 430 F. Supp. 855 (1977). The City finds it interesting that this case dealing with national oil reserves arose during a time of national petroleum shortages—the 1970's "Energy Crisis"—which fact seems to provide added significance to the underlying interest rather than diminishing it. KS Tacoma's own characterization of the case states that the court required proof of an "environmental injury in fact." Appellant's Brief at pg. 26.

⁵⁹ Appellant's Brief at pg. 27.

and ecology, harm to marine species, or impacts from the discharge of pollutants but not to views, aesthetic impacts, or land use, which is nonsensical.⁶⁰

As the City stated above, it would appear that the SMA does place a higher level of protection on certain interests above others. The list found at RCW 90.58.020 specifically imposes a hierarchical order of preferential uses based on how a given use incorporates other SMA interests, and environmental protection interests are right at the top.

KS Tacoma claims that it is nonsensical to question whether views, aesthetics, and recreation belong in the same category as pollution protection, environmental protection and workplace safety interests, but gives no reasoning to support the assertion. The City sees this distinction drawn by the Board as both reasonable and logical. The greater the potential harm, the more protection afforded against it. The greater the harm, the greater the ability to establish standing thereon. “Life/health/safety” is a collocation heard often in government regulation circles, but in this case, it would appear that, on the federal level, health and safety get the greater nod when it comes to a corporation’s establishing standing than simple quality of life issues such as view protection and recreation. In any event, without extending the holdings in the numerous cases KS Tacoma cites to lesser interests than environmental and health/safety concerns, the precedents are insufficient to grant KS Tacoma standing on a corporate basis for its employees.

In addition to the foregoing, the City would point out that the “relation to corporate purpose” requirement for corporate standing seems to be something that KS Tacoma cannot meet in any sense other than an

⁶⁰ Appellant’s Brief at pg. 27-28.

economic one. That is, the only way in which views, recreational opportunities and aesthetic interests relate to KS Tacoma's corporate interest is through its financial bottom line. To the extent that KS Tacoma could show facts that actually supported an injury to view, recreational, aesthetic, or land use interests, it would seem that the relation to KS Tacoma's corporate purpose would only exist insofar as such injuries might deter guests from staying at the Murano. Such an interest cannot be characterized as non-economic. The economic relational interest seems to fold back in upon the fact that KS Tacoma has no environmental, or health/safety interest in the mix either. The Board seemed to grasp this nuance in its decision and it appeared to be key in denying KS Tacoma standing. What was even more pivotal in the Board's decision was the fact that the Board found no concrete injury *even if* the corporation could champion the interests of its principals, employees and patrons.

(b) Organizational Standing. Championing causes from an organizational standpoint appears to be very similar to KS Tacoma's corporate standing claims. Again, there appears to be a strong environmental, health/safety component when championing the interests of employees.⁶¹ Such an interest is absent here. When employee interests are examined against the injuries claimed here, the City would ask and offer the following:

⁶¹ Organizational standing does not appear to apply to the point where KS Tacoma could use it to champion the interests of its patrons because there is no perspective from which hotel patrons can be considered members of the organization. The City would further posit that if the test set forth in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) is strictly followed, KS Tacoma cannot rely on organizational standing to champion employee interests either. KS Tacoma has supplied no evidence that it is an employee owned enterprise or that its employees are otherwise members in the organization that is KS Tacoma Holdings, LLC, and therefore its employees are not "members" of the organization in any sense either.

(a) How many employees regularly enjoy the views of the Foss Waterway from the top floor of the Murano?

(b) How many employees recreate 5½ blocks away down on the Foss Waterway as employees, i.e. during their shifts or breaks as opposed to off time as regular citizens?

(c) Given that the only views of the Foss Waterway that currently exist from the Murano are from the top floor and given that the answer to (b) above is probably “very few,” the City would ask how many KS Tacoma employees have aesthetic interests relevant to the Revision that relate to their status as an employee?

(d) As for KS Tacoma’s “land use” issues, employee interests in these should either fall along the same lines as the answer to (c) above, or come down on the side of a purely economic interest tied to the continued business viability of their employer.

In addition to these questions, the City would also point out that KS Tacoma has submitted no first hand evidence from any employee that the above interests even exist.

The Board correctly noted that there is no other “organization” present in this appeal than Appellant, KS Tacoma Holdings, LLC, a Delaware, for profit, limited liability company. According to information available on-line 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.⁶² KS Tacoma has not alleged any type of work environment, natural environment, or other health/safety protection issue for its employees. Ultimately, the only interests left to KS Tacoma in the organizational context are purely economic. Whether the organization or its employees, the only interest here is in not suffering a decrease in

⁶² http://www.sos.wa.gov/corps/search_results.aspx?search_type=simple&criteria=all&name_type=contains&name=KS+Tacoma&ubi=; see Exhibit B.

revenues from the completion of a competitor hotel.

The Board correctly ascertained that the “Hotel Murano employees and guests have not come together to form any type of organization devoted to expressing collective views and protecting the collective interest of its members[;]...the only organization in evidence is KS Tacoma.”⁶³ This is the correct call. As with all the other alleged bases for standing, the organizational basis similarly withers under scrutiny.

D. CONCLUSION

In its introduction, the City stated that KS Tacoma’s appeal is full of allegations with no support. That has been true at every stage including Appellant’s current brief. The Board made particular note of this lack of support in the context of addressing KS Tacoma’s corporate and organizational standing contentions with a series of “even ifs.”⁶⁴ The Board’s “even ifs” are summed up quite adequately in the Reconsideration Order at page 5, where it stated “that even if the third party interests in recreation, aesthetics and view were considered, KS Tacoma ha[s] failed to show a concrete injury to any of those interests.”⁶⁵ With or without the ability to champion third party interests, KS Tacoma has not been able to satisfy the factors for showing standing.

The Board’s two rulings were rather pointed, but that was so for a reason. Whether as an organization, a corporation, or simply as a person under the law, an appellant “must establish a specific injury that is related to an identifiable corporate [or other personal] interest or right protected by

⁶³ CP at pg. 540.

⁶⁴ CP at pg. 482, line 14, pg. 11 , line 4, pg. 12, line 7, and pg. 539, line 10.

⁶⁵ CP at pg. 539.

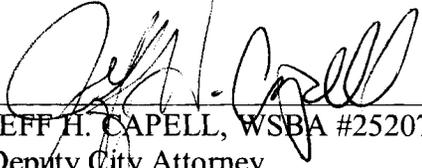
the environmental law at issue.”⁶⁶ KS Tacoma has alerted on a variety of interests that could possibly come into play in and around the shorelines of the state of Washington as a result of new development. After doing so however, it has failed to turn these areas of interest into actual injuries in fact because the facts necessary to make that next step do not exist. That leaves KS Tacoma stalled in the realm of speculation without a “specific and perceptible harm”⁶⁷ and without standing to carry on its appeal.

As a result, the City would respectfully urge this Court to uphold the Shorelines Hearings Board’s Order of Dismissal dated June 10, 2010 finding that Appellant KS Tacoma Holdings, LLC has failed to establish standing.

DATED this 23rd day of March, 2011, at Tacoma, Washington.

ELIZABETH A. PAULI, City Attorney

By:


JEFF H. CAPELL, WSBA #25207
Deputy City Attorney
Of Attorneys for City Tacoma

⁶⁶ CP at pg. 538.

⁶⁷ CP at pg. 480 *citing* Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 829, 965 P.2d 636 (1998).

Thea Foss Waterway Design and Development Plan

A Comprehensive Plan Element



Conducted by the Tacoma Planning Commission
Consistent with Washington State
Growth Management Act requirements



The *Thea Foss Waterway Design and Development Plan* is an element of the City's long range *Comprehensive Plan* and the *Master Program for Shoreline Development* and was developed pursuant to the authority conferred by the Washington State Constitution, the Revised Code of Washington Chapter 36.70A, and Title 13 of Tacoma's Charter and General Ordinances. The Growth Management Act requires that development regulations be consistent and implement the comprehensive land use plan.

Planning and redevelopment efforts along Thea Foss Waterway are ongoing. The *Thea Foss Waterway Design and Development Plan*, originally developed in 1992, has been amended in 1995, 1998 and 2005.

Amendments in 2005 modify the "Thea Foss Waterway Marine Guidelines" chapter by deleting a design guideline that restricts the location of fueling stations and adding two new guidelines concerning the use of best management practices and avoiding pedestrian/view conflicts. The amendments also modify the "East Side of Thea Foss Waterway" chapter to encourage residential and hotel/motel uses only for the portion of the east side lying south of S. 11th Street. The 2005 amendments were adopted by the City Council on November 15, 2005 (Substitute Ordinance No. 27430) and approved by the State Department of Ecology on September 1, 2006.

Additional amendments may be necessary as planning and redevelopment efforts continue.

Redevelopment Concept

In the Central Waterfront, buildings are envisioned as developing with retail commercial, office, and hotel uses.

Strong connections with downtown are envisioned and considered an integral part of future Waterway redevelopment and the continuing vitality of the downtown. Such connections will be strongly recommended as part of any future redevelopment proposals for this area. Development of additional pedestrian links, possibly including a “lid” over the railroad and freeway perhaps along the 12th Street corridor, is a consideration. The use of the public property south of the Murray Morgan Bridge adjacent to the primary pedestrian access to the downtown should be predominantly mixed-use. Since the parking on the site is accessory to Totem Marina which is intended to remain, the parking will remain in the short term. Future lease agreements with the marina should respond to reconfiguration of the marina. Any proposals for this property should integrate with the pedestrian esplanade, the Municipal Dock, and waterfront uses, but also address the future of the marina.

Recommendations

- o Investigate alternative development proposals for the area south of the Murray Morgan Bridge.
- o Incorporate the esplanade as a top priority feature on the area south of the Murray Morgan Bridge.
- o Make accommodations for enhanced pedestrian connections at 11th Street and potentially at 12th Street. Encourage strong connections with Downtown Tacoma as part of any future redevelopment proposals for this area.
- o Incorporate a future transit stop into the area south of the Murray Morgan Bridge. The transit stop may serve both the Municipal Dock and the south bridge area.
- o Maintain the Sea Scouts, an important historic resource on the Waterway, and its associated cultural center in either their current location or in an alternate feasible site on the Waterway.
- o Require public access components in all improvements.
- o Investigate the relocation of Johnny’s Seafood Company and additional alternative uses compatible with the Johnny’s Seafood Company site.
- o Retain and enhance the existing seaplane and transient moorage dock at 15th Street.
- o Maintain and enhance the esplanade and the pedestrian link to Dock Street and the 15th Street ramp.

Family Campus

Existing Conditions

The Family Campus extends from South 15th Street to South 21st Street (SR-509). It contains the largest developable area on Thea Foss Waterway. The area is strongly influenced by the uses to the west, which include the Union Station, federal courthouse complex, the new Washington State History Museum, and University of Washington-Tacoma. There is limited grade separation to the west, although it increases in the north end of the area.

The north end of the area is a vacant site approximately 1080 feet in length with a temporary asphalt esplanade and a limited number of paved, off-street public parking spaces. To the south, the City View Marina (acquired by the City of Tacoma) is opposite Union Station. It has a temporary office building, a 40-slip marina (Morris Marina site), and associated off-street parking. This site has been remediated for known or potentially contaminated waste. Albers Mill is a vacant, 5 story brick building adjacent to the south. The Harmon site, north of the new SR-509 bridge, is currently vacant. The new SR-509 has been constructed in the South 21st Street right-of-way as an elevated bridge and provides direct connections between downtown Tacoma, the Port of Tacoma, and Northeast Tacoma.

Portions of the property in this district are subject to property restrictions limiting uses of the property to public open space and recreation, which is a result of their acquisition with state Interagency Committee for Outdoor Recreation (IAC) funds. These properties include an approximately 60-foot wide upland waterfront strip across all properties in the district (excluding the Morris property), the southern portion of the Harmon property, and a portion of the South 21st Street right-of-way.

Redevelopment Concept

This zone is envisioned as a “family campus” area, supporting retail commercial and cultural family uses. A prominent feature of the area will be the International Glass Museum proposed for the Morris site across from the Union Station complex. A significant public gathering space at Albers Wharf and a park just north of SR-509 with a wooden boat center, boating education facility, and a rowing shell house will also support family and marine uses. Additional features might include theaters, museums, and in-water facilities.

This district is also designated as an area for retail commercial, office, hotel, and residential uses in a mixed use building configuration. Strong

East Side of Thea Foss Waterway

Intent

The intent of this section is to provide development guidance for the east side of Thea Foss Waterway. The east side of the Waterway differs from the west side of the Waterway in that it contains active industrial and commercial development. The long-range intent for the east side is to encourage a transition to mixed use commercial, marinas, retail, and office uses including residential and hotel/motel uses south of 11th Street. However, this plan recognizes existing industrial and terminal uses and allows their continuation until market conditions drive higher uses.

East Side Concept:

Existing commercial and industrial uses are valuable to the success of the waterfront and the economic life of our community. These businesses, coupled with other Waterway uses, can provide synergy that will continue to benefit Tacoma's economic prosperity. However, if change occurs, offering a variety of other mixed uses, these developments must be carefully designed to avoid conflicts that could arise between existing industrial uses and new development. Environmental clean-up of east side properties will allow the redevelopment of, marinas, water-oriented commercial, retail, and office uses and the redevelopment of the area south of 11th Street with residential uses, including hotels or motels.

The Foss Plan promotes public access and the enjoyment of the shoreline while allowing for existing and new commercial interests. This is a response to the current understanding that such a mixture of uses is for the greatest common good of the citizens of Tacoma and the economic life of our community.

Key Design and Development Issues

1. Retain the working waterfront character while encouraging water-oriented commercial, retail and office uses and also encourage residential uses in the area south of 11th Street.
2. Encourage public access and interpretation where there are no conflicts with industrial activities due to safety or security hazards.
3. Improve the visual qualities of the shoreline edge through clean-up, removal of dilapidated structures, and repair of shoreline features. Encourage landscaping treatment near the shoreline to emphasize the natural qualities of the Waterway except where marine dependent activities require bulkheading. The shoreline edge should be restored to a natural condition where possible. Native plant materials and upland habitat enhancement should be accommodated as part of site development.

Boat Moorage

Channel and shoreline depths will be developed in conjunction with Superfund clean-up of the Waterway and upland redevelopment. Geotechnical and environmental engineering resources will be coordinated with marine development as they occur.

Public transient moorage

Concept

Boat moorage remains the most visible aspect of in-water uses. Existing public transient moorage facilities do not support the maritime activities envisioned for the Thea Foss Waterway. They will be enhanced or developed with consideration for public needs in the future, connection with adjacent public uses, and environmental impacts such as the level of in-water shading due to moorage structures.

The concept for public transient moorage is related to upland public spaces and local transportation facilities. Preliminary studies indicate that if the public transient moorage areas designated in these guidelines is built out (at the proposed Albers Wharf/IGM, 16th Street, Puget Sound Freight Building, and public breakwater/wave attenuator), they will provide up to 130 spaces on the Thea Foss Waterway for times of increased activity and maritime events. These calculations include boats of various sizes, with larger boats recommended where water levels are deeper at more northerly moorage areas. They exclude the moorage count of the future Maritime Transportation Center at the Municipal Dock which will be reserved for ferries, water taxis and tour boats during special events.

A component of public moorage is the accommodation of historic vessels and non-profit maritime organizations whose moorage needs may be less transient. The Foss Waterway Public Development Authority will insure that a portion of public moorage along the Waterway will accommodate these uses.

Guidelines

- o Designate public moorage sites that contribute to a city-wide system of maritime, pedestrian, bicycle, vehicular, and light rail transportation.
- o Locate transient public moorage slips adjacent to public areas such as plazas, open spaces, or public-use buildings (museums, aquarium, hotel, public market, or maritime transportation center).
- o Relocate private moorage adjacent to the Municipal Dock building to provide public moorage and unobstructed access to the boardwalk and floats.
- o Provide public moorage with double berthing at Albers Wharf and possibly in cooperation with the International Glass Museum.

IGM and Marina

The International Glass Museum will bring the studio glass setting to a working waterfront and extend an arm of the museum district on Pacific Avenue to the waterfront. The public will be drawn to an opportunity to view creation of glass art by some of the world's finest artists. An associate transient public moorage area will facilitate public access via the water.

Municipal Dock

The Municipal Dock, originally completed in 1911, served local passenger steamers. Its central location, pedestrian access to downtown, and historic use continue to make it an optimum location for a future passenger ferry terminal. Planned removal of existing private moorage slips adjacent to the property for the reestablishment of this purpose will provide moorage for new or historic vessels. The proposed adaptive reuse of the Municipal Dock building as a possible public market will complement the cultural focus of the International Glass Museum and accommodate transient moorage and unobstructed public access to the pier from the boardwalk. This shared public use and terminal will be a great amenity to the waterfront.

Totem Marina Proposal

Redevelopment of the Totem Marina property could introduce mixed use residential, retail, and associate marina development. Residential developments may include an option for marina slips, possibly sold on a condominium basis. Residential housing on the waterfront would offer a desirable living environment and a level of activity critical to the operation and security of the neighborhood.

Aquarium

An aquarium on the Thea Foss Waterway would be an appropriate water-based destination and take advantage of the marine setting for education and research. Along with the International Glass Museum, the aquarium would bring many visitors to the Thea Foss Waterway.

Hotel development (new)

A marina associated with a hotel development can either provide a normal service, support other uses in the area, or allocate its slips to the short-term moorage needs of its guests. It interacts with both a public and *private* clientele. The hotel could provide facilities such as club house,

Thea Foss Waterway Marine Guidelines

conference rooms, jogging and recreational facilities on the esplanade. Transient moorage in front of a hotel development would allow boat clubs to rent banquet and meeting rooms for business as well as special maritime meetings and events. Research indicates that marinas stimulate related hotel occupancy.

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EXHIBIT B

Hollander Foss
Comparison of Areas and Uses
6/24/2009

Phase 1		Proposed Design	Existing Approved Design
Parking Garage			
Parking		58,429	
Total		58,429	58,429

Hilton Hotel		Proposed Design	Existing Approved Design
Ground Floor		13,620	26,238
Tower			
2nd Floor		7,756	17,300
3rd Floor		7,756	17,300
4th Floor		7,756	17,300
5th Floor		7,756	
6th Floor		7,756	
7th Floor		7,756	
8th Floor		7,756	
9th Floor		7,756	
Total		75,668	78,138

Residence Inn		Proposed Design	Existing Approved Design
Ground Floor		8,719	
Tower			
2nd Floor		7,733	
3rd Floor		7,733	
4th Floor		7,733	
5th Floor		7,733	15,552
6th Floor		7,733	15,552
7th Floor		7,733	15,459
8th Floor		7,733	
9th Floor		7,733	
Total		70,583	46,563

Retail Building		Proposed Design	Existing Approved Design
Ground Floor		6,624	1,365
Total		6,624	1,365

Totals		211,304	184,495
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Phase 2		Proposed Design	Existing Approved Design
Commercial / Office			
Ground Floor		8,172	
Tower			
2nd Floor		8,172	
3rd Floor		8,172	
4th Floor		8,172	
5th Floor		8,172	
6th Floor		5,536	
Total		46,396	

Totals		257,700	184,495
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Site Coverage	Site Area	New Design (Gross SF)	Percentage
Phase 1	60,631	24,707	41%
Phase 2	60,631	38,553	64%
Existing Approved Des.	60,631	27,999	46%

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 41361-2-II

**COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON**

THE CITY OF TACOMA,
a Washington municipal corporation,

Petitioner,

vs.

KS TACOMA HOLDINGS, LLC,
a Washington limited liability company,

Respondent.

**CERTIFICATE OF SERVICE
CITY OF TACOMA'S RESPONSE BRIEF**

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