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DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUNRISE RIDGE/THE HIGHLANDS AT SOMERSET HILL HOMEOWNERS ASSOCIATION, a Washington Non-Profit Corporation, Appellant

v.

CITY OF TUMWATER, a Washington Municipal Corporation; PATRICK and PATRICIA QUINN; and BRETT and KARA DURBIN, Respondents.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

No. 1. The trial court erred in granting summary judgment in favor of the respondents, City of Tumwater and Brett and Kara Durbin.

No. 2. The trial court erred by failing to grant summary judgment in favor of the petitioner, Sunrise Ridge/The Highlands at Somerset Hill Homeowners Association.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a city ordinance provides that the duty of maintenance should be enforced against the owner of the property served by a storm water facility and the conditions of plat approval require a planned unit development to maintain its own storm water can a court be said to have viewed all facts and reasonable inferences in the light most favorable to the non-moving party when it granted the motion for summary judgment?

2. Should Vistas at Somerset Hill be responsible for its own storm water facility?

3. Can the terms of plat approval for one planned unit development alter the terms of plat approval that were previously imposed upon another planned unit development?

4. Does the Land Use Petition Act bar Respondent, Sunrise Ridge/The Highlands at Somerset Hills Homeowners Association's claim?

C. STATEMENT OF THE CASE

This case involves the interpretation and binding effect of laws and regulations as well as conditions of plat approval for two separate planned unit developments. Specifically, the City of Tumwater processes plat applications pursuant to subdivision statutes and ordinances and delegates the responsibility for maintenance of storm water facilities serving separate subdivisions within the city. See RCW 58.17.170; Tumwater Municipal Code 17.02.110. The appellant, Sunrise Ridge/The Highlands at Somerset Hill (hereinafter denominated as "SR/HSH") homeowner's association, and Vistas at Somerset Hills (hereinafter referred to as "Vistas") are two separate subdivisions that are located in the City of Tumwater (hereinafter referred to as the "City") and both subdivisions were required to maintain their storm water facilities as a condition of plat approval. CP 157-159. A determination as to what storm water facilities the Vistas subdivision is responsible for maintaining is at issue in this case.

The Vistas and SR/HSH subdivisions drain storm water onto two lots within the SR/HSH subdivision. Those lots are owned by the SR/HSH Homeowner's Association, (hereinafter denominated as the "HOA"). CP 124. The lots are referred to as Lots "U" and "T" on the face of the SR/HSH plat. Lots "U" and "T" have privately owned storm water ponds

or cells located on them that benefit both the SR/HSH subdivision and the Vistas subdivision. CP 138-140.

A storm water pond is located on Lot "U" and it is referred to as Cell 1. Cell 1 is used for the SR/HSH subdivision storm water. CP 135-137.

Two storm water ponds are located on Lot "T" and they are referred to as Cells 2 and 3. Cell 2 is used exclusively for Vistas storm water. Cell 3 services both SR/HSH and Vistas storm water.

The City processed Vistas subdivision application before the SR/HSH subdivision application was submitted to the City. Notably, the Vistas Developers were required to obtain a nonexclusive storm water detention facility easement outside of the subdivision. They acquired an offsite easement on what is currently referred to as Lots "U" and "T" and which was previously referred to as Tract "F". The easement provided that "the cost of any inspection, maintenance, improvement...shall be borne by Grantee." CP 157-158.

Vistas' developers built a storm water facility in the offsite easement area as a condition of plat approval. They constructed the facility in the area where Cell 2 is currently located. CP 138-140.

Plat approval for Vistas was provided on March 15, 1995. Vistas' developers were required to not only obtain a storm water detention facility easement but they were also required to enter into a Storm Water Maintenance Agreement with the City. The Storm Water Maintenance Agreement required Vistas Homeowner's Association to maintain its storm water facilities. CP 141-144. Regrettably, the Storm Water Maintenance Agreement generic form does not specifically identify what storm water facilities are Vistas' responsibility.

The developers of SR/HSH were also required to enter into a Storm Water Maintenance Agreement with the City as a condition of plat approval. Unfortunately, the city used the same type of generic form for the Storm Water Maintenance Agreement as they used for the Vistas subdivision. The SR/HSH Storm Water Maintenance Agreement did not specifically identifies what storm water facilities were SR/HSH's responsibility. CP 135-137.

Notably, the City required the developers of SR/HSH to build Cell 1 and 3. This was required in order to provide a storm water detention system for their subdivision. The developers of SR/HSH were also required to reconstruct Cell 2. The purpose of Cell 2, which was to provide storm water detention for Vistas storm water, however, did not change. CP 138-140.

Significantly, both the Vistas subdivision and SR/HSH subdivision were subject to Covenants, Conditions and Restrictions (CC&Rs) at the time of plat approval. The CC&Rs filed with the plat applications also obligated the Vistas and SR/HSH homeowner's associations to maintain their respective storm water facilities. CP 141-144.

The respondents have noted that Vistas' CC&Rs state that Vistas is relieved of their obligation for storm water pond maintenance if the City of Tumwater identifies another party which agrees to assume that responsibility. The respondents' reference to Vistas' CC&Rs, however, are to amended CC&Rs that were not submitted with the Vistas plat application. The developer of Vistas, Mr. Hodges, unilaterally, amended the Vistas' CC&Rs without the City being involved two years after the plat was approved. The amended CC&Rs are inconsistent with Vistas' original CC&Rs, the Storm Water Maintenance Agreement signed by the original developer of Vistas and the conditions of Vistas' plat approval which includes its storm water easement. CP 141-144.

Significantly, the conditions of plat approval set forth on the face of the plat for the SR/HSH subdivision are not specific. On sheet 8 of the plat map for Phase III of the SR/HSH plat it provides that "Storm Drainage Facilities shall be maintained by the Sunrise Ridge/Highlands at Somerset Homeowner's Association as referenced in the Maintenance

Agreement. CP 141-144, without identifying what storm water facilities were SR/HSH's responsibility. Presumptively, the reference to Drainage Facilities is with regard to Cell 1 and Cell 3 which were built by SR/HSH's developer.

Notwithstanding the conditions of Vistas plat approval, Vistas exclusively use of Cell 2 pursuant to its storm water easement and the City's own ordinance reference above, the City has taken the position that since the notes and conditions on the face of the third phase of the SR/HSH' plat states that the SR/HSH HOA shall maintain all drainage easements, swales, ponds, conveyance ditches, storm facilities and all other appurtenances, SR/HSH must maintain Cell 2. CP 145-152. It is the appellant's position that the reference to all drainage easements, swales, ponds, conveyance ditches, storm water facilities and all other appurtenances should be interpreted to apply only to those drainage facilities that benefit the SR/HSH plat and not third party easements.

D. ARGUMENT

1. **Summary Judgment is only appropriate where, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law based on the facts presented. *Viking Properties Inc. v. Holm,* 155 Wn. 2d 112, 119 (2005).**

The appellate court has the same authority Under CR 56 in reviewing a trial court's order of summary judgment as the trial court had. *Sherman v. State,* 128 Wn.2d 164, 183, 905 P.2d 355,367 (1995). The appellate court may affirm the summary judgment only if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Sherman, id at 183; CR 56.* It must view the facts, and all reasonable inferences from the facts, in the light most favorable to the nonmoving party. The court may determine questions of fact as a matter of law, however, when reasonable minds could reach only one conclusion from the facts. Questions of law are always reviewed by the appellate court, *de novo. Sherman v. State, Id at 184.*

In this case it is undisputed that both the SR/HSH and Vistas homeowners were required to maintain their respective storm water facilities as a matter of plat approval. Vistas' developer had to acquire an offsite easement for its storm water pond. Vistas developer was required to construct a storm water pond or cell as part of its storm water drainage system.

Vistas' developer was required to obtain an off-site storm water easement as a condition of plat approval. Vistas' obtained an offsite easement that is located in the same area as Cell 2 on property owned by SR/HSH. The easement specifically provides that the cost of any

inspection, maintenance, and improvements shall be borne by the Vistas homeowners. The fact that Vistas' easement requires it to maintain its storm water easement is undisputed.

Correspondingly, it is undisputed that on the face of the Vistas' plat map it states that Storm Drainage Facilities located in the easement area are to be maintained by the Vistas HOA as referenced in the maintenance agreement. When viewing those facts most favorably to SR/HSH's position it is clear the city's motion for Summary Judgment should not have been granted. Moreover, when the Tumwater Municipal Storm water Ordinance (Section 13.12.020) is applied to those facts it is illogical to conclude Vistas does not owe a duty to maintain cell 2 since the ordinance provides that required maintenance should be enforced against the owner of the property served by the storm water facility. The city's motion for Summary Judgment should, therefore not have been granted and the trial court committed reversible error by granting the city's motion.

2. Vistas homeowners have the exclusive use Cell 2. Therefore the responsibility for maintenance of Cell 2 should be delegated to Vistas' homeowners.

Tumwater Municipal Ordinance 13.12.020(D)(1)(a) provides that any person(s) holding title to a premises for which a storm water drainage system and BMP (Best Management Practices) have been required shall

be responsible for the continual operation, maintenance and repair of their storm water facilities. Vistas is required to have a storm drainage system and it has no other storm water facility than Cell 2.

Tumwater Municipal Ordinance 13.12.020(D)(1)(b) provides for privately maintained storm water facilities, the maintenance requirements specified in this chapter, including the manual, shall be enforced against the owner(s) of the property served by the storm water facility.

If the City does not hold the Vistas homeowners responsible, by enforcing the conditions of their plat, for the maintenance and repair of Cell 2, Vistas will have no responsibility for any storm water in spite of the fact that the city ordinance specifically requires the Vistas homeowners to maintain and repair the storm water facility that serves their development. That is flagrant violation of the City ordinance.

The respondents have asserted that the SR/HSH HOA should be responsible for the maintenance and repair of all drainage easements, swales, ponds conveyances, ditches, storm facilities and all other appurtenances. The city takes that position because it specifically states that on page 8 of the third and final phase of the SR/HSH plat. The provision is located under "Notes and Conditions of Approval" number 6.

The interpretation of the provision regarding the maintenance of all drainage easements, swales, ponds, conveyances, ditches, storm facilities

and all other appurtenances should, however, recognize that it applies only to those storm water facilities that benefit SR/HSH or are "appurtenant" to the SR/HSH HOA. Thus, SR/HSH would not be responsible for Vistas' storm water easement. Such an interpretation is consistent with how other third party easements have been treated. For example, third party utility easements are referenced on the face of the plat for power, cable television and telephone service. Those easements are for the benefit of third parties and are appropriately maintained by the power, cable and telephone companies. Correspondingly, Vistas should be responsible for its storm water easement and Cell 2.

Even if you assume arguendo, however, that the SR/HSH HOA has a duty of maintenance regarding Cell 2 that does not necessarily relieve Vistas of its primary duty to maintain its own storm water facility. It should be recognize that both Vistas and the SR/HSH HOA owe a duty to maintain the storm water facilities that serves them as provided by the city ordinance. The duty to maintain the storm water facilities on Lot "T" do not need to be interpreted as being mutually exclusive. The creditable approach is to therefore recognize that Vistas has the primary responsibility for the maintenance and repair of Cell 2 and the SR/HSH HOA is responsible for the maintenance and repair of Cells 1 and 3. Thus the maintenance and repairs correspond with what the city ordinance requires.

Nonetheless, the respondents assert that since the SR/HSH HOA owns lot "T" and Cell 2 is located on lot "T" the SR/HSH HOA must maintain Cell 2. Clearly, this is not what the City ordinance requires. The ordinance makes it clear that it does not matter whose property a development's storm water system is located. The important thing to concentrate upon is whether the development is required to have a storm water drainage system, and if it does require a storm water system the development that is served by the storm water facility must maintain their system. Tumwater Municipal Ordinance 13.12.020(D)(1)(a)(b). Obviously, the respondent's position is inconsistent with the City's Storm Water Ordinance and is not well founded.

3. An approved plat can only be appropriately altered by complying with the requirements of RCW 58.17.215.

RCW 58.17.215 provides that "when any person is interested in the alteration of any subdivision or any portion thereof.... that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located." The legislative body may deny or approve the application for alteration.

The statute does not define the word "alteration." Presumably, the word carries the meaning found in a dictionary. See *Burton v. Lehman*, 153 Wn.2d, 416, 422, 103 P.3d 1230 (2005) ("If the undefined statutory term is not technical, the court may refer to the dictionary to establish the

meaning of the word."). According to Webster's Third New International Dictionary, "alter" means "to cause to become different in some particular characteristic." *Webster's Third New International Dictionary* 63 (1969). An "alteration" is defined as the result of altering or as "a change in a legal instrument that changes its legal effect either in the obligation it imports or its force as legal evidence...." *Id.*

In this case there has been no application to alter the Vistas' conditions of plat approval. Nonetheless, the respondents argue that SR/HSH's conditions of plat approval have effectively amended Vistas' conditions of plat approval.

First, the respondents assert that Vistas is no longer obligated to comply with its conditions of plat approval and maintain Cell 2 since the SR/HSH developer signed a storm water maintenance agreement that requires SR/HSH to maintain the storm water facilities located within the SR/HSH plat. That position assumes that the Vistas' conditions of plat approval requiring it to maintain storm water facilities has been amended by the SR/HSH developer signing a subsequent storm water maintenance agreement. There is no authority for such a proposition. The SR/HSH storm water agreements do not even mention Vistas and cannot amend Vistas' conditions of plat approval. Again, the respondent's position is not well founded.

Next, the respondents argue that Vistas CC&Rs relieves Vistas of their obligation for storm water maintenance. The CC&Rs referred to by the respondents, however, are with regard to amended CC&Rs which were not a part of the Vistas plat approval.

Vistas plat application included CC&Rs that were executed by Vistas' original developer. James Hodges, who subsequently acquired the entire plat, unilaterally amended the CC&Rs two years after plat approval without the city being involved in the alteration. The amended CC&Rs are inconsistent with the original CC&Rs, the storm water maintenance agreement signed by Vistas' original developer and Vistas storm water easement. It is obvious that Mr. Hodges intended to avoid the conditions of plat approval by amending Vistas' CC&Rs.

Cities have no authority to enforce or invalidate restrictive covenants. *Jones v. Town of Hunts Point, 166 Wn. App. 452, 272 P3d 853 (2011).* Private covenants cannot be enforced by a city because if a city tries to enforce the covenant they may be different than what was provided at the time of plat approval. The city's authority to impose conditions of plat approval could thereby be undermined if a city is allowed to enforce private covenants. Therefore, it is inappropriate for cities to try to enforce private covenants. *Jones v. Town of Hunts Point, id.*

Next, the respondents take the position that Vistas cannot owe a duty to maintain Cell 2 since it does not have a proprietary interest in Cell 2. Respondents base their argument upon a notation on the face of the third phase of the SR/HSH plat map which states that Vistas' storm drainage easement over lot "T" was to be relinquished upon the file of the plat. Specifically, the notation provides on page seven (7) that the storm drainage easement filed under auditor file number 9208190116 was to be relinquished.

Notably, the reference to the relinquishment of a drainage easement is only with respect to the easement filed under auditor file number 920190116. The notation did not refer to the easements filed under auditor file number 9208190117 which is the same easement but with a revised legal description. Moreover, the purported relinquishment did not reference Vistas' storm water easement filed under auditor file number 9108310223. That restatement of Vistas' 1992 storm water easement amended the legal description of the prior two storm water easements and clarified the fact that it was a nonexclusive easement. Accordingly, no relinquishment of Vistas storm water easement has occurred as suggested by the respondents. Clearly, the notation did not amend the conditions of Vistas plat approval which requires Vistas to maintain its own storm water. The conditions of Vistas plat approval are unambiguous and should be enforced against the Vistas homeowners.

4. **The Land Use Petition Act has no application to this case since the court is being asked to enforce the conditions of both Vistas plat approval and the conditions of SR/HSH plat approval.**

The Land Use Petition Act (LUPA) was enacted in 1995, Chapter 347, §701-719, and is codified at Chapter 36.70C RCW. The act deals with appeals from land use decisions including subdivisions. It requires the petitioner to provide a concise statement of facts upon which the petitioner relies to sustain a statement of error. RCW 36.70C.070.

In this case SR/HSH does not take issue with the conditions of plat approval imposed upon either the Vistas subdivision or the SR/HSH subdivision. It is SR/HSH's position that the conditions of plat approval for both plats should be enforced. This is because the condition of plat approval for both plats can be and should be construed or interpreted as being consistent with each other.

The homeowner of Vistas and SR/HSH both have storm water drainage systems. They both are required to maintain their storm water drainage systems. Those duties are derived from the express terms of easement, storm water maintenance agreements and conditions of plat approval. Thus, there is a shared responsibility to maintain storm water facilities on Lot "T."

SR/HSH HOA has brought their Petition for Declaratory Relief in order to determine how the responsibility for maintaining storm water

drainage facilities on Lot "T" should be shared. It is SR/HSH's position that Vistas should be primarily responsible for the maintenance of Cell 2 since that storm water facility exclusively serves Vistas storm water and the Tumwater Municipal Ordinance 13.12.020 applies to this case. That ordinance provides that for privately maintained storm water facilities, the duty of maintenance should be enforced against the property served by the storm water facility. Thus, SR/HSH is seeking to enforce the conditions of plat approval for both the Vistas plat and the SR/HSH plat. This is not an appeal and LUPA, therefore, does not apply to this case.

E. CONCLUSION

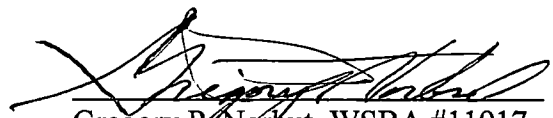
As a condition of plat approval, the City ordinance, easement, and case law, both Vistas and SR/HSH are responsible for maintaining storm water facilities on Lot "T" and those responsibilities are not mutually exclusive. Vistas' conditions of plat approval, storm water maintenance agreement, and easement are enforceable. They have not been amended or relinquished.

The duty of maintenance of the storm water facilities located on lot "T" should be enforced against the property that was required to have the storm water drainage system and is served by the storm water facility. Therefore, Vistas is responsible for maintenance of Cell 2. They were required to maintain the storm water facilities located on Lot "T." Vistas' should be primarily responsible for the maintenance of Cell 2 because of

their exclusive use of Cell 2. Moreover, the City ordinance requires Vistas' homeowners to maintain Cell 2.

Under the facts, interpretation and binding effects of the laws and regulations of this case, the trial court committed reversal error in granting Summary Judgment to the respondents. Summary Judgment should be granted to the appellants.

Respectfully submitted this 6th day of December, 2017.



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APPENDIX

Chapter 13.12
STORMWATER SYSTEM

Sections:

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13.12.010 Definitions.
13.12.015 Drainage design and erosion control manual.
13.12.020 Stormwater management.
13.12.030 User fees established.
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13.12.070 Mobile residence community user charge.
13.12.100 Collection of unpaid service charges.

13.12.005 Intent.

This chapter is enacted as an exercise of the city's power to protect and preserve the public health, safety, and welfare. Its provisions shall be liberally construed to give full effect to the objectives and purposes for which it was enacted. This chapter is not enacted to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefitted by the terms of this chapter. The primary obligation of compliance with this chapter is placed upon the person holding title to the property. Nothing contained in this chapter is intended to be or shall be construed to create or form a basis for liability for the city, its officers, employees or agents for any injury or damage resulting from the failure of the person holding title to the property (owner of record) to comply with the provisions of this chapter, or by reason or in consequence of any act or omission to act in connection with the implementation or enforcement of this chapter by the city, its officers, employees, or agents.

(Ord. O2009-018, Added, 01/19/2010)

13.12.010 Definitions.

For purposes of this chapter, the following definitions shall apply:

A. "AKART" means all known, available, and reasonable methods of prevention, control and treatment. See also the state Water Pollution Control Act, RCW 90.48.010 and 90.48.520 as currently enacted and hereafter amended.

B. "Best management practices" or "BMPs" means the best available and reasonable physical, structural, managerial, or behavioral activities that, when used singly or in combination, eliminate or reduce the contamination of surface and/or ground waters of the city.

C. "Clean Water Act" means the federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) and any subsequent amendments thereto.

D. "City" means the city of Tumwater, Washington, or, as indicated by the context, city administrator,

director or authorized designee.

E. "Combined sewer" means a system that collects sanitary sewage and stormwater in a single sewer system.

F. "Director" means the public works director and/or designees.

G. "Developed property" means any property on which any alteration has been made that has reduced the ability of the land to absorb rainfall. This includes all activities for which city permits are required, i.e., clearing, grading, filling, surfacing, paving, building construction, landscaping or similar activity.

H. "Ground water" means all waters that exist beneath the land surface or beneath the bed of any stream, lake, or reservoir, or other body of surface water, whatever may be the geologic formation or structure in which such water stands, flows, percolates, or otherwise moves.

I. "Hazardous materials" means any material, including any substance, waste, or combination thereof, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to, a substantial present or potential hazard to human health, safety, property or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

J. "Hyperchlorinated" means water that contains more than ten mg/liter chlorine.

K. "Illicit discharge" means any direct or indirect nonstormwater discharge to the city's storm drain system, except as expressly allowed by this chapter.

L. "Illicit connection" means any manmade conveyance that is connected to the city's storm system without a permit or other form of approval by the director, excluding roof drains and other similar connections. Examples include sanitary sewer connections, floor drains, channels, pipelines, conduits, inlets, or outlets that are connected directly to the city's storm system.

M. "Impervious surface" means a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development. A hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to, rooftops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled, macadam or other surfaces which similarly impede the natural infiltration of stormwater. Open, uncovered retention/detention facilities shall not be considered as impervious surface for purposes of determining whether the thresholds for application of minimum requirements are exceeded. Open, uncovered retention/detention facilities shall be considered impervious surfaces for purposes of runoff modeling.

N. "Manual" means the current city of Tumwater Drainage Design and Erosion Control Manual, as amended.

O. "Municipal separate storm sewer system (MS4)" means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade

channels, or storm drains):

1. Owned or operated by the city of Tumwater;
2. Designed or used for collecting or conveying stormwater;
3. Which is not part of a publicly owned treatment works (POTW); and
4. Which is not a combined sewer.

P. "National Pollutant Discharge Elimination System (NPDES) stormwater discharge permit" means a permit issued by the Environmental Protection Agency (EPA) (or by the Washington Department of Ecology under authority delegated pursuant to 33 U.S.C. 1342(b)) that authorizes the discharge of pollutants to waters of the United States, whether the permit is applicable to an individual, group, or general area-wide basis.

Q. "Nonstormwater discharge" means any discharge to the storm drain system that is not composed entirely of stormwater.

R. "Person" means any individual, association, organization, partnership, firm, corporation or other entity recognized by law and acting as either the owner of a premises or as the owner's agent.

S. "Pollutant" means anything which causes or contributes to pollution. Pollutants may include, but are not limited to: stains, resins, lacquers, paints, varnishes, and solvents; degreasers; drain cleaners; petroleum products, including oil and other automotive fluids; laundry, carpet and/or steam cleaning wastes; soaps, detergents or ammonia; nonhazardous liquid and solid wastes and yard wastes; swimming pool or spa filter backwash; chlorine, bromine or other disinfectants; heated water; chlorinated water with a concentration in excess of 0.1 parts per million (ppm) chlorine; any solid waste, refuse, rubbish, garbage, litter, or other discarded or abandoned objects and accumulations, so that same may cause or contribute to pollution; bark and other fibrous materials, not including large woody debris (LWD) in approved restoration projects; landscape wastes, including lawn clippings, leaves and branches; floatables; pesticides, herbicides, and fertilizers; any hazardous substances and/or wastes; flammable or explosive materials; radioactive materials; batteries; acids, alkalis or bases; chemicals not normally found in uncontaminated water; any unauthorized process-associated water; sewage, including recreational vehicle wastes, fecal coliform and pathogens; food or food wastes; animal carcasses; dissolved and particulate metals in excess of naturally occurring amounts; domestic animal wastes; wastes and residues that result from constructing a building or structure, including but not limited to silt, sediment, sand, dirt, concrete, concrete by-products and gravel; and noxious or offensive matter of any kind.

T. "POTW" means any device or system used in treatment of municipal sewage or industrial waste of a liquid nature that is publicly owned.

U. "Premises" means any building, lot, parcel of land, or portion of land, whether improved or unimproved, including adjacent sidewalks and parking strips.

V. "Property" means and includes all lands, real estate and development, public and private, including

road, street, and highway rights-of-way, and all governmental, tax-exempt, and other property, within the city limits of the city or such other areas as the city storm drainage system may serve under this chapter.

W. "Storm drainage system" and/or "stormwater facility" means publicly or privately owned facilities, including the city's municipal separate storm sewer system, by which stormwater is collected and/or conveyed, including but not limited to any roads with drainage systems, municipal streets, gutters, curbs, inlets, piped storm drains, pumping facilities, retention and detention basins, natural and human-made or altered drainage channels, reservoirs, and other drainage structures.

X. "Stormwater" means runoff during and following precipitation and snowmelt events, including surface runoff and drainage.

Y. "Stormwater pollution prevention plan" means a document which describes the best management practices and activities to be implemented by a person to identify sources of pollution or contamination at a premises and the actions to eliminate or reduce pollutant discharges to stormwater, stormwater conveyance systems, and/or receiving waters to the maximum extent practicable.

(Ord. O2009-018, Amended, 01/19/2010; Ord. 1085, Added, 02/03/1987)

13.12.015 Drainage design and erosion control manual.

A. Standards for Stormwater Management. The city adopts the 2010 Drainage Design and Erosion Control Manual, as amended.

B. Authority to Develop and Administer Standards. The public works director shall have full authority to administer the stormwater management program, develop, revise and implement rules and regulations, enforce this chapter and take any other action necessary to implement stormwater management in the city.

1. The director shall develop and administer city standards that relate to best management practices for stormwater management and set threshold requirements for the development of stormwater control facilities.

2. The director is authorized to develop policies that relate to the submission and modification of stormwater, erosion and sediment control plans.

3. The director is authorized to periodically review and revise the best management practices for stormwater management and threshold requirements for the development of stormwater control facilities in order to address improvements in stormwater management, erosion control and treatment techniques to best serve the purpose of this section. Revisions to these standards shall be maintained on file with the public works department.

(Ord. O2010-003, Added, 05/18/2010)

13.12.020 Stormwater management.

A. Illicit Discharges. It is unlawful for any person to throw, drain or otherwise discharge, cause or permit others under its control to throw, drain or otherwise discharge into the city's stormwater system and/or

surface and ground waters any pollutant or material other than stormwater.

B. Conditional Discharges. The following types of discharges shall not be considered illicit discharges for the purposes of this chapter if they meet the stated conditions, unless the city determines that the type of discharge, whether singly or in combination with others, is causing or is likely to cause pollution of surface water or ground water:

1. Potable water, including water from water line flushing, hyperchlorinated water line flushing, fire hydrant system flushing, and pipeline hydrostatic test water. Planned discharges shall be dechlorinated to a concentration of 0.1 ppm or less, pH-adjusted if necessary, and in volumes and velocities controlled to prevent resuspension of sediments in the stormwater system;

2. Dechlorinated swimming pool and spa discharges. These discharges shall be dechlorinated to a concentration of 0.1 ppm or less, pH-adjusted if necessary, and in volumes and velocities controlled to prevent resuspension of sediments in the stormwater system;

3. Runoff from lawn/landscape watering is permitted if the amount of runoff is reduced to the maximum extent practical;

4. Street and sidewalk wash water, water used to control dust, and routine external building washdown that does not use detergents are permitted if the amount of street wash and dust control water used is minimized. At active construction sites, street sweeping must be performed prior to washing the street;

5. Dye testing is allowable but requires verbal notification to the city's public works department at least one working day prior to the date of the test. The Tumwater public works department is exempt from this notice requirement;

6. Nonstormwater discharges covered by another NPDES permit; provided, that the discharger is in full compliance with all requirements of the permit, waiver, or order and other applicable laws and regulations; and provided, that written approval has been granted for any discharge to the storm drain system;

7. Irrigation water from agricultural sources that is commingled with urban stormwater, provided the city has received written notification and the irrigation water does not increase the pollutant load of the receiving urban stormwater; and

8. Other nonstormwater discharges. The discharges shall be in compliance with the requirements of a stormwater pollution prevention plan (SWPPP) reviewed and approved by the director, which addresses control of such discharges by applying AKART to prevent pollutants from entering surface or ground water.

C. Allowable Discharges. The following types of discharges shall not be considered illicit discharges for the purposes of this chapter unless the city determines that the type of discharge, whether singly or in combination with others, is causing or is likely to cause pollution of surface water or ground water:

1. Diverted stream flows;

2. Rising ground waters;

3. Uncontaminated ground water infiltration – as defined in 40 C.F.R. C.F.R.(20);

4. Uncontaminated pumped ground water;

5. Foundation drains;

6. Air conditioning condensation;

7. Springs;

8. Water from crawl space pumps;

9. Footing drains;

10. Flows from riparian habitats and wetlands; and

11. Discharge from emergency fire fighting activities.

D. Storm Drainage System – Inspections and Maintenance.

1. Maintenance of Stormwater Drainage System by Owners.

a. Any person(s) holding title to a premises for which a stormwater drainage system and BMPs have been required shall be responsible for the continual operation, maintenance and repair of said stormwater facilities and BMPs in accordance with the provisions of this chapter.

b. For privately maintained stormwater facilities, the maintenance requirements specified in this chapter, including the manual, shall be enforced against the owner(s) of the property served by the stormwater facility.

2. Maintenance Agreement Required for Privately Maintained Stormwater Facilities.

a. When applicable, prior to the issuance of a certificate of occupancy, the person(s) holding title to a premises for which a stormwater system has been required shall record a maintenance agreement which guarantees the city that the stormwater facilities shall be properly operated, maintained and inspected. Restrictions set forth in such agreement shall be included in any instrument of conveyance of the premises and shall be recorded with the Thurston County auditor.

b. The director may require the person(s) responsible for existing stormwater facilities, for which the city has not previously received a maintenance agreement, to record a maintenance agreement for the premises.

c. Maintenance agreements shall remain in force for the life of the development, or until the responsibility for the operation and maintenance of the subject stormwater facilities is accepted by the city.

3. City Acceptance of Existing Stormwater Facilities.

a. The city is responsible for the maintenance, including performance and operation, of stormwater facilities which have formally been accepted for maintenance by the director.

b. The city may assume maintenance of privately maintained stormwater facilities only if the following conditions have been met:

i. All necessary easements or dedications entitling the city to properly maintain the stormwater facility have been conveyed to the city;

ii. The director has determined that the stormwater facility is in the dedicated public road right-of-way or that maintenance of the facility will contribute to protecting or improving the health, safety and welfare of the community based upon review of the existence of or potential for:

(A) Flooding,

(B) Downstream erosion,

(C) Property damage due to improper function of the facility,

(D) Safety hazard associated with the facility,

(E) Degradation of water quality or in-stream resources, or

(F) Degradation to the general welfare of the community; and

iii. The director has declared in writing acceptance of maintenance responsibility by the city. Copies of this document will be kept on file in the public works department.

c. The director may terminate the city's assumption of maintenance responsibilities in writing after determining that continued maintenance will not significantly contribute to protecting or improving the health, safety and welfare of the community based upon review of the existence of or potential for:

i. Flooding;

ii. Downstream erosion;

iii. Property damage due to improper function of the facility;

iv. Safety hazard associated with the facility;

v. Degradation of water quality or in-stream resources; or

vi. Degradation to the general welfare of the community.

d. A stormwater facility which does not meet the criteria of this section shall be the responsibility

of the person(s) holding title to the premises for which the facility was required.

e. Director may recover costs for maintenance activities incurred by the city from the person(s) holding title to the premises served by the stormwater facility.

4. City Inspections of Privately Maintained Stormwater Facilities.

a. The director is authorized to develop and implement an inspection program for privately owned and maintained stormwater facilities in the city. The purpose of this inspection program shall be to determine if said stormwater facilities, conveyance structures and water quality facilities are in good working order and are properly maintained, and to ensure that stormwater quality BMPs are in place and that nonpoint source pollution control is being implemented.

b. As part of the inspection program, or whenever there is cause to believe that a violation of this chapter has been or is being committed, the city is authorized to inspect during regular working hours, or at other reasonable times, any and all stormwater drainage facilities within the city to determine compliance with the provisions of this chapter.

c. When making any inspections, the director or designee shall follow the procedures delineated in subsection (D)(5) of this section.

5. Inspection Procedures.

a. Prior to making any inspections, the city shall present identification, state the reason for the inspection and request entry.

b. If the premises is unoccupied, the city shall make a reasonable effort to locate the person(s) having charge or control of the property or portions of the property and request entry.

c. If, after reasonable effort, the city is unable to locate the person(s) having charge or control of the property, and has reason to believe the condition of the site or of the stormwater drainage system creates an imminent hazard to persons or property, the city may enter.

d. If entry is not consented to by the owner or person(s) in control of the property or portion of the property, and no conditions are reasonably believed to exist which create a risk of imminent hazard, the inspector shall obtain a search warrant prior to entry. To the extent authorized by the laws of the state of Washington, the Tumwater municipal court is hereby authorized to issue a warrant permitting the inspection of privately owned stormwater facilities, upon a showing of probable cause to believe that a provision of this title has been or is being violated.

e. The inspector may also inspect the stormwater drainage system without obtaining a search warrant provided for in subsection (D)(5)(d) of this section, provided the inspection can be conducted while remaining on public property or other property on which permission to enter is obtained.

E. Illicit Connections – Inspection and Removal.

1. The construction, use, maintenance or continued existence of illicit connections to the storm drainage system is prohibited.

2. This prohibition expressly includes, without limitation, connections made in the past, regardless of whether the connection was permissible under law or practices applicable or prevailing at the time of connection.

3. A person is in violation of this chapter if the person connects a line conveying sanitary sewage to the MS4, or allows such a connection to continue.

4. Any connection identified by the director that could convey anything not composed entirely of surface and stormwater directly into the city's storm drainage system is considered an illicit connection and is prohibited.

5. When the director has reason to believe that an illicit connection is resulting in an illicit discharge, the director may sample and analyze the discharge and recover the costs from the person(s) responsible for the connection or premises.

F. Administration.

1. General. The director is authorized to implement and enforce the provisions of this chapter. The director will coordinate the implementation and enforcement of this chapter with other city departments.

2. Treatment BMPs. In the event that a person discharges stormwater into a municipal separate storm sewer system (MS4) that is not of a quality that complies with city, county, state, and/or federal requirements, or where determined necessary, water quality-based requirements, the person shall provide necessary source control/stormwater treatment BMPs as required to comply with these requirements.

a. The manual shall be used to select acceptable technologies.

b. Any facility required to treat stormwater to an acceptable level shall be properly operated and maintained at the owner's expense. Detailed engineering plans and specifications showing the treatment facilities shall be submitted to the city for review, and must be acceptable to the city before construction of the facility. The person responsible for the premises shall obtain all necessary construction/operating permits from the city. Depending upon size and complexity of the treatment facility, the city may find it necessary to require that the facility be run by a qualified operator. Necessary qualifications shall be determined by the city in each individual case. The review of such plans shall in no way relieve the person from the responsibility of modifying its facility as necessary to produce a stormwater effluent acceptable to the city under the provisions of this chapter.

c. Upon completion of the treatment facility, the person responsible for the premises shall furnish its operations and maintenance procedures to the city for review and approval. Any subsequent changes in the treatment facilities or operation and maintenance procedures shall be reported to and be accepted by the city prior to initiation of the changes.

3. Inspection and Sampling. The city may inspect all facilities of any person to determine compliance with the requirements of these regulations. The city shall be allowed to enter upon the premises at all reasonable hours for the purposes of inspection, sampling, or records examination. The city shall have the right to inspect and copy any of the person's records that are required by, or that relate to, compliance with the terms and conditions of these regulations. The city shall have the right to set up on the person's property such devices as are necessary to conduct sampling, inspection, compliance monitoring, and/or metering operations.

G. Enforcement.

1. Authorization. The director is authorized to enforce this chapter and any permit, order or approval issued pursuant to this chapter, against any violation or threatened violation thereof. Violations of this chapter shall constitute a public nuisance. The director is authorized to take enforcement action for violations of this chapter including but not limited to illicit discharges and connections, as well as dumping as described in this chapter.

2. Compliance. The director shall attain compliance with this chapter by requiring the implementation and maintenance of BMPs. The director may initially rely on education and informational assistance to gain compliance with this chapter. However, if the director determines a violation poses a hazard to public health, safety, or welfare or endangers any property, the director may demand immediate cessation of unlawful discharges and/or connections and assess penalties for violations. Said penalties shall escalate as necessary to achieve compliance with this chapter.

3. Penalties. The city is authorized to issue violation notices and orders, levy fines, recover costs, issue notices of civil infraction, and/or institute both civil and criminal actions in court. Recourse to any single remedy shall not preclude recourse to any other remedies available to the city.

a. Orders. The city may serve an order of violation of this chapter. The order shall include the following:

i. Owner Information. Name and address of the property owner and/or other person(s) to whom the notice and order is directed.

ii. Description of Violation. The specific nature, extent, and time of violation.

iii. Code Reference. Reference to the provision of code which has been violated.

iv. Corrective Measures. The order may include specific corrective measures to be taken to correct the violation and a date or time by which correction is to be completed.

v. Correction Required. The order shall include a statement that the person(s) to whom the notice is directed must:

(A) Complete correction by the date stated in the notice;

(B) Appeal the notice and order to the hearing examiner within fourteen days as provided in TMC 14.08.030; or

(C) Enter into and comply with a voluntary correction agreement with the city.

vi. Nonaction. The order shall include a statement that if the violation is not corrected, the notice and order not appealed, a voluntary correction agreement not entered or complied with, or hearing examiner order not complied with, a penalty as specified in this chapter shall accrue, and that the violation may be abated by the city and costs assessed against the person(s) as authorized by this chapter.

vii. Service. The notice and order shall be served by personal delivery or mailing a copy by registered or certified mail and/or by posting a copy conspicuously on the affected property, etc. The order issued under this section shall become effective immediately upon personal delivery or posting, or, in the case of mailing, three days after deposited in the U.S. mail.

viii. Civil Penalty. Any person(s) who unlawfully discharges and/or connects into a municipal storm drainage system may be assessed a civil penalty as follows:

(A) The director may assess the owner a civil penalty not to exceed $5,000 for each violation. Each violation or each day or portion of a day of continued unlawful activity shall constitute a separate violation. For a first violation, the civil penalty shall not exceed $1,000; $2,500 for a second violation; and $5,000 for a third and continual violation of this chapter.

(B) Any person(s) who, through an act of commission or omission, aids in a violation shall be considered to have committed the violation for purposes of the civil penalty.

(C) Within fourteen days of receiving the notice of violation, the person may appeal the penalty or action to the hearing examiner as provided in TMC 14.08.030.

b. Recovery of Costs Incurred by the City. In addition to any penalty, any person(s) violating any of the provisions of this chapter, who discharges or causes a discharge which violates the city's NPDES permit and/or produces a deposit or obstruction or causes damage to or impairs the city's stormwater system or causes damage to physical, chemical, or biological systems of waters of the state or waters of the United States, shall be liable to the city for any expense, loss, or damage caused by such violation or discharge, including the costs for bringing the city back into compliance with its NPDES permit associated with the violation of these regulations, and any fines levied for violations of the city's NPDES permit.

c. Abatement by City. The city may perform the abatement required upon noncompliance with the terms of an unappealed notice and order, a voluntary correction agreement, or a final order of the hearing examiner. The city may utilize city employees or a private contractor under city direction to accomplish the abatement. The city, its employees and agents using lawful means are expressly authorized to enter upon the property of the violator for such purposes.

i. Recovery of Abatement Costs. The city shall bill its costs, including incidental expenses, of abating the violation to the person obligated to perform the work under the notice and order, voluntary correction agreement or the hearing examiner's decision, which costs shall become

due and payable thirty days after the date of the bill. The term "incidental expenses" shall include, but not be limited to, personnel costs, both direct and indirect, including attorney's fees incurred by the city; costs incurred in documenting the violation; the actual costs and expenses in the preparation of notices, specifications and contracts, and in inspecting the work; and the cost of any required printing and mailing. The director, or the hearing examiner, may in his or her discretion waive in whole or part the assessment of any costs of abatement upon a showing that abatement has occurred or is no longer necessary, or that the costs would cause a significant financial hardship for the person(s) responsible for the violation. The city may authorize the use of collection agencies to recover costs. The city attorney is authorized to collect the costs by use of appropriate legal remedies.

ii. Obstruction with Work Prohibited. No person shall obstruct, impede or interfere with the city, its employees or agents, or any person who owns or holds any interest or estate in any property in the performance of any necessary act, preliminary or incidental to carrying out the requirements of a notice and order to correct, voluntary correction agreement, or order of the hearing examiner issued pursuant to this chapter. A violation of this provision shall constitute a misdemeanor.

iii. Report to the City Council on Cost of Abatement. Where costs are assessed under this section and the person(s) responsible fails to pay within the thirty-day period, the director shall prepare a written itemized report to the city council showing the cost of abatement, including rehabilitation, demolition, restoration or repair, including such salvage relating thereto plus the amount of any outstanding penalties.

(A) A copy of the report and a notice of the time and date when the report shall be heard by the city council shall be served on the person(s) responsible for payment at least five days prior to the hearing before the city council.

(B) The city council shall review the report and such other information on the matter as it receives and deems relevant to the hearing. The city council shall confirm or revise the amounts in the report, authorize collection of that amount or, in the case of a debt owed by a property owner, authorize placement of an assessment lien on the property as provided herein.

iv. Assessment Lien. Following the hearing and authorization by the city council, the city clerk shall certify to the county treasurer the confirmed amount. The county treasurer shall enter the amount of such assessment upon the tax rolls against the property for the current year and the same shall become a part of the general taxes for that year to be collected at the same time and with interest at such rates as provided in RCW 84.56.020, as now or hereafter amended, for delinquent taxes, and when collected to be deposited to the credit of the stormwater utility of the city. The lien shall be of equal rank with the state, county and municipal taxes. The validity of any assessment made under the provisions of this chapter shall not be contested in any action or proceeding unless the same is commenced within fifteen calendar days after the assessment is placed upon the assessment roll.

d. Violators Punishable by Fine and Imprisonment. Any person who without authorization discharges pollutants into a municipal stormwater system, uses an unapproved connection to discharge into a municipal stormwater system, submits false information in permitting and reporting requirements, violates the terms and conditions of a permit, violates an order issued by the director or designee, fails to pay a civil penalty or cost recovery assessment, or obstructs or damages a municipal storm drainage system shall be deemed guilty of a misdemeanor. Each person found guilty of a violation shall be deemed guilty of a separate offense for every day during any portion of which the violation is committed, continued, or permitted by such person and shall be punishable as provided for in this chapter. Any person who, through an act of commission or omission, procures, aids, or abets in a violation shall be considered to have committed a violation for the purpose of this section.

e. Injunction and Other Civil Remedies. In addition to any other penalty or method of enforcement, the city attorney may bring civil actions and suits for damages, injunctive relief and/or for other civil remedies as necessary. Any violation of this chapter shall constitute a public nuisance, and may be enjoined as provided by the statutes of the state of Washington.

4. Records Retention. All persons subject to these regulations shall retain and preserve for no less than three years any records, books, documents, memoranda, reports, correspondence, and any and all summaries thereof, relating to operation, maintenance, monitoring, sampling, and chemical analysis made by or on behalf of a person in connection with its discharge. All records which pertain to matters which are the subject of enforcement or litigation activities brought by the director pursuant to this chapter shall be retained and preserved by the person until all enforcement activities have concluded.

(Ord. O2011-007, Amended, 07/19/2011; Ord. O2009-018, Amended, 01/19/2010; Ord. 1099, Added, 04/07/1987)

13.12.030 User fees established.

There is established a monthly user fee for stormwater service against all developed property within the city for the purposes of providing for the acquisition, design, construction, operation, and maintenance of the city's stormwater drainage system. The service charges shall be based on the amount of impervious surface on each property.

(Ord. O2009-018, Amended, 01/19/2010; Ord. 1085, Added, 02/03/1987)

13.12.040 Monthly account fee.

Every developed property within the city limits shall pay a stormwater account fee as per the latest established by the fee resolution of the city council.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O99-043, Amended, 12/21/1999; Ord. 1151, Amended, 02/16/1988; Ord. 1085, Added, 02/03/1987)

13.12.050 Residential service charges.

In addition to the monthly account fee described in TMC 13.12.040, all single-family residential units and all duplex-family units shall be considered as receiving equal stormwater drainage service and shall be charged

the same monthly service charge, which shall be as per the latest established fee resolution of the city council per living unit per month; provided, that if the amount of impervious area on any such property shall exceed fifty percent of the gross property area, the service charge shall be computed as per TMC 13.12.060.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O99-043, Amended, 12/21/1999; Ord. O95-037, Amended, 12/05/1995; Ord. 1151, Amended, 02/16/1988; Ord. 1085, Added, 02/03/1987)

13.12.060 User charges for other developed property.

In addition to the monthly account fee described in TMC 13.12.040, except as defined in TMC 13.12.050, all other developed properties within the city shall be charged for stormwater drainage service on the basis of the amount of impervious surface on the property in accordance with the latest established fee resolution of the city council. Public and private streets whose principal purpose is the conveyance of vehicular traffic, airport runways and taxiways and agricultural areas are not considered impervious surfaces for purposes of assessing stormwater fees.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O99-043, Amended, 12/21/1999; Ord. O95-037, Amended, 12/05/1995; Ord. 1151, Amended, 02/16/1988; Ord. 1085, Added, 02/03/1987)

13.12.070 Mobile residence community user charge.

In addition to the monthly account fee described in TMC 13.12.040, all mobile residence communities shall be billed based upon the latest adopted fee resolution of the city council.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O99-043, Amended, 12/21/1999; Ord. O95-037, Amended, 12/05/1995; Ord. 1151, Amended, 02/16/1988; Ord. 1085, Added, 02/03/1987)

13.12.100 Collection of unpaid service charges.

A. The city may use all remedies as provided by law for the collection of delinquent stormwater service charges, including the filing of liens, seeking court orders for payment, and/or the termination of other utility services provided by the city to the delinquent property.

B. Resumption of service following termination shall be in accordance with TMC Chapter 13.18.

(Ord. O2009-018, Amended, 01/19/2010; Ord. O95-032, Amended, 10/17/1995; Ord. 1085, Added, 02/03/1987)

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUNRISE RIDGE/THE HIGHLANDS AT SOMERSET HILL HOMEOWNERS ASSOCIATION, a Washington Non-Profit Corporation, Appellant, v. CITY OF TUMWATER, a Washington Municipal Corporation; PATRICK and PATRICIA QUINN; BRETT and KARA DURBIN, Respondents.	No. 51091-0-II CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of December, 2017, she caused a copy of the following documents:

1. **Brief of Appellant**

to be served on the party(s) listed below by the method indicated:

Jeffrey S. Meyers
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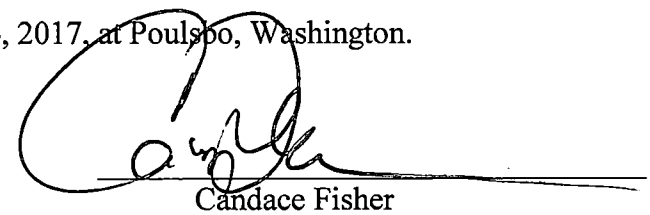
I, Candace Fisher certify under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED: December 6, 2017, at Poulsbo, Washington.



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