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Court of Appeals, Division II
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 RESPONDENT CITY OF TUMWATER

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TABLE OF CONTENTS

| | |
|--|-----------|
| I. INTRODUCTION..... | 1 |
| II. STATEMENT OF ISSUES | 2 |
| III. STATEMENT OF THE CASE | 2 |
| A. Creation of Storm Water Pond to Serve the Vistas at Somerset Plat..... | 3 |
| B. Conveyance of the Storm Water Facility Property to Graoch Associates #8 and subsequent phased development of Sunrise Ridge/Highlands at Somerset Hill plat. | 4 |
| C. Phase III of the SR/HSB plat is approved with conditions to maintain new stormwater ponds located on Tract “T”..... | 5 |
| IV. ARGUMENT | 9 |
| A. The Appellant’s duty to maintain the storm water facilities on Tract “T” is set forth in unambiguous plat conditions governing the SR/HSB subdivision. | 9 |
| B. The Vistas plat language, easement or stormwater maintenance agreements do not extinguish the duty of Appellant to maintain the storm water facilities on Tract “T”..... | 14 |
| C. The storm water facilities located on Tract “T” were reconstructed during the development of the SR/HSB subdivision. | 15 |

D. The requirement for Appellants to maintain the pond on their property is consistent with the Tumwater Municipal Code..... 16

E. LUPA bars revision of the unambiguous plat conditions in a collateral action..... 18

V. CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

| | |
|---|----|
| <i>Jones v. Town of Hunts Point</i> , 166 Wn. App. 452, 272 P.3d 853 (2011)... | 9 |
| <i>Olson Land Co. v. Seattle</i> , 76 Wash. 142, 136 P. 118 (1913) | 10 |
| <i>Selby v. Knudson</i> , 77 Wn. App. 189, 890 P.2d 514 (1995) | 10 |
| <i>Twin Bridge Marine Park, LLC v. Dep’t of Ecology</i> , 162 Wn.2d 825, 175 P.3d 1050 (2008)..... | 18 |

Other Authorities

| | |
|--------------------------|-------|
| RCW 36.70C.030..... | 18 |
| RCW 36.70C.040..... | 18 |
| RCW 58.17 | 9, 10 |
| RCW 58.17.170 | 9, 10 |
| TMC 13.12.020(D)(1)..... | 16 |
| TMC 17.02.110..... | 9 |

I. INTRODUCTION

This case is about whether a homeowners' association is responsible to maintain a storm water pond on property it owns as required by unambiguous plat conditions and a maintenance agreement with the City of Tumwater. In this case, the City notified Appellant Sunrise Ridge / The Highlands at Somerset Hill Homeowners' Association ("SR/HSH") that maintenance was needed on a storm water facility that serves and is located within the SR/HSH subdivision on a parcel known as "Tract T". Appellant refused to perform the needed maintenance despite the unambiguous plat conditions and maintenance agreement executed by the developer of the subdivision. CP 328 at Conditions 2, 4 and 6.

Rather than perform the required maintenance, Appellant sued the City for declaratory relief, asserting that the duty to maintain the storm water pond belonged to its neighbors in the subdivision located across the street (the "Vistas"). CP 3-8. The City joined the Vistas' homeowners who would be affected by such a determination. CP 9-52. The parties filed cross motions for summary judgment on the issue of who was responsible to maintain the storm water facilities on Tract "T". The trial court granted summary judgment to the City and Vistas' homeowners Brett and Kara Durbin, holding that Appellant SR/HSH is required to maintain a storm water pond located on Tract "T". CP 383-385.

II. STATEMENT OF ISSUES

A. Was the trial court correct in ruling that Appellant is required to maintain the storm water ponds on Tract “T” of the SR/HSH plat by the unambiguous terms of the plat approval, maintenance agreement and covenants applicable to SR/HSH?

B. Whether Appellants are excused from the duty to maintain the storm water facilities on Tract “T” as set forth in the SR/HSH plat conditions and maintenance agreement by the Vistas’ plat, storm water maintenance agreement or easement documents?

C. Whether the trial court’s ruling is consistent with Tumwater Municipal Code provisions that require owners to maintain their storm water facilities?

D. Whether Appellant’s attempt to negate the plain language in the final plat of SR/HSH is barred by LUPA?

III. STATEMENT OF THE CASE

Appellant Sunrise Ridge/The Highlands at Somerset Hill Homeowners’ Association (“SR/HSH”), is comprised of owners of property located within a subdivision located on Tumwater Hill in the City of Tumwater. CP 3. The SR/HSH subdivision is located across the street from a separate subdivision, known as the Vistas at Somerset Hill (“Vistas”).

A. Creation of Storm Water Pond to Serve the Vistas at Somerset Plat.

The Vistas plat was created in the early 1990's. As part of the plat development, a storm water detention facility easement [recorded as AF #9208190116] was provided on "Tract F", a piece of property (owned by a separate party) across the street (Crosby Boulevard) from the Vistas subdivision, to benefit the development which would become Vistas at Somerset. CP 237-246. At that time, the responsibility to maintain the storm water facilities serving the Vistas neighborhood was established by a storm water maintenance agreement that obligated the Vistas at Somerset Homeowners' Association to maintain the storm water facilities located on Tract "F". CP 248-251.

The obligation of the Vistas to maintain storm water facilities was also memorialized in covenants for the Vistas at Somerset subdivision, recorded in April, 1997. CP 267. Section 8.1 provides: "The Association shall have the responsibility to maintain stormwater (sic) facilities..." *Id.* However, Section 8.1 of the Vistas' CCRs also provided for the end of the responsibility to maintain the storm water pond on Tract F:

This maintenance responsibility shall terminate in the event the City of Tumwater, or some other entity approved by the City of Tumwater, agrees to assume maintenance responsibility for the stormwater (sic) facilities. In this event, the Association Board of Directors shall be authorized to quit claim any property interests

the Association may have in the stormwater (sic) facilities to the City of Tumwater or approved entity.

Id.

B. Conveyance of the Storm Water Facility Property to Graoch Associates #8 and subsequent phased development of Sunrise Ridge/Highlands at Somerset Hill plat.

In 1994, the owner of the Vistas' property conveyed the property which included the portion of the tract containing the Vistas' storm water detention facilities, (Tract "F") to Graoch Associates #8 Limited Partnership ("Graoch"). CP 280-284. Graoch proceeded to plat the Sunrise Ridge and The Highlands at Somerset Hill subdivision on that property in multiple phases from 2003 to 2006. CP 286-289; 316-319; 321-333.

Phase I of the SR/HSR plat was approved and recorded in July, 2003. CP 286-289. The Phase I plat notes a restriction, "(4) Storm drainage facilities shall be maintained by the Sunrise Ridge at Somerset Hill Homeowner's Association as referenced in maintenance agreement recorded under Auditor's File No. 3550131." CP 286. The 2003 Storm Water Maintenance Agreement referenced by the plat (AF No. 3550131) provided for maintenance of the storm water on "Parcel B". CP 291-296. On page 2 of the plat, item "8" in the Legend identifies a "Storm drainage easement described under AF #9208190116" which is depicted as part of

“Parcel B” on the map on the same page. CP 287. Further, the developer recorded CCRs that obligated the Homeowner’s Association to maintain all drainage facilities including “Ponds” within the development. CP 306 at Sect. 5.1(a).

Phase II of the SR/HSB plat was approved and recorded in June, 2004. In the Phase II plat, the restriction “(4) Storm drainage facilities shall be maintained by the Sunrise Ridge at Somerset Hill Homeowner’s Association as referenced in maintenance agreement recorded under Auditor’s File No. 3550131” is referenced on page 1. CP 316. Similar to the Phase I plat, the Phase II plat also has a legend and map on page 2 which identifies, “(8) Storm drainage easement described under AF #9208190116.” CP 317.

C. Phase III of the SR/HSB plat is approved with conditions to maintain new stormwater ponds located on Tract “T”.

Phase III of the SR/HSB plat was approved and recorded in May, 2006. Phase III (denominated “The Highlands at Somerset Hill”) approved new development surrounding the storm water facility identified on Parcel “B” in the two previous phases. CP 321-333. Page 7 of the Phase III plat shows that the previous storm water facility on Parcel “B” became Tracts “U” and “T” abutting Crosby Boulevard. CP 327. A new road separated Tracts “U” and “T”. CP 356-330. The Phase III plat

further noted that the storm drainage easement per Auditor's File No. 920819116 (The Vistas' Easement) is to be "relinquished" upon recording of this plat. CP 327.

The conditions of approval of the Phase III plat are set forth on page 8 of the plat and relevant excerpts are as follows:

- (2) Tracts "L" through "Z" [including tracts U and T] shall be owned and maintained by the SR/HSH...
- (4) Storm drainage facilities shall be maintained by the SR/HSH as referenced in the stormwater maintenance agreement...
- (6) All drainage easements, swales, ponds, conveyance ditches, storm facilities and all other appurtenances shall be maintained by the SR/HSH...
- (8) A community facilities district is hereby formed for the purpose of providing the City of Tumwater the opportunity for maintenance of common facilities in the event of the failure of SR/HSH. The City of Tumwater may undertake responsibilities associated with the maintenance of common improvements and bill residents within the district for all costs present and future property owners to the community facilities district...

CP 328. (Emphasis added).

In conjunction with the approved recording of Phase III of the SR/HSH plat, the developer was required to enter into a storm water maintenance agreement and execute and record amended CCR's. CP 335-338; 340-347. The Stormwater Maintenance Agreement between the City of Tumwater and Graoch provided for maintenance of the storm drainage

facilities as delineated on the Phase III plat of the Highlands at Somerset Hill recorded on May 31, 2006 under AF #3836480. CP 335-338. The agreement provides,

(i) at such time as the property subject to the agreement “is conveyed to the Sunrise Ridge/The Highlands at Somerset Hill Homeowners Association (the “Association”), AND (ii) at such time as the property is subject to that certain Storm Water Maintenance Agreement, dated June 25, 2003, relating to the Plat of Sunrise Ridge at Somerset Hill (the “Sunrise Agreement”) is conveyed to the Association, then (iii) the Association shall assume and become liable for all duties of the owner hereunder, under the Sunrise Agreement,..”

CP 337. (Emphasis added).

As part of the SR/HSR Phase III plat, the CCRs (previous 2003 CCRs) were amended simultaneously to redefine the “Ponds” that were subject to the maintenance obligation in Section 5.1 of the 2003 CCRs. CP 349-355. This amendment acknowledged the Appellant’s maintenance responsibilities under both the plat condition and storm water maintenance agreement. The Third Amended Declaration of Covenants, Conditions, Restrictions, and Easements, paragraph 8, were amended as follows:

“Section 2.13 of the Declaration is further amended to add and supplement the existing definition of the term “**Ponds**” by the addition of those tracts of property to be used for storm water management, and designated on the face of the Phase II Plat as tracts “M,” “T,” and “U”.

Id.

Following completion of Phase III of the Sunrise Ridge/Highlands plat, title to this property including Tracts “T” and “U” was conveyed from Graoch to the Sunrise Ridge/Highlands HOA by Quit Claim Deed on June 18, 2010. CP 349-355.

The City of Tumwater is tasked with enforcing the conditions set forth in final plats within the City limits and ensuring that the neighborhood associations carry out maintenance responsibility for storm water ponds under the Tumwater Municipal Code. The City’s interest is to ensure that a failure to maintain storm water ponds does not cause flooding that could potentially harm citizens or damage public infrastructure.

The plat conditions and storm water maintenance agreements between the City and the owners of the Sunrise Ridge/Highlands Plat authorize the City to give the owner of the property notice of the specific maintenance and/or repair required. The City reviewed the relevant formation and plat approval documents, storm water agreements and Covenants Conditions and Restrictions (“CCRs”) associated with the subdivisions housing (“SR/HSR”), and across the street from, (“Vistas”) the storm water facilities at issue in this case, and concluded that the SR/HSR Homeowners’ Association had a duty to maintain the storm water facilities located on Tract “T” within the SR/HSR subdivision.

The City's Water Resources Specialist, Tim Wilson, sent a letter to SR/HSB on September 10, 2015. CP 357-358. To date, SR/HSB has refused to accomplish the necessary to maintenance to the storm water pond. CP 360. This litigation followed. The parties filed cross motions for summary judgment on the issue of who was responsible to maintain the storm water facilities on Tract "T" and the trial court agreed with the City's contention that it was Appellant's duty to maintain Tract "T". Therefore, the trial court granted summary judgment to the City and denied Appellant's motion for summary judgment. CP 383-385.

IV. ARGUMENT

A. **The Appellant's duty to maintain the storm water facilities on Tract "T" is set forth in unambiguous plat conditions governing the SR/HSB subdivision.**

There are no facts in dispute in this matter and the trial court properly granted summary judgment to the City of Tumwater. Under RCW 58.17.170, a subdivision shall be governed by the terms of approval of the final plat. The Tumwater Municipal Code, TMC 17.02.110, requires the City to comply with the terms of RCW 58.17. Accordingly, the City "must enforce restrictions imposed upon a subdivision as a term or condition of approval." *Jones v. Town of Hunts Point*, 166 Wn. App. 452, 458, 272 P.3d 853 (2011).

Appellant's argument would require the Court to ignore the plain, unambiguous language of the plats, storm water maintenance agreements and CCR's that were created during the development of the SR/HSB subdivisions. The plain language of the plat for the SR/HSB subdivision governs the duties of the SR/HSB HOA. RCW 58.17.170.

Where a plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence. *Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P.2d 514 (1995), citing *Olson Land Co. v. Seattle*, 76 Wash. 142, 145, 136 P. 118 (1913). The Phase III Plat of the SR/HSB subdivision assigns the duty to maintain "all" "ponds" and "storm facilities" to the SR/HSB HOA. CP 328. There is no exception of this duty for any pond on Tract "T" or any other lot. *Id.*

Appellant contradicted that duty by offering parol evidence in the form of declarations setting forth the subjective opinions and beliefs of the developer's project manager and the subcontractor as to who they thought would be responsible for maintaining the ponds on Tracts "T". CP 135-140. Parol evidence cannot alter or vary an unambiguous instrument. *Olson Land Co. v. Seattle*, 76 Wash. 142, 145, 136 P. 118 (1913). Neither of those individuals executed the Storm Water Maintenance Agreement. CP 335-338. Their subjective opinions and beliefs are not sufficient to undermine the plain, unambiguous language on the face of the Plat which

assigns maintenance duties to the Plaintiff or the unambiguous terms of the maintenance agreement requiring Appellants to maintain the subject ponds.

The Phase III Plat further required execution of a storm water maintenance agreement to cover the storm water facilities within the plat, which was done. CP 335-338. The storm water maintenance agreement, like the Phase III plat conditions, assigned the duty of maintaining storm water facilities to the SR/HSH. *Id.*

Appellant asks the Court to look beyond the plain language of the SR/HSH plat, which was approved on the condition that the SR/HSH Homeowner's Association maintain all storm drainage facilities on tracts owned by the SR/HSH Homeowner's Association. *See* CP 328.

Appellant fails to cite any legal authority which supports this position.

The conditions of the approval of the final (Phase III) plat for the Sunrise Ridge/Highlands at Somerset Hill development clearly set forth the duty of Plaintiff SR/HSH Homeowner's Association to maintain the storm water facilities located on their property, including Tract "T":

2. Tracts "L" through "Z" shall be owned and maintained by the Sunrise Ridge/The Highlands at Somerset Hill Homeowner's Association ...

4. Storm drainage facilities shall be maintained by the Sunrise Ridge/The Highlands at Somerset Hill Homeowner's Association ...

6. All drainage easements, swales, ponds, conveyance ditches, storm facilities and all other appurtenances shall be maintained by the Sunrise Ridge/The Highlands at Somerset Hill Homeowner's Association....

CP 328.

The conditions set forth on the face of the Phase III SR/HSR plat plainly and unambiguously sets forth the duty of the Appellant to maintain "all" storm water facilities, including ponds, on Tracts "L" through "Z". The SR/HSR plat does not segregate any "cells" within Tract "T", for example, but instead covers all drainage easements, ponds and storm facilities. *Id.* Because the plat language is plain and unambiguous, it controls the result, and a Court should not have to look beyond the express conditions of the Plat to determine the responsibility for maintenance of the storm water facilities.

Even so, approval of the Phase III SR/HSR plat was also conditioned on the concurrent execution of a Storm Water Maintenance Agreement. The Storm Water Maintenance Agreement also assigns the duty to maintain the ponds to the Appellant. CP 335-338. The Agreement provides as follows:

1. Owner shall implement the storm water facility maintenance program located in Appendix K of the Drainage Design and Erosion Control Manual for Tumwater, Washington.

CP 336. The Agreement further provides that the duty of maintaining the storm water facilities passes to the Sunrise Ridge/The Highlands at Somerset Hill Homeowners Association. CP 337.

The intent to require SR/HSH to maintain the subject ponds is also evident in the covenants, conditions and restrictions (CCRs) recorded by the developer of SR/HSH. The developer, Graoch, recorded CCR's at the time Phase I Plat was approved, which obligated the SR/HSH HOA to maintain all drainage facilities, including "ponds". CP 298-314. When the Phase III plat was approved, the CCR's were amended in 2006 to expressly include the storm water facilities on Tracts "T" and "U" as ponds that Plaintiff SR/HSH must maintain. CP 339-347. It is evident that SR/HSH assumed the duty to maintain all of the storm water facilities within the plat, including the disputed facility located on Tract "T".

In sum, the plat conditions, the storm water maintenance agreement and CCR's executed therewith all show a clear intention to require the SR/HSH Homeowners to maintain all the storm drainage facilities within the subdivision. *See*, CP 286, 291-296; 306; 316, 317. This includes the disputed facilities within Tract "T".

B. The Vistas plat language, easement or stormwater maintenance agreements do not extinguish the duty of Appellant to maintain the storm water facilities on Tract “T”.

The SR/HSH Phase III SR/HSH plat was executed in May, 2006.

The Vistas’ easement for storm water drainage onto what was then known as Tract “F” was executed in 1992 [CP 237-246] and a storm water maintenance agreement was executed in 1995 [CP 248-251]. The Vistas CCR’s, recorded in 1997, provided that the storm water maintenance responsibility “shall terminate in the event the City of Tumwater, or some other entity approved by the City of Tumwater, agrees to assume maintenance responsibility for the stormwater facilities.” CP 267 at §8.1.

Tract “F” was then conveyed to the developer of the SR/HSH subdivision [CP 278-282], and totally reconstructed in the process of the development of the SR/HSH subdivisions. *See* CP 139, Declaration of contractor Michael Tennant, at line 13-17. Appellants concede that the developers of SR/HSH were required to reconstruct Cell 2, which receives the Vistas storm water. Appellant’s Brief at 7. The approval of the Phase III plat thus involved a new and different storm water facility now located on Tract “T” (Formerly part of Tract “F”), and logically assigned the duty of maintenance for the newly developed pond to the Appellant, which

owned the Tract “T” and benefitted from the approval of the Phase III plat under the conditions of maintaining that storm water facility.

Additionally, on the face of the Phase III SR/HSB plat, it states the storm drainage easement on Tract “T” is to be relinquished upon the recording of the plat. CP 328. Similarly, the Vistas CCRs provide that the maintenance responsibility for storm water facilities “shall terminate in the event the City of Tumwater, or some other entity approved by the City of Tumwater, agrees to assume maintenance responsibility for the stormwater facilities.” CP 267 at Section 8.1. So, when the maintenance was assumed by SR/HSB as set forth in the Phase III Plat, the intent was for the maintenance duty of the Vistas’ neighbors to end.

C. **The storm water facilities located on Tract “T” were reconstructed during the development of the SR/HSB subdivision.**

Plaintiff argues that the Third-Party Defendants (Property owners in the Vistas neighborhood) should be responsible for maintaining one of the ponds located on Tract “T” which is owned by and located within the SR/HSB neighborhood. Plaintiff claims that one of the cells within the storm water pond at issue retains water drained exclusively from the Vistas’ neighborhood. Plaintiff does not raise an issue with maintaining the other cells located on Tract “T” or the pond located on Tract “U”.

This argument is inconsistent with the plain language of the plat conditions and storm water maintenance agreement which assign all the maintenance responsibility to the Plaintiff. When the SR/HSH neighborhood was platted, conditions relating to all storm water ponds were set forth in the plat. Furthermore, it goes against common sense that one entity (Graoch) would be approved to reconstruct the storm water facility, but the maintenance responsibility would be assigned to a location of the development of storm water ponds by Graoch on Tract “T”.

Plaintiff offers only their subjective “presumption” that the maintenance agreement does not apply to a portion of the stormwater ponds on Tract “T”. Appellant’s Brief at 9. Nothing in the language of the storm water maintenance agreement or plat conditions supports this conclusion. Instead, these documents require Appellants to maintain “all” storm water facilities within the plat.

D. The requirement for Appellants to maintain the pond on their property is consistent with the Tumwater Municipal Code.

Appellant argues that Tumwater Municipal Code relieves them of responsibility. Appellants rely upon TMC 13.12.020(D)(1), which provides:

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.

This provision does not excuse the plainly stated maintenance obligations set forth in the Phase III SR/HSB plat. Instead, it requires the “person(s) holding title” to be responsible for the required maintenance. In this case, Appellant SR/HSB owns the relevant pond.

It is undisputed that Appellant SR/HSB Homeowner’s Association owns Tract “T”. It is also clear that the approval of the Phase III plat was served by the reconstruction of the ponds on Tract “T”. If only water from Vistas drains into one of the ponds on Tract “T”, it does not mean that SR/HSB is not served by the reconstruction of the ponds by their developer, and the approval of the Phase III plat on the condition that SR/HSB Homeowner’s Association maintain the storm water facilities on its property.

Given the weight of the evidence supporting a finding that the Appellant is responsible for maintaining the storm water facilities on Tract “T”, the trial court’s order granting summary judgment in favor of the City should be affirmed.

E. LUPA bars revision of the unambiguous plat conditions in a collateral action.

Appellant has argued that it should not be responsible for maintaining the storm water pond characterized as Cell 2 on Tract “T”. However, to do so would invalidate and alter the plain language on the face of Appellant’s Phase III Plat which requires that Tract “T” be owned and maintained by the SR/HSB Homeowner’s Association, and that storm drainage facilities shall be maintained by the SR/HSB Homeowners Association. CP 328 at Nos. 2, 4, 6.

Washington’s Land Use Petition Act (LUPA) provides the exclusive means of obtaining judicial review of land use decisions, subject to statutory exceptions not applicable here. RCW 36.70C.030, *Twin Bridge Marine Park, LLC v. Dep’t of Ecology*, 162 Wn.2d 825, 854, 175 P.3d 1050 (2008). A land use petition is barred, and the court may not grant review, unless the petition is filed with the court and served on the parties within twenty-one days of the issuance of the land use decision. RCW 36.70C.040.

In this case, the Phase III plat of the SR/HSB subdivision was approved in May, 2006. SR/HSB filed a lawsuit against the City of Tumwater for a declaration that it is not solely responsible to maintain the storm water ponds on Tract “T” in July, 2016—over 10 years after

approval of the Phase III Plat. This is a collateral attack on the terms of the plat approval by means of a declaratory judgment action filed beyond the LUPA appeal period. As a result, the Appellants' untimely action fails, and the Court may affirm the trial court on this basis without even reaching the merits.

V. CONCLUSION

Under the unambiguous plat conditions and explicit terms of the maintenance agreement, Appellant is responsible for maintaining the entire storm water pond located on Tract "T" within the SR/HSB subdivision. The Court of Appeals should affirm the trial court's decision granting summary judgment in favor of the City of Tumwater and denying summary judgment to the Appellant which confirmed this responsibility.

RESPECTFULLY SUBMITTED this 31st day of January, 2018.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

s/ Julie Carignan

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2018, I served the foregoing with the Clerk of the Court for the Washington State Court of Appeals using the Court of Appeals portal. I certify that all participants in the case are registered Court of Appeal portal users and that service will be accomplished by the Court of Appeals portal system.

Signature:

s/ Marry Marze _____
Legal Assistant to Jeffrey S. Myers and
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LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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