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

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JZ KNIGHT,

Petitioner/Appellee,

v.

CITY OF YELM; TTPH 3-8, LLC,

Respondents/Appellants.

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BRIEF OF APPELLANT CITY OF YELM

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## I. INTRODUCTION

Separate property owners in the City of Yelm ("City") applied for five preliminary plat approvals or binding site plan approvals (collectively referred to as the subdivision applications). JZ Knight, leader of the Ramtha School of Enlightenment, owns a large estate outside the City limits where she and her colleagues, employees, and spiritual followers periodically reside and conduct a variety of meetings and programs. Knight opposed all of the subdivision applications, ostensibly based upon her concerns about the City's ability to serve the proposed developments with water.

The preliminary subdivision applications were reviewed in extensive proceedings before City Hearing Examiner Stephen Causseaux. The Examiner granted the preliminary approvals; Knight sought reconsideration; the Examiner modified conditions and reaffirmed the approvals; and Knight administratively appealed to the City Council. The Council dismissed the appeal because Knight lacked standing and upheld the Examiner's preliminary approvals. AR: City Resolution 481 (attached).

Knight filed actions in Thurston County Superior Court challenging the City's five preliminary approvals under the Land Use Petition Act (LUPA), RCW Ch. 36.70C.

The trial court, after denying respondents' motions for dismissal and summary judgment, granted Knight's LUPA petition based on a minor, unnecessary clarification of a condition imposed by the Hearing Examiner. The clarification was unnecessary because it merely recited statutory requirements, and the Hearing Examiner's special finding made its meaning absolutely clear. Nevertheless, all parties agreed to the inconsequential clarification. This type of minor clarification does not constitute a reversal of the Examiner, and the trial court should not have reversed the City's land use decisions on this basis.

However, the City's primary concern and reason for appealing is the trial court's imposition of special process requirements for any future applications for final subdivision approvals and the trial court's entry of findings and conclusions. In those findings and conclusions, the trial court purported to decide what water rights are held by the City and issued an advisory opinion that the City must make certain showings of water rights at final subdivision approval. Even though the trial court's findings and

conclusions are nullities on appeal, they were also outside the trial court's jurisdiction and contrary to the plain meaning of state statute.

The City also challenges the trial court's decision on three additional procedural issues: (1) Knight's failure in her LUPA petition to assign error to, or even mention, the primary, dispositive basis for the Council's decision – lack of standing under the City Code; (2) Knight's failure to show standing under the City Code to administratively appeal the Examiner's decisions to the Council; and (3) Knight's failure to show standing to challenge the City's land use decisions under LUPA.

Knight's challenges are based solely on her claim that the City's preliminary subdivision approvals were granted without appropriate provision for water. Under LUPA, Knight has the burden of proving that the City's decisions were erroneous. RCW 36.70C.130.

The applicable provisions of RCW 58.17.110, YMC 16.12.170, and YMC 16.32.065 are essentially identical and required the Examiner to make written findings at the time of preliminary subdivision approval that "appropriate provisions are made for...potable water supplies." The Examiner interpreted the statutory language as requiring a reasonable expectation that water would be available to serve the proposed development when needed. CP111 at 1260-86; AR: 10/9/07 Hearing

Examination Decision.<sup>1</sup> The Examiner also recognized that more exacting determinations of adequate water supplies would be required prior to final subdivision approval and building permit issuance. *Id.*

The Examiner considered all of the evidence and made findings: that the City was successfully implementing its planned expansion of water supplies by acquisition of water rights; that the planned increases in water supplies would be adequate to serve projected development at such time the water is needed in the future; and that water demand was effectively being reduced by successful ongoing water conservation and reclamation programs. The Examiner concluded that this was appropriate provision for potable water supplies.

The Examiner rejected Knight's argument that the City must prove that the City itself has sufficient water rights in hand to immediately serve all of the proposed development, plus all development that might occur under previous subdivision approvals, even though such development would not occur for at least several years hence, if at all. The Examiner rejected the argument because applicable law does not impose any such requirement. Even at building permit approval, long after the preliminary

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<sup>1</sup> There are five separate Hearing Examiner decisions in the Administrative Record ("AR"), which do not differ in material respect with regard to water availability. The Tahoma Terra Phase II decision is attached is representative and is attached.

plat approvals at issue here, the Legislature requires evidence of adequate water, which may be shown by a water right or a letter from a water provider or any other facts sufficient to show adequate supply.

RCW 19.27.097.

The Council dismissed Knight's administrative appeal for lack of standing under the City Code. In case the Council's determination of standing was overturned, the Council contingently reviewed the substantive issues raised and upheld the Examiner's decisions. AR: City of Yelm Resolution 481 (attached).

Under the law governing LUPA actions, once appealed, the trial court's decisions become nullities and are not entitled to any deference. Rather, the Court of Appeals directly reviews the City's land use decisions to decide the issues raised in Knight's LUPA petition that have been brought before this Court and directly reviews the procedural issues raised by respondents' motions to dismiss and for summary judgment. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court erred in denying respondents' motions to dismiss because Knight's LUPA petition did not appeal the City Council's

determination that she lacked standing under the City Code to appeal the Examiner's decisions to Council.

2. The trial court erred in denying summary judgment that Knight failed to establish standing under (a) the City Code to administratively appeal the Examiner's decisions to the Council and (b) under LUPA to obtain judicial review of the City's land use decisions.

3. The trial court erred in granting Knight's LUPA petition based on an Examiner condition placed upon preliminary subdivision approvals where (1) all parties were in agreement on the meaning of the condition; (2) the trial court's minor modifications of the condition merely confirmed the meaning the Examiner expressly intended; and (3) the condition was unnecessary because its requirements, that determinations of adequate water supply be made before final subdivision and building permit approvals, are required by state statute, as the Examiner acknowledged in a special finding preceding the condition.

4. The judgment and legal conclusions were legally erroneous and exceeded the trial court's jurisdiction by rewriting the City Code to require specific notice and comment opportunities for Knight for final subdivision applications.

5. The trial court erred as a matter of law in entering findings of fact and conclusions of law in this LUPA action.

6. If findings of fact and conclusions of law in a LUPA action have any legal effect, findings 3, 4, 5, and 7 and conclusions 3, 4, 5 and 7 are beyond the court's jurisdiction and/or legally erroneous, in particular Findings 4 and 7 unlawfully purport to determine the amounts of water rights held by the City, and Conclusion 5 contains a legally incorrect advisory opinion about how adequate potable water must be shown for final subdivision applications.

**B. Issues**

1. Should the Court overturn the trial court because Knight failed to appeal the City Council's determination that she lacked standing under the City Code?

2. Should the Court overturn the trial court because Knight failed to establish standing both (a) under City Code in order to bring administrative appeals and (b) under LUPA to obtain judicial review?

3. Should the Court overturn the trial court's decision granting Knight's LUPA petition on the basis of a purportedly unclear Hearing Examiner condition where (1) all parties agreed on the meaning of the condition; (2) the trial court's minor modification of the condition merely

confirmed the Examiner's express intent, as explained in his special finding; and (3) the condition merely states the requirements of state statute, as the Examiner acknowledged in his special finding immediately preceding the condition.

4. Should the Court overturn the trial court's judgment and conclusions requiring the City to grant Knight special notice and opportunity to comment on future applications for final subdivision approvals not given to other members of the public?

5. Should the Court overturn the trial court's entry of findings of fact and conclusions of law in this LUPA action?

6. If the trial court's findings and conclusions have any legal effect, should the Court hold that the trial court's findings 3, 4, 5 and 7 and conclusions of law 3, 4, 5 and 7 are unsupported and legally erroneous, in particular Findings 4 and 7, which unlawfully purport to determine the amount of water rights held by the City, and Conclusion 5, which issues a legally incorrect advisory opinion about how adequate potable water must be shown for final plat applications that were not even before the trial court?

### III. STATEMENT OF THE CASE

On July 23, 2007, the Hearing Examiner held a public hearing on the five proposed preliminary plat and binding site plan approvals at issue in this case: Tahoma Terra, Windshadow PRD, Windshadow Townhomes, Wyndstone, and Berry Valley I. CP30 at 68121; CP34 at 137-189; AR: H.E. Decisions dated 10/9/07 & 12/7/07.<sup>2</sup> After reviewing extensive post-hearing submissions, the Examiner conditionally granted preliminary approval to the five proposed subdivisions in five decisions issued on October 9, 2007. *Id.* The decisions are essentially the same in relation to the issues before the Court. The Tahoma Terra Decision (CP111 at 1260-81 & 1282-86) is attached for the Court's convenience. In his decisions, the Examiner specifically determined:

At the preliminary binding site plan [or preliminary plat] approval stage, an applicant must show a reasonable expectancy that the water purveyor (in this case the City) will have adequate water to serve the development upon final plat approval. CP111 at 1268; AR: 10/9/07 H.E. Decision at Finding 12. (attached).<sup>3</sup>

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<sup>2</sup> Under Title 16 of the Yelm Municipal Code, plats (for residential lot development) and binding site plans (for commercial or condominium development) are reviewed similarly, and identical provisions for showing appropriate provision for potable water are required. The five applications are referred to jointly herein as the subdivision applications.

<sup>3</sup> The cited decisions are found both at CP111 and in the Administrative Record ("AR") under the same title and date. Because the AR is unnumbered, citations are made CP111 for the convenience of the Court's reference.

The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a 'reasonable expectation' that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final binding site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Project Water Demand, which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand. CP111 at 1270; AR: 10/9/07 H.E. Decision at Finding 15.

Courts and the legislature have not required applicants to show water availability at the time of preliminary plat/ binding site plan approval, but only that the City or other purveyor has a reasonable plan to provide such service. In the present case, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. CP111 at 1275; AR: 10/9/07 H.E. Decision at Finding 20.

Knight filed a motion for reconsideration of the Examiner's decisions. CP34 at 139. After additional briefing, the Examiner issued his Decision on Reconsideration on December 7, 2007, adding three findings and a new condition to his previous decisions on the five preliminary subdivision approvals. CP111 at 1282-86; AR: 12/7/07 H.E. Decision on Reconsideration (attached).

The two new findings relevant in this case are as follows:

1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.

2. While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon in his response are beyond the Examiner's authority and interfere with the City's ability to manage his [sic] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

CP111 at 1283; AR: 12/7/07 H.E. Decision on Reconsideration at 2. In addition, the Examiner added the following new condition to each of the five preliminary subdivision approvals:

The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

CP111 at 1284. *See* Callison letters to Hearing Examiner with attachments dated 8/3/07, 8/16/07 and 8/13/07 (CP111 at 1289-96, 1305-25, 1464-81; water rights conveyances from Tahoma Terrace and TVGCC to City dated 5/19/05 and 9/13/06(CP111 at 1388-1411 & 1413-34); conveyance agreement between McMonigle and City dated 12/11/06 (CP111 at 1436-63); letter from Ecology to City dated 12/22/06 approving changes to water rights certificates (CP111 at 1327-86); DOH letter to City dated 9/16/02 approving Yelm water system plan (CP111 at 1298-99).<sup>4</sup>

Knight appealed the Examiner's preliminary subdivision approvals to the City Council. The Council heard all five appeals together. After dismissing Knight's administrative appeal for lack of standing under the City Code, the Council contingently reviewed the issues raised by Knight and upheld the Examiner's reasons for granting the approvals. AR: City of Yelm Res. 481 (Feb. 12, 2008) (attached).

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<sup>4</sup> All referenced documents are in the Administrative Record under the referenced date and title. Because the AR is unnumbered and these documents are also in the Clerk's Papers, the CP citation is used for convenience of the Court's reference.

Knight appealed the City's land use decisions to Thurston County Superior Court under LUPA. In her LUPA petition, Knight failed to assign error to the Council's final and dispositive decision that Knight lacked standing to appeal the Examiner's decisions to the Council. AR: City of Yelm Res. 481 (Feb. 12, 208) at Conclusion of Law 3. Knight failed even to mention the Council's decision that Knight lacked standing in Section 7 of Knight's petition, "A Separate and Concise Statement of Each Error Alleged to Have Been Committed" or anywhere else in her petition. CP5.

In April 2008, the City filed a Motion to Dismiss Knight's petition on the ground that she failed to appeal the Council's dispositive decision that she lacked standing to appeal the Examiner's decisions to the Council because she had not shown that she was an "aggrieved person," as required by the City Code. CP43. The City also joined in a motion filed by other respondents seeking dismissal of the LUPA petition on the grounds that Knight lacked standing both to administratively appeal the Examiner's decision to the Council and to obtain judicial review under LUPA. CP44; CP27; CP32. The trial court denied the motions to dismiss without prejudice to a subsequent motion for summary judgment. CP77.

Subsequently, several respondents filed a motion for summary judgment on dual grounds of lack of standing under the City Code and under LUPA. CP70; CP71. The City joined in this motion. CP91. The trial court denied the motion for summary judgment. CP100.

After briefing by the parties, the court held the LUPA hearing on October 1, 2008, and issued a letter decision on October 7, 2008. CP121. Knight submitted a proposed judgment, findings of fact, and conclusions of law. CP128. The City and other respondents filed objections. CP131, 132, 137. The trial court entered Knight's proposed judgment, findings of fact, and conclusions of law, with minor revisions. CP139; CP140.

The City adopts the more detailed Statement of the Case in the Opening Brief of Appellant Tahoma Terra.

#### **IV. ARGUMENT**

##### **A. Summary of Argument**

It is not necessary for the Court to reach the merits of this LUPA action for three independent reasons.

First, in Knight's LUPA petition, she failed to assign error to the Council's dispositive decision that Knight lacked standing to appeal the Examiners' decisions to the Council, as required by LUPA. Thus, the

Council's decision that Knight lacked standing became final and beyond the jurisdiction of the trial court.

Second, Knight lacked standing under the City Code to appeal the Examiner's decision to the Council because she was not a person aggrieved. She did not establish any specific injury in fact that she would suffer as a result of the City's land use decisions.

Third, for essentially the same reasons, Knight lacked standing under LUPA to obtain judicial review of the City's land use decisions.

The other issues before this Court are narrow and relate solely to whether the City erred, under applicable LUPA standards of review, in granting the preliminary subdivision approvals. More specifically, Knight's sole grievance relates to the City's "written findings" that "appropriate provisions are made for...potable water supplies," as required by RCW 58.17.110 and the essentially identical requirements of YMC 16.12.170 and YMC 16.32.065.

Knight's primary contention was that "appropriate" provisions for potable water supplies at the preliminary approval stage required the City to condition preliminary approval upon a determination of water availability prior to final approval. Knight contended that the Examiner's preliminary approvals were erroneous because they allowed the

determination of water availability to be deferred until building permit approval. CP102 at 673. This argument is based on an inaccurate reading of the Examiner's condition and accompanying finding. The Examiner's potable water condition required that "[t]he applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit... ." CP111 at 1284 AR: 12/7/07 H.E. Decision on Reconsideration, Condition 2.

Knight construes the conjunction, "and/or," as allowing deferral of water availability to the building permit stage. But the Examiner's finding accompanying this condition is clear that determinations of adequate water supply must be made prior to both final plat and building permit approvals under RCW 58.17.150 and RCW 19.27.097:

While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such."

CP111 at 1283: AR:12/7/07 Decision on Reconsideration, Finding 2)

(emphasis added). As the Examiner recognized, regardless of any condition he might impose, state law requires a determination of water availability at both the final plat and building permit stages.

RCW 58.17.150 (final plat) and RCW 19.27.097 (building permit). The parties all agree on these requirements.

However, the parties sharply disagree about Knight's additional assertion before the Examiner, the Council, and the trial court that adequate water supply at final plat approval must be shown by proof that the City has sufficient water rights, in hand, to serve the proposed developments and all previously approved developments. The City acknowledges that additional, more detailed determinations of adequate water supply must be made prior to final subdivision and building permit approvals under RCW 58.17.150 and RCW 19.27.097. However, the Examiner, as he explicitly acknowledged, had no authority to impose the specific requirement of showing adequate water supply by proof of water rights because there was no such statutory requirement. CP111 at 1283. This follows the fundamental principle of Washington law that quasi-judicial decision makers have no authority to create specific land use regulatory requirements from general statutory language. *See, e.g., Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 358-59, 190 P.3d 38 (2008).

The trial court upheld the City's determinations in this case that there were appropriate provisions for potable water supply for each of the subdivisions as required by RCW 58.17.110. That determination has not been appealed to this court and is a verity on appeal. The trial court,

however, went on to issue an unlawful advisory opinion regarding RCW 58.17.150, which governs final subdivision approval and requires the agency furnishing water to state that there is adequate water supply for the subdivision. RCW 58.17.150(1).

Washington courts do not issue advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994). In this case, no final plat applications have been filed, and therefore the City's decisions on those applications were not before the trial court. Accordingly, the trial court's advisory opinion in Conclusion 5 regarding what would be a showing of adequate water supply at final subdivision approval was an unlawful advisory opinion. (In fact, in Conclusion 6, the trial court itself recognized that this determination should be deferred until final subdivision approval.) CP139 at 1578.

In addition, the trial court's interpretation of RCW 58.17.150 in Conclusion 5 is clear legal error. When interpreting statutes, court's must give them their plain meaning and look at the statutory scheme as a whole, including related statutes. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). Here, the plain language of RCW 58.17.150 does not require proof of adequacy to be by a showing of sufficient water rights. The most telling proof of the trial court's error, however, is the

final part of the statutory scheme regulating actual construction of subdivisions at RCW 19.27.097. That statute, which governs building permit issuance (the final stage before actual water use), has much more detailed requirements than either RCW 58.17.110 or RCW 58.17.150 for showing “evidence of an adequate water supply for the intended use of the building.” RCW 19.27.097(1). The statute provides that “evidence of adequate water supply” may be shown by any one of an open-ended list of permissible means and does not require proof of water rights. RCW 19.27.097(1). RCW 58.17.150 (the requirement to show adequate water supply at final subdivision approval) must be read to be consistent with RCW 19.27.027 (the requirement to show adequate water supply at building permit approval). Therefore, the trial court’s unlawful advisory opinion in Conclusion 5, which interpreted RCW 58.17.150 to require a showing of water rights only, was a clear error of law.

For similar reasons, the trial court erred by imposing detailed notice and comment requirements upon the City for any future applications for final approvals of the proposed subdivisions in the Judgment and in Conclusion 7. There is no factual basis in the record showing a need for special procedural rights for Knight, and Knight has certainly had no problem participating in the public process to date. There

is also no legal basis for requiring the City to provide special procedures solely for Knight to participate in the final subdivision applications process. *See Thurston County*, 164 Wn.2d at 358-59 (no authority to create specific land use requirements). Moreover, the trial court had jurisdiction over only the preliminary subdivision approvals challenged in the LUPA action. No applications for final approvals have even been filed.

Most of Knight's arguments below were merely attacks on the City's water management policies and the sufficiency of the City's water rights. The attacks were irrelevant because the Court had no jurisdiction, in a LUPA action, to adjudicate the validity and extent of the City's water rights. A superior court has jurisdiction to decide such issues only in a water rights adjudication. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1996). For that reason, the trial court's Findings 4 and 7 in this case, which purport to adjudicate what water rights are held by the City, were clearly beyond the trial court's jurisdiction.

Knight is entitled to her opinion on how adequate water supply should be determined prior to final subdivision approval, but there is no statutory basis for her assertion that proof of sufficient water rights is required. It is fundamental in our legal system that such policy choices are

for the legislative, not judicial branch of government. Knight may legislatively advocate her preferred water availability standards to the City Council or the Legislature.

It would be improper for a court to impose the very specific proof of water rights requirement advocated by Knight, regardless of whether it would be good public policy, because it simply is not required by the language of the operative statutes. However, Knight's proposed prescriptions would be disastrous public policy. The City would be forced to either obtain surplus water rights, at great expense, long before they actually would be needed, or deny subdivision approvals and abdicate its obligation under the Growth Management Act (GMA) to accommodate projected population growth and avoid sprawl. RCW 36.70A.020(1) and (2). Moreover, RCW 58.17.110 requires appropriate provision for, not only water supplies, but the entire range of public facilities, prior to preliminary subdivision approval. Extending Knight's arguments to schools, roads, sewers, and other public facilities, would require that those facilities be built and maintained (unused) for years before they would be needed. This would be irrational public policy.

Preliminary subdivision approval has a duration of five years, after which the approval expires unless a final approval is applied for and

issued. RCW 58.17.140. Lots can be sold after final approval, but, depending on market conditions, may not be sold for years. And even after lots are sold, additional time will pass before building permits are approved. Forcing the City to secure water rights for everything that could be built under present and past approvals, and to hold water rights for projects that may not be constructed for years, if ever, would be extremely wasteful of public funds and would tend to motivate a City to avoid such wasteful expenditures by declining to accommodate growth.

Knight's assertion also ignores the dynamic nature of water rights planning. The reality is that water acquisition and usage are in constant flux depending upon the City's existing sources, the acquisition of new water rights, the conversion of existing water rights from other uses, the efficacy of conservation and reclamation measures, and the amount of development that actually occurs.<sup>5</sup> Knight's implausible assumption that construction of all approved development will immediately occur and begin using water has no basis.

The City has a track record of effectively planning for and obtaining water rights and for leading the state in reducing water demand

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<sup>5</sup> See, e.g., CP111 at 1289-96 (AR: Callison letter to H.E. dated 12/7/07); CP111 at 1305-1325 (AR: Callison letter to H.E. dated 8/16/07); CP111 at 1464-81 (AR: Callison letter to H.E. dated 8/13/07).

through water conservation, reclamation, and reuse programs and facilities. CP111 at 1289-96, 1305-25 and 1464-81. If it should become necessary, the City has the power to acquire water rights by condemnation or to adopt moratoria on final subdivision approvals, building permit approvals, and water hookups to protect the public interest.

RCW 90.03.040; RCW 36.70A.390.

The only land use decisions that are before this Court are the City's findings of appropriate provisions for potable water supplies made prior to the preliminary subdivision approvals. Knight has the burden of proving that such findings were based on: (a) an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; (b) evidence that was not substantial when viewed in light of the whole record before the court; or (c) a clearly erroneous application of law to the facts.

The Examiner's written findings, approved by Council, that appropriate provisions had been made for potable water supplies prior to granting the challenged preliminary subdivision approvals were well within the Examiner's legal authority conferred by RCW 58.17.110, under the applicable standards of review of RCW 36.70C.130. The Examiner's interpretation of "appropriate provision for potable water supplies" was

reasonable and, as the expert interpretation by an official charged with administering the laws, is entitled to deference. *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987). The evidentiary basis for the Examiner's decision was extensive. The Examiner's conscientious decision-making process, Decision, and Decision on Reconsideration reflected a careful application of his reasonable interpretations of law to his factual findings, and were supported by substantial evidence. *E.g.*, CP111 at 1289-1481.

The trial court, at Knight's request, and over the City's objection, entered findings of fact and conclusions of law. Under Washington law, the entry of findings and conclusions by a superior court sitting in an appellate capacity is unauthorized and, if entered are deemed to be nullities on appeal. *E.g.*, *State ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn. App. 614, 829 P.2d 217 (1992). A major reason for the City's appeal was concern about the erroneous content of the findings and conclusions and that they might have some legal effect if they were not appealed. Accordingly, the City asks the Court to explicitly hold that findings of fact and conclusions of law adopted by a superior court in a LUPA action are nullities and have no legal effect whether they are appealed or not.

**B. Knight Failed to Appeal the City Council's Denial of her Administrative Appeal of the Examiner's Decisions for Lack of Standing and the Council's Determination that Knight Lacked Standing is Final under Res Judicata.**

LUPA invokes the appellate jurisdiction of the superior court:

Judicial review of land use decisions is governed by the LUPA, chapter 36.70C RCW. *Girton v. City of Seattle*, 97 Wn. App. 360, 362, 983 P.2d 1135 (1999). "By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction." *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001).

*Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693, 49 P.3d 860 (2002). In order to invoke the superior court's appellate jurisdiction, rather than its general jurisdiction, strict compliance with statutory requirements is mandatory:

Superior courts are courts of general jurisdiction. When a superior court acts in an appellate capacity, however, the superior court has only the jurisdiction as conferred by law. Thus, before a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal. *Crosby v. County of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32 (1999).

*Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

LUPA's mandatory requirements for the land use petition include the following:

A land use petition must set forth: ...

(7) A separate and concise statement of each error alleged to have been committed; . . .

RCW 36.70C.070 (emphasis added).

Here, the City Council dismissed Knight's appeal of the Examiner's decision on the sole ground that Knight lacked standing. The Council reviewed the Examiner's land use decisions on the merits only "contingently," as a matter of adjudicative economy so that remand and rehearing would not be necessary if a reviewing court were to decide that Knight did have standing. The City Council specifically decided:

JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, Knight is not an aggrieved person with standing to appeal the Examiner's decision to the City Council. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council contingently decides Knight's appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.

AR: City Resolution 481 (Feb. 12, 2008) at Conclusion of Law No. 3.

This decision that Knight had not demonstrated that she was "aggrieved"

is based upon Yelm Municipal Code requirements:

The final decision by the hearing examiner may be appealed to the city council, by any aggrieved person or agency of record.

YMC 2.26.150.

Knight's LUPA petition did not appeal the Council's decision that she lacked standing. Contrary to LUPA's clear mandate, Knight's LUPA petition failed to allege that the Council erred when it found that Knight was not an "aggrieved person" and that she therefore lacked standing to appeal the Examiner's decisions to the Council. Her petition is entirely silent on this issue. All of Knight's statements in her LUPA petition regarding standing explicitly pertain only to whether she has judicial standing to bring the LUPA appeal, and all appear under the heading, "6. Facts Demonstrating that the Petitioner Has Standing to Seek Judicial Review Under RCW 36.70C.060"

When a land use decision is not timely challenged under LUPA, it becomes final and conclusive, as our Supreme Court has often, and recently, affirmed:

The crux of LUPA is that persons and agencies who oppose a final land use decision made by the local permitting authority must appeal that decision within 21 days.  
RCW 36.70C.040(3).

*Twin Bridge Marine Park, L.L.C. v. Department of Ecology*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008).

The Council's decision that Knight lacked standing was dispositive of her appeal. Having failed to challenge this dispositive element of the Council's decision within 21 days of its issuance, the Council's decision

upholding the Examiners' decisions is final and conclusive and not subject to judicial review under LUPA. *Twin Bridges Marine Park*, 162 Wn.2d at 843. Accordingly, Knight's LUPA petition should have been dismissed below.

**C. Knight Failed to Satisfy City Code Standing Requirements in her Appeal of the Examiner's Decisions to the City Council, and Failed to Satisfy LUPA Standing Requirements in Her Appeal of the City's Land Use Decisions to Superior Court.**

If the trial court was not deprived of jurisdiction by the failure of Knight's LUPA petition to appeal the Council's decision that she lacked standing, the trial court erroneously determined that Knight had standing to obtain Council review under the City Code and standing to obtain judicial review under LUPA. Although these are two separate standing requirements, they will be addressed together because their requirements are essentially the same. The City construes the administrative appeal standing requirement of YMC 2.26.150 ("aggrieved person") to be the same as LUPA's judicial standing requirements. CP30 at 72; *see* RCW 36.70C.060. Both require the appealing party to show that the challenged land use decision has caused or will cause a specific and perceptible injury-in-fact that is immediate, concrete and specific. If the asserted future injury is merely conjectural or hypothetical, there is no standing. *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992).

“Pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected.” *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994).

In response to the lack of standing arguments, Knight asserted that the City’s preliminary approvals will injure two of her property interests. In her reply brief to the City Council, Knight asserted, for the first time, that she satisfied standing because of (1) undeveloped land she owns at an unspecified location in the City and (2) senior water rights she owns and uses on developed land she owns outside the City, but in the general vicinity of the proposed preliminary subdivisions, that might be impaired. In her brief in Opposition to Motion for Summary Judgment, Knight abandoned the allegation that her undeveloped land in the City will be injured and relied solely on her allegation that her senior water rights will be injured. CP93. Knight never has asserted with any specificity how or when she might be injured by the City’s preliminary subdivision approvals. Any potential future injury to these interests is improbable, conjectural and speculative, and does not satisfy the fundamental injury-in-fact requirement for administrative or judicial standing.

First, the challenged preliminary subdivision approvals were conditioned on determinations of adequate water supply prior to final subdivision approvals and again prior to building permit approvals, as required by state law. If there is adequate water supply at the time of those approvals, no harm can occur to Knight's asserted interests. If determinations of inadequate water supply leads to denial of the future final subdivision or building permit approvals, no harm can occur to Knight. If determinations of adequate water supply are made, and Knight thinks they are incorrect, she can obtain judicial review under LUPA of the final subdivision or building permit approvals. Given these multiple future checkpoints, the likelihood that houses will be built without adequate water supply or that Knight's interests will be affected is conjectural and improbable.

Second, even if future approvals were granted despite inadequate water supply and even if judicial review failed to invalidate such approvals, Knight's water rights are protected by Washington's Water Code under which the Department of Ecology must curtail the use of junior water rights to protect senior water rights. Chapter 90.03 RCW.

Knight has not alleged that she will, in fact, suffer specific concrete injury, but rather that she might suffer some unspecified injury to

her water rights only if a hypothetical parade of unlikely events occur in the years to come. Knight hypothesizes that the applicants for the preliminary subdivision approvals will within the next five years apply for final subdivision approvals, that the City will not have adequate water supply when such applications are filed, that the City nevertheless will grant such final subdivision approvals, that the courts will not invalidate such final approvals in future LUPA actions, that, in the years following final subdivision approval, applications for building permits to construct houses will be filed, that the City will not have adequate water supply to serve them, that the City nevertheless will grant the building permits, that the courts will not invalidate such building permits in future LUPA actions, that the houses will be built, that water will actually be used, that water usage will reduce water available from Knight's wells, and that Ecology will not enforce and protect Knight's water rights.

In our legal system, standing requirements allow the adjudication only of real, concrete cases and controversies, that is, real disputes about actions that have caused or will cause real harm unless the courts intervene. Disputes about unlikely, unspecified, hypothetical, future harm are not subject to adjudication. There is no evidence that senior water rights have ever been impaired by development served by the City or that

Ecology ever has taken enforcement actions against the City. The record showed the City's commitment to ongoing programs of water rights acquisition, water conservation, and water reclamation to keep pace with the growth the City is required to accommodate by the Growth Management Act. CP111 at 1289-96, 1305-25, 1464-81.

**D. Knight Has the Burden of Proof Under LUPA, and the City's Decisions Are Entitled to Substantial Deference.**

In a LUPA action, the party seeking relief must carry the burden of establishing that the land use decision was erroneous under one of the applicable standards of RCW 36.70C.130. *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006). Knight claims that the land use decisions were erroneous under three subsections of RCW 36.70C.130

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

Under all three of these standards, deference is accorded the City's decision. Under subsection (b), judicial review of any claimed error of law in the City's interpretation of its ordinances is *de novo* but must

accord deference to the City's expertise, *Pinecrest Homeowners Ass'n v. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

Under subsection (c), the City's decision must be upheld if there is evidence in the record

[t]hat would persuade a fair-minded person of the truth of the statement asserted. [citation omitted]. Our deferential review requires us to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.

*Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

Under subsection (d), the Court applies the law to the facts:

Under that test, we determine whether we are left with a definite and firm conviction that a mistake has been committed. [citation omitted]. Again, we defer to factual determinations made by the highest forum below that exercised fact-finding authority.

*Id.*

**E. The City's Interpretation of the Requirement of Appropriate Provisions for Potable Water Supplies was Reasonable and Within the City's Interpretive Discretion.**

**1. As the Local Jurisdiction with Expertise Charged with the Interpretation of the Requirement Regarding Findings of Appropriate Provisions for Potable Water Supplies, the City's Interpretation is Entitled to Judicial Deference.**

Under RCW 58.17.110(2), prior to granting preliminary subdivision approval, the City is required to enter written findings that the proposed subdivision includes appropriate provisions for a long list of services and amenities, including potable water supplies. The requirements of YMC 16.12.170 and YMC 16.32.065 are essentially the same. The Supreme Court has explained that the purpose of the preliminary plat approval process was to give local governments and the public "an approximate picture of how the final subdivision will look." *Friends of the Law v. King County*, 123 Wn.2d 518, 528-29, 869 P.2d 1056 (1994) The Court noted that "it is up to local governments to decide what level of specificity they will require from a developer in its initial application" and that it was to be expected "that modifications will be made during the give and take of the approval process." *Id.*

Recognizing that local governments have the authority to impose regulatory conditions or to withhold subdivision approval if appropriate provisions have not been made, courts have interpreted RCW 58.17.110 as

allowing such conditions only to mitigate the direct impacts of the proposed development. *Isla Verde Intern. Holding, Inc. v. City of Camas*, 146 Wn. 2d 740,764, 49 P.3d 867 (2002); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 892-93, 795 P.2d 712 (1990).

The Examiner reasonably construed the requirements of RCW 58.17.110 and equivalent ordinances as requiring that, for preliminary subdivision approval, the City must provide substantial evidence of a reasonable expectancy that adequate water supplies will be available when needed to serve the development. CP111 at 1260-86.

On the basis of the City's water rights, recognized by the state Departments of Health and Ecology in the City's Water System Plan (WSP) and the City's ongoing water planning efforts, the Examiner concluded that there was a reasonable expectancy that the City's projected water supply would be adequate to serve the proposed developments when water would be needed, and he entered written findings of appropriate provision for potable water supply. CP111 at 1260-86. This is all that the law requires. As the expert official charged with administration of the operative laws, the Examiner's expert interpretation of the broad language of those laws is entitled to great judicial deference. *Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381

(1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 801 (1992).

The Examiner clearly recognized that both state law and the City Code require a determination of adequate potable water supplies “at final plat approval and building permit approval.” CP111 at 1283 (AR: 12/7/07 H.E. Decision on Reconsideration, Finding 2). The Examiner added this new finding in response to Knight’s Motion for Reconsideration to make clear that a determination of adequate water supply was required at both final plat approval and building permit approval.

In this finding, the Examiner noted that he had “added a condition of approval requiring such,” while recognizing that the condition was not necessary because the requirement was imposed by both state law and local ordinance. While the conjunction the Examiner employed in the initial condition, “applicant must provide a potable water supply adequate to serve the development at Final plat approval and/or prior to the issuance of any building permit” is arguably susceptible to Knight’s interpretation that the condition allowed deferral of the determination of adequate water supply to building permit issuance, the Examiner’s new Finding 2 made it absolutely clear that he did not intend to allow such deferral. Rather, the

condition was intended to mean that the adequate water supply determination was required before both final plat approval and building permit issuance. The Examiner apparently used the conjunction, “and/or,” in recognition of potential proposed structures that could be constructed before final plat approval, requiring only building permit approval.

The Examiner made the meaning and effect of the condition absolutely clear through new Finding 2. Moreover, even if the condition had been erroneous, it would have been harmless error because RCW 58.17.150 and RCW 19.27.097 require determinations of adequate water supply prior to both final plat and building permit approvals. RCW 36.70C.120(1)(a).

**2. The City Was Not Required to Make a Finding That the City Held Sufficient Water Rights, at the Time of Preliminary Plat Approval, to Provide the Water that Would be Used by the Residences If and When They are Constructed and Occupied Years Later After Final Plat Approval.**

Knight has consistently asserted that the City is required to determine that it has sufficient water rights to serve proposed developments along with all other previously approved developments. However, Knight has been unclear regarding when her asserted requirement of determining sufficient water rights must be made. Before the Hearing Examiner, Knight argued that the City was required to make a

finding that the City held sufficient water rights prior to preliminary plat approval to serve the proposed developments. The plain language of RCW 58.17.110 imposes no such requirement. Moreover, RCW 58.17.110 must be read in context with RCW 58.17.150 (final plats) and RCW 19.27.097 (building permits). As the Examiner noted in his Decision on Reconsideration, these statutes require more stringent analysis of water availability as a project moves closer to construction and actual water use. CP111 at 1282-86.

At preliminary subdivision approval, RCW 58.17.110 merely requires a finding that “[a]ppropriate provisions are made for ...potable water supplies....”

At final subdivision approval, RCW 58.17.150 more specifically requires that applications for final plat approval must be accompanied by a recommendation of approval or disapproval from the:

- (1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply.

At building permit approval, RCW 19.27.097 is more stringent yet, requiring that each applicant for a building permit provide:

Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water

purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.

So there is a sequence of legal safeguards in the subdivision and building permit approval process to ensure that adequate water is available by the time it actually is needed. It is especially significant that even under the building permit statute's most detailed requirements, water availability does not have to be shown through water rights and may be demonstrated through any of an open-ended list of reasonable means. There is no support in the plain language of RCW 58.17.110, RCW 58.17.150, or RCW 19.27.097 for Knight's assertion that a finding of appropriate provision for water supplies must be based on a finding of sufficient water rights at the preliminary or final subdivision approval stage.

In *Topping v. Pierce County Board of Commissioners*, 29 Wn. App. 781, 630 P.2d 1385 (1981), a preliminary plat approval was upheld even though the County had not required the applicant to demonstrate that the plat complied with a health regulation governing septic systems. The court noted that the purpose of a preliminary plat was to secure approval for a general design of a proposed subdivision and that, at the time of

preliminary plat approval, regulations that may impact, but would not preclude, all possibility of approval, are “guidelines not mandates.”

*Topping* recognized that ultimately compliance with applicable regulations is required, but compliance alternatives may become available between the time of preliminary plat approval and permit application. *Id.* at 785. The court affirmed the preliminary plat approval because there was “no showing of infirmities or conditions that would preclude any possibility of plat approval.” *Id.*

Here, the Examiner recognized that the City had a record of success in acquiring and transferring water rights and was actively pursuing the acquisition and transfer of additional water rights to meet the City’s projected future needs, that the City was successfully pursuing water conservation and water reclamation and reuse programs that reduced demand for water, and, therefore, that the City had a reasonable expectation that it would have sufficient water supplies to meet future water demand as a result of future development of the preliminary subdivisions along with other previously approved subdivisions. Nothing more was required at the preliminary approval stage. The trial court upheld the Examiner’s decisions that there was appropriate provision for

potable water at preliminary subdivision approval, and that holding has not been appealed.

**3. The City Was Not Required to Condition Preliminary Approval on a Determination of Sufficient Water Rights at Final Approval, and the Trial Court Lacked Jurisdiction to Require a Particular Determination of Sufficient Water Rights at Final Approval.**

At the trial court, Knight's position was that the City was required to condition preliminary approval to require a showing of sufficient City water rights at final approval. There is no basis for such a requirement in RCW 58.17.110 or RCW 58.17.150.

RCW 58.17.110 does not require that the City employ any particular methodology or standards to determine what constitutes "appropriate provisions" for "potable water supplies" at preliminary subdivision approval, and the City's interpretation of this requirement is entitled to deference. In the Decision on Reconsideration, the Examiner correctly noted that requiring the City to adopt the detailed prescriptions advocated by Knight (1) was beyond the jurisdiction of the Examiner and (2) would violate the applicant's legal rights.

The Washington Supreme Court recently reaffirmed unanimously that land use regulatory ordinances must be strictly construed in favor of the property owner:

It must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

*Sleasman v. Lacey*, 159 Wn.2d 639, 643, fn.4, 151 P.3d 990 (2007).

Moreover, with regard to the scope of RCW 58.17.110, the Court has held that authority to impose conditions on preliminary plat approval is limited to those that are necessary as a direct result of the development:

Recognizing that local governments have the authority to adopt regulations or to withhold plat approval if appropriate provisions have not been made, courts have interpreted RCW 58.17.110 as allowing such conditions only where the purpose is to mitigate problems caused by the particular development.

*Isla Verde Intn'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 763-64, 49 P.3d 867 (2002) (RCW 58.17.110 did not authorize the City to impose a 30% open space set-aside on all preliminary plat applicants).

The requirement asserted by Knight would violate these fundamental limitations on local regulatory authority. Under Knight's asserted requirement, subdivision approval would have to be denied if the City could not prove sufficient water rights, in hand, to serve not only this development immediately, rather than when water actually would be needed, but also, all other potential developments that have previously

been approved, even though they will not, in reality, be developed immediately but over an extended period of time, if ever.

Such a requirement would impose a regulatory burden on subdivision applicants far in excess of what is necessary as a direct result of their developments, in violation of the Supreme Court's holding in the *Isle Verde* case, as the Examiner correctly recognized. CP111 at 1283.

At final plat approval, RCW 58.17.150 requires that a water purveyor confirm the adequacy of the applicant's proposed source of water. However, this confirmation is not required to be in the form of a determination of sufficient water rights to immediately serve the proposed development as well as all previously approved development if and when it occurs in the future. Regardless of what RCW 58.17.150 may or may not require, however, no applications for final plat approval have been filed or approved for the proposed developments. Accordingly, the requirements of RCW 58.17.150 are not ripe for adjudication. If and when final plat applications are filed and approved, such land use decisions may be appealed under LUPA, and what is specifically required by RCW 58.17.150 may be judicially determined. Doing so now would be an unlawful advisory opinion.

**4. The City was not Required to Condition Preliminary Approvals on Special Notice and Comment Opportunities for Future Final Plat Applications.**

The Examiner properly denied Knight's request that she be given special notice and opportunity to comment on any future applications for final plat approvals because such future applications were not before the Examiner and such special opportunities for notice and comment were not required by law. The trial court erred by requiring, in both its Judgment and Conclusion of Law 7, that Knight be given such special notice and comment opportunities. CP140 at 1644-45; CP139 at 1642. Only the challenged preliminary subdivision approvals were appealed in this LUPA action. No applications for final approvals have been filed. If and when any such applications are filed, Knight may participate in the administrative review process at that time. The trial court had no authority to impose special process requirements beyond those required by applicable law, and no evidence in the record shows that any special procedural requirements are required.

**F. The City's Findings of Appropriate Provisions for Potable Water Supplies Are Supported by Substantial Evidence and Are Not Clearly Erroneous.**

In the Decision on Reconsideration, the Examiner found that the City had provided competent evidence regarding the availability of water, the City's Water System Plan, and water planning process. This evidence

included the conveyance, and Ecology-approved transfer, of water rights from the Dragt farm, the conveyance of water rights from the Nisqually Golf and Country Club, the lease of water rights from the McMonigle farm, and the City's advanced-stage applications for substantial additional water rights. CP111 at 1283; *see* CP111 at 1289-1481.

In the Examiner's October 9, 2007 Decision, his findings and conclusions on appropriate provisions for potable water supplies comprise over eight single-spaced pages and are unusually detailed and comprehensive. CP111 at 1267-1275; *see* CP111 at 1289-1481. After reconsideration, they were supplemented by three additional findings relating to appropriate provisions for water supply and a new condition requiring a showing of adequate water supply to serve the developments prior to final subdivision approvals and issuance of building permits. CP111 at 1282-86.

The findings and conclusions addressed all of the applicable law, evidence, and argument presented by the parties in both the hearings on the applications and the motions for reconsideration. The Examiner explained that the law did not require the imposition of the conditions and that the Examiner lacked authority to impose most of the proposed conditions. The Examiner's decision, adopted by the Council, carefully

and reasonably applied the law to his findings, based on substantial evidence, and was not clearly erroneous.

**G. The Trial Court's Findings of Fact and Conclusions of Law Were Unlawful and Nullities.**

Under LUPA, the trial court acts in an appellate capacity in reviewing the City's land use decisions based upon the City's administrative record. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003); *Satsop Valley Homeowner's Ass'n, Inc. v. Northwest Rock, Inc.*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005); RCW 36.70C.130(1); RCW 36.70C.020(1). Subsequent review of a LUPA petition by the Court of Appeals also is of the City's administrative record and decision, not the decision or any findings and conclusions of the trial court. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008). Even before LUPA, Washington law has long recognized that a tribunal acting in an appellate capacity does not have authority to issue findings and conclusions, and, if entered, they are nullities. *State ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992) ("a tribunal with only appellate jurisdiction is not permitted or required to make its own findings, and such findings, if entered, are surplusage). *Dickson* was recently quoted in a LUPA case. *J.L. Storedahl & Sons, Inc. v. Cowlitz County*,

125 Wn. App. 1, 8, 103 P.3d 802 (2004). *See also, Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006) (superior court's findings and conclusions in LUPA case disregarded as surplusage.).

Despite this clear body of law, Knight proposed extensive findings and conclusions; and the trial court, over the City's written and oral objections, adopted them, presumably intending that they have legal effect on the City's future actions if they were not appealed. As a result, the City has been forced to endure substantial expense in objecting to and appealing the trial court's entry of findings and conclusions to be sure they would have no future legal effect. So that such costly objections and appeals will not be necessary in the future, the City asks this Court to hold that the entry of findings and conclusions in a LUPA action is unlawful and that, if entered, they have no legal effect, whether the trial court's decision is appealed or not.

#### **H. Recovery of Attorney Fees and Costs**

If the City substantially prevails in this appeal, the City will be entitled to attorney fees and costs under RCW 4.84.370(1). The City adopts the arguments in the Opening Brief of Tahoma Terra in support of the recovery of attorney fees and costs.

## V. CONCLUSION

The City has always agreed that determinations of adequate water supply will be required prior to approval of any final subdivision and building permit applications. The City disagrees with Knight's assertion that the only means of demonstrating adequate water supply is by proof of sufficient water rights to serve such developments, along with all other development that may have been contingently approved by the City.

Although the City fully expects that it could make such determinations for these subdivisions prior to any final approvals, the law does not require that adequate water supply at final subdivision approval be demonstrated in that fashion. Even at the building permit stage, which is subject to the most detailed requirements, adequate water supply does not have to be shown through water rights, but may be demonstrated by an open-ended list of reasonable means.

For the foregoing reasons, the City requests that the Court uphold the challenged preliminary subdivision approvals, dismiss Knight's LUPA petition because she failed to appeal the City Council's dispositive decision that she lacked standing and because she, in fact, lacks standing, and overturn the trial court Judgment to the extent that it (1) purported to reverse the preliminary subdivision approvals, (2) imposed special notice

and comment requirements for potential future applications for final subdivision approvals, and (3) unlawfully entered findings and conclusions, in particular findings that purport to determine the City's water rights and conclusions regarding how the City must determine adequate potable water at final subdivision approval.

DATED this 19<sup>th</sup> day of February, 2009.

FOSTER PEPPER PLLC

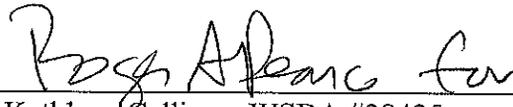


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Roger A. Pearce, WSBA #21113

Patrick J. Schneider, WSBA #11957

LAW OFFICE OF KATHLEEN  
CALLISON, PS



Kathleen Callison, WSBA #28425

Attorneys for Appellant City of Yelm

## APPENDICES

- A. October 9, 2007, Hearing Examiner Decision (Tahoma Terra) from Administrative Record.
- B. December 7, 2007, Hearing Examiner Decision on Reconsideration (Tahoma Terra) from Administrative Record.
- C. Yelm City Council Resolution 481 (February 12, 2008) from Administrative Record.
- D. Amended Findings & Conclusions (November 7, 2008).
- E. Judgment For Petitioner JZ Knight (November 7, 2008).
- F. RCW 58.17.110
- G. RCW 58.17.150
- H. RCW 19.27.097

# Appendix A

**OFFICE OF THE HEARING EXAMINER**

**CITY OF YELM**

**REPORT AND DECISION**

**CASE NO.:** SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

**APPLICANT:** TTPH 3-8 LLC  
4200 6<sup>th</sup> Avenue SE #301  
Lacey, WA 98503

**AGENT:** KPFF Consulting Engineers  
4200 6<sup>th</sup> Avenue SE #309  
Lacey, WA 98503

**SUMMARY OF REQUEST:**

The applicant is requesting approval to allow subdivision of approximately 32 acres into 198 single family residential lots.

**SUMMARY OF DECISION:**

Request granted, subject to conditions.

**PUBLIC HEARING:**

After reviewing Planning and Community Development Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on July 23, 2007.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "1" - Planning and Community Development Staff Report and Attachments**
- EXHIBIT "2" - Letter to Grant Beck from Jeff Schramm dated July 19, 2007**
- EXHIBIT "3" - Letter to Grant Beck from Clinton Pierpoint and Mark Steepy dated July 20, 2007**
- EXHIBIT "4" - Letter to Tahoma Terra LLC, Attn: Doug Bloom from William**

- Halbert dated July 19, 2007
- EXHIBIT "5" - Letter to City of Yelm from Thomas Loranger dated December 22, 2006
  - EXHIBIT "6" - Letter to Examiner from Keith Moxon dated July 23, 2007, with attachments
  - EXHIBIT "7" - Letter to Grant Beck from Clinton Pierpoint dated July 31, 2007
  - EXHIBIT "8" - Letter to Examiner from Jeff Schramm dated August 1, 2007
  - EXHIBIT "9" - Letter to Examiner from Curtis Smelser dated August 2, 2007
  - EXHIBIT "10"- Letter to Examiner from Kathleen Callison dated August 3, 2007
  - EXHIBIT "11"- Letter to Examiner from Keith Moxon dated August 10, 2007
  - EXHIBIT "12"- Letter to Examiner from Kathleen Callison dated August 16, 2007
  - EXHIBIT "13"- Letter to Grant Beck from Mark Steepy dated August 16, 2007
  - EXHIBIT "14"- Letter to Examiner from Curtis Smelser dated August 17, 2007
  - EXHIBIT "15"- Letter to Examiner from Keith Moxon dated August 21, 2007
  - EXHIBIT "16"- Letter to Examiner from Edward Wiltsie dated August 22, 2007
  - EXHIBIT "17"- Letter to Examiner from Curtis Smelser dated August 24, 2007
  - EXHIBIT "18"- Letter to Examiner from Kathleen Callison dated August 24, 2007
  - EXHIBIT "19"- Letter to Examiner from Edward Wiltsie dated September 4, 2007
  - EXHIBIT "20"- Memorandum Decision from Examiner dated September 13, 2007

GRANT BECK appeared, presented the Community Development Department Staff Report, and testified that the applicant previously received conceptual master site plan approval for Tahoma Terra on a 220 acre parcel. The applicant also received final master site plan approval for Phase 2 and final plan approval for Phase 1 east of Thompson Creek as well as final plats for projects in Phase 1. The applicant has received approval to develop 200 lots in Divisions 3 and 4 and today requests approval for development of the most westward part of the project into 198 lots. The conceptual approval required compliance with the comprehensive plan for the area, and final approval required compliance with the zoning code for the area. The subdivisions are then tested against the conceptual and final site plan approvals. Staff finds that the project meets all of the criteria plus the mitigating measures issued in the MDNS for the entire project. The transportation mitigating measures require improvements keyed to trip generations from the entire site. Trip generations trigger Longmire Street improvements, and Tahoma Boulevard is under construction. The bridge across Thompson Creek is also under construction, and a City LID will provide funding to construct the remaining portion. Improvements not yet triggered include the reconstruction Mosman Road. The MDNS also addressed water availability and allowed 89 lots within the master site plan and required transfer of water rights to the City. The applicant conveyed the dairy farm water rights, and will convey the golf course water rights to the City. The dairy has been conveyed. The golf course has not been transferred as yet, but will be shortly. These transfers fulfill the SEPA condition. The City will not issue building permits until it receives the transfers from both the farm and the golf course. The threshold determination is adequate as the environmental official can use the previous threshold determination unaltered if it addresses the proposal. The applicant is submitting exactly what it submitted with the conceptual approval. Therefore, the City can use the

MDNS unaltered. The site meets all parks and multi-family requirements. The MPC uses different standards and Phase 2 utilized the adopted 1992 DOE Manual for stormwater. The applicant analyzed the stormwater requirements as opposed to designing the system. They have proposed a system to the south of the boulevard, but that may not be the final location as the plan presently shows lots. The concurrency for water availability is discussed in the staff report. The staff report would be no different if the City were not the purveyor, and he did not get into depth in his analysis of water availability. The amount of water available in the City as a whole was not raised until this morning.

CURT SMELSER, attorney at law, appeared, introduced the applicant's case, and requested that the record remain open for them to respond to Mr. Moxon's submittals.

DOUG BLOOM, applicant, appeared and testified that he has worked closely with staff throughout the process and agrees with the entire staff report.

JEFF SCHRAMM appeared and testified that he has worked as a traffic engineer for 14 years and in 2005 prepared the TIA for the entire project. He identified the traffic impacts and the proposed mitigation. He disagrees with Mr. Moxon's letter which was introduced as Exhibit "2". He evaluated the traffic for the entire MPC. He did evaluate the impacts of the entire build-out and also identified impacts to the street system. He evaluated the road threshold capacity. When the capacity street standards were exceeded, he recommended mitigation.

CLINT PIERPOINT, project engineer, appeared and referred to the MPC process. The stormwater facilities were approved as part of the Tahoma Boulevard extension and were identified in phases 3 and 4. The stormwater system will accommodate all stormwater in Divisions 3 and 4 and from the boulevard. They designed the system to meet the 1992 DOE Manual.

MARK STEEPY, professional engineer, appeared and introduced Exhibit "3", his response letter to Mr. Wiltsie's letters. The stormwater ponds were considered in the previous approval pursuant to the boulevard plans. They did base the infiltration of the water on one test pit and now have a usable pond with infiltration of six to seven inches per hour which gives them a significant factor of safety. They will discharge no stormwater to the Thurston Highlands project.

BILL HALBERT, geologist and hydrogeologist, appeared and introduced his response to Mr. Wiltsie's letters. They originally performed one test, but have since graded and constructed the pond. The pond is 7.5 feet deep and ten feet of top soil was removed. The results of their test indicate infiltration rates on an average of 6-7 inches per hour which is consistent with the geology of the site. Soils in the pond area vary from silts to the west to gravel. The area is in the terminal area of the last glaciation period and has many interesting soil types. The gray color indicates high groundwater conditions and is referred to as gleyed. They found gray sand mixed with rocks and a wide range of sand color. They installed three wells 28 to 30 feet below the surface and found the water 18 to 20 feet

below. In late May and June of this year the water was 20 feet below. It will not rise more than five feet. Thompson Creek acts as a drain and controls the elevation of the groundwater. They graded the topsoil off and now have geologic material only in the pond. Changing the land use to residential will result in groundwater containment. The project will better treat water than the dairy farm as it is common practice to spray waste over the pasture to fertilize the grass. The homeowners will not use fertilizers or pesticides at greater quantity. He knows of no issues related to residential use. They evaluated the well logs within .5 miles north of the property and down gradient. Of the 20 wells, none were less than 50 feet deep and some were more than 100 feet deep.

MR. PIERPOINT reappeared and testified that they will treat the water in a settling pond and that the ponds are receiving water now. They were constructed in January, 2007. The water settles first and then goes to the infiltration pond. The first pond will silt up and then the water flows to the second pond. After the site is stabilized they will remove the top six inches of silt. The homeowners association will have responsibility for maintaining the pond.

KEITH MOXON, attorney at law representing J.Z. Knight, appeared and introduced Exhibits "5" and "6" concerning water rights and his letter and exhibits. He excerpted pages from the original TIA and referred to page 2 specifically. We now have 568 units. None of the other development we have considered today was considered in previous Tahoma Terra approvals. He referred to page 11, an assessment of the MPC, and referred to conceptual mitigation. He also referred to page 7 of the staff report. The City says it can adopt the MDNS, but the report itself said that the SEPA based analysis was only valid for the first two phases. He has not taken the study out of context. The stormwater dialogue has been helpful. Mr. Wiltsie did the best he could with the information he had. He referred to Mr. Wiltsie's letter as Exhibit "B" and understands that his information was not correct. He may not have had complete information, but the tests are available now. Concerning water, his understanding is that the dairy conveyed the rights to the City and that DOE approved the transfer. The City was allowed 719 acre feet per year which equals 2,100 units. However, outside of the MPC the City only has 1,500 ERUs. A significant question exists as to the number of units the City has connected to its water supply. The City Comprehensive Plan requires 300 gallons per day per ERU. Even though the City doesn't use that figure, the comprehensive plan says it must. Two water rights are reportedly transferred, the golf course and McMonigle. Exhibit "F" and Tab "C" to Exhibit "6" refer to approval by DOE. Exhibit "G" authorizes termination of the agreement. The City could say in writing that it will supply water, but we need to know how it calculates water availability. The water is not presently in place. The subdivision code is clear that the City must ensure water availability at the time of subdivision approval. Adequate and available water is required now to obtain concurrence. The City can't approve the subdivision now and hope the water comes later, as doing so places the public in a precarious position. They are not attempting to block development, but want to ensure compliance with development regulations and obtain answers to their questions. It is unknown if DOE will approve the water rights and when the rights will be transferred. Mr. McDonald has addressed these issues in his memorandum. The threshold question is whether the City has looked at the water rights in consideration

of the ERUs which require 300 gallons per day for concurrence. The Hearing Examiner must follow the code and determine water availability.

MR. SCHRAMM reappeared and testified that he did identify mitigation for traffic impacts for the entire project. He built the formulation for the additional phases. He agrees that a master plan is conceptual, but he identified specific trigger points for road improvements and the City agreed. He referred to pages 4 and 5 of the staff report. The TIAs performed by other projects considered this project.

MR. PIERPOINT reappeared and testified that concerning stormwater design, the test pits measure 17.5 feet below the existing ground and the finished grade is 7.5 feet below the original grade. The ponds were reviewed and approved as part of the boulevard plan and Phases 3 and 4. They are not in the design process, but have already been constructed.

MR. HALBERT reappeared and testified that the bottom of the pond is 15 feet above Thompson Creek.

MR. SMELSER reappeared and requested that the record remain open.

MR. BECK reappeared and testified that the conceptual and final site plans were approved at the same time, that the City conditioned the eastern portion of the site, but that the western side was more of a guess. However, they guessed exactly right with the TIA. Mr. Schramm was on point when he testified that the City considered Tahoma Terra when evaluating traffic impacts of nearby development. The City did consider the cumulative impacts. The cumulative impacts allowed them to impose additional mitigation. The City does not issue a water availability letter, but they perform water calculations. They are constantly aware of their water availability and concurrency. Concurrency means now or within six years. The McMonigle rights, when transferred, will provide more than adequate water for Tahoma Terra. The dairy farm provided 155 acre feet which will serve 514 ERUs and the golf course will provide 180 acre feet which will serve 811 ERUs.

MR. MOXON reappeared and testified that it would be helpful if Mr. Beck was relying on an addendum to the TIA for other developments. He was unaware of the other TIAs. Concerning water, the dairy farm only provides 462 ERUs in accordance with the comprehensive plan standard, not 514. Up to this point the farm would cover up to the maximum usage, but only one-half of the projects are covered by water from the golf course and McMonigle. The staff report contains no discussion and the City does not keep track of the ERUs. The City cannot provide evidence of water rights unless DOE approves the transfer. Without the transfer the City has no water to cover any of the development today. Concerning SEPA compliance, the neighborhood commercial has not been completed.

MR. SMELSER reappeared and testified that the commercial permits are ready for submittal and that no permits on the west side will be issued until that occurs.

MR. BECK referred to page 6 of the staff report for his discussion of water rights. The City has received the first application for commercial development and it is in process.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded.

**NOTE:** A complete record of this hearing is available in the City of Yelm Community Development Department

### **FINDINGS, CONCLUSIONS AND DECISION:**

#### **FINDINGS:**

1. The Hearing Examiner has admitted documentary evidence into the record, previously viewed the property, heard testimony, and taken this matter under advisement.
2. The City of Yelm SEPA Responsible Official issued a Mitigated Determination of Nonsignificance based on WAC 197-11-158 on May 24, 2005. No appeals were filed.
3. Notice of the date and time of the public hearing before the Hearing Examiner was posted on the project site, mailed to the owners of property within 1,000 feet of the project site, and mailed to the recipients of the Notice of Application on July 9, 2007. Notice was also published in the Nisqually Valley News in the legal notice section on July 13, 2007.
4. The Tahoma Terra Master Planned Community (MPC) consists of a generally rectangular, 220 acre parcel of property located south of SR-510 and west of SR-507 in the southwest portion of the City of Yelm. The Draght family previously used the parcel for a dairy farm for many years, but ceased operation in 1993. The applicant subsequently acquired ownership of the farm and applied for approval of a Master Plan Development pursuant to Chapter 17.62 of the Yelm Municipal Code (YMC). Subsequent to submittal of the application the following land use actions have occurred:
  - A. On August 2, 2005, the Examiner issued a recommendation of approval of the Tahoma Terra Conceptual Site Plan for the Master Plan Development.
  - B. The Yelm City Council approved the conceptual plan on August 10, 2005.
  - C. On June 6, 2006, the Examiner issued a decision approving Phase II Tahoma Terra Final Master Site Plan which covered the area west of Thompson Creek.

- D. The Examiner issued decisions approving preliminary subdivisions for Phase 1, Divisions 1 and 2 consisting of 215 single family lots. The City has issued final plat approval and builders are constructing homes within said subdivisions.
  - E. Site plan review approval was issued for Phase 1 multi-family, a 48 unit multi-family complex not yet under construction.
  - F. The Examiner issued a decision approving a preliminary plat for Divisions 3 and 4 of Phase 2, west of Thompson Creek. The City has approved civil engineering plans and construction of the subdivisions has commenced.
5. The applicant now requests preliminary plat approval for Divisions 5 and 6 of Phase II of the MPC which proposes subdivision of 32.6 acres into 198 single family residential lots. The Final Master Site Plan designates Divisions 5 and 6 as Low Density Residential (R4-6) which requires a minimum density of four dwelling units per gross acre and allows a maximum density of six dwelling units per gross acre. The R4-6 zone classification sets forth requirements for minimum setbacks, building heights, off-street parking, and lot access. Said classification also includes features to encourage "unique and distinct sub-neighborhoods within the Phase 2 master plan".
6. The site plan shows access provided by an internal plat road extending north from Tahoma Boulevard and five accesses provided to Divisions 3 and 4 to the east. Road stub-outs are also provided to the north and west property lines. The average lot size measures 5,000 square feet and the density calculates to six dwelling units per gross acre. The project complies with the R4-6 zone classification adopted for the Tahoma Terra MPC.
7. Chapter 14.12 of the Yelm Municipal Code (YMC) requires new subdivisions to provide a minimum of 5% of the gross area as usable open space. The preliminary plat map shows a park adjacent to the northeast corner of the intersection of Tahoma Boulevard and the internal plat road. Said park extends east to the Phase II community park proposed for Divisions 3 and 4. The community park will ultimately measure six acres in size. The plat map also shows pocket parks and smaller neighborhood park in the northwest corner. The overall Tahoma Terra MPC provides approximately 60 acres of open space land which includes Thompson Creek and its associated floodplain and wetland system. The applicant will enhance said area with park facilities and footpaths. The plat makes appropriate provision for open spaces, parks and recreation, and playgrounds.
8. A mitigating measure in the MDNS issued for the MPC requires the applicant to enter a school mitigation agreement with Yelm community schools to offset the impacts of school aged children residing in the subdivision. Entry of such agreement will ensure appropriate provision for schools and school grounds.

9. The internal plat roads will include a variety of streetscapes to include sidewalks on one side of the road. Sidewalks will provide access to the proposed community park as well as to Tahoma Boulevard which will have sidewalks and bike lanes. The sidewalks along Tahoma Boulevard will connect to recreational trails within the Thompson Creek open space and with the community park located in Phase I on the east side of the creek. The applicant will also coordinate bus stops with Inter-City Transit when service becomes available. The applicant will dedicate all streets to the City upon final plat approval, and the site plan shows continuation of streets to adjoining subdivisions. The subdivision provides a street grid system and continuation of streets from other development in the MPC. Furthermore, as found hereinafter, the project will comply with all traffic mitigation requirements set forth in the MDNS for the overall Tahoma Terra MPC, and therefore the preliminary plat makes appropriate provision for streets, roads, alleys, and other public ways.
10. The City of Yelm will provide both domestic water and fire flow to the site and the applicant will decommission any existing water wells pursuant to Department of Ecology (DOE) standards. The applicant will also use reclaimed water from the City's wastewater treatment plant for irrigation, decorative fountains, street cleaning, dust control, fire fighting, and other uses with the exception of public consumption. The City will also provide sanitary sewer service to each lot. The preliminary plat makes appropriate provision for potable water supplies and sanitary waste.
11. Mr. Edward A. Wiltsie, professional engineer, submitted comments and concerns regarding the storm drainage system for Divisions 5 and 6 in a letter dated May 23, 2007. The applicant responded to Mr. Wiltsie's concerns in a letter from KPFF Consulting Engineers dated July 20, 2007, (Exhibit "3"), and in a letter from Insight Geologic, Inc., dated July 19, 2007 (Exhibit "4"). Mr. Wiltsie responded to the applicant's engineers in a letter dated August 9, 2007 (Exhibit "11"), and the applicant's engineer, KPFF, responded to Mr. Wiltsie in a letter dated August 16, 2007. Despite Mr. Wiltsie's concerns it appears that the interim storm drainage system meets City standards which include the 1992 DOE Manual. Furthermore, City ordinances require that the storm drainage system meet such standards, and the final master plan also requires that all stormwater systems be consistent with the 1992 Manual. If discharge to surface water becomes necessary, such will trigger the need to meet the requirements of the NPDES system and compliance with the 2005 DOE Manual. However, infiltration is the standard within the City for disposing of treated stormwater. The preliminary stormwater report includes a conceptual design for the treatment and infiltration of stormwater entirely within the boundary of the MPC. The plan proposes to direct water first to a wet pond and then to an infiltration pond. The CCRs for the MPC will address the use of pesticides and fertilizers on residential lots and will also include a stormwater maintenance plan. The infiltration rates in the pond location more than triple the rate authorized by the City. In his August 9 letter, Mr. Wiltsie requests monitoring of the interim pond which currently accepts water from Tahoma Boulevard and Divisions 3-6. Mr. Wiltsie

asserts that monitoring should occur during the 2007/08 wet season and should establish site specific and in situ pond bottom infiltration rates. He also requests that the City allow him or his staff to observe the interim pond, and provide him the raw and processed monitoring data and monitoring well data from the present through the completion of the Division 3-8 project. The applicant objects to Mr. Wiltsie having access to the interim pond as it's own experts are capable of performing the monitoring. The Examiner has added a condition of approval which requires submittal of the monitoring data as well as the final stormwater design plans for Mr. Wiltsie's review prior to approval by the City. Mr. Wiltsie will have two weeks to review said plans and provide comment to the City. However, the decision to approve or disapprove said plans rests solely with the City. The interim storm drainage facility satisfies the requirements of the 1992 DOE Manual as adopted by the City, and the MPC requires all final storm drainage facilities to meet the 1992 Manual. The project makes appropriate provision for drainage ways.

12. Keith Moxon, attorney at law representing J.Z. Knight, asserts that the City does not have sufficient water availability to provide potable water and fire flow to the site. Mr. Moxon asserts that the applicant and City must show that adequate water supplies are available to serve the binding site plan concurrently with development, which he asserts is at the preliminary binding site plan stage (Exhibit "3"). Mr. Moxon attaches numerous documents to his letter to include a "Review of Yelm Water Supply and Growth Demand Issues" prepared by Thomas McDonald, Cascadia Law Group. Following Mr. Moxon's submittal of Exhibit "3", the Examiner left the record open for the applicant and the City to respond and the following letters were received:

- A. Letter from Clinton Pierpoint and Mark Steepy dated July 31, 2007.
- B. Letter from Jeff Schramm dated August 1, 2007.
- C. Letter from Curtis Smelser dated August 2, 2007.
- D. Letter from Kathleen Callison dated August 3, 2007.
- E. Letter from Keith Moxon dated August 10, 2007.
- F. Letter from Kathleen Callison dated August 16, 2007.
- G. Letter from Curtis Smelser dated August 17, 2007.
- H. Letter from Mark Steepy dated August 16, 2007.
- I. Letter from Keith Moxon dated August 21, 2007.
- J. Letter from Edward Wiltsie dated August 22, 2007.
- K. Letter from Kathleen Callison dated August 24, 2007.

Based upon the above letters and attachments thereto the Examiner finds that concurrence, to include the provision of potable water and fire flow, must occur at the final binding site plan approval stage and/or upon submittal of an application for a building permit. At preliminary binding site plan approval, an applicant must show a reasonable expectancy that the water purveyor (in this case the City) will have adequate water to serve the development upon final approval.

13. RCW 36.70A.020, a section of the Growth Management Act (GMA), provides in subsection (12) as follows:

(12) Public Facilities and Services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. (emphasis added)

RCW 36.70A.030(12)(13) defines public facilities and services in part as follows:

(12) "Public Facilities" include...domestic water systems....

(13) "Public Services" include fire protection and suppression...

Thus, GMA requires provision of potable water supplies and fire flow at the time of occupancy and not at the time of preliminary binding site plan approval.

14. The City of Yelm adopted its comprehensive plan and development regulations pursuant to GMA and therefore meets the definition of a "GMA City". Chapter 15.40 YMC entitled "Concurrency Management" provides the following definition:

"Concurrency" means a determination that the facilities necessary to serve a proposed land development are in place or planned for and properly funded with a reasonable expectation that the facilities will be in place at the time needed to preserve adopted levels of service. (emphasis added)

...

"Public facilities" means...water service...[and]...are the public facilities for which the City will make specific findings of concurrency based upon the comprehensive plan.

Thus, the YMC incorporates RCW 36.70A.020(12) and requires concurrency at the time public facilities and services are needed to serve a particular development. Furthermore, Section 15.40.020(A) YMC requires a finding that prior to approval of a division of land for sale, "the reviewing official shall make a written determination of concurrency in connection with facilities proposed or available for the project".

15. For water supply concurrency, Section 15.40.020(B)(2) YMC provides as follows:

2. Water.

- a. The project is within an area approved for municipal water service pursuant to the adopted water comprehensive plan for the city:
- b. Improvements necessary to provide city standard facilities and services are present or are on an approved and funded plan to assure availability in a time to meet the needs of the proposed development. (emphasis added)

The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a "reasonable expectation" that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final binding site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Projected Water Demand", which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand. Both Skillings Connelly and the City Development Review Engineer see no need for additional water to serve anticipated development including this project.

16. RCW 58.17.110(2), a section of the State Subdivision Act, provides in part as follows:

A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that:

- a. Appropriate provisions are made for...potable water supplies...and
- b. The public use and interest will be served by the platting of such subdivision and dedication.

The above section requires that prior to obtaining preliminary plat (or binding site plan) approval an applicant must establish that the project makes appropriate provision for potable water and fire flow. As previously found, GMA and the YMC consider that the impacts of development occur at the time of occupancy of a development; or in the present case, upon final binding site plan approval or the issuance of a building permit which would authorize construction of residential

dwellings. Furthermore, RCW 19.27.097(1) provides in part as follows:

Each applicant for a building permit for a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply....

Thus, RCW 58.17.110 requires a finding that a preliminary plat (or binding site plan) makes "appropriate provision" for potable water supplies while RCW 19.27.097(1) requires the actual provision of potable water supplies. Furthermore, Section 15.40.010 YMC defines "concurrency" as a "reasonable expectation" that a public facility will be in place when needed.

17. In Haas, et al., v. Clark County, et al., Division II of the Court of Appeals of Washington addressed the requirements of RCW 58.17.110 in an unpublished opinion dated January 22, 1999. While unpublished opinions cannot be cited as authority, the Court's reasoning supports the comprehensive plan:

The hearing examiner found that there was insufficient evidence for him to conclude that there would be an adequate supply of potable water to Alice's Wanderland [preliminary plat]. RCW 58.17.110(2) provides that a proposed subdivision "shall not be approved unless" the agency finds that "appropriate provisions are made" for potable water supplies and public health and safety. In addition, because this was a cluster subdivision, it must comply with CCC 18.302.090F which requires the agency to find that "potable water supplies are available". The hearing examiner apparently interpreted these provisions to mean that he must be able to find at the time of preliminary plat approval that the water supply was in existence or guaranteed to be in consistency in the near future. Both the Clark County Director of Planning and Code Administration and the Board recommended approval of the preliminary plat, but made establishing sufficient potable water supplies a condition of final approval. The Superior Court found that at the time of preliminary plat approval, the hearing examiner had only to "set standards for gallonage and pressure to review the lots proposed". Before we can decide if the hearing examiner erroneously concluded that there was not sufficient evidence of potable water, we must decide whether the evidence must show that potable water is immediately available or that it will be available before final approval...

Neither RCW 58.17.110(2) nor CCC 18.302.090F specifically state whether the potable water requirement must be met before preliminary approval or before final approval. Thus, they are ambiguous and require our interpretation...

RCW 58.17.110(2) and CCC 18.302.090F are most consistent with the interpretation that the finding of adequate potable water supplies need be made only before final approval. Both provisions refer only to findings being made before approval of a proposed subdivision. A development would not be "approved" until final approval is granted, rather than at the time of preliminary plat approval. RCW 58.17.020(4) provides that a "preliminary plat" "is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision". In contrast, a "final plat" "is the final drawing of a subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted under this chapter"...Further, both the statute and the code contemplate conditional approval, which suggests that if a requirement is not fully satisfied at the time of preliminary approval, then meeting this requirement may be made a condition of final approval...and we have previously held that the approving authority is empowered to condition approval of the plat upon compliance with RCW 58.17.110...Conditional approval serves the goal of compliance with the statutory scheme and the county code requirements because it requires the developer to satisfy those requirements before final approval. Therefore, we hold that the requirements contained in RCW 58.17.110(2) and CCC 18.302.090F need not be met until approval of the final plat. (emphasis supplied).

Division III of the Court of Appeals reached the same result in Largent, et al. v. Klickitat County, another unpublished opinion, and cited with approval the case of Topping v. Pierce County Board of Commissioners, 29 Wn. App 781 (1981), as follows:

The purpose of a preliminary plat is to secure approval of the general "design" of a proposed subdivision and to determine whether the public use and interest will be served by the platting. Although the planning department must determine...whether water supplies [and] sanitary waste disposal...are currently available or whether provisions must be made for the addition of such services,

see also RCW 58.17.110, compliance with specific health regulations applicable to a completed development is not required for approval of a preliminary plat. Essentially, the preliminary plat supplies information not specified by regulation or ordinance. Matters which are specified by regulation or ordinance need not be considered unless conditions or infirmities appear or exist which would preclude any possibility of approval of the plat.

Topping, 29 Wn. App at 783 (citations omitted). The determination of whether the application meets the health regulations is a matter for the local health authority later in the process:

[C]ompliance with specific health regulations is not required for the approval of a preliminary plat; at the time of submission of the preliminary plat, such regulations are only guidelines, not mandates...

Here, the Board's decision regarding the septic system was based on specific health regulations, Conclusion 5 states Mr. Largent did not meet the requirements of WAC 246-272 – 20501. Under Topping, this would appear to be an invalid ground for rejecting the preliminary plat application.

Finally, in Daly Construction Company v. Planning Board of Randolph, 163 NE 2d 27 (1959), the Supreme Court of Massachusetts considered a town planning board's denial of a proposed subdivision of land for the failure of the applicant to show how it would "secure adequate provision for water". The board had notice of an acute shortage of water and water pressure. The Court ruled:

In effect, the board here has denied to the owner the opportunity the subdivide its land, not because of any inpropriety in the proposed plan for its use, but because the supply of water for the town, possibly inadequate unless augmented from new sources, will be further depleted by use in the buildings to be constructed. The board's powers here asserted rest solely upon the provisions of the subdivision control law...

The general tenor of the entire section shows legislative concern primarily with (a) adequate ways to provide access furnished with appropriate facilities and (b) sanitary conditions of lots. Read in context, the words, "securing adequate provision for water," seem to us to mean installation of an adequate system of water pipes rather than an adequate supply of water, which, if not to be supplied from wells or other privately owned sources, is usually a matter of municipal water supply or water company action...

In the absence of more explicit statutory language, we interpret the authority of planning boards under the existing subdivision control law as not permitting disapproval of an otherwise proper plan on the ground that its execution would tax existing water sources. (emphasis supplied).

The Examiner could find no authority supporting either denial of a preliminary plat or requiring provision of domestic water and fire flow at the time of preliminary plat approval. Therefore, based upon the above authority, conditioning a preliminary plat to provide both domestic water and fire flow prior to final plat approval satisfies the provisions of RCW 58.17.110 and the YMC that require an applicant to show that a proposed preliminary plat makes appropriate provision for the public health, safety, and general welfare for potable water supplies and fire flow.

18. Mr. Moxon asserts that the City must provide 300 gallons of water per day for each equivalent residential unit (ERU) as set forth in Section V(C)(2)(c) of the City Comprehensive Joint Plan with Thurston County. Said section provides in part:

For planning and concurrency purposes, the City requires 300 gallons per day per connection and 750 gallons per minute peak fire flow capacity in residential areas and Uniform Fire Code criteria for industrial and commercial areas, together with a reserve capacity of 15%...(emphasis added).

Section 13.04.120(C) YMC defines "ERU" as follows:

(C) "Equivalent Residential Unit (ERU)" means the unit of measurement determined by that quantity of flow associated with a single residential household defined as follows:

- (1) ERU measurement shall be an equivalent flow of 900 cubic feet, or less, per month, based on water meter in-flow.(emphasis added)

Since one cubic foot equals 7.48 gallons, the total monthly flow equals 6,732 gallons or 224.4 gallons or less per day in a 30 day month. Such is substantially less than the 300 gallons set forth in the comprehensive plan.

19. The 300 gallons per day set forth in the comprehensive plan is for infrastructure planning purposes and utilized for sizing of pipes, pumps, etc. Furthermore, the Comprehensive Plan also provides in Section V(C)(2)(a):

...The city has an on-going program to acquire water rights to

assure adequate capacity to serve the growing population. Yelm currently has adequate water rights in process to serve the existing population and the anticipated growth for at least 20 years....

Thus, regardless of the ERU standard used, the Comprehensive Plan provides that the City can accommodate anticipated growth for at least 20 years and has an active, on-going program to acquire additional water rights. The Comprehensive Plan does not show an inadequate water supply within the City.

20. Courts and the legislature have not required applicants to show water availability at the time of preliminary plat/binding site plan approval, but only that the City or other purveyor has a reasonable plan to provide such service. In the present case, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. An in-depth, detailed review of a water purveyor or city utility at a quasi-judicial hearing to consider a site specific project is not appropriate. If allowed, such would establish a precedent for investigating a fire department's existing and projected apparatus, budget, personnel, and ability to provide service; a sewer district's financing and ability to provide service; a school district's capital facilities plan and future plans for school construction; a city's public works budget, etc. Such investigations appear far beyond a quasi-judicial proceeding to consider a site specific, 61 unit, multi-family development. Furthermore, if the same investigation does not occur in future site specific cases, can the Examiner consider evidence not in the record and not subject to cross examination in future land use hearings? Such could result in a piece-meal, case-by-case determination of water availability depending upon the evidence presented. Finally, determining that the City will not have sufficient water to serve this project essentially imposes a moratorium upon building throughout the City. Such decisions are within the jurisdiction of the legislative body.
21. In a number of paragraphs within the Transportation Impact Study prepared by Transportation Engineering NW for the overall Tahoma Terra Master Planned Community, the engineer writes:

...nine phases of development have been contemplated in this traffic analysis, with the first two phases given a detailed level of traffic analysis to meet the City's SEPA requirements...

This section is not intended to provide a detailed evaluation of traffic impacts of the full project master plan build-out, but rather an assessment of potential mitigation for City consideration as each future phases of the master plan are pursued. A detailed traffic analysis is provided only for the first two phases of development, which is included in a subsequent section of this report....

The City responsible official reviewed the MDNS issued for the overall MPC and

determined that mitigating measures are triggered by trip generation as opposed to specific phases of the proposed development. Furthermore, the official determined that the proposed individual developments within the MPC are virtually identical with those contemplated in the conceptual master plan. The MDNS further provides:

This threshold determination and adoption of previous environmental documents will be used for all future development permits and approvals within the Conceptual Master Site Plan of Tahoma Terra provided that those permits and approvals are consistent with the application and approval for the Conceptual Master Site Plan.

Thus, even though the traffic engineer did not consider the TIA effective for SEPA purposes for the entire MPC, the responsible official did and utilized it to impose mitigating measures based on traffic generation. Had the Conceptual Master Plan changed, the official could have issued a new MDNS to address the changes. However, since the conceptual plan did not change, the official properly used the original MDNS for the overall MPC.

22. Those in opposition argue that significant development has either been approved or proposed adjacent to the Tahoma Terra MPC and that the TIA did not consider such development. However, the City required the TIAs for the newly proposed development to consider Tahoma Terra traffic. Such resulted in additional mitigation to include the traffic signal at Longmire Street/SR-510. Furthermore, the TIA for the entire MPC is dated February 25, 2005, and thus relatively recent. Significant changes in the area occurring since then were evaluated by the new projects. The MPC will continue to construct traffic improvements based upon future trip generation as evidenced by building permit applications. The environmental official did not err in utilizing the previous MDNS.

### **CONCLUSIONS:**

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The environmental official appropriately considered the probable, significant, adverse environmental impacts associated with development of the project. Unlike the fact situation in Quality Rock v. Thurston County, 139 Wn. App 125 (2007), the environmental official had all studies and expert letters before him for consideration prior to his decision to utilize the MDNS issued for the overall MPC.
3. The proposed preliminary plat makes appropriate provision for the public health, safety, and general welfare for open spaces, drainage ways, streets, roads, alleys, other public ways, transit stops, potable water supplies, sanitary waste, parks and recreation, playgrounds, schools and school grounds, sidewalks, and safe walking

conditions.

4. The proposed subdivision is in conformity with the R4-6 zone classification applicable in the Tahoma Terra MPC as well as other development regulations adopted specifically therefor and for the City overall.
5. Public facilities impacted by the subdivision are either adequate and available or the City has a plan to finance the needed public facilities which will assure retention of an adequate level of service.
6. The project is within the City's sewer service area which has capacity to serve all lots.
7. The proposed subdivision will serve the public use and interest by providing an attractive location for a single family residential subdivision within a master planned community with significant amenities and therefore should be approved subject to the following conditions:
  1. The conditions of the Mitigated Determination of Non-significance are hereby referenced and are considered conditions of this approval.
  2. Each dwelling unit with the subdivision shall connect to the City water system, pursuant to the terms of the water right conveyances for the Dragt water rights and the Tahoma Valley Golf and Country Club water rights, including the terms for issuance of building permits and water connection fees.
  3. All conditions for cross connection control shall be met as required in Section 246-290-490 WAC.
  4. Each dwelling within the subdivision shall connect to the City S.T.E.P. sewer system. The connection and inspection fees will be established at the time of building permit issuance.
  5. All irrigation systems for planting strips in the Boulevard and collector streets, any large open spaces, and stormwater tracts shall be served by an irrigation system utilizing reclaimed water where available and approved through a reclaimed water users agreement. Civil engineering plans shall identify proposed reclaimed water lines, meters, and valves pursuant to adopted City standards.
  6. The final landscape plan submitted as part of the civil plan review shall include details of the active recreation component of each pocket park and of the community park. The final landscape plans shall meet the standards of Chapter 17.80 YMC as amended in the final master site plan approval. All

landscaping within City right-of-way, including all planter strips in the Boulevard and internal streets, shall include drought tolerant shrubs, a weed barrier, landscaping material, and drip irrigation.

The final landscape plan shall also include the restoration of the planter strips on Longmire Street between the Tahoma Terra Master Planned Community and SR 507 with drought tolerant shrubs, a weed barrier, and landscaping material.

7. The final stormwater plan shall be consistent with the preliminary plan and shall be consistent with the 1992 DOE Stormwater Manual, as adopted by the City of Yelm. Stormwater facilities shall be located in a separate recorded tracts owned and maintained by the homeowners association. The stormwater system shall be held in common by the Homeowners Association and the homeowners agreement shall include provisions for the assessment of fees against individual lots for the maintenance and repair of the stormwater facilities. All roof drain runoff shall be infiltrated on each lot utilizing individual drywells.
8. The civil engineering plans shall include the location of fire hydrants consistent with the Yelm Development Guidelines and applicable fire codes. The plan shall include fire flow calculations for all existing and proposed hydrants and the installation of hydrant locks on all fire hydrants required and installed as part of development.
9. The civil engineering plans shall include street lighting consistent with the final master site plan approval.
10. The civil engineer plans shall include an addressing map for approval by the Building Official.
11. The applicant shall provide a performance assurance device in order to provide for maintenance of the required landscaping for this subdivision, until the homeowners' association becomes responsible for landscaping maintenance. The performance assurance device shall be 150 percent of the anticipated cost to maintain the landscaping for three years.
12. The applicant shall submit monitoring data and the final stormwater design plans to Mr. Wiltsie for his review prior to approval by the City. Mr. Wiltsie shall have two weeks to review said plans and provide comments to the City. However, the decision to approve or disapprove said plans rests solely with the City.

**DECISION:**

The request for preliminary plat approval for Tahoma Terra Divisions 5 and 6 is hereby granted subject to the conditions contained in the conclusions above.

**ORDERED** this 9<sup>th</sup> day of October, 2007.



**STEPHEN K. CAUSSEAU, JR.**  
Hearing Examiner

**TRANSMITTED** this 9<sup>th</sup> day of October, 2007, to the following:

**APPLICANT:** TTPH 3-8 LLC  
4200 6<sup>th</sup> Avenue SE #301  
Lacey, WA 98503

**AGENT:** KPFF Consulting Engineers  
4200 6<sup>th</sup> Avenue SE #309  
Lacey, WA 98503

**OTHERS:**

Keith Moxon  
2025 First Avenue, Ste. 500  
Seattle, WA 98115

Matthew Schubart  
P.O. Box 192  
McKenna, WA 98597

Curt Smelser  
1420 5<sup>th</sup> Avenue Ste. 3010  
Seattle, WA 98101

Doug Bonner  
8120 Freedom Lane #201  
Lacey, WA 98516

City of Yelm  
Tami Merriman  
105 Yelm Avenue West  
P.O. Box 479  
Yelm, Washington 98597

**CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II  
DIVISIONS 5 AND 6)**

**NOTICE**

1. **RECONSIDERATION:** Any interested party or agency of record, oral or written, that disagrees with the decision of the hearing examiner may make a written request for reconsideration by the hearing examiner. Said request shall set forth specific errors relating to:

A. Erroneous procedures;

B. Errors of law objected to at the public hearing by the person requesting reconsideration;

C. Incomplete record;

D. An error in interpreting the comprehensive plan or other relevant material; or

E. Newly discovered material evidence which was not available at the time of the

hearing. The term "new evidence" shall mean only evidence discovered after the hearing held by the hearing examiner and shall not include evidence which was available or which could reasonably have been available and simply not presented at the hearing for whatever reason.

The request must be filed no later than 4:30 p.m. on October 19, 2007 (10 days from mailing) with the Community Development Department 105 Yelm Avenue West, Yelm, WA 98597. This request shall set forth the bases for reconsideration as limited by the above. The hearing examiner shall review said request in light of the record and take

such further action as he deems proper. The hearing examiner may request further information which shall be provided within 10 days of the request.

2. **APPEAL OF EXAMINER'S DECISION:** The final decision by the Examiner may be appealed to the city council, by any aggrieved person or agency of record, oral or written that disagrees with the decision of the hearing examiner, except threshold determinations (YMC 15.49.160) in accordance with Section 2.26.150 of the Yelm Municipal Code (YMC).

**NOTE:** In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

## **Appendix B**

**OFFICE OF THE HEARING EXAMINER**

Dec 11 2007

**CITY OF YELM**

**DECISION ON RECONSIDERATION**

**CASE NO.:** SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

**APPLICANT:** TTPH 3-8 LLC  
4200 6<sup>th</sup> Avenue SE #301  
Lacey, WA 98503

**AGENT:** KPFF Consulting Engineers  
4200 6<sup>th</sup> Avenue SE #309  
Lacey, WA 98503

By Report and Decision dated October 9, 2007, the Examiner conditionally approved the request for Binding Site Plan and Planned Residential Development approval for Tahoma Terra Phase II, Divisions 5 and 6. On October 19, 2007, J.Z. Knight, by and through her attorney, Keith E. Moxon, timely filed a Request for Reconsideration. On October 25, 2007, the Examiner circulated Mr. Moxon's reconsideration request to parties of record and their legal representatives and the City of Yelm and received the following responses:

- A. Letter from Kathleen Callison, Attorney at Law on behalf of the City of Yelm, dated November 8, 2007.
- B. Letter from Curtis R. Smelser, Attorney at Law on behalf of Tahoma Terra Division II, Phase 3 and 4, Divisions V and VI, dated November 8, 2007.
- C. Memorandum from Alison Moss, Attorney at Law on behalf of Jack Long, dated November 8, 2007.

Pursuant to a request by Mr. Moxon, objected to by the City and the applicants' attorneys, the Examiner granted Mr. Moxon the opportunity to respond to the reconsideration responses. The Examiner also granted all counsel the opportunity to respond to Mr. Moxon. Mr. Moxon submitted his response on November 14, 2007, and Alison Moss submitted two responses on November 19, 2007, one on behalf of Jack Long and the other on behalf of Windshadow.

Based upon the above documents, the following additional findings are hereby made as follows:

1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.
2. While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon in his response are beyond the Examiner's authority and interfere with the City's ability to manage his public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.
3. The Examiner has not considered additional issues raised in Mr. Moxon's Reply to Responses To Motions as such were not raised either at the hearing or during the reconsideration period. However, the Binding Site Plan (BSP) process parallels the subdivision process with preliminary and final site plan approval. The site plan considered at the public hearing is akin to a preliminary plat and not a final plat. Furthermore, the Planned Residential Development (PRD) process set forth in Chapter 17.60 YMC provides for a preliminary and final review process similar to the platting process.

**CONCLUSIONS:**

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The following condition is added:

The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

**DECISION:**

The Request for Reconsideration is hereby denied with the exception of the addition of the condition of approval set forth in the conclusions above.

**ORDERED** this 7<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
**STEPHEN K. CAUSSEAU, JR.**  
Hearing Examiner

**TRANSMITTED** this 7<sup>th</sup> day of December, 2007, to the following:

**APPLICANT:**        TTPH 3-8 LLC  
                              4200 6<sup>th</sup> Avenue SE #301  
                              Lacey, WA 98503

**AGENT:**                KPFF Consulting Engineers  
                              4200 6<sup>th</sup> Avenue SE #309  
                              Lacey, WA 98503

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Alison Moss  
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Seattle, WA 98116

Kathleen Callison  
802 Irving Street SW  
Tumwater, WA 98512

City of Yelm  
Tami Merriman  
105 Yelm Avenue West  
P.O. Box 479  
Yelm, Washington 98597

**CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)**

**NOTICE**

**APPEAL OF EXAMINER'S DECISION:** The final decision by the Examiner may be appealed to the city council, by any aggrieved person or agency of record, oral or written that disagrees with the decision of the hearing examiner, except threshold determinations (YMC 15.49.160) in accordance with Section 2.26.150 of the Yelm Municipal Code (YMC).

**NOTE:** In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

## **Appendix C**

**City of Yelm  
Resolution No. 481**

A RESOLUTION AFFIRMING THE HEARING EXAMINER'S APPROVAL OF PRELIMINARY SUBDIVISIONS AND BINDING SITE PLANS FOR WINDSHADOW I (SUB-05-0755-YL & PRD-05-0756-YL), WINDSHADOW II (SUB-07-0128-YL & PRD-07-0129-YL), WYNDSTONE (BSP-07-0094-YL), BERRY VALLEY I (BSP-07-0097-YL & PRD-07-0098-YL), AND TAHOMA TERRA PHASE II, DIVISIONS 5&6 (SUB-07-0187-YL)

WHEREAS, the Yelm City Council held a closed record hearing on January 22, 2008, regarding appeals by JZ Knight of the Hearing Examiner's approval of preliminary subdivision and preliminary binding site plan applications related to five development proposals within the Berry Valley area of Yelm; and

WHEREAS, the Council considered the appellant's notice of appeal and accompanying memorandum, response memoranda filed by the City of Yelm Community Development Department and representatives of Tahoma Terra, Windshadow I, and Berry Valley I, a reply by appellant Knight, the Hearing Examiner's decisions, reconsideration requests filed by Knight and the Hearing Examiner's decisions on reconsideration; and

WHEREAS, the Council heard oral arguments from the parties during a closed record hearing on January 22, 2008, and

WHEREAS, the Council reviewed the record before the Hearing Examiner prior to the closed record appeal hearing, an index of which is included as Attachment A to this resolution;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yelm, Washington, that the Hearing Examiner's reports and decisions and orders on reconsideration in the matter of Windshadow I (SUB-05-0755-YL & PRD-05-0756-YL), Windshadow II (SUB-07-0128-YL & PRD-07-0129-YL), Wyndstone (BSP-07-0094-YL), Berry Valley I (BSP-07-0094-YL), and Tahoma Terra Phase II, Divisions 5&6 (SUB-07-0187-YL) are hereby affirmed; and

BE IT FURTHER RESOLVED that the Hearing Examiner's Findings of Fact are hereby affirmed and the Examiner's Conclusions of Law are hereby affirmed and amended as follows:

***Conclusions of Law***

1. This matter comes before the City Council on appeals filed by JZ Knight of decisions by the Yelm Hearing Examiner and is properly before the Council as a closed record appeal.
2. The City Council acts in an appellate capacity when reviewing a decision of the Hearing Examiner and the Council's review is based solely upon the evidence presented to the Examiner, the Examiner's report and decisions, the notices of appeal, and submissions by the parties. The City Council may "adopt, amend and adopt, reject, reverse, and amend conclusions of law and the decision of the

Hearing Examiner, or remand the matter for further consideration." Section 2.26.160 (D) YMC.

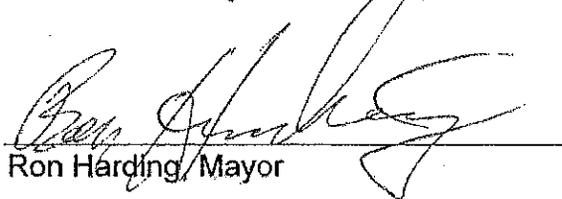
3. JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, Knight is not an aggrieved person with standing to appeal the Examiner's decision to the City Council. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council contingently decides Knight's appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.
4. Knight did not carry her burden of showing that the Hearing Examiner failed to follow prescribed processes; erroneously interpreted applicable law; made findings, conclusions, and decision that were not supported by substantial evidence; or was clearly erroneous in his application of law to the facts. The Hearing Examiner's findings, conclusions, and decision were supported by substantial evidence submitted through the land use hearing process, were not legally erroneous, and to the extent relevant to this appeal, the Findings and Conclusions of the Hearing Examiner are hereby adopted.
5. The Yelm Hearing Examiner and the City Council do not have jurisdiction to adjudicate water rights. [alleged error of fact 3].
6. The Hearing Examiner properly considered all the evidence submitted as part of the open record hearing on these matters and found that the evidence presented by the City regarding water rights that the City expects will be available to serve these subdivisions provided sufficient basis to support his decision to approve the developments. The Hearing Examiner is charged with determinations of credibility and the weight to give evidence and such determinations may be overturned on appeal only if they are not supported by some substantial evidence. [alleged errors of fact 1, 2, 4, 6, and 7].
7. The Department of Ecology (Ecology) reviews water rights as part of the approval of a Comprehensive Water System Plan (WSP) by the Washington Department of Health. Ecology, in its 2002 comment letter on the WSP, agreed with the assessment of water rights included in the WSP. Since that time, Ecology has stated a number of conflicting opinions relating to Yelm's water rights outside of the official Comprehensive Water System planning process. Neither Ecology, nor the Dept. of Health, which is the regulatory agency charged with overseeing water system planning and compliance, has taken any enforcement action against the City in relation to the compliance of the Yelm water system with applicable laws or regulations or the validity or adequacy of its water rights. No superior court has adjudicated the City's water rights inconsistently with their characterization in the City's WSP. In these circumstances, the City has reasonably relied on its approved and adopted

- Water System Plan to administer its water system. [alleged errors of fact 3 and 6].
8. A true procedural error, such as defective notice, which is harmless or does not cause actual prejudice is insufficient to overturn the Examiner's decisions. Knight does not show any such prejudice as a result of her alleged procedural errors. [alleged procedural errors 1 through 6].
  9. Knight does not provide any basis for finding the process was irregular but rather, in effect, asserts substantive arguments regarding the evidence considered by the Examiner, and the sufficiency of evidence in the record to support the Examiner's conclusions. [alleged procedural errors 3 through 6].
  10. The Examiner reviewed an unpublished decision of the Washington Court of Appeals and a Massachusetts case as part of his consideration. The Examiner explicitly recognized that he could not cite these cases as controlling legal authority, and instead properly considered them as persuasive authority consistent with his interpretation of state statutory and local ordinance provisions related to the requirement of determining whether appropriate provision had been made for potable water at the preliminary plat or preliminary binding site plan stage of regulation. [alleged procedural errors 1 and 2].
  11. After the close of the July, 2007 public hearing before the Hearing Examiner, Knight requested that the hearing be re-opened and offered the second McDonald Declaration in support of that request. When the Examiner denied the request to re-open the hearing, the materials submitted after the close of the public hearing were properly excluded from the record. Nevertheless, these materials were included in the record provided to and considered by the Council in these appeals. [alleged omission from the record 1].
  12. Knight has failed to identify any provision of law that requires the City to provide evidence as part of the record in applications for preliminary plat approval or preliminary binding site plan approval relating to documentation of the number of current water connections, the amount of present demand for potable water, the water rights currently held by the City, or the amount of projected demand for potable water upon actual future development of the proposed preliminary plats or binding site plans. [alleged omission from the record 2].
  13. Knight has not met her burden to show that the interpretation of the City Comprehensive Plan and development regulations by the City of Yelm and its Hearing Examiner is erroneous, particularly since the agency's interpretation is entitled to deference absent a compelling indication that the City's interpretation conflicts with regulatory intent or is in excess of the City's authority. Knight has provided no competent or compelling indication or evidence that the Examiner's interpretation of the Comprehensive Plan was erroneous. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].
  14. The appropriate standard for the purpose of determining water availability at the time of preliminary subdivision or preliminary binding site plan approval is found at Section 13.04.120 YMC which, as concurrency standards are development

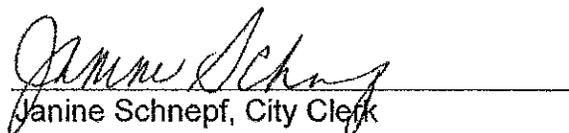
regulations, prevails over any inconsistent comprehensive plan provisions. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].

15. The exact quantity of water rights that the City currently holds, which recently has been disputed by Knight, is immaterial because the City presented evidence, upon which the Hearing Examiner reasonably relied, that substantial additional water rights have been obtained by the City and that their transfer is reasonably expected to be approved the State Department of Ecology (Ecology), and that substantial new water rights are the subject of water rights applications pending before Ecology. On the basis of such evidence, the Hearing Examiner concluded that the requirements of Section 58.17.110 RCW and Sections 15.40.010 and .020 YMC were satisfied by evidence supporting a reasonable expectation that ample water will be available at the time that water is required upon connection and entered written findings that appropriate provision was made for potable water. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].
16. The City has made appropriate findings of water availability at the appropriate points in the application process. Title 16 YMC requires, at the time the Hearing Examiner considers a preliminary subdivision or preliminary binding site plan application, a determination that water is reasonably expected to be available at the time of future development. Chapter 15.40 YMC requires a determination that the utility infrastructure be in place at the time of or within six years of the development. Chapter 19.27 RCW requires availability of water service at the time of building permit issuance and, thus, by it's explicit terms, does not apply to preliminary subdivision or preliminary binding site plan applications. [alleged provisions of law violated 1, 2, 3 (binding site plan and subdivision appeals), 4 (binding site plan and subdivision appeals), and 5 (subdivision appeals)].
17. Knight impermissibly raises a new issue upon appeal, alleging the Examiner's decision is inconsistent with "Ordinance 351". This issue is untimely and was waived because it was not properly raised before the Examiner.
18. Moreover, Resolution 351 was repealed by the City Council through the adoption of Resolution 380 on December 9, 1998. [alleged provision of law violated (subdivision appeals) and 6 (binding site plan appeals)].

PASSED and signed in authentication on this 12<sup>th</sup> day of February, 2008

  
\_\_\_\_\_  
Ron Harding, Mayor

Authenticated:

  
\_\_\_\_\_  
Janine Schnepf, City Clerk

## **Appendix D**

7

FILED  
SUPERIOR COURT  
THURSTON

'08 NOV -7 P2:05

EXPEDITE  
 No hearing set  
 Hearing is set  
 Date: November 7, 2008  
 Time: 9:00 a.m.  
 Judge/Calendar: Chris Wickham

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SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC;  
 ELAINE C. HORSACK; WINDSHADOW II  
 TOWNHOMES, LLC; RICHARD E.  
 SLAUGHTER; REGENT MAHAN, LLC;  
 JACK LONG; PETRA ENGINEERING, LLC;  
 SAMANTHA MEADOWS LLC; TTPH 3-8,  
 LLC,

Respondents.

No. 08-2-00489-6

AMENDED FINDINGS AND  
 CONCLUSIONS

[PROPOSED]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenged the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

The Court considered the following evidence:

1. The record evidence for each of the five proposed subdivisions, including the City of Yelm files for these projects, the Hearing Examiner's Report and

FINDINGS AND CONCLUSIONS-1

**GordonDerr.**  
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 Seattle, WA 98121-3140  
 (206) 382-9540

1 Decision dated October 9, 2007, the Hearing Examiner's Decision on  
2 Reconsideration dated December 7, 2007, and all exhibits and attachments  
3 listed in the Hearing Examiner decisions.

- 4 2. Petitioner's and Respondents' submissions to the Hearing Examiner;
- 5 3. Petitioner's and Respondents' submissions to the Yelm City Council;
- 6 4. The Yelm City Council's decision on the five proposed subdivisions;
- 7 5. Petitioner's LUPA appeal petition;
- 8 6. Petitioner's and Respondents' other submissions to this Court;
- 9 7. The Amicus brief provided by the Washington State Department of Ecology  
10 and Respondents' responses thereto;
- 11 8. Oral argument of the parties; and
- 12 9. The pleadings and records on file in this action.

13 Based on the evidence in the record and the applicable law, the Court makes  
14 The following Findings of Fact and Conclusions of Law.<sup>1</sup>

#### 15 I. FINDINGS OF FACT

16 1. Petitioner brought this petition under the Land Use Petition Act ("LUPA"),  
17 RCW 36.70. Standards for granting relief are set forth in RCW 36.70C.130. Petitioner claims  
18 that the decision of Respondent City of Yelm ("Yelm") (Resolution No. 481, adopted February  
19 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL  
20 (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094  
21 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL  
22 (Tahoma Terra Phase II, Division 5 & 6) should be reversed because (1) it is an erroneous  
23 interpretation of the law; (2) the City's determination of water availability is not supported by  
24

25 <sup>1</sup> Any finding of fact that may be deemed a conclusion of law is incorporated into the  
26 Conclusions of Law section, and any conclusion of law that may be deemed a finding of fact is  
incorporated into the Findings of Fact section.

1 substantial evidence; and (3) the City's determination of water availability is a clearly  
2 erroneous application of the law to the facts.

3 2. On October 9, 2007, the Yelm Hearing Examiner granted preliminary approval  
4 of the five proposed preliminary subdivisions. Following Petitioner's request for  
5 reconsideration, on December 7, 2007, the Hearing Examiner entered a decision on  
6 reconsideration that contained the following condition:

7 The applicant must provide a potable water supply adequate to  
8 serve the development at final plat approval and/or prior to the  
9 issuance of any building permit except as model homes as set  
10 forth in Section 16.04.150 YMC [Yelm Municipal Code]  
(emphasis added).

11 3. At the hearing before the Court, Yelm agreed to amend the language of this  
12 condition to remove the word "/or" to make clear that proof of adequate potable water must be  
13 made at the time of final plat approval and may not be deferred to the time of building permit  
14 approval. The other Parties appear to be in agreement with the City's position on this issue.

15 4. The record contains evidence that Yelm has been issuing building permits and  
16 other approvals since 2001 that committed Yelm to the supply of water in excess of its  
17 Department of Ecology ("Ecology") approved water rights. Amicus Ecology indicated that at  
18 the time of the Hearing Examiner proceedings in this case, Yelm held primary (additive) water  
19 rights authorizing use of a total of 719.66 acre feet per year ("afy"). Prior to December 2006,  
20 Yelm's water right totaled 564 afy. Yelm's usage records show that the amount of water used  
21 by the City since 2001 exceeded its legal water rights.

22 5. Ecology is the administrator of water resources in the State of Washington,  
23 pursuant to Chapter 43.21A RCW, Chapter 90.03 RCW, Chapter 90.14 RCW, Chapter 90.44  
24 RCW, and Chapter 90.54 RCW. The Washington Water Code requires that Ecology  
25 determine whether water sought is physically and legally available for use.  
26



1 D. Public facilities impacted by the proposed subdivision will  
2 be adequate and available to serve the subdivision concurrently  
3 with the development or a plan to finance needed public  
4 facilities in time to assure retention of an adequate level of  
5 service.

6 c. In relevant part, YMC 16.12.310 provides:

7 Upon finding that the final plat has been completed in  
8 accordance with the provisions of this title and that all required  
9 improvements have been completed or that arrangements or  
10 contracts have been entered into to guarantee that such required  
11 improvements will be completed, and that the interests of the  
12 city are fully protected, the city council shall approve and the  
13 mayor shall sign the final plat and accept dedications as may be  
14 included thereon.

15 d. YMC 16.12.330, further provides:

16 A subdivision shall be governed by the terms of approval of the  
17 final plat, and the statutes, ordinances and regulations in effect at  
18 the time of approval under RCW 58.17.150(1) and (3) for a  
19 period of five years after final plat approval unless the legislative  
20 body finds that a change in conditions creates a serious threat to  
21 the public health or safety in the subdivision. . . A final plat shall  
22 vest the lots within such plat with a right to hook up to sewer  
23 and water for a period of five years after the date of recording of  
24 the final plat.

25 2. Petitioner first asserts that Yelm may not delay proof of a potable water supply  
26 until issuance of building permits. Second, Petitioner asserts that Yelm must demonstrate the  
existence of appropriate provision for potable water necessary to serve the proposed  
developments at the time of final plat approval through evidence of Ecology approved water  
rights.

3. Preliminary plat approval can be conditioned on the applicant resolving  
identified issues before final plat approval. 17 Stoebuck and Weaver, Real Estate: Property  
Law, Washington Practice Series, p.282 (2004). However, RCW 58.17.110 prohibits approval  
of a proposed subdivision unless written findings are made that "[a]ppropriate provisions are

1 made for ... potable water supplies." Therefore, all requirements must be met and confirmed  
2 in written findings before final approval pursuant to RCW 58.17.110. The law is clear that  
3 these conditions, including the provision of a potable water supply, must be met before the  
4 building permit stage. Thus, the hearing examiner's condition, as written and as adopted by  
5 the Yelm City Council, is an erroneous interpretation of the law.

6 4. The parties have agreed that it is appropriate to amend the language of the  
7 Hearing Examiner's condition by removing the word "/or" to make clear that proof of  
8 adequate potable water must be made at the time of final plat approval and may not be  
9 deferred to the time of building permit approval. The insertion of the word "also" is consistent  
10 with the Yelm's argument before the Court that proof of potable water must be provided at  
11 both final plat approval and building permit approval. Such a resolution is consistent with the  
12 law.

13 5. RCW 58.17.110 and YMC 16.12.170 make clear that Yelm must make findings  
14 of "appropriate provisions" for potable water supplies by the time of final plat approval.  
15 Based upon the present record and this Court's interpretation of the law, such findings would  
16 require a showing of approved and available water rights sufficient to serve all currently  
17 approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable  
18 water based upon Yelm's historical provision of potable water would be insufficient to satisfy  
19 this requirement.

20 6. Yelm has argued that final plat approvals of the subdivisions in this matter are  
21 not expected in the near future. It is therefore possible that at the time of final subdivision  
22 approvals the facts and the law that will bear upon Yelm's ability to demonstrate the existence  
23 of "appropriate provisions" for potable water to serve these subdivisions may have changed.  
24 Accordingly, it is appropriate to defer the determination of "appropriate provision" until the  
25 time of final subdivision approval for each of the five subdivisions.  
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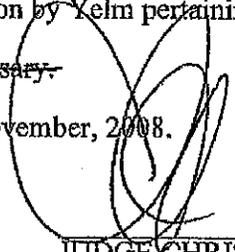
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7. Petitioner holds water rights that are subject to impairment in the event Yelm should continue to use water in excess of its Ecology approved water rights. Accordingly, Petitioner is entitled to written notice pertaining to final subdivision approval of the five proposed subdivisions, including: (1) written notice of any application for final subdivision approval of any of the five subdivisions within five days of Yelm's receipt of such application; (2) ~~thirty~~ <sup>seven calendar</sup> days written notice, and an opportunity to comment upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions; and, (3) ~~thirty~~ <sup>seven calendar</sup> days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony ~~at any such hearing~~ <sup>if a public is held</sup> before the Yelm City Council. Finally, Petitioner may seek judicial review ~~by this Court~~ of any decision by Yelm pertaining to final plat approval of any of the five subdivisions ~~as she deems necessary.~~

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*business*  
*seven calendar* - This will provide Petitioner to stop  
*Prior to the date the City Staff report is submitted to the City Council.*  
*to stop*  
*on any of the five final subdivisions.*

DATED this 7 day of November, 2008.

  
JUDGE CHRIS WICKHAM

Presented by:

GORDON DERR LLP

By: Keith Moxon  
Keith E. Moxon, WSBA #15361  
Dale N. Johnson, WSBA #26629  
Attorneys for JZ Knight

## **Appendix E**

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FILED  
SUPERIOR COURT  
THURSTON COUNTY

'08 NOV -7 P2:05

BY \_\_\_\_\_ DEPUTY

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EXPEDITE  
 No hearing set  
 Hearing is set  
Date: November 7, 2008  
Time: 9:00 a.m.  
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,  
  
Petitioner,  
  
v.  
  
CITY OF YELM; WINDSHADOW LLC;  
ELAINE C. HORSAK; WINDSHADOW II  
TOWNHOMES, LLC; RICHARD E.  
SLAUGHTER; REGENT MAHAN, LLC;  
JACK LONG; PETRA ENGINEERING, LLC;  
SAMANTHA MEADOWS LLC; TTPH 3-8,  
LLC,  
  
Respondents.

No. 08-2-00489-6  
  
JUDGMENT FOR PETITIONER  
JZ KNIGHT

[REDACTED]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenges the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

JUDGMENT GRANTING LAND USE PETITION  
[PROPOSED] - 1

**GordonDerr**  
2025 First Avenue, Suite 500  
Seattle, WA 98121-3140  
(206) 382-9540

ru

1 The Court received the evidence contained in the record, considered the pleadings  
2 filed in the action and heard the oral argument of the parties' counsel at a hearing on  
3 October 1, 2008. On October 7, 2008, the court rendered a letter opinion in favor of the  
4 Petitioner JZ Knight, granting her land use petition. The Court made findings of fact and  
5 conclusions of law on November 7, 2008, which were entered on the same date. A copy  
6 of the findings of fact and conclusions of law are attached as **Exhibit A**.

7 Consistent with the Court's findings of fact and conclusions of law, final judgment  
8 is entered in this matter as follows:

9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

- 10 1. Petitioner's LUPA petition is GRANTED.  
11 2. The decision by the Yelm City Council on February 12, 2008, is reversed  
12 and this matter is remanded to the Yelm City Council with instruction that each of  
13 the five preliminary subdivision approvals issued by the City of Yelm on February  
14 12, 2008, shall be modified as follows:

15 The condition of preliminary plat approval contained in the Hearing  
16 Examiner's Decisions on Reconsideration dated December 7, 2007, and  
17 incorporated into the Yelm City Council's decision dated February 12, 2008, shall  
18 be modified by striking the word "/or" and inserting the word "also" as follows:

19  
20 The applicant must provide a potable water supply adequate  
21 to serve the development at final plat approval and ~~for~~ also  
22 prior to the issuance of any building permit except as model  
homes as set forth in Section 16.04.150 YMC [Yelm  
Municipal Code].

- 23 3. Yelm shall provide written notice to Petitioner pertaining to final sub-  
24 division approval of the five proposed subdivisions as follows:

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a. Yelm shall provide written notice to Petitioner of any application for final subdivision approval of any of the five subdivisions within <sup>business</sup> five days of Yelm's receipt of such application.

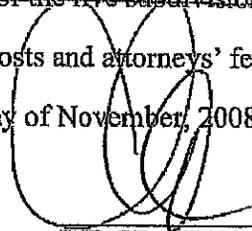
b. Yelm shall provide <sup>seven calendar</sup> Petitioner ~~thirty~~ days written notice <sup>This will provide</sup> and an <sup>Petitioner</sup> opportunity to comment <sup>to city staff</sup> upon any proposed findings by Yelm pertaining to <sup>A Prior</sup> the "appropriate provisions . . . for potable water supplies" for each of the <sup>to the date the</sup> five subdivisions prior to any final subdivision approval for those five <sup>city staff</sup> subdivisions. <sup>report is</sup>

c. Yelm shall provide <sup>seven calendar</sup> Petitioner ~~thirty~~ days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony <sup>if a public</sup> ~~at any such hearing~~ <sup>is held on any of the five final</sup> ~~is held on any of the five final~~ subdivisions.

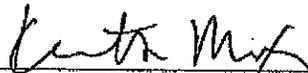
~~d. This Court retains jurisdiction over this matter. Petitioner may seek judicial review of any such decision by this Court as she deems necessary, following Yelm's action on any of the five subdivision approvals.~~

4. All parties shall bear their own costs and attorneys' fees.

DONE IN OPEN COURT this 7 day of November, 2008.

  
JUDGE CHRIS WICKHAM

Presented by:  
GORDONDERR LLP

By:   
Keith E. Moxon, WSBA #15361  
Dale N. Johnson, WSBA #26629  
Attorneys for JZ Knight

JUDGMENT GRANTING LAND USE PETITION  
[PROPOSED] - 3

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(206) 382-9540

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## **Appendix F**

**RCW 58.17.110**

**Approval or disapproval of subdivision and dedication — Factors to be considered — Conditions for approval — Finding — Release from damages.**

(1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

[1995 c 32 § 3; 1990 1st ex.s. c 17 § 52; 1989 c 330 § 3; 1974 ex.s. c 134 § 5; 1969 ex.s. c 271 § 11.]

**Notes:**

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17:** See RCW 36.70A.900 and 36.70A.901.

## **Appendix G**

**RCW 58.17.150**

**Recommendations of certain agencies to accompany plats submitted for final approval.**

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

(1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply;

(2) Local planning agency or commission, charged with the responsibility of reviewing plats and subdivisions, as to compliance with all terms of the preliminary approval of the proposed plat subdivision or dedication;

(3) City, town or county engineer.

Except as provided in RCW 58.17.140, an agency or person issuing a recommendation for subsequent approval under subsections (1) and (3) of this section shall not modify the terms of its recommendations without the consent of the applicant.

[1983 c 121 § 4; 1981 c 293 § 8; 1969 ex.s. c 271 § 15.]

**Notes:**

**Severability -- 1981 c 293:** See note following RCW 58.17.010.

## **Appendix H**

**RCW 19.27.097**

**Building permit application — Evidence of adequate water supply — Applicability — Exemption.**

(1) Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.

(2) Within counties not required or not choosing to plan pursuant to RCW 36.70A.040, the county and the state may mutually determine those areas in the county in which the requirements of subsection (1) of this section shall not apply. The departments of health and ecology shall coordinate on the implementation of this section. Should the county and the state fail to mutually determine those areas to be designated pursuant to this subsection, the county may petition the department of community, trade, and economic development to mediate or, if necessary, make the determination.

(3) Buildings that do not need potable water facilities are exempt from the provisions of this section. The department of ecology, after consultation with local governments, may adopt rules to implement this section, which may recognize differences between high-growth and low-growth counties.

[1995 c 399 § 9; 1991 sp.s. c 32 § 28; 1990 1st ex.s. c 17 § 63.]

**Notes:**

**Section headings not law -- 1991 sp.s. c 32:** See RCW 36.70A.902.

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17:** See RCW 36.70A.900 and 36.70A.901.

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JZ KNIGHT,

Petitioner/Appellee,

v.

CITY OF YELM; TTPH 3-8, LLC,

Respondents/Appellants.

---

**CERTIFICATE OF SERVICE**

---

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Roger A. Pearce, WSBA #21113  
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Kathleen Callison, WSBA #28425  
LAW OFFICE OF KATHLEEN CALLISON PS  
802 Irving Street S.W.  
Tumwater WA 98512  
Telephone: (360) 705-3087

Attorneys for Appellant City of Yelm

The undersigned certifies that on the 19<sup>th</sup> day of February, 2009, I caused to be served the **Brief of Appellant City of Yelm** and this **Certificate of Service** in the above-captioned matter upon the parties herein as indicated below:

*Via U.S. Mail*

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Averil Budge Rothrock  
Philip T. Kasin  
Schwabe, Williamson & Wyatt,  
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*Attorneys for Appellant TTPH  
3-8 LLC*

*Via U.S. Mail*

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Olympia, WA 98501  
*Co-Counsel for Respondent JZ  
Knight*

*Via U.S. Mail*

Keith E. Moxon  
Dale Noel Johnson  
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*Co-counsel for Respondent JZ  
Knight*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19<sup>th</sup> day of February, 2009.



Susan Grimes-Zak