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SUPREME COURT
OF THE STATE OF WASHINGTON

JZ Knight,

Petitioner,

v.

City of Yelm and TTPH 3-8, LLC,

Respondents

SUPPLEMENTAL BRIEF OF RESPONDENT CITY OF YELM

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ORIGINAL

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I. INTRODUCTION

JZ Knight's Ramtha School of Enlightenment is housed in her large walled estate located just outside the City of Yelm (City) in unincorporated Thurston County. Knight has vigorously opposed, in every available forum, five proposed residential subdivisions, the nearest of which is 1300 feet from her property. The five separate proposals, if and when they are built-out to full capacity, would add 568 new units to the City's existing 2,135 dwellings.

After preliminary approvals were granted by City Hearing Examiner Stephen Causseaux¹ and upheld by the City Council,² Knight brought a LUPA action in Superior Court where the preliminary approvals were upheld and remanded to the City for a minor clarification of a condition, upon which all parties agreed. At the urging of Knight and over the City's opposition, the trial court entered superfluous findings of fact and conclusions of law, extending beyond the scope of the judgment.³ The City and one of the developers, TTPH 3-8, LLC ("Tahoma Terra")

¹ The Tahoma Terra decision is representative. That Examiner decision is attached as APPENDIX A. The Examiner's decision on reconsideration is attached as APPENDIX B.

² The City Council decision on its closed-record appeal is attached at APPENDIX C.

³ The trial court findings and conclusions and its judgment are attached at APPENDIX D.

appealed because of the potential legal consequences of the findings and conclusions. All parties agree that they became nullities when appealed.

In an unpublished decision, the Court of Appeals held that Knight lacked standing to challenge the City's preliminary subdivision approvals and awarded attorney fees and costs to the City and Tahoma Terra under RCW 4.84.370. *JZ Knight v. TTPH 3-8, LLC* (April 13, 2010) ("Decision").⁴ Knight unsuccessfully moved for reconsideration and then filed a Petition for Review that was granted by the Supreme Court.

The City submits this supplemental brief to focus on the two issues raised in Knight's Petition for Review that are now before this Court: (1) whether Knight had standing to challenge the City's five preliminary plat approvals; and (2) whether the Court of Appeals properly awarded attorney fees and costs under RCW 4.84.370. The City also adopts the Supplemental Brief of Tahoma Terra.

Throughout this case, at administrative, trial, and appellate levels, Knight has relentlessly attacked the City's water rights and water system management, apparently as a pretext to stop residential development within the City in the vicinity of Knight's opulent estate.

At trial, Knight primarily argued that the **preliminary plat**

⁴ The Decision of the Court of Appeals is attached at APPENDIX E.

approvals were invalid because they were not conditioned upon determinations at possible, future **final** plat approvals that the City held sufficient water rights to serve the proposed developments along with all unbuilt previously approved developments. But on appeal, Knight conceded that what was required at future **final** plat approvals was not ripe for adjudication in the appeal of **preliminary** plat approvals. Amended Brief of Respondent JZ Knight (Resp.Br.), 3, 43-44. Even after explicitly abandoning this argument, Knight continued her attack on the City's water rights and water management in the same brief and in her Petition for Review (PFR). *See, e.g.*, PFR, 2, 3, 4, 6, 8, 9, 10, 11, 13, 16, 18. Because these attacks have been a central focus of every submission by Knight, the City assumes they will continue these irrelevant attacks in her supplemental brief to this Court.

Regardless of their irrelevance, these assaults on the City's water management are factually erroneous, as the City has demonstrated in its briefing throughout this case. At trial, the City responded at length, showing that Knight's assertions were factually incorrect. CP 108 (City of Yelm's Response to Petitioner JZ Knight's Opening Brief: 1209-1214; 1217-1223. On appeal, the City again had to rebut Knight's water rights-related misrepresentations, *See* Reply Brief of Appellant City of Yelm

(App. City's Reply Br.), 4-7, 7-8, 9, 10-12, 13. There is abundant evidence in the administrative record of the City's exemplary record of water system planning and management, including a successful proactive program of water rights acquisition and transfer, new water rights applications, and the City's leading local programs in water conservation, reclamation, and reuse. CP 111: 1289-1491; *see* CP 111: 1267-75.

As is the case with many small cities in the path of urban growth, the City is diligently trying to do what the Growth Management Act requires - accommodate concentrated growth in the City and adjacent urban growth area to avoid sprawling low density development in the County's rural areas. RCW 36.70A.010, .020, .070, .110, .115. Determined opponents of urban development, like JZ Knight, make GMA compliance difficult.

II. ISSUES

- A. Did Knight fail to establish standing under (1) the City Code to administratively appeal the Hearing Examiner's decisions to the City Council and (2) LUPA to obtain judicial review of the City's land use decisions?
- B. Did the Court of Appeals properly award attorney fees and costs to the City under RCW 4.84.370?

III. STATEMENT OF THE CASE

The City incorporates by this reference the Statement of the Case in the City's Answer To Petition For Review which also adopted the more detailed Counter-Statement of the Case in the Answer of TTPH 3-8, LLC ("Tahoma Terra") To Petition For Review.

IV. ARGUMENT

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

1. Knight's LUPA Petition Failed to Effectively Appeal the City Council's Final Decision that Knight Did Not Have Standing to Appeal the Examiner's Decision to the Council.

The City Council explicitly dismissed Knight's appeals of the Hearing Examiner's preliminary subdivision approvals because she was not an "aggrieved person" under YMC 2.26.150:⁵

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

The Council reviewed the Examiner's substantive preliminary plat decisions only "contingently," as a matter of adjudicative economy, so that remand and rehearing would not be necessary if a reviewing court were to

⁵ APPENDIX C – Yelm City Council Resolution 481 (Feb. 12, 2008).

decide that the Council's standing determination was erroneous. The 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.

City Resolution 481 at Conclusion of Law No. 3 (APPENDIX C). If this Court agrees that Knight failed to specifically assign error to and, thus, failed to effectively appeal the Council's dispositive decision that she lacked standing under LUPA, then the Council's standing decision is not subject to judicial review. Alternately, if this Court decides the Council's standing decision is reviewable and then upholds that decision that Knight lacked standing, then the only remaining question is the award of attorney fees under RCW 4.84.370.

This argument is presented in greater detail and with supporting authorities in the Brief of Appellant City of Yelm, 25-28, and the Reply Brief of Appellant City of Yelm, 15-18.

2. The Court of Appeals' Decision on Standing Was Based on Well-Established Washington Law.

The Decision applied well-established standing law to the facts of this case. *Decision* at 10-13. Knight's sole basis for asserting standing was her ownership of senior water rights in groundwater and Thompson Creek *Resp. Br.* at 9. She claims that withdrawal of water to serve the proposed developments, along with previously approved development, would jeopardize her water rights. *Resp. Br.* at 26-27.

The Court recognized, as the parties agreed, that the standing requirements of YMC 2.26.150, for appealing the hearing examiner's decision to the City Council and LUPA (RCW 36.70C.070) are the same. *Decision* at 11. Under both, Knight was required to show "injury-in-fact" as a result of the preliminary plat approvals. *Id.* Since Knight asserted standing on the basis of threatened, rather than actual, injuries, she had to show "an immediate, concrete, and specific injury to herself." *Id.* Conjectural, hypothetical, or imagined injury was not sufficient. *Id.*

The Court of Appeals recognized that injury-in-fact to Knight's alleged senior water rights could occur only under a highly unlikely and speculative combination of circumstances: (1) there would, in fact, not be sufficient water to serve the new development without impairing Knight's water rights; (2) future final plat approvals would be erroneously granted

despite insufficient water; (3) subsequent building permits would be erroneously granted despite insufficient water; (4) such erroneous future approvals would not be overturned in LUPA actions; (5) the State Department of Ecology (Ecology) would, contrary to the requirements of RCW Ch.90.03, erroneously transfer water rights without conditions to protect Knight's senior water rights; and (6) Ecology would not take enforcement action to protect Knight's senior water rights from excessive withdrawals under junior water rights. The Court correctly concluded that such imaginable, but extremely unlikely, future injuries to Knight's alleged water rights do not meet standing requirements because they are not immediate, concrete, and specific, but merely conjectural.

Knight claimed standing solely on the basis of those highly conjectural supposed injuries to her water rights. Knight does not even argue that her water rights would suffer specific, concrete, immediate injury. Instead, she cites Washington court decisions upholding the standing of neighboring property owners who *would* suffer immediate, concrete injuries as a result of traffic or stormwater generated by development proposals. *PFR* at 12. In contrast, the only injury asserted by Knight is speculative impairment of her allegedly senior water rights, property rights that are already protected from impairment under the State Water Code, RCW Ch. 90.03. Moreover, development that would utilize

such junior rights may not be approved without multiple determinations of the adequacy of water supply prior to final subdivision approval and subsequent building permit issuance, and is subject to state enforcement action if somehow senior water rights were impaired. Knight acknowledges that her water rights are "constitutionally protected property interests" that "cannot be impaired by junior water rights or by changes to other senior or junior water rights," citing RCW 90.03.010 and .380. *Resp. Br.* at 26. Such speculative, conjectural, and extremely unlikely potential future injuries are not sufficient to establish standing. *E.g., Trepanier v. Everett*, 64 Wn.App.380, 383, 824 P.2d 524 (1992). Moreover, a superior court in a LUPA action does not have jurisdiction to decide whether water usage related to a development violates senior water rights. Such determinations may be made only through judicial review under the State Water Code. RCW Ch. 90.03; *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1996).

3. Knight's Standing Argument, If Judicially Adopted, Would Immensely Expand the Scope of Standing Beyond Well-Established Washington State and Federal Standing Doctrine.

Knight's standing argument, if judicially embraced, would radically expand standing to challenge state and local regulatory actions. A person with senior water rights would have standing to challenge land use

approvals of any proposed development that would utilize water from the same aquifer or watershed and might *conceivably* reduce available water. A person with water rights could challenge regulatory approvals of any development proposal no matter how far away if the water sources were hydraulically connected and the proposal's water rights were junior to the challenger's. Given the extensive reach of many watersheds and aquifers, standing would be radically expanded far beyond the well-established limitations of both state⁶ and federal⁷ law.

4. In Holding that Knight Lacked Standing, the Court of Appeals Did Not Disregard Undisputed Evidence of Knight's Standing.

Knight argues that the Court failed to construe her evidence of standing "in the light most favorable to the nonmoving party." *PFR* at 10-11. However, as Knight acknowledges, *Id.*, the Court stated the correct standard of review on issues raised in motions for summary judgment. *Decision*, p.9. The City's argument and the Court's Decision that Knight lacked standing were based not on the resolution of evidentiary issues, but on the law of standing. Even granting the most favorable construction of Knight's evidence, it clearly does not establish standing. Knight's

⁶ See, e.g. *S.A.V.E. v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978).

⁷ See, e.g., *Summers v. Earth Island Institute*, 555 U.S. ____, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

argument depends on a logical leap from Knight's evidence of her water rights and the City's water consumption pattern to the conclusion that numerous legal requirements will be ignored and her water rights will be impaired by junior water rights. Her argument implicitly assumes that legally required water availability determinations at final plat approval and again at building permit issuance will be erroneously made, that such errors would not be corrected through LUPA appeals, that Ecology would transfer water rights to the City without protecting senior water rights, and that Ecology would not take enforcement action against infringing water users. Knight presented no evidence, no matter how favorably construed, that this extremely unlikely series of events will occur. Thus, the Court properly concluded that she had not shown she would suffer immediate, concrete, specific injuries to her senior water rights because of the preliminary subdivision approvals.

5. In Holding that Knight Lacked Standing, the Court of Appeals Did Not Rely on "Concessions that Knight Won" or "Facts that Arose Only After She Appealed."

Knight apparently argues that the Court's decision that she lacked standing is premised on the Court's clarification of a condition in the Examiner's Decision on Reconsideration (APPENDIX B) to change "and/or" to "and also," *PFR* at 9 – claiming that the uncertainties regarding

impairment of her water rights were created by the clarification. The argument is factually and legally unfounded. First, as previously argued, the City agreed to the clarification, rather than wasting resources arguing about it, because it did not matter. The City always has taken the position, as the Hearing Examiner emphasized in his Decision on Reconsideration (CP 394 see APPENDIX B at Finding 2) that state law requires determinations of water availability prior to both final plat approval and building permit issuance. RCW 58.17.150; RCW 19.27.097. Second, these requirements existed long before Knight filed her City Council and LUPA appeal. Clarification of the Condition's language did not create these requirements. Third, the Court's conclusion that impairment of Knight's water rights was too uncertain and conjectural to establish standing was based on other uncertainties, such as assumptions that the City would not follow state law in requiring water availability showings at final plat or building permit, assumptions that Ecology would fail to take enforcement actions and assumptions that courts would fail to correct erroneous determinations of water availability. *See* Decision at 10-13. There is no basis for Knight's contention that the Court's standing decision depended on facts that arose after she filed her LUPA actions.

B. The Court of Appeals properly awarded attorney fees and costs under RCW 4.84.370.

1. Knight Is Barred From Making Arguments in the Supreme Court that She Did Not Brief in the Court of Appeals.

In the Court of Appeals, the sole basis for Knight's argument that the City was not entitled to recover attorney fees under RCW 4.84.370 was that the preliminary plat approvals were not "upheld at superior court" under RCW 4.84.370(2). *Resp.Br.* at 55-57. In her PFR, Knight makes two additional arguments: (1) that only parties who appeal beyond superior court are entitled to attorney fees and (2) that attorney fees are not recoverable by a party who prevails on procedural grounds. The latter two issues were improperly raised in Knight's PFR. They are not reviewable by this Court because issues not supported by argument and authority in an appellate brief are waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Since an issue raised for the first time in a reply brief may not be considered,⁸ an issue that was not raised at all in briefing may not be raised for the first time in a motion for reconsideration, or supplemental brief. Because these two issues were not raised in the Court of Appeals, they were not supported by argument and authority and may

⁸ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

not be considered for the first time by this Court.⁹

2. The City Was the “prevailing party or substantially prevailing party” in the Superior Court under RCW 4.84.370(1)(b), and the City’s Land Use Decision was “upheld at superior court” under RCW 4.84.370(2).

The Court of Appeals applied the plain language of RCW 4.84.370 in concluding that the City and Tahoma Terra substantially prevailed in superior court because that court “ultimately upheld the City’s decisions to grant the preliminary subdivision approvals.” Decision at 14. Knight acknowledges that the superior court “upheld the decision to approve the preliminary subdivisions.” *PFR* at 18. Knight nevertheless argues that the City was not upheld at superior court because that court remanded for a minor clarification of language in a condition, superfluous findings and conclusions, and procedural rulings that had no effect on the validity of the preliminary plat approvals.

The minor clarification of the language of Condition 2 in the Examiner’s Decision on Reconsideration¹⁰ from “and/or” to “and also” was a mere technicality that had no effect on the validity of the challenged preliminary plat approvals. The clarification merely reflected what the

⁹ See *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). See also *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005).

¹⁰ APPENDIX B.

hearing examiner explicitly said he meant in Finding 2, CP 394 and APPENDIX B. As the Examiner explained, state law requires determinations of available water supply at both final plat approval and at building permit issuance. And all parties agreed to the clarification.

The reason the City appealed, as the City explained in its opening brief, was to make the irrelevant and incorrect findings and conclusions of the trial court nullities. *See, Br. of App. City* at 2. Once appealed, the findings and conclusions automatically became nullities. *E.g., J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn.App. 1, 8, 103 P.3d 802 (2004). Given the superfluous nature of the findings and conclusions, they do not support the argument that the City did not substantially prevail before the superior court. What was **substantial** was the lower court's denial of Knight's arguments that the City's approvals should be invalidated. The court declined to invalidate the preliminary subdivision approvals, and they remained in effect.

Similarly, the lower court's rulings on standing and other procedural matters did not make Knight the substantially prevailing party. The City's "land use decisions," appealable under LUPA, were the City's decisions granting preliminary subdivision approvals. Knight petitioned the superior court to invalidate these land use decisions. The superior court

did not invalidate the City's land use decisions. The substantial issue before the superior court was the validity of the preliminary subdivision approvals. Because the City's decisions were upheld, the City was the "substantially prevailing party" and the City's decisions were "upheld at superior court" under the plain language of RCW 4.48.370(1) and (2).

3. RCW 4.84.370 Does Not Apply Only to Respondents on Appeals Beyond Superior Court.

Knight is barred from arguing that only respondents may recover attorney fees by failing to raise this issue in briefing to the Court of Appeals. Even if the argument may be raised, it is without merit. Knight's argument is contradicted by the plain language of the statute and relies solely on *dicta* in two reported decisions.¹¹ In both cases, the courts awarded attorneys' fees to respondents. In neither case was the court presented with the issue of whether an appellant who satisfies the plain language of the statute is barred from recovery of attorneys' fees. Statements in a case "that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed." *State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992).

¹¹ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005) and *Gig Harbor Marina v. City of Gig Harbor*, 94 Wn.App.789, 800, 873 P.2d 1081 (1999).

It is not surprising that there are no reported decisions awarding attorney fees to an appellant under RCW 4.84.370. Normally, a party who substantially prevails in superior court has no motivation to appeal. However, this is an unusual case. The superior court decision did not overturn the City's land use. That decision simply required that the wording of Condition 2 be slightly modified to reflect what state law requires anyway and what the Hearing Examiner explicitly acknowledged in accompanying findings explaining Condition 2. The City agreed with this clarification throughout the superior court proceedings and did not appeal this clarification. Rather, the City appealed, as it clearly explained, because of superfluous findings and conclusions regarding the City's water rights and other matters advocated by Knight that went far beyond the superior court's decision on the City's preliminary subdivision applications. *App. City's Br.* at 2. Knight pressed the lower court to adopt the superfluous findings and conclusions over the City's objections. Under these circumstances, Knight's own actions essentially forced the City and Tahoma Terra to appeal the superior court's findings and conclusions so that they would become nullities and could not have any future legal effect. Knight's vigorous advocacy of the findings and conclusions served no

constructive purpose, since they would be nullities if appealed, and virtually ensured that the City would file an appeal.

Under the unambiguous language of the statute, filing an appeal does not disqualify a party from an award of attorney fees. So it would not be proper to construe the language on the basis of underlying legislative intent. However, under the special circumstances of this case, even if the legislative intent were relevant, awarding attorneys' fees would be consistent with the legislative intent of avoiding time-consuming, costly appeals. Although the appeals were filed by the City and Tahoma Terra, they were knowingly caused by Knight's persistent pursuit of superfluous findings and conclusions that served no constructive purpose.

Moreover, once the appeals were filed, Knight could have declined to participate in the appeal. However, Knight vigorously participated in the appeal not only contesting the issues raised by appellants, but raising and rearguing issues regarding the validity of the City's preliminary subdivision approvals that were not raised in the appeals and, thus, were, in effect, a cross-appeal by Knight. *See, e.g. Resp.Br., p.47-52.*

4. RCW 4.84.370 Does Not Bar Recovery of Attorney Fees by a Party Who Prevails on a Procedural Basis.

Knight argues that appellants were not prevailing parties in the Court of Appeals because the Court decided in their favor on the basis of Knight's lack of standing rather than "on the merits." Knight has waived this argument because it was not raised in her Court of Appeals briefing. Even if the argument were not barred, it is contrary to the Supreme Court's decision in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) and Division Two's most recent reported decision on attorneys' fees under RCW 4.84.370 in *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 383, 223 P.3d 1172 (2009). In *Habitat Watch*, the Supreme Court awarded attorneys' fees under RCW 4.84.370 to parties who prevailed on procedural grounds. Similarly, in *Nickum*, attorneys' fees were awarded where the City prevailed on a procedural basis - lure to exhaust administrative remedies. The issue was briefed to the Court in *Nickum*.¹² The Court resolved the issue consistently with the Supreme Court's decision in *Habitat Watch*.

¹² See *Nickum v. City*, 2008 WA App. Ct. Briefs 967745, 2009 WA App. Ct. Briefs, LEXIS 65 (Wash.Ct.App), Jan. 23, 2009.

C. The City is entitled to an additional award for attorney fees and costs incurred before the Supreme Court.

For the reasons set-forth above, pursuant to RCW 4.84.370 and RAP 18.1(j), the City requests an award of attorneys' fees and costs for the proceedings before the Supreme Court.

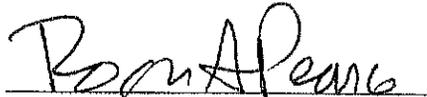
V. CONCLUSION

It is unknown why Knight has so persistently opposed preliminary approvals of residential subdivisions that pose no immediate, concrete or specific injury. Her determined opposition has imposed major financial burdens on the City of Yelm that is trying to responsibly accommodate population growth, as the Growth Management Act requires. For the reasons set-forth in this brief and the previous briefing before the Hearing Examiner, Superior Court, Court of Appeals and Supreme Court, the City requests that the Court bring this litigation to a close and award attorney fees to the City under RCW 4.84.370 and RAP 18.1(j).

Respectfully submitted this 2nd day of December 2010.

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BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

On this 2nd day of December 2010, I caused to be delivered in the

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manner indicated below a true and correct copy of the foregoing

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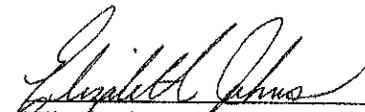
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ORIGINAL

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

Executed at Seattle, Washington, this 2nd day of December 2010.


Elizabeth A. Johns

OFFICE RECEPTIONIST, CLERK

To: Elizabeth Johns
Cc: Richard Settle; Roger Pearce; callison@callisonlaw.com
Subject: RE: Supreme Court No. 84831-9, JZ Knight v. City of Yelm and TTPH 3-8, LLC

Rec. 12-2-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Elizabeth Johns [<mailto:JohnE@foster.com>]
Sent: Thursday, December 02, 2010 4:02 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Richard Settle; Roger Pearce; callison@callisonlaw.com
Subject: Supreme Court No. 84831-9, JZ Knight v. City of Yelm and TTPH 3-8, LLC

Transmitted for filing please find a PDF of *Supplemental Brief of Respondent City of Yelm* in Supreme Court No. 84831-9 - JZ Knight v. City of Yelm and TTPH 3-8, LLC and my certificate of service. Appendices to this brief to be sent to the court by U.S. Mail today.

I am transmitting this on behalf of the following:

Richard L. Settle
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Thank you.

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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 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th 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 clayed. 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 to 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 9th day of October, 2007.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 9th day of October, 2007, to the following:

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th 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 5th Avenue Ste. 3010
Seattle, WA 98101

Doug Bonner
8120 Freedom Lane #201
Lacey, WA 98516

City of Yelm
Tarni 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 1 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 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th 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 7th day of December, 2007.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 7th day of December, 2007, to the following:

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th 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 98558

Curt Smelser
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Seattle, WA 98101

Doug Bonner
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Alison Moss
2183 Sunset Avenue SW
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

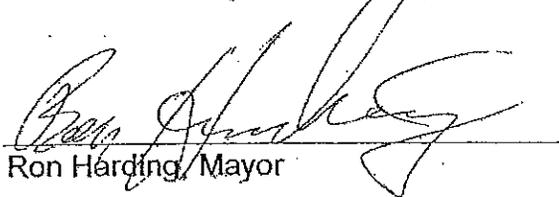
Water System Plan to administer its water system. [alleged errors of fact 3 and 6].

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].

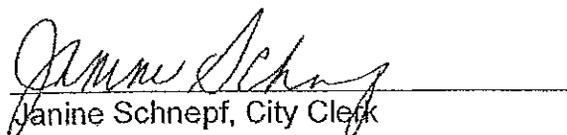
15. The exact quantity of water rights that the City currently holds, which recently has been disputed by Knight, is immaterial because the City presented evidence, upon which the Hearing Examiner reasonably relied, that substantial additional water rights have been obtained by the City and that their 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 its 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 12th day of February, 2008



Ron Harding, Mayor

Authenticated:



Janine Schnepf, City Clerk

Appendix D

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

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

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.¹

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 ¹ 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.
26

1 7. Petitioner holds water rights that are subject to impairment in the event Yelm
2 should continue to use water in excess of its Ecology approved water rights. Accordingly,
3 Petitioner is entitled to written notice pertaining to final subdivision approval of the five
4 proposed subdivisions, including: (1) written notice of any application for final subdivision
5 approval of any of the five subdivisions within five ^{business} days of Yelm's receipt of such application;
6 ~~(2) thirty~~ ^{seven calendar} days written notice, and an opportunity to provide ^{business} ~~comment~~ ^{comment} upon any proposed findings by
7 Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the
8 five subdivisions prior to any final subdivision approval for those five subdivisions; and; (3)
9 ~~thirty~~ ^{seven calendar} days written notice of any City Council hearing to consider final subdivision approval
10 for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and
11 written testimony ^{if a public is held} ~~at any such hearing~~ before the Yelm City Council. Finally, Petitioner may ^{on any of the five final} ~~submit~~ ^{subdivisions.}
12 seek judicial review ~~by this Court~~ of any decision by Yelm pertaining to final plat approval of
13 any of the five subdivisions, ~~as she deems necessary.~~

14 DATED this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

18 Presented by:

19 GORDONDERR LLP

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

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This will provide Petitioner to 5/0 RF
Prior to the date the City Staff report is submitted
to the City Council

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FILED
SUPERIOR COURT
THURSDAY

'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: Chrls Wickham

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

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) 362-9540

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/or~~ 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 ^{business} five days of Yelm's receipt of such application.

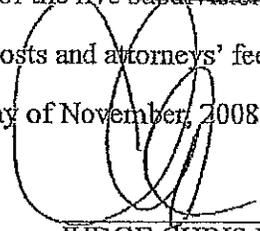
b. Yelm shall provide Petitioner ^{seven calendar} ~~thirty~~ days written notice ^{and an} opportunity to comment upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions.

c. Yelm shall provide Petitioner ^{seven calendar} ~~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 ^{if a public} ~~at any such hearing~~ is held on any of the five final subdivisions.

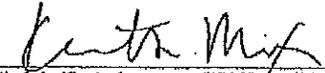
~~d. This Court retains jurisdiction over this matter. Petitioner may seek judicial review of any such decision by this Court as she deems necessary, following Yelm's action on any of the five subdivision approvals.~~

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

0-000001645

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Appendix E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

10 APR 12 AM 11:59
STATE OF WASHINGTON
BY _____
DEPUTY

JZ KNIGHT,

No. 38581-3-II

Respondent,

v.

UNPUBLISHED OPINION

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

Appellants.

PENoyer, A.C.J. — TTPH 3-8 (Tahoma Terra) and the City of Yelm appeal, arguing that the trial court erred by denying their motion to dismiss JZ Knight's Land Use Petition Act (LUPA)¹ petition and their subsequent motion for summary judgment. They argue that Knight failed to (1) establish standing under both the Yelm Municipal Code (YMC) and LUPA and (2) assign error to the Yelm City Council's determination that she lacked standing under the YMC to appeal the hearing examiner's decisions granting preliminary subdivision approvals. They also argue that the trial court erred by remanding the examiner's "condition," by entering findings of fact and conclusions of law, and by imposing additional notice requirements on the City. Both parties argue that they are entitled to attorney fees and costs. We affirm the challenged preliminary subdivision approvals, reverse the trial court, dismiss Knight's LUPA petition for lack of standing, and award attorney fees and costs to the City and Tahoma Terra.

¹ Chapter 36.70C RCW.

FACTS

I. HEARING EXAMINER

In 2007, five separate applicants applied for preliminary subdivision approvals with the City.² One of the applicants, Tahoma Terra, sought to subdivide approximately 32.2 acres into 198 single-family residential lots.

On July 23, 2007, the hearing examiner held public hearings on the five subdivision applications. Knight, who owns property near the proposed subdivisions,³ opposed all of the subdivision applications. She argued that the applicants and the City failed to establish that: (1) appropriate provisions had been made for potable water supplies to serve the subdivisions; (2) the subdivisions complied with the water availability requirements of the Comprehensive Plan and the Water System Plan; and (3) the proposed water supply was adequate and available to serve the subdivisions concurrently with development.

On October 9, after considering the parties' post-hearing submissions, the examiner conditionally granted preliminary subdivision approvals in five decisions. In his decisions, the examiner determined:

² Three of the applicants, including Tahoma Terra, sought preliminary plat approval under chapter 16.12 YMC. The other two sought binding site plan approval under chapter 16.32 YMC. The five proposed subdivisions would add a total of 568 new residential units to the City's existing 2,135 residential units. The water availability requirements under both processes are identical. YMC 16.12.170, YMC 16.32.065. Tahoma Terra is the only applicant who now appeals.

³ Knight's property is located approximately 1,300 feet from the closest of the proposed subdivisions. She owns a surface water right from Thompson Creek, which traverses her property. Knight also operates a domestic water system that is authorized to use groundwater for potable water requirements under a water right certificate. The aquifer from which Knight draws water is also the supply source for the City's wells. Additionally, Thompson Creek is in hydraulic continuity with the City's wells.

At preliminary binding site plan [or preliminary plat] 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 [plat] approval.

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 building site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology [DOE] 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.

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.

Clerk's Papers (CP) at 1268, 1270, 1275; Administrative Record (AR) (Oct. 7, 2007) Office of the Hearing Examiner City of Yelm Report and Decision, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PDR-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

Knight subsequently moved for reconsideration of the examiner's decisions, requesting that he add a requirement that provisions for water be made prior to final subdivision approval.

The examiner denied Knight's motion on December 7, 2007.

The examiner, however, added three findings and a new condition to his previous decisions. He found the following:

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 the water rights from the Dragt farm have been

conveyed to the City and approved by [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 [YMC] 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 [Knight's counsel] in his response are beyond the Examiner's authority and interfere with the City's ability to manage [its] 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.

CP at 1283 (emphasis added); AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

The examiner then added the following condition to each of the 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.

CP at 1284 (emphasis added); AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

II. CITY COUNCIL

Knight subsequently appealed the examiner's preliminary subdivision approvals to the City Council, which denied her consolidated appeals based on lack of standing:

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.

CP at 26 (emphasis added). On February 12, 2008, the City Council passed Resolution No. 481, affirming the examiner's individual findings and conclusions.

III. SUPERIOR COURT

Knight next filed a LUPA petition in Thurston County Superior Court, again challenging the City's preliminary subdivision approvals. In her petition, however, Knight did not specifically assign error to the City Council's decision that she lacked standing to appeal the examiner's decisions or that she was not an "aggrieved person" under the YMC.⁴

In April 2008, Tahoma Terra and the City joined two other respondents in their motion to dismiss Knight's petition on the grounds that she had failed to appeal the City Council's dispositive decision that she lacked standing and that she also lacked standing under the YMC and LUPA. The trial court denied their motion without prejudice. The respondents then moved for summary judgment, again arguing that Knight lacked standing to (1) appeal the examiner's decision to the City Council under the YMC, and (2) seek judicial review of the City's decisions

⁴ Knight argues, however, that she challenged the entire City Council decision and that her petition contained "detailed allegations" demonstrating that she had standing. Resp't's Br. at 13.

under LUPA. The trial court again denied their motion. The parties then submitted briefing on the merits.

Knight made two assertions: (1) that a finding that appropriate provisions have been made for potable water at the preliminary plat approval stage requires the City to condition preliminary approval on a determination of water availability at the final plat approval stage rather than the building permit stage and (2) that a determination of water availability at the final plat approval stage must be based on available and DOE-approved water rights currently held by the water purveyor (in this case, the City) sufficient to serve all demand, including all approved but not yet constructed developments and pending development applications. Tahoma Terra and the City did not dispute Knight's first argument, and they asserted that the examiner's decision reflected this legal interpretation.⁵ As for Knight's second assertion, Tahoma Terra argued that it had no basis in the law and that the record demonstrated that it had already made appropriate and adequate provisions of potable water for its proposed subdivision.

On October 1, 2008, the trial court held a hearing on Knight's petition. Six days later, it issued a letter opinion in Knight's favor, granting her petition. It subsequently adopted her proposed judgment, findings of fact, and conclusions of law, to which the City and other respondents objected. Conclusion of law 5 provided:

RCW 58.17.110 and YMC 16.12.170 make clear that [the City] must make findings of "appropriate provisions" for potable water supplies by the time of final

⁵ Knight argues that the appellants agreed to amend the condition at the trial court. The record confirms this. See Report of Proceedings (RP) (Oct. 1, 2008) at 58 ("We would be perfectly happy with striking the "and/or" or simply striking the "/or," I believe all of us agreed to that."); CP at 1641 (Knights proposed conclusion of law 4 stating that the parties "have agreed that it is appropriate to amend the [condition's] language" by removing the word "/or.").

plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable water based upon [the City's] historical provision of potable water would be insufficient to satisfy this requirement.

CP at 1641.⁶

In its order, the trial court "reversed"⁷ the matter and remanded the examiner's condition of preliminary plat approval with instructions to strike the word "or" and insert the word "also" as follows:

The applicant must provide a potable water supply adequate to serve the development at final plat approval and . . . *also* prior to the issuance of any building permit

CP at 1644 (emphasis in original).

The trial court also imposed new notice requirements on the City. It ordered the City to provide Knight with notice of the following: any application for final subdivision approval of any of the five subdivisions; any proposed findings by the City pertaining to "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final

⁶ We discuss the requirements of RCW 58.17.110 and YMC 16.12.170 in more depth below.

⁷ Both appellants characterize the trial court's ruling as a reversal on "the undisputed issue of whether a determination of water availability [has] to be made both at the final plat approval and building permit stages" because it remanded for modification when "the meaning remained the same." Appellant's (Tahoma Terra) Br. at 20.

subdivision approval; and any city council hearing to consider final subdivision approval for any of the five subdivisions.⁸ CP at 1645. Tahoma Terra and the City now appeal.

ANALYSIS

I. STANDARD OF REVIEW

LUPA governs judicial review of land use decisions. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693, 49 P.3d 860 (2002). “By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction.” *Benchmark Land Co.*, 146 Wn.2d at 693 (quoting *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001)).

LUPA authorizes the superior court to reverse a land use decision if the party seeking relief shows that:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (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;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

⁸ On appeal, the City emphasizes that its “primary concern and reason for appealing” is the trial court’s imposition of special notice requirements for any future applications for future subdivision approvals and its entry of findings and conclusions. Appellant’s (City) Br. at 2. It contends that, in its 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.” Appellant’s (City) Br. at 2. The City argues that these findings and conclusions are nullities on appeal, outside the trial court’s jurisdiction, and contrary to the statute’s plain meaning.

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(a)-(f).

Judicial review of any claimed error under subsection (b) is de novo but we must accord deference to the City's expertise. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); RCW 36.70C.130(1)(b). Under subsection (c), we must uphold the City's decision if there is evidence in the record that would persuade a fair-minded person of the truth of the statement asserted, and we must consider all evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless, LLC, v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006); former RCW 36.70C.130(1)(c). Under subsection (d), we must determine whether we are left "with a definite and firm conviction that a mistake has been committed." *Cingular Wireless, LLC*, 131 Wn. App. at 768; RCW 36.70C.130(1)(d).

In reviewing an administrative decision, we sit in the same position as the superior court. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Furthermore, when reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Finally, we review questions of law de novo. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

II. STANDING

The appellants argue that Knight lacked standing to appeal the examiner's decision to the City Council under the YMC and that she similarly lacks standing under LUPA.⁹ Knight responds that the City's decisions will injure her senior water rights and that any "further groundwater withdrawal by the City will adversely impact the flow of groundwater that supports [her] wells and the flow of Thompson Creek where she has surface water rights." Resp't's Br. at 9. Knight claims that, even before approving the subdivision at issue in this case, the City's water use had already exceeded the total use amount determined by DOE. If the City "uses or commits water use to developers and future homeowners before [DOE] approves a water right for the City," she contends, her existing water rights are "jeopardized." Resp't's Br. at 26-27. The appellants' argument that Knight lacks standing to challenge the City's decisions is persuasive.

Under YMC 2.26.150, any "aggrieved person" or agency of record may appeal a hearing examiner's final decision to the City Council. Similarly, under RCW 36.70C.060(1), standing to bring a LUPA petition is limited to (1) the applicant and the property owner to which the land use decision is directed or (2) another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is "aggrieved or adversely affected" within the meaning of this

⁹ The appellants devote a portion of their briefs to the argument that the trial court should have dismissed Knight's LUPA petition for failure to assign error to the City Council's "dispositive conclusion" that she lacked standing to appeal under RCW 36.70C.070. Appellant's Br. (Tahoma Terra) at 21. Additionally, Tahoma Terra argues that by failing to present evidence that she was "aggrieved" to the examiner, Knight foreclosed the opportunity to appeal his decisions under chapter 2.26 YMC. Appellant's (Tahoma Terra) Br. at 24. The appellants' argument that LUPA's procedural requirements act to bar her petition are unpersuasive; therefore, the foregoing analysis will examine the merits of the standing issue.

section only when (1) the land use decision has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those the local jurisdiction was required to consider when it made the land use decision; (3) a judgment in that person's favor would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and (4) the petitioner has exhausted his or her administrative remedies to the extent the law required. RCW 36.70C.060(2). The City construes both the YMC and LUPA as requiring the same thing.

To satisfy LUPA's "aggrieved or adversely affected" standing requirement, objectors must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision; in other words, objectors must show that they "personally will be 'specifically and perceptibly harmed' by the proposed action." *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 47-48, 52 P.3d 522 (2002) (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992)).

Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to herself. *Trepanier*, 64 Wn. App. at 383. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier*, 64 Wn. App. at 383. Pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected. *Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994).

As Tahoma Terra correctly notes, in order to establish standing under LUPA, Knight must demonstrate that: (1) the preliminary subdivision approvals have or are likely to prejudice her; (2) the interest she asserts is among those that the City was required to consider when it granted the preliminary subdivision approvals; (3) a judgment in her favor would substantially

eliminate or redress the alleged prejudice; and (4) she has exhausted her administrative remedies to the extent the law required. *See* RCW 36.70C.060(2)(a)-(d). Knight argues that the land use decisions at issue in this case are likely to prejudice her. She has not, however, demonstrated that she will be “specifically and perceptibly harmed” by the preliminary subdivision approvals themselves. *Thornton Creek Legal Def. Fund*, 113 Wn. App. at 48. Moreover, she fails to show that a judgment in her favor would substantially eliminate or redress the alleged prejudice. Therefore, Knight lacks standing to challenge the preliminary subdivision approvals at this time.

At this time, Tahoma Terra has not obtained final plat approval and has not submitted building permit applications. RCW 58.17.150(1) requires that Tahoma Terra provide adequate potable water to serve the subdivision for those applications. Recognizing this, the examiner conditioned preliminary approval on Tahoma Terra’s ability to do so. Although his condition contained the now disputed “and/or” language, the record demonstrates that all parties understood and agreed that this condition required this showing at both final plat approval *and* building permit approval.¹⁰ No one disputes this on appeal. Therefore, if Tahoma Terra cannot demonstrate its ability to provide an adequate supply of potable water at that time, the City cannot and will not grant final plat approval or issue building permits. If this occurs, then Knight will suffer no injury. If, on the other hand, there is adequate water supply at that time, then

¹⁰ Furthermore, the examiner’s finding reflected this: “While State law and the [YMC] require potable water supplies *at final plat approval and building permit approval*, the Examiner has added a condition of approval requiring such.” CP at 1283 (emphasis added).

Knight will suffer no injury. As Tahoma Terra notes, the preliminary subdivision approvals therefore do not necessarily lead to the impacts Knight alleges.¹¹

The City correctly argues that if we were to find that Knight had standing, we would first be required to presuppose a series of future events that may not ultimately occur. Furthermore, it would require us to agree with Knight's contention that, absent the trial court's judgment, she will not receive notice of any final plat or building permit approvals and will thus be unable to obtain judicial review of these decisions. Knight's alleged injuries are simply too remote to confer standing; the trial court should have granted the appellants' motions on this basis. Therefore, we affirm the challenged preliminary subdivision approvals, reverse the trial court, and dismiss Knight's LUPA petition for lack of standing.

III. ATTORNEY FEES

Finally, the City and Tahoma Terra argue that if they prevail on appeal, they are entitled to attorney fees and costs under RCW 4.84.370(1). Knight responds that their request "borders on the frivolous." Resp't's Br. at 55. She contends that the trial court did not uphold the City's decisions; rather, it "expressly" reversed and remanded those decisions. Resp't's Br. at 56.

RCW 4.84.370(1) provides that we shall award reasonable attorney fees and costs to the prevailing party or substantially prevailing party on appeal of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use

¹¹ Tahoma Terra also contends that even "[u]sing Knight's calculations," the City has "more total water rights" than necessary to serve its subdivision. Appellant's (Tahoma Terra) Br. at 29-30. Moreover, it notes, under RCW 90.03.380(1), DOE will not approve transfers or changes in water rights unless it finds that the transfers or changes will not detrimentally impact existing water rights.

approval or decision. We shall award and determine the amount of reasonable attorney fees and costs if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

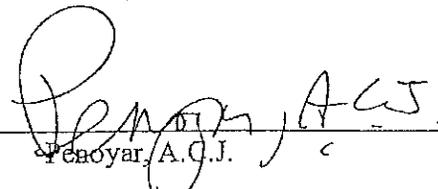
(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party *if its decision is upheld at superior court and on appeal.*

RCW 4.84.370 (emphasis added).

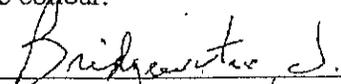
Although the trial court remanded for modification of the examiner's condition, it ultimately upheld the City's decisions to grant the preliminary subdivision approvals. Therefore, the appellants' argument that they substantially prevailed below is persuasive. Because we affirm the City's decisions, we also grant the appellants' requests for reasonable attorney fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

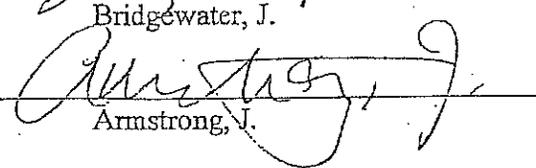


Penoyar, A.C.J.

We concur:



Bridgewater, J.



Armstrong, J.