



Rob McKenna
ATTORNEY GENERAL OF WASHINGTON

Ecology Division
2425 Bristol Court SW 2nd Floor • Olympia WA 98502
PO Box 40117 • Olympia WA 98504-0117 • (360) 586-6770

September 25, 2008

Betty J. Gould, Clerk
Thurston County Courthouse, Bldg. 2
Thurston County Superior Court
2000 Lakeridge Drive SW
Olympia, WA 98502

RE: ***J Z Knight v. City of Yelm, et al***
Thurston County Superior Court Case No. 08-2-00489-6

Dear Ms. Gould:

Enclosed are an original and one copy of the Amicus Curiae Brief of the State of Washington Department of Ecology and Certificate of Service to be filed in the above-referenced case. Also enclosed is a copy to be conformed and returned in the enclosed self-addressed, postage pre-paid envelope.

Thank you for your assistance.

Sincerely,

JANET L. DAY
Legal Assistant to
MAIA D. BELLON
Assistant Attorney General
(360) 586-6750

JLD
Enclosures
cc: Service List

1 [] EXPEDITE
2 [] No hearing is set
3 [X] Hearing is set:
4 Date: Wednesday, October 1, 2008
5 Time: 9:00 a.m.
6 Judge/Calendar: Judge Chris Wickham

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 JZ KNIGHT,

10 Petitioner,

No. 08-2-00489-6

11 V.

AMICUS CURIAE BRIEF OF
THE STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

12 CITY OF YELM; WINDSHADOW LLC;
13 ELAINE C. HORSACK; WINDSHADOW II
14 TOWNHOMES, LLC; RICHARD E.
SLAUGHTER; REGENT MAHAN, LLC;
SAMANTHA MEADOWS LLC; TTPH 3-8,
LLC,

15 Respondents.

16 **I. INTRODUCTION**

17 This amicus curiae brief is filed by the State of Washington Department of Ecology
18 (Ecology) pursuant to the Order on Department of Ecology's Motion for Leave to File an
19 Amicus Curiae Brief entered by this Court on April 25, 2008. The main issue in this case
20 involves the statutory interpretation of the State Subdivision Law, specifically
21 RCW 58.17.110. The City of Yelm issued preliminary plat and binding site plan approvals
22 for five subdivisions contingent on securing access to a potable water supply at the final plat
23 approval stage *or* the building permit stage. While the City of Yelm is permitted to issue
24 preliminary plat approvals contingent on securing services such as water at a later time,
25 RCW 58.17.110 requires a potable water supply to be firmly in place no later than final plat
26

1 approval. Delaying provisions for a secure and available water supply until the building
2 permit stage of a development project is contrary to the State Subdivision Law.

3 II. ISSUE ADDRESSED IN THIS BRIEF

4 1. Whether the City of Yelm's five preliminary subdivision approvals comply
5 with the State Subdivision Law (RCW 58.17.110) requiring that appropriate provisions be
6 made for potable water supplies.

7 III. RELEVANT FACTS

8 This Court is reviewing the Hearing Examiner's Decisions on Reconsideration (dated
9 December 7, 2007), upheld by the Yelm City Council, regarding five preliminary subdivision
10 approvals. Three preliminary plat approvals were for Windshadow I, Windshadow II, and
11 Tahoma Terra Phase II (Division 5 & 6), and two binding site plan approvals were for
12 Wyndstone and Berry Valley I (collectively referred to as the "preliminary subdivision
13 approvals"). Petitioner's Opening Brief in Support of LUPA Appeal (Petitioner's Br.), Ex. K
14 (attached to the Judge's working papers).¹ These five proposed subdivisions will add 568 units
15 of new residential development to the City of Yelm in the form of single family homes,
16 townhouses, fourplexes, and condominiums. *Id.* The applicants for these subdivisions have
17 designated the City of Yelm as the supplier of potable water for these new residences. *Id.*

18 The City of Yelm's Comprehensive Plan provides that the amount of water needed for
19 each residential connection ("equivalent residential unit" or "ERU") is 300 gallons per day
20 (gpd).² Petitioner's Br., Ex. K (citation to the Comprehensive Plan at § V(C)(2)(c) by the
21 Hearing Examiner in Report and Decision dated October 9, 2007). Thus, each new residential
22

23 ¹ The opening and response briefs submitted by the parties include copies of documents from the record
24 as attached exhibits. In order to reduce duplication of these documents from the record, Ecology will simply refer
25 to the relevant exhibits attached to the parties' various briefs, as well as any relevant declarations.

26 ² Gallons per day (gpd) is an instantaneous measurement of water on a daily basis. Acre-feet per year
(ac-ft/yr) is the measurement of water on an annual basis. The Hearing Examiner discussed the fact that the Yelm
Municipal Code at 13.04.120(C) provides an alternative ERU calculation whereby 1 ERU equals 224.4 gpd
(rather than 300 gpd). Petitioner's Br., Ex. K. However, all of the parties rely on the 300 gpd per 1 ERU figure as
provided in the City's Comprehensive Plan for purposes of this appeal.

1 connection requires 109,500 gallons of water per year (300 gpd x 365 days per year = 109,500
2 gallons per year). One ERU at a rate of 300 gpd totals 0.34 acre feet per year (ac-ft/yr). In
3 order to serve 568 new residential units alone, the City of Yelm will need to supply additional
4 potable water in the amount of 190.87 ac-ft/yr.³

5 The record before the Court in this matter demonstrates that at the time of the Hearing
6 Examiner's decisions, the City of Yelm held primary (additive)⁴ water rights authorizing use of
7 a total of 719.66 ac-ft/yr. Petitioner's Br., Ex. C. It is Ecology's position that the City's use of
8 the 676 ac-ft/yr figure in City of Yelm's Response to Petitioner JZ Knight's Opening Brief
9 (City's Br.) at 19 represents inclusion of its 112 ac-ft/yr *non-primary* (non-additive) water
10 right. Petitioner's Br., Ex. C; *See* Declaration of Yelm City Administrator Shelly Badger
11 (Badger Decl.) ¶ 28, Ex. C. Therefore, the City's actual primary water rights held from 2001-
12 2005 only equates to 564 ac-ft/yr (676 ac-ft/yr – 112 ac-ft/yr (non-additive) = 564 ac-ft/yr
13 (additive)). *Id.* The record reflects that Ecology recently approved the City's applications for
14 changes and transfers of existing water rights adding an additional 155.66 ac-ft/yr of primary
15 water rights to the City's supply. Respondent TTPH 3-8, LLC's Opening Brief (TTPH's Br.)
16 Exs. 5–7. Thus, the City's total primary water right supply increased in 2006 from 564 ac-ft/yr
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18
19
20
21

22 ³ 568 homes x 300 gpd x 365 days per year = 62,196,000 gallons of water per year. 62,196,000 gallons
per year equals 190.87 ac-ft/yr.

23 ⁴ "Additive" water rights are also known as "primary" water rights. *See generally Schuh v. Ecology*, 100
24 Wn.2d 180, 184-185, 667 P.2d 64 (1983). "Non-additive" water rights have also been referred to as
25 "supplemental" or "alternate" water rights. *Id.* Non-additive water rights are allowances for water to be used
26 either from a different point of withdrawal or diversion or from an alternative water supply, in exchange and not
in excess, of an underlying primary water right. *Id.* For example, if a primary water right has a river diversion
point that receives heavy silt and sediment during spring run-off, that water right holder would have the option to
cease diverting river water, in exchange for using a "non-additive" groundwater well right during the spring run-
off period. The City of Yelm has one "non-additive" water right (i.e., not primary) in the amount of 112 ac-ft/yr,
therefore, that water right is not included in the City's portfolio of additive, primary water rights.

1 to 719.66 ac-ft/yr (564 ac-ft/yr + 155.66 ac-ft/yr = 719.66 ac-ft/yr).⁵ *Id.*

2 The City of Yelm's usage records show that the amount of water used by the City in
3 recent years exceeds its 719.66 ac-ft/yr primary water right allocation. Petitioner's Br. Ex. B
4 (Attachment A). For example, in 2006, the City of Yelm used 766 ac-ft/yr of water, which
5 exceeded the City's legal limit by 46.34 ac-ft/yr (766 ac-ft/yr – 719.66 ac-ft/yr = 46.34 ac-
6 ft/yr). *Id.* Thus, based on the City's most current usage records (766 ac-ft/yr), the City lacks
7 any capacity for new uses. The record shows that the City of Yelm does not hold primary
8 water rights authorizing use of 910.53 ac-ft/yr (719.66 ac-ft/yr primary rights + 190.87 ac-ft/yr
9 additional need for new subdivisions = 910.53 ac-ft/yr).

10 To the City's credit, Ecology acknowledges that the City of Yelm has recently
11 acquired, and Ecology has approved (on March 6, 2008—after the record in this matter was
12 closed) for municipal supply 77 ac-ft/yr of additional primary water rights.⁶ Badger Decl., ¶
13 15. This additional primary water right brings the City's total portfolio of primary water rights
14 to 796.66 ac-ft/yr. Even if this additional 77 ac-ft/yr of primary water could be considered by
15 the Court in this matter, the amount of water needed to cover these additional residential units
16 far exceeds the City's current holdings of 796.66 ac-ft/yr. This is because 910.53 ac-ft/yr (the
17 total water need including the new 568 residential units) minus 796.66 ac-ft/yr (Yelm's current
18

19 ⁵ It is unfortunate the City believes it has not received consistent information from Ecology about the
20 amount of its water rights. However, more recently, Ecology has been *very clear* with the City that Groundwater
21 Certificate No. 3561-A (G2-*04924C) represents a non-primary (non-additive) right of 112 ac-ft/yr, which cannot
22 be included in the City's primary water rights. See Badger Decl. ¶ 28, Ex. C (the City's acknowledgement of
23 Ecology's position that the 112 ac-ft/yr non-additive water right is not a primary right). Thus, in 2006-2007, the
24 City only held 719.66 ac-ft/yr of primary water rights, not 831.66 ac-ft/yr as the City would represent (City's Br.
25 at 16) to this Court. Petitioner's Br., Ex. C (letter dated August 20, 2007 by Ecology's Hydrogeologist Tammy
26 Hall). Ecology's calculation of the City's water rights is not a "challenge" to the "validity" of the City's rights,
but an assessment of the amount of water rights held by the City, as granted by Ecology. Further, the April 26,
2002 letter written by Ecology employee Jill Walsh to the Department of Health in relation to the City of Yelm's
Water System Plan describing the City's rights as being "currently limited to 676 acre-feet per year" made no
distinctions about whether these water rights were primary or non-additive or both. Even if the 676 ac-ft/yr figure
used by Ms. Walsh could be read to have inadvertently added the primary portion of the City's water rights (564
ac-ft/yr) to the non-additive portion of the City's rights (112 ac-ft/yr), Ecology has since informed the City that it
considers Groundwater Certificate No. 3561-A (G2-*04924C) to represent a non-additive right for 112 ac-ft/yr.
Petitioner's Br., Ex. C; Badger Decl. ¶ 28, Ex. C.

⁶ This recently acquired and changed water right was previously associated with the Tahoma Valley Golf
and Country Club water right.

1 quantity of primary water rights including the recently acquired 77 ac-ft/yr water right) equals
2 a 113.87 ac-ft/yr deficit. However, because this matter is a record review, it appears that the
3 Court's review of the potable water supply determinations made below for the preliminary
4 subdivision approvals is confined to the 719.66 ac-ft/yr primary water right figure.

5 In addition, Ecology understands that the first phase of the Tahoma Terra developments
6 (Tahoma Terra Phase 1), which already received final subdivision approval from the City of
7 Yelm prior to the date of the preliminary subdivision approvals at issue in this matter, have yet
8 to fully hook-up to the City's municipal supply. TTPH Br. at 5, 6, 15. The City of Yelm has
9 issued subdivision approvals for 463 new residential units, of which only 90 have received
10 building permits to date. *Id.* Assuming homes have been built on those 90 lots and they are
11 connected to the City's water supply, 373 Tahoma Terra Phase 1 residential units have not
12 been connected to the City's municipal supply. *Id.* This means that there will be additional
13 demand on the City of Yelm's potable water supply as new building permits are issued by the
14 City for the remainder of the 373 residential units that previously received final subdivision
15 approval. Because this additional demand has yet to be realized as part of the entire water
16 supply demand, the City of Yelm's water deficit is further exacerbated.

17 Finally, the City of Yelm's preliminary subdivision approvals under appeal to this
18 Court all include a similar provision stating the following:

19 The applicant must provide a potable water supply adequate to serve the
20 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.

21 See TTPH's Br., Ex. 15.⁷ This provision allows the determination of appropriate provisions for
22 potable water supply to be made at *either* the time of final plat approval, or at the later building
23 permit stage.

24 ⁷ Although there were five separate hearing examiner decisions on reconsideration (all under appeal in
25 this matter), Ecology will also cite to the Tahoma Terra Phase II Decision on Reconsideration (dated December 7,
26 2007) as a representative copy of all of the Hearing Examiner's decisions that are at issue in this case. TTPH's
Br., Ex. 15.

IV. THE SUBDIVISION PROCESS

Subdividing land requires essentially a two-step process: preliminary plat and final plat approval. The first stage of the subdivision process is where one applies for a preliminary plat (or binding site plan) proposing subdivision of the land. *See* 17 William B. Stoebe & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 5.3 at 279 (2d ed. 2004). If the local government determines, after inviting public comments and holding a public hearing, that the provisions of RCW 58.17.110, other applicable state law, and the local government regulations have been met, a preliminary plat application can be approved. *Id.* at 279-282. Even if all of the requirements of RCW 58.17.110 are not met upfront, prior to preliminary plat approval, a local government can condition a preliminary plat to ensure that all of the requirements of RCW 58.17.110 are met prior to granting final plat approval. *Id.* at 282-283.

After a preliminary plat has been approved, all the requirements of the State Subdivision Law, local government regulations, and the conditions of the preliminary plat approval must be met. *See HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468-469, 61 P.3d 1141 (2003). It is at this stage in the subdivision process when land is cleared (including removal of trees if necessary) and graded in order to accommodate the subdivision. This preliminary stage requires the installation of all improvements, such as streets, alleys, sidewalks, electrical hook-ups, telephone lines, sewage disposal, and water lines.⁸ *Id.*

The second stage of the subdivision process is where the applicant then submits an application for a final plat. *Id.* This is essentially the stage where the local government verifies that all of the conditions of the preliminary plat approval have been met, including confirmation that all required improvements have been installed according to specifications. *Id.* Upon making this confirmation, the local government can then approve the final plat for

⁸ If all improvements are not installed prior to the final plat stage, the State Subdivision Law provides that local governments can require the posting of bonds to insure all improvements will be installed within a specified period of time. RCW 58.17.130.

1 the subdivision. *Id.* After the local government approves and records the final plat, the
2 subdivided lots can then be sold. *See* RCW 58.17.200; RCW 58.17.205. It is after final plat
3 approval where one then applies for a building permit in order to commence construction of a
4 residence or building on the subdivided lot. *See* RCW 19.27.

5 **V. ECOLOGY'S INTEREST IN THIS MATTER**

6 The Washington State Legislature established Ecology as the administrator of water
7 resources: one of our state's most precious natural resources. *See* RCW 43.21A; RCW 90.03;
8 RCW 90.14; RCW 90.44; RCW 90.54. Ecology administers Washington's water permitting
9 system through issuance of decisions related to applications for water rights for surface water
10 diversions and groundwater withdrawals. RCW 90.03.290; RCW 90.44.060. Ecology also
11 processes and issues decisions on applications for changing and transferring existing water
12 rights. RCW 90.03.380; RCW 90.44.100. Ecology is the agency charged with determining
13 whether a water right permit can be granted. RCW 90.03.290; RCW 90.44.060;
14 RCW 90.03.380; RCW 90.44.100. The Washington Water Code requires that Ecology make
15 findings about whether water sought for use can be beneficially used and whether water
16 sought is physically and legally available for such use. *See Postema v. Pollution Control*
17 *Hearings Bd.*, 142 Wn.2d 68, 94-95, 11 P.3d 726 (2000). Ecology is charged with
18 determining whether such an application for water use would impair existing water right
19 holders or be detrimental to the public welfare. *Id.*

20 Ecology specifically regulates water rights in the Nisqually River Basin, Water
21 Resource Inventory Area 11. *See* WAC 173-511. The Nisqually River is regulated pursuant
22 to a minimum instream flow rule adopted by Ecology. *See* WAC 173-511-030. Numerous
23 tributaries to the Nisqually River, including Yelm Creek, are closed to further appropriation
24 under Ecology's rule. *See* WAC 173-511-040. Ecology has also established standards for
25 groundwater withdrawals in the Nisqually River Basin. WAC 173-511-050; *see, e.g.,*
26 *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000). Ecology's

1 instream flow rules were established in order to protect the Nisqually watershed, including the
2 watershed's various instream values related to habitat, aesthetics, and fish. WAC 173-511-
3 010; *see* RCW 90.54.020(3). The City of Yelm's water rights and the water associated with
4 its pending water rights applications (that are directly related to whether the City of Yelm will
5 be able to obtain additional municipal supply to serve these new residences) are located within
6 the Nisqually River Basin. Petitioner's Br., Ex. A.

7 In addition, Ecology has authority to issue enforcement orders and penalties to those
8 who violate the Washington Water Code or the terms and conditions of water rights.
9 RCW 90.03.600; RCW 90.03.605. Ecology's participation as a friend of the court in this
10 matter is not an attempt to either "adjudicate" the City of Yelm's water rights or to "enforce"
11 against the City through the instant case. Notwithstanding, Ecology is interested in
12 highlighting the problem of granting a preliminary plat or binding site plan that defers
13 securing potable water supply to the building permit stage, when there is insufficient water to
14 supply the proposed development. Ecology notes that it has authority to enforce against the
15 City of Yelm if it exceeds its water limitations. However, Ecology is also attempting to be
16 proactive by participating in this matter so as to prevent possible water right violations by the
17 City of Yelm, as well as other water purveyors, by over-committing water supply in
18 contravention of RCW 58.17.110.

19 Ecology's interest in participating in this case is to ensure that the status and content of
20 the water rights and pending applications for additional water rights held by and related to the
21 City of Yelm are accurately calculated in terms of the facts presented to the Court. In
22 addition, Ecology's interest in this matter relates to the interpretation of RCW 58.17.110 and
23 the timing of when local governments must determine whether appropriate provisions have
24 been made for potable water supplies in subdivision decisions. Ecology has a strong interest
25 in this case because of the overlap between the substance and timing of local government
26

subdivision decisions and Ecology's role in processing related applications for new water rights and changes and transfers of existing water rights.

VI. ARGUMENT

A. Standard of Review

As provided under the State Subdivision Law, the appeal of the City of Yelm's decisions to approve five new preliminary subdivisions is reviewable under the Land Use Petition Act (LUPA), RCW 36.70C. RCW 58.17.180. This Court has authority to grant relief in a LUPA appeal if it determines that:

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

RCW 36.70C.130(1).

B. The City Of Yelm's Preliminary Subdivision Approvals Fail To Meet The State Subdivision Law And Yelm's Municipal Code

1. The State Subdivision Law and Yelm's Municipal Code

This Court must determine whether the City of Yelm's five preliminary subdivision approvals at issue in this matter comport with the requirements of the State Subdivision Law and the Yelm Municipal Code (YMC). RCW 58.17.110(2) requires that upon approval of subdivision decisions that local governments ensure that there exists "[a]ppropriate provisions are made for . . . potable water supply" and that "the public use and interest will be served by the platting of such subdivision." The relevant portion of RCW 58.17.110(2) reads 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 public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for

1 students who only walk to and from school; and (b) *the public use and interest*
2 *will be served by the platting of such subdivision and dedication.*

3 (Emphasis added.) In addition, the State Subdivision Law provides that its purpose “is to
4 regulate the subdivision of land and to promote the public health, safety and general welfare in
5 accordance with standards established by the state . . . to facilitate adequate provision for
6 water, . . .”. RCW 58.17.010.

7 The Yelm Municipal Code has virtually identical provisions requiring that its Hearing
8 Examiner make written findings that “appropriate provisions” are made for potable water
9 supply upon acting on subdivision applications. YMC 16.12.170; YMC 16.32.065. The Yelm
10 Municipal Code also requires that the Hearing Examiner make findings that the “public interest
11 will be served” by allowing the subdivision of the land as proposed. *Id.*

12 **2. The Hearing Examiner’s Decisions on Reconsideration fail to properly**
13 **condition the preliminary subdivision approvals to ensure that appropriate**
14 **provisions will be made for potable water supply as a prerequisite for final**
plat approval

15 The crux of this appeal is whether the condition on the Hearing Examiner’s Decisions
16 on Reconsideration (dated December 7, 2007) for the five preliminary subdivisions regarding
17 the potable water supply determination was legally adequate. All of the subdivision approvals
18 include a similar provision stating the following:

19 The applicant must provide a potable water supply adequate to serve the
20 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.

21 Petitioner’s Br., Ex. K (emphasis added). The “condition” included in the City of Yelm’s
22 preliminary subdivision approvals allows the *option* (per the Hearing Examiner’s use of
23 “and/or” in the condition) of the potable water supply provisions to be made as late as the
24 building permit stage. The Court should order that the Hearing Examiner’s reference to the
25 building permit stage in the water supply condition be struck. The deferral of making
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1 appropriate provision for potable water supply to the building permit stage is contrary to the
2 State Subdivision Law, the Yelm Municipal Code, and the public interest.

3 The term “appropriate provision” is not defined in RCW 58.17. Words should be given
4 their ordinary meaning when there is no statutory definition of a word to provide guidance.
5 *State v. Athan*, 160 Wn.2d 354, 369, 158 P.3d 27 (2007). When words are not defined in a
6 statute the courts often rely on dictionary definitions to supply the ordinary meaning. *Id.* The
7 word “appropriate” is defined as “specially suitable,” “fit,” and “proper.” *Webster’s Third*
8 *New International Dictionary* 106 (1971). The dictionary definition of “provision” is “the act
9 or process of providing” and the definition of “provide” is “to make ready,” “to procure in
10 advance,” and to “get ready beforehand.” *Id.* at 1827. Taken together, these definitions lead to
11 the interpretation that “appropriate provision” for potable water supply means that one must
12 procure in advance a proper, suitable, and firm supply of potable water.

13 Ecology urges this Court to hold that a proper and suitable procurement of potable
14 water supply is one where there is a legal water supply that would be available for use by the
15 development as a condition precedent to approval of a final plat. The intent of the required
16 finding of “appropriate provisions” for potable water supply under RCW 58.17.110 is to screen
17 out clearly infirm development proposals. Ecology submits that an infirm development
18 proposal includes a proposal to subdivide land for residential development where the developer
19 is relying on a water purveyor that lacks sufficient quantity of potable water to actually supply
20 the proposed new residences.⁹

21 Ecology takes the position that if appropriate provisions are not made for potable water
22 supply at the time of preliminary plat and binding site plan approval, those approvals must be

23
24 ⁹ The fact that the Building Permit Statute (RCW 19.27.097) requires “evidence of an adequate water
25 supply” does not in any way obviate the requirement of RCW 58.17.110 for “appropriate provisions” when the
26 final plat is approved. Both requirements may overlap in instances where lots are part of a subdivision or
shortplat, but no such overlap would exist for single lots that are not part of either. The State Subdivision Law
preceded the Building Permit Statute by several decades, and the latter did not in any way amend or evidence an
intent to weaken the requirements of the former. *Compare* RCW 58.17.110 with RCW 19.27.097.

1 explicitly conditioned to require that potable water supplies actually be secured and available
2 for the intended use prior to final plat approval. In order for a subdivision to meet the
3 provisions of RCW 58.17.110, a preliminary permit can be conditioned requiring that firm
4 provisions for potable water not in place at preliminary approval stage can be arranged after
5 preliminary subdivision approval but before final subdivision approval. *See e.g. Miller v. City*
6 *of Port Angeles*, 38 Wn.App. 904, 908-909, 691 P.2d 229 (1984). The reason why a
7 conditional approval is acceptable for a preliminary plat but not a final plat is that
8 RCW 58.17.110 requires appropriate provisions to be *present* for the “approval” of a
9 subdivision, and that approval is complete when the final plat is approved. Thus, since the
10 preliminary plat is not the “final” approval of the plat, the actual satisfaction of the
11 “appropriate provisions” may be delayed until the final plat approval.¹⁰ The clear intent is that
12 once platting is done, any buyer of that development would have assurance that all required
13 infrastructure is legal and physically feasible, and water needed for use at the subdivision is
14 secure.

15 Respondents Windshadow, LLC, Elaine C. Horsak, and Richard E. Slaughter admit in
16 their response brief that both the State Subdivision Law and the Yelm Municipal Code “require
17 that, before approving a final plat, the City must make a determination as to the adequacy of
18 the water supply.” Brief of Respondents Windshadow, LLC, Elaine C. Horsak, and Richard E.
19 Slaughter (Windshadow Br.) at 3. These respondents offer an alternative to the Court that the
20 clause in the preliminary subdivision approvals that allows potable water supply adequacy

21 ¹⁰ This interpretation of RCW 58.17.110 is consistent with the holding in *Topping v. Pierce Cy. Bd. of*
22 *Comm’rs*, 29 Wn.App. 781, 630 P.2d 1385 (1981). The *Topping* Court did not rule that “appropriate provisions”
23 for a preliminary plat may be based on as yet contingent future arrangements to be satisfied as late as the *building*
24 *permit stage*. By the time building permits are sought, the site may be irrevocably altered in such a way and at
25 such great expenditure that the City may feel compelled to approve building permits despite inadequate water
26 supply. Lots are typically purchased with an expectation of water supply for the proposed residence. The
statutory requirement of RCW 58.17.110 of “appropriate provisions” for potable water supply would be rendered
all but meaningless if it may be satisfied by simply stating in a preliminary plat that “appropriate provisions” must
be in place before a building permit is issued. The City’s reading of RCW 58.17.110 renders the required finding
of “appropriate provisions” for potable water supply vacuous. Under it, “appropriate provisions” can be found in
all cases by simply stating in the plat approval that actual legal potable water supply must be shown prior to
issuance of building permits, and not prior to the final plat approval itself.

1 determinations at the building permit stage be stricken from the condition at issue. Ecology
2 agrees that this proposed amendment to the Hearing Examiner's condition to ensure that
3 appropriate provisions are made for potable water supply before approval of the final plats is
4 an adequate remedy and would produce a revised approval that complies with the law.
5 Further, such a remedy is within the Court's jurisdiction to render.¹¹

6 **3. Pending water right applications do not constitute "appropriate**
7 **provisions" for potable water supply**

8 The City of Yelm is designated as the purveyor of potable water for the proposed
9 subdivisions at issue in this appeal. See TTPH's Br., Ex. 15. Ecology acknowledges that the
10 City is attempting to increase its municipal supply. See Badger Decl., ¶¶ 16, 17. The City has
11 applications pending that seek new water rights as well as seek changes and transfers of
12 existing water rights. *Id.* However, pending applications do not guarantee that new or changed
13 water rights will be issued by Ecology to the City of Yelm. As described in more detail, *supra*
14 in § V, Ecology's evaluation of new water right applications and applications for changes and
15 transfers to existing water rights must pass a stringent statutory test. RCW 90.03.290; RCW
16 90.03.380; RCW 90.44.060; RCW 90.44.100. Ecology's review of water right applications is
17 a complicated process that includes evaluations of hydrogeology and other scientific factors, as
18 well as the assessment of existing water rights and whether such rights will be impacted by
19 proposed new water rights or changes and transfers of existing rights.

21 ¹¹ The City implies that the Court lacks jurisdiction over this case because it believes that the Petitioner is
22 actually challenging water supply determinations at the final plat and building permit stage. City's Br. at 8-9.
23 This appeal is about whether the condition on the *preliminary subdivision approvals* was appropriate. Because
24 the City allowed "appropriate provisions" to be made after final plat approval, i.e., at the building permit stage,
25 Ecology submits that the *preliminary subdivision approvals* are unlawful. This issue is squarely before the Court.
26 The City also attempts to portray the Hearing Examiner's condition as intending to require appropriate provisions
of potable water supply only prior to final plat (and not necessarily allowing deferral until the building permit
stage). City's Br. at 25. Because the language in the Hearing Examiner's condition is susceptible to interpretation
(since it employs "and/or") as to when water supply must be secured, then the condition should be amended to be
made clear. And if the City truly believes this was the Hearing Examiner's intent, then the City should not object
to striking the offensive clause.

1 Because the City does not currently hold sufficient water rights to supply these
2 additional residential units (*see* § VI.B.5 below), the City will need to firmly secure additional
3 water supply to serve this new demand before final plat approval. If the water rights needed
4 for these new developments have yet to be approved for use by Ecology at the time of approval
5 of the final plat, Ecology submits that “appropriate provisions” have not been made for
6 securing a potable water supply as RCW 58.17.110 requires.

7 **4. Public policy supports the requirement that potable water supply be firmly**
8 **in place no later than final subdivision approval**

9 Sound public policy supports Ecology’s interpretation of RCW 58.17.110 that
10 appropriate provisions for potable water supply should firmly be in place prior to final
11 subdivision approval. Waiting for the building permit stage to make such provisions, well after
12 physical alteration of the development site and expenditure of large financial outlays, is
13 contrary to public policy and the public interest. Further, water is a limited natural resource
14 that is an absolutely necessary component for residential development. Acquiring new water
15 rights or changing and transferring existing water rights to provide additional water supply is a
16 difficult proposition this day and age.

17 Prior to final plat approval, all of the required improvements must be in place, and if
18 water is secured well in advance before the improvements must be installed, those
19 improvements would not be a wasted effort. Public policy supports having the questions
20 related to available water supply answered before developers further invest in improvements
21 and infrastructure. Having water in place early in the process would also eliminate the
22 possibility of a lot owner’s expectations being dashed and his or her investment being stranded
23 because there is no water to serve the actual lot. Public policy also supports reconciling the
24 rate of subdivision approvals with the amount of available water supply, so that the cart does
25 not get before the horse, and Ecology’s enforcement of water right limitations is not triggered.

1 This type of sound planning is consistent with Yelm's Municipal Code, the State Subdivision
2 Law, and the Growth Management Act, RCW 36.70A.

3 **5. The City of Yelm's water right portfolio is not sufficient to meet the needs**
4 **of the 568 proposed new residential units**

5 The City of Yelm's municipal water supply does not have enough capacity to cover the
6 additional 190.87 ac-ft/yr of water needed to serve the 568 new residential connections
7 associated with the five preliminary subdivision approvals. Because this LUPA appeal is a
8 record review, the Court looks to the amount of water rights held by the City of Yelm during
9 the time of the proceedings below. The record demonstrates, and it is Ecology's position, that
10 at the time the Hearing Examiner issued the subject preliminary subdivision approvals, the City
11 of Yelm held 719.66 ac-ft/yr of total primary water rights.¹²

12 The City of Yelm's usage records show that the amount of water used by the City in
13 recent years exceeds the amount of water that it holds. Petitioner's Br., Ex. A. For example, in
14 2006, the City of Yelm used 766 ac-ft/yr of water, which exceeded the City's legal limit by
15 46.34 ac-ft/yr. *Id.* To add the additional supply needed for the five new subdivisions (190.87
16 ac-ft/yr), the City would need a total of 956.87 ac-ft/yr of primary water rights (190.87 ac-ft/yr
17 new need + 766 ac-ft/yr actual historical use from 2006) to serve its present population and the
18 new subdivisions. Even if the City of Yelm stayed within the legal limits of primary water
19 rights in the amount of 719.66 ac-ft/yr, it will still need a total of at least 910.53 ac-ft/yr of
20 primary water rights to adequately serve its current needs along with these new subdivisions.

21 The City of Yelm lacks the requisite primary water rights to supply 190.87 ac-ft/yr of
22 additional potable water needed for the five new preliminary subdivision approvals. Ecology
23

24 ¹² Ecology's presentation of facts and information to this Court regarding the quantity of water rights
25 held by the City of Yelm is absolutely within Ecology's purview as the water resources manager for the state.
26 The water right permits and certificates held by the City were issued to it by Ecology. Ecology's description of
the quantity of water authorized under the City of Yelm's current water rights is entirely appropriate and not
prohibited by any law.

1 acknowledges that the City has put considerable effort into water saving and conservation
2 efforts. However, this still does not change the fact that based on the City's current water right
3 portfolio and recent water use records the City does not hold enough primary water rights to
4 supply these five new subdivisions.

5 The Windshadow Brief argues that the 300 gpd per 1 ERU figure from the City
6 Comprehensive Plan should not be relied on to determine the gallons per day figures required
7 to serve these new residential units, but that based on a calculation found in the Yelm
8 Municipal Code, the ERU figure should reflect 224 gpd rather than 300 gpd. Windshadow
9 Br. at 11, n.6. Further, per Windshadow's calculations, it asserts that the 568 residential units
10 actually translates into 542 ERUs (not 568 ERUs) due to the assignment of 0.80 ERU per 1
11 unit in a fourplex and 0.75 ERU per 1 unit in a condominium. Windshadow Br. at 10. Even if
12 the water need for these new subdivisions was based on a calculation of 542 ERUs times 224
13 gpd, there is still a need for additional water supply to cover these subdivision approvals in the
14 amount of 136 ac-ft/yr ($542 \text{ ERU} \times 224 \text{ gpd} \times 365 \text{ day per year} = 44,313,920 \text{ gallons per year}$
15 which equals 136 ac-ft/yr).

16 Furthermore, Ecology understands that the City of Yelm previously issued final
17 subdivision approvals for 463 additional residential units related to the first phase of the
18 Tahoma Terra Master Planned Community (Tahoma Terra Phase 1). TTPH Br. at 5-6.
19 Although the subdivision approvals for Tahoma Terra Phase 1 are not before this Court, the
20 additional *water demand* for these residential units *directly* relates to the analysis of whether
21 the City has adequate water to supply the 568 additional new residential units associated with
22 the preliminary subdivision approvals at bar. TTPH explains that only 90 building permits
23 have been issued for residential units associated with the Tahoma Terra Phase 1 subdivisions.
24 TTPH Br. at 15. Thus, assuming that these 90 lots have been built-out and are connected to the
25 City's water supply, 373 Tahoma Terra Phase 1 residential units have not been connected to
26 the City's municipal supply ($463 \text{ new residential units} - 90 \text{ building permits} = 373 \text{ lots not}$


1 connected to the City's Supply). This means that there is an additional demand on the City of
2 Yelm's potable water supply that has been approved through the subdivision process that has
3 yet to be realized. This circumstance, coupled with the City of Yelm's use of water in excess
4 of its legally allotted 719.66 ac-ft/yr municipal water rights over the last few years, as
5 demonstrated in the record below, shows that the City of Yelm does not currently have
6 sufficient primary water rights to supply the new residences associated with the subject
7 preliminary subdivision approvals. The City must ensure that additional water is firmly in
8 place before the final plat approval can be granted as the State Subdivision Law requires.

9 VII. CONCLUSION

10 For the foregoing reasons, the State of Washington Department of Ecology respectfully
11 requests that the Court hold that RCW 58.17.110 requires that appropriate provisions for
12 potable water supply must be made no later than final plat approval. The pendency of
13 applications that seek new water rights or changes and transfer to existing water rights is not
14 enough to meet the requirement for "appropriate provisions" for a potable water supply. The
15 Court should hold that water rights needed to supply the development must actually be
16 approved and available for such development no later than final plat approval.

17 DATED this 25th day of September, 2008.

18 ROBERT M. MCKENNA
19 Attorney General

20 
21 MAIA D. BELLON, WSBA # 24777
22 Assistant Attorney General
23 Attorneys for
24 State of Washington Department of Ecology
25 (360) 586-6750
26

☐ EXPEDITE
☐ No hearing is set
☒ Hearing is set:
Date: Monday, October 1, 2008
Time: 9:00 a.m.
Judge/Calendar: Judge Chris Wickham

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

JZ KNIGHT,

Petitioner,

No. 08-2-00489-6

V.

CERTIFICATE OF SERVICE

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

Respondents.

Pursuant to RCW 9A.72.085, I certify that on the 25th day of September, 2008, I caused to be served a copy of the Amicus Curiae Brief of the State of Washington Department of Ecology and this Certificate of Service, in the above captioned matter, upon the parties herein, as indicated below:

Keith E. Moxon
GordonDerr LLP
2025 First Avenue Suite 500
Seattle WA 98121

☐ U.S. Mail
☒ Overnight Express
☐ By Fax: 206/626-0675
☐ By Email: kmoxon@GordonDerr.com

Thomas McDonald
Cascadia Law Group
606 Columbia Street NW, Suite 212
Olympia, WA 98501

☐ U.S. Mail
☐ Hand Delivered
☒ Overnight Express
☐ By Fax: (360) 786-1835
☐ By Email:
tmedonald@cascadialaw.com

1	Curtis R. Smelser & Philip T. Kasin	<input type="checkbox"/> U.S. Mail
2	Schwabe Williamson & Wyatt PC	<input checked="" type="checkbox"/> Overnight Express
3	1420 – 5 th Avenue Suite 3010	<input type="checkbox"/> By Fax: 206/292-0460
4	Seattle WA 98101	<input type="checkbox"/> By Email: csnekser@schwabe.com
5		pkasin@schwabe.com
6	Kathleen Callison	<input type="checkbox"/> U.S. Mail
7	Law Office of Kathleen Callison PS	<input type="checkbox"/> Hand Delivered
8	802 Irving Street SW	<input checked="" type="checkbox"/> Overnight Express
9	Tumwater WA 98512	<input type="checkbox"/> By Fax: 360/570-0365
10		<input type="checkbox"/> By Email: callison@callisonlaw.com
11	Richard L. Settle	<input type="checkbox"/> U.S. Mail
12	Roger A. Pearce	<input checked="" type="checkbox"/> Overnight Express
13	Patrick J. Schneider	<input type="checkbox"/> By Fax: 206/447-9700
14	Foster Pepper LLC	<input type="checkbox"/> By Email: settr@foster.com
15	1111 – 3 rd Avenue Suite 3400	pear@foster.com ; schnp@foster.com
16	Seattle WA 98101	
17	Christopher W. Keay	<input type="checkbox"/> U.S. Mail
18	Johnson, Graffe, Keay, Moniz & Wick	<input checked="" type="checkbox"/> Overnight Express
19	LLP	<input type="checkbox"/> By Fax: 253/572-5413
20	2115 N 30 th Street Suite 101	<input type="checkbox"/> By Email: ckeay@jgkm.com
21	Tacoma WA 98403	
22	Allison Moss	<input type="checkbox"/> U.S. Mail
23	Dearborn & Moss PLLC	<input checked="" type="checkbox"/> Overnight Express
24	2183 Sunset Avenue SW	<input type="checkbox"/> By Fax: 206/923-0814
25	Seattle WA 98116	<input type="checkbox"/> By Email: amoss@dearbornmoss.com
26		
27	Clark McGowan	<input type="checkbox"/> U.S. Mail
28	c/o Trinity Land Development	<input checked="" type="checkbox"/> Overnight Express
29	310 - 29 th Street NE	<input type="checkbox"/> By Fax:
30	Puyallup WA 98372	<input type="checkbox"/> By Email:
31		
32	Bryce H. Dille	<input type="checkbox"/> U.S. Mail
33	Christopher M. Alston	<input checked="" type="checkbox"/> Overnight Express
34	Campbell, Dille, Barnett, Smith & Wiley	<input type="checkbox"/> By Fax:
35	317 South Meridian	<input type="checkbox"/> By Email: bryced@cdb-law.com
36	Puyallup, WA 98371-0164	calston@cdb-law.com
37		
38	Jack Long	<input type="checkbox"/> U.S. Mail
39	Samantha Meadows LLC	<input checked="" type="checkbox"/> Overnight Express
40	14747 Berry Valley Road SE	<input type="checkbox"/> By Fax:
41	Yelm WA 98597	<input type="checkbox"/> By Email:
42		jacklong@pacificfrontierllc.com

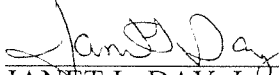
1 Jack Long
2 111 - 5th Street NE
3 Auburn WA 98002

☐ U.S. Mail
☒ Overnight Express
☐ By Fax:
☐ By Email:
jacklong@pacificfrontierllc.com

4 the foregoing being the last known business addresses.

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

7 DATED this 25th day of September, 2008, in Olympia, Washington.

8 
9 JANET L. DAY, Legal Assistant

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