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SUPERIOR COURT  
THURSTON COUNTY

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

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,  
  
Petitioner,  
  
v.  
  
CITY OF YELM; WINDSHADOW LLC;  
ELAINE C. 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.**  
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Seattle, WA 98121-3140  
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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 The applicant must provide a potable water supply adequate  
20 to serve the development at final plat approval and ~~or~~ also  
21 prior to the issuance of any building permit except as model  
22 homes as set forth in Section 16.04.150 YMC [Yelm  
Municipal Code].

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

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a. Yelm shall provide written notice to Petitioner of any application for final subdivision approval of any of the five subdivisions within <sup>business</sup> five days of Yelm's receipt of such application.  
b. Yelm shall provide Petitioner <sup>seven calendar</sup> ~~thirty~~ days written notice <sup>and an</sup> opportunity to comment <sup>to city staff</sup> 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.

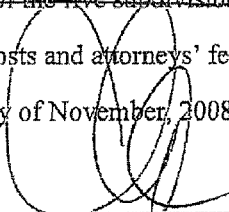
<sup>business</sup>  
<sup>This will provide</sup>  
<sup>Petitioner</sup>  
<sup>Prior to the date the</sup>  
<sup>city staff</sup>  
<sup>report is</sup>  
<sup>submitted to</sup>  
<sup>the city</sup>  
<sup>council.</sup>

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

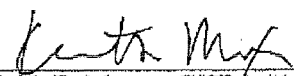
4. All parties shall bear their own costs and attorneys' fees.

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

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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.<sup>1</sup>

#### 15 I. FINDINGS OF FACT

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

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

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

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

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

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

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

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

c. In relevant part, YMC 16.12.310 provides:

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

d. YMC 16.12.330, further provides:

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

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

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



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

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

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

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

DATED this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

Presented by:

GORDONDERR LLP

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

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This will provide Petitioner to staff  
Prior to the date the City Staff report is submitted to the City Council.  
on any of the five final subdivisions.