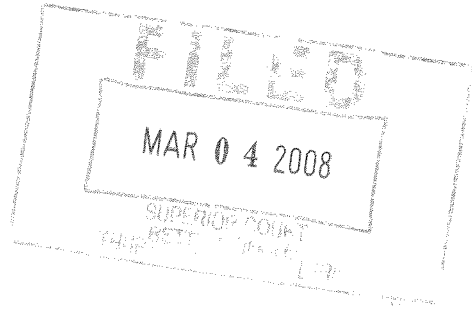


- ☐ EXPEDITE  
☐ No hearing set  
☐ Hearing is set

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Judge/Calendar: \_\_\_\_\_



SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

JZ 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**

LAND USE PETITION

Petitioner JZ Knight hereby brings this Land Use Petition pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"), to challenge 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).

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1. Name and Mailing Address of the Petitioners

JZ Knight  
14507 Yelm Highway SE  
Yelm, WA 98597

2. Name and Mailing Address of Petitioner's Attorney

Keith E. Moxon  
GordonDerr LLP  
2025 First Avenue, Suite 500  
Seattle, WA 98121-3140

3. Name and Mailing Address of the Local Jurisdiction Whose Land Use Decision is at Issue

City of Yelm  
105 Yelm Avenue West  
PO Box 479  
Yelm, WA 98597

4. Identification of the Decision Making Body, Together with a Duplicate Copy of the Decision

City of Yelm  
105 Yelm Avenue West  
PO Box 479  
Yelm, WA 98597

A copy of the City's final Decision, Resolution No. 481, adopted on February 12, 2008, is attached as **Exhibit A**.

5. Identification of Each Person to be Made a Party Under RCW 36.70C.040(2)(b)-(d)

Windshadow LLC  
315 - 39<sup>th</sup> Avenue SW, Suite 6  
Puyallup, WA 98373

Windshadow LLC  
310 - 29<sup>th</sup> Street NE  
Puyallup, WA 98372

Elaine C. Horsak  
14848 Berry Valley Road SE  
Yelm, WA 98597

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1 Windshadow II Townhomes, LLC  
2 310 - 29<sup>th</sup> Street NE  
3 Puyallup, WA 98372

4 Richard E. Slaughter  
5 14940 Berry Valley Road SE  
6 Yelm, WA 98597

7 Regent Mahan LLC  
8 3077 - 20<sup>th</sup> Street, Suite B  
9 Fife, WA 98424

10 Jack Long  
11 111 - 5<sup>th</sup> Street NE  
12 Auburn, WA 98002

13 Samantha Meadows LLC  
14 14747 Berry Valley Road SE  
15 Yelm, WA 98597

16 Petra Engineering LLC  
17 535 Dock Street, Suite 213  
18 Tacoma, WA 98402

19 TTPH 3-8 LLC  
20 4200 - 6<sup>th</sup> Avenue SE, Suite 301  
21 Lacey, WA 98503

22 TTPH 3-8 LLC  
23 4200 - 6<sup>th</sup> Avenue SE, Suite 401  
24 Lacey, WA 98503

25 6. Facts Demonstrating that the Petitioner Has Standing to Seek Judicial Review  
Under RCW 36.70C.060

6.1 Petitioner's interest in the City of Yelm's decision regarding these five proposed subdivisions is real and substantial. Petitioner is a property owner and taxpayer in the City of Yelm. Petitioner owns undeveloped property in the City of Yelm's water service area and has an interest in the development of this property, including an interest in obtaining water connections to the City of Yelm's municipal water system. Petitioner's personal and property rights and interests will be directly and adversely affected by the City's decision, which would result in substantial new development and new water

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1 demand in excess of the City's ability and legal rights to provide adequate water service.  
2 The effect would be a direct and adverse impact on Petitioner's ability to obtain future  
3 water service for her property within the City of Yelm's water service area.

4         6.2     In addition, Petitioner owns property and resides within the City of Yelm's  
5 Urban Growth Area (UGA) near all of the five proposed subdivisions. Petitioner has  
6 significant water rights approved by the Department of Ecology for her property. These  
7 water rights are constitutionally protected water rights administered under a permit system  
8 implemented by the Department of Ecology. Petitioner's water rights have priority over,  
9 and are protected against impairment by, all subsequent new uses of water, including new  
10 water rights and changes to all existing water rights, such as would be required to serve  
11 the proposed subdivisions.

12         6.3     Petitioner is entitled to the protection of a permit system that requires all  
13 water uses to be authorized under the State's permit system as required by Washington  
14 water law. *See* Chapters 43.21A, 43.27A, 90.03, and 90.44 RCW. This permit process  
15 allows Petitioner to participate in the required investigation and determination of water  
16 availability related to proposed new and revised water rights in order to avoid impairment  
17 to senior water rights and to protect the public interest.

18         6.4     Petitioner's property rights and interests with respect to Petitioner's  
19 property and Petitioner's water rights are directly and adversely affected by the City's  
20 decision, which would authorize new water demand and use without legal water rights in  
21 violation of Petitioner's rights under the water code, including the right to protect her  
22 water use from impairment. As an existing and senior water right holder, Petitioner would  
23 suffer real and substantial injury from the City's approval of these subdivisions without  
24 adequate evidence of water availability, because the water demand from these  
25

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1 subdivisions will result in a water withdrawal from the aquifer serving Petitioner's  
2 property to the detriment of Petitioner's personal and property rights.

3         6.5     The decision by the City of Yelm to approve the five proposed  
4 subdivisions that are the subject of this appeal will result in an "immediate, concrete, and  
5 specific injury" to Petitioner. The injury to Petitioner will directly result from the City's  
6 approval of the five proposed subdivisions. The interest she seeks to protect is within the  
7 zone of interests the statute was designed to protect. The Court has the ability and the  
8 authority to prevent the injury to Petitioner and others by reversing the City's decision to  
9 approve the five proposed subdivisions.

10         6.6     Petitioner has exhausted her administrative remedies to the extent required  
11 by law, because she appealed the Hearing Examiner's decision on each of the five  
12 proposed subdivisions to the City of Yelm City Council, which issued a final decision on  
13 February 12, 2008.

14     7.     A Separate and Concise Statement of Each Error Alleged to Have Been  
15             Committed

16         7.1     The City of Yelm's final decision on these five proposed subdivisions is an  
17 erroneous interpretation of the law, is not supported by substantial evidence in the record  
18 and is a clearly erroneous application of the law to the facts because the decision fails to  
19 comply with the requirements of State subdivision law (Chapter 58.17 RCW) and local  
20 subdivision and binding site plan code requirements (Yelm Municipal Code Chapter 16.12  
21 and Yelm Municipal Code Chapter 16.32).

22         7.2     The City of Yelm's final decision on these five proposed subdivisions is an  
23 erroneous interpretation of the law, is not supported by substantial evidence in the record  
24 and is a clearly erroneous application of the law to the facts because the decision fails to  
25

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1 comply with planning and concurrency requirements of the Growth Management Act  
2 (Chapter 36.70A RCW) and the “concurrency management” requirements of Yelm  
3 Municipal Code Chapter 15.40.  
4

5 7.3 The City of Yelm’s final decision on these five proposed subdivisions is an  
6 erroneous interpretation of the law, is not supported by substantial evidence in the record  
7 and is a clearly erroneous application of the law to the facts because the decision is not  
8 supported by, and is inconsistent with, the City’s Comprehensive Plan and the City’s  
9 Water System Plan (2002 Comprehensive Water Plan).

10 7.4 The City of Yelm’s final decision on these five proposed subdivisions is an  
11 erroneous interpretation of the law, is not supported by substantial evidence in the record  
12 and is a clearly erroneous application of the law to the facts because the City relied on  
13 erroneous information regarding its legal water rights in making determinations of current  
14 and future potable water supplies.  
15

16 7.5 The City of Yelm’s final decision on these five proposed subdivisions is an  
17 erroneous interpretation of the law, is not supported by substantial evidence in the record  
18 and is a clearly erroneous application of the law to the facts because the City failed to  
19 provide reasonable and non-speculative evidence of an adequate future potable water  
20 supply to serve these five proposed subdivisions.  
21

22 7.6 The City of Yelm’s final decision on these five proposed subdivisions is an  
23 erroneous interpretation of the law, is not supported by substantial evidence in the record  
24 and is a clearly erroneous application of the law to the facts because the City has failed to  
25

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1 provide any reasonable documentation of (a) current water service connections, (b)  
2 committed (but not yet connected) water service connections, or (c) estimated water  
3 demand attributable to previously approved residential and commercial development  
4 projects, all of which are necessary to make reasonable determinations of future water  
5 demand and reasonable determinations of the City's ability to provide water to serve the  
6 five proposed subdivisions.  
7

8 7.7 The City of Yelm's final decision on these five proposed subdivisions is an  
9 erroneous interpretation of the law, is not supported by substantial evidence in the record  
10 and is a clearly erroneous application of the law to the facts because the City's decision  
11 fails to require evidence of water availability at the time of final subdivision approval.  
12

13 7.8 The City of Yelm's final decision on these five proposed subdivisions is an  
14 erroneous interpretation of the law, is not supported by substantial evidence in the record  
15 and is a clearly erroneous application of the law to the facts because the City has failed to  
16 require compliance with SEPA and other conditions imposed on these proposed  
17 subdivisions in the City's prior land use approvals.  
18

19 7.9 The City of Yelm's final decision on these five proposed subdivisions is an  
20 erroneous interpretation of the law, is not supported by substantial evidence in the record,  
21 is a clearly erroneous application of the law to the facts, and is the result of unlawful  
22 procedure and failure to follow a prescribed process, because the City Council's public  
23 hearing and final decision on Petitioner's appeal were not confined to the record.  
24  
25

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1           7.10    The City of Yelm's final decision on these five proposed subdivisions is an  
2 erroneous interpretation of the law, is not supported by substantial evidence in the record,  
3 is a clearly erroneous application of the law to the facts, and is the result of unlawful  
4 procedure and failure to follow a prescribed process, because the City denied Petitioner  
5 the right to make objections at the City Council closed record public hearing to evidence  
6 presented by applicants and City representatives that was not included in the record  
7 submitted to the City Council.

8       8.       A Concise Statement of Facts Upon Which Petitioner Relies to Sustain the  
9               Statements of Error

10           8.1     In 2002, the City of Yelm adopted its current Water System Plan for its  
11 municipal water system (City of Yelm Comprehensive Water Plan). This plan was  
12 approved by the Washington Department of Health on September 16, 2002. The  
13 Department of Health's approval letter stated:

14               This approval does not provide any guarantee and should not be considered to  
15 provide any guarantee concerning legal use of water or subsequent water rights  
16 decisions by the Department of Ecology. Ecology's comment letter dated April  
17 26, 2002, indicates that there are uncertainties or deficiencies regarding your water  
18 rights. ... This [Department of Health] approval of your WSP [water system  
19 plan] does not affect any uncertainties or deficiencies regarding your water rights  
20 or the resolution of those uncertainties or deficiencies. Depending on Ecology's  
21 future action on your water rights, additional planning or other submittals may be  
22 required by the Department of Health.

23           8.2     The City's 2002 Water System Plan recognizes that the City's ability to  
24 supply water service to future customers will depend upon the City obtaining additional  
25 water rights.

          8.3     The City's 2002 Water System Plan adopts water service policies including  
a policy that "[t]ax parcels established after the date of adoption [of the 2002 Water



1 System Plan] will not be provided with City water service until additional water resources  
2 are obtained.”

3 8.4 The City’s Water System Plan adopts an ERU (Equivalent Residential  
4 Unit) value of 271 gallons per day (GPD), a value that does not include water lost or  
5 otherwise wasted by the system, typically 10 percent.

6 8.5 The City’s 2002 Water System Plan notes that future development within  
7 the southwest Yelm master planned community would require the developer to provide  
8 the City with sufficient water rights for development as well as the necessary  
9 infrastructure to supply water to the development.

10 8.6 The City’s 2002 Water System Plan specifically states that an update to the  
11 2002 Water System Plan “will be required for approval of the new master planned  
12 community.”

13 8.7 The City’s 2002 Water System Plan contains the following statement under  
14 Chapter 3 (System Analysis), Section 4 (Summary of System Deficiencies):

15 **Water Rights**

16 The City needs to acquire additional water rights to continue to meet customer  
17 demand. Chapter 4 of this report identifies the existing water rights and the  
18 estimated amount of new water rights required for future growth. The estimated  
additional water rights that are needed by the City to meet future demand have  
been identified in Chapter 4.

19 8.8 Chapter 4 of the 2002 Water System Plan acknowledges that “[i]t is  
20 becoming increasingly difficult, if not impossible, to obtain new or expanded water rights  
21 from DOE [Department of Ecology].”

22 Table 4-3 of the 2002 Water System Plan included the following table  
23 summarizing current and projected water right requirements.  
24  
25

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Table 4-3. Current and Projected Water Right Requirements <sup>1</sup>			
	2001	2007	2021
Existing Water Rights	676 acre-ft	676 acre-ft	676 acre-ft
Projected Water Volume	687 acre-ft	895 acre-ft	1,659 acre-ft
<b>New Water Rights Required</b>	<b>11 acre-ft</b>	<b>219 acre-ft</b>	<b>983 acre-ft</b>

8.9 The City's Water System Plan acknowledges the magnitude of this future water rights problem and specifically states the City's intent to ensure that water rights will be in place (approved by Ecology) prior to project acceptance for the master planned community in southwest Yelm.

The City is acutely aware that additional water rights are necessary to meet future demands. The City requires that, prior to the approval of any project in the MPC, sufficient water rights must be provided to the City by the project proponents to meet the demands of proposed developments. Prior to project acceptance, water rights need to be perfected, beneficial use demonstrated and approved for transfer by the DOE.

*WSP, p.4-14 (emphasis added)*

8.10 The "System Reliability" section of Chapter 4 of City's 2002 Water System Plan includes the following statement: "The City of Yelm does not have sufficient water rights to meet the projected future demand."

8.11 Table 4.2 of the City's 2002 Water System Plan summarizes the City's existing water rights and "potential" City water rights. Included in the list of "potential" City water rights are three wells located on the Thurston Highlands property with potential yields of 2000 afy<sup>2</sup>, 3,500 afy and 3,500 afy, respectively.

8.12 The City's 2002 Water System Plan includes an evaluation of its existing water rights.

<sup>1</sup> One acre-foot of water is the volume of water required to cover one acre of land to a depth of one foot (43,580 cubic feet), which is equivalent to **325,851** U.S. gallons.

<sup>2</sup> afy = acre-feet per year

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Well No.	Certificate No	Volume	
1		145 afy	
2		112 afy	Supplemental but <u>not additive</u> to the water rights of Well No. 1
3A	G2-26041C	356 afy	"The total quantity under all rights [Well No. 1, Well No. 2, and Well No. 3A] shall not exceed 501 acre-feet."
3A	G2-22969	63 afy	

8.13 Based on this water rights information, the City's total water rights at the time of the 2002 Water System Plan totaled 564 afy (501afy plus 63 afy). The City acknowledges this limitation on page 4-11 of the Water System Plan in its recommendation that approval of the Department of Ecology be requested to remove the maximum water rights withdrawal limit of 501 afy that is shown on certificate G2-26041C (Well No. 3A). The City claims that the water rights listed in its 2002 Water System Plan should total 676 afy. This claim ignores the City's admission that the limitation of 501 afy for the first three water rights is in effect and "should be removed from the water rights record." The City has not taken any action to remove the total water rights limit of 501 acre-ft for the first three certificates from its water rights record.

8.14 With respect to the potential water rights available from the three Thurston Highlands wells, the City's 2002 Water System Plan concludes that "until [the Department of Ecology] begins to issue new water rights for the Nisqually Basin, it is unlikely that a new well source will be approved and water rights granted."

8.15 On March 31, 2005, Tahoma Terra LLC submitted an application for approval of a 220-acre Master Planned Community of up to 1200 residential units.

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1           8.16    On May 26, 2005, the City of Yelm issued a SEPA (State Environmental  
2 Policy Act) threshold determination for the Tahoma Terra Master Planned Community.  
3 The City's "mitigated determination of non-significance" incorporated a condition from  
4 the environmental impact statement for the southwest Yelm annexation area stating that  
5 developers within the annexation area would be required to provide water rights sufficient  
6 to serve the development of the property. The City's SEPA determination also required  
7 that final subdivision approval of any phase of the Tahoma Terra development (beyond  
8 the first 89 lots) would not be granted without the Washington Department of Ecology  
9 approval of a transfer of water rights sufficient to serve the proposed development.  
10

11           8.17    On August 2, 2005, the Hearing Examiner issued a decision approving the  
12 conceptual master site plan for Tahoma Terra subject to a number of conditions.  
13 Condition 6 required that "prior to approval of any residential development west of  
14 Thompson Creek, the neighborhood commercial center should be improved and ready for  
15 the construction of commercial buildings." The Hearing Examiner also adopted the  
16 conditions of the City's SEPA determination issued on May 26, 2005, including the  
17 restriction on development beyond the first 89 lots prior to the conveyance of water rights  
18 sufficient to serve the proposed development.  
19

20           8.18    On December 26, 2006, the City of Yelm recorded a transfer of water  
21 rights approved by the Department of Ecology, in the amount of 155.66 afy (the Dragt  
22 water rights). This brought the City's total water rights to 719.66 afy.  
23  
24  
25

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1           8.19    On February 9, 2007, Regent Mahan, LLC submitted an application to  
2 divide 4.89 acres into a 66 unit townhome development (Wyndstone).

3           8.20    On February 23, 2007, Petra Engineering LLC on behalf of owner Jack  
4 Long submitted an application to develop 4.6 acres into 61 units of multi-family  
5 residential development (Berry Valley Phase I).

6           8.21    On February 28, 2007, Windshadow II Townhomes, LLC submitted a  
7 preliminary plat application to develop 24 units of four-plex townhome development on  
8 property owned by Richard E. Slaughter (Windshadow II).

9           8.22    On March 12, 2007, Windshadow LLC submitted a preliminary plat  
10 application to develop property owned by Elaine C. Horsack totaling 30.1 acres into 219  
11 residential units, including 56 attached townhome four-plex units and 163 single family  
12 lots (Windshadow I).

13           8.23    On April 27, 2007, TPH 3-8 LLC submitted a preliminary plat application  
14 to divide 32.2 acres of property into 198 single family lots (Tahoma Terra, Divisions 5-6).

15           8.24    Three of the proposed projects (Windshadow I, Windshadow II, and  
16 Tahoma Terra) requested preliminary plat approval under Yelm Municipal Code  
17 (“YMC”) Chapter 16.12. Two of the proposed projects (Wyndstone and Berry Valley I)  
18 requested binding site plan approval under YMC Chapter 16.32. Collectively, these five  
19 proposed subdivisions would add 568 units of residential development.

20           8.25    The City of Yelm’s municipal code requires that a water supply  
21 determination must be made as a condition of approval for both preliminary plats and  
22

1 proposed binding site plans. Under the City of Yelm's code, a proposed preliminary plat  
2 or binding site plan:

3 **shall not be approved unless the decision-maker [the Hearing Examiner]**  
4 **makes written findings that:**

- 5 • **Appropriate provisions are made for the public health, safety and general**  
6 **welfare [including] ... potable water supplies ...;**
- 7 • **The public interest will be served ...;**
- 8 • **Public facilities impacted by the proposed [subdivision or binding site**  
9 **plan] will be adequate and available to serve the subdivision concurrently**  
10 **with the development or a plan to finance needed public facilities in time**  
11 **to assure retention of an adequate level of service (YMC 16.12.170; YMC**  
12 **16.32.065).**

13 8.26 In June of 2007, in response to a public records request asking for the  
14 number of service connections currently maintained by the City, the City's Community  
15 Development Director informed the Petitioner that the City does not maintain a master list  
16 of the total number of water service connections currently committed by the City.

17 8.27 Public hearings on each of the five proposed subdivisions were held before  
18 the City's Hearing Examiner on July 23, 2007. The City and the applicants provided no  
19 water availability documentation to the Hearing Examiner at these public hearings.  
20 Petitioner provided extensive documentation to the Hearing Examiner showing that there  
21 were significant problems and "data gaps" related to the City of Yelm's ability to provide  
22 an adequate potable water supply to serve the five proposed subdivisions.

23 8.28 The City's Community Development Director testified at the public  
24 hearings that the City makes water availability determinations "in the staff report [for each  
25 project] as part of the concurrency analysis." However, the concurrency analysis in the  
City's staff report for each project does not include any fact-based determination  
regarding adequacy and availability of a potable water supply.

8.29 Because the City and the applicants had provided no documentation of  
water availability for the public hearing, the Hearing Examiner agreed to leave the record

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1 open to allow the City and the applicants to provide water availability information and to  
2 give the Petitioner an opportunity to respond. Post-hearing submissions to the record are  
3 listed by the Hearing Examiner in each Report and Decision of the Hearing Examiner  
4 dated October 9, 2007. *Hearing Examiner Report and Decision – Windshadow I, Ex. 1-13; Windshadow II, Ex. 1-13; Wyndstone, Ex. 1-14; Berry Valley, Ex. 1-15; Tahoma*  
5 *Terra, Ex. 1-20.* Additional post-hearing submissions to the record are identified in the  
6 Hearing Examiner’s Decision on Reconsideration dated December 7, 2007.

8 8.30 The Hearing Examiner approved each of the five proposed subdivisions.  
9 In his findings regarding water availability, the Hearing Examiner relied on one document  
10 provided by the City of Yelm suggesting that the City might achieve six-fold increase in  
11 its total water rights within four years - from 719.66 afy in 2007 to 4186 afy in 2012 . No  
12 evidence was offered by the City in support of the reasonableness of this speculative  
13 assumption, and this assumption is directly contrary to the City’s current Water System  
14 Plan, which describes the acquisition of such “potential” water rights as “unlikely.”

15 8.31 The City’s evidence shows that the City exceeded its water rights in 2006  
16 and 2007 and has not accounted for the water supply that will be needed to serve other  
17 previously approved projects.

18 8.32 Petitioner filed a timely appeal of each of the five Hearing Examiner  
19 decisions approving the proposed subdivisions. These appeals were consolidated for  
20 hearing before the Yelm City Council on January 22, 2007.

21 8.33 The City of Yelm issued a final decision approving the five proposed  
22 subdivisions on February 12, 2008.

23 9. Request for Relief, Specifying the Type and Extent of Relief Requested

24 Consistent with RCW 36.70C.140, Petitioner therefore respectfully requests that  
25 the Court enter:

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- 1           9.1     An order pursuant to RCW 36.70C.080 setting an initial hearing on  
2 jurisdictional and preliminary matters;
- 3           9.2     An order requiring the City of Yelm to submit to the Court a certified copy  
4 of the complete record in this matter;
- 5           9.3     An order granting a stay of action pending review pursuant to RCW  
6 36.70C.100;
- 7           9.4     An order granting Petitioner's Land Use Petition and reversing the City of  
8 Yelm's decision issued on February 12, 2008, which approved the five proposed  
9 subdivisions that are the subject matter of this Petition;
- 10          9.5     An order granting relief as deemed necessary by the Court to preserve the  
11 interests of the parties and the public, pending further proceedings or action by the local  
12 jurisdiction pursuant to RCW 36.70C.140;
- 13          9.6     A judgment for costs and attorneys' fees to Petitioner as may be allowed by  
14 law; and
- 15          9.7     Such other relief as the Court deems just and equitable.

16       Dated this 3<sup>rd</sup> day of March, 2008.

17                       Respectfully submitted,

18                       GORDONDERR LLP

19                       By: Keith E. Moxon  
20                       Keith E. Moxon, WSBA #15361  
21                       Attorney for Petitioner  
22  
23  
24  
25

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**City of Yelm  
Resolution No. 481**

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

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

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

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

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

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

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

***Conclusions of Law***

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

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

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

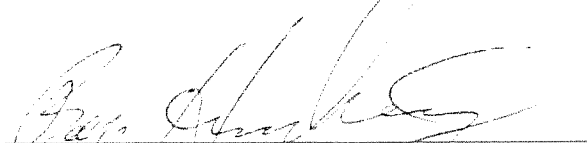
Water System Plan to administer its water system. [alleged errors of fact 3 and 6].

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

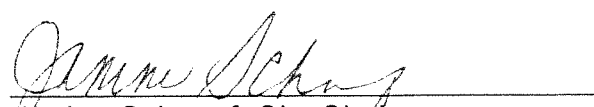
regulations, prevails over any inconsistent comprehensive plan provisions. [alleged errors of interpretation of the Comprehensive Plan 1 through 3].

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

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

  
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Ron Harding, Mayor

Authenticated:

  
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Janine Schnepf, City Clerk