Superior Court of the State of Washington
For Thurston County

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

LETTER OPINION

Dear Counsel:

A hearing in this action on Petitioner J Z Knight's Land Use Petition was held on October 1, 2008. The decision of the court follows.

At the time of argument, Petitioner had reduced the issues requiring adjudication to the following: (1) may the City of Yelm delay until issuance of building permits

proof of a potable water supply to support the development being permitted; and (2) what level of proof of adequate potable water must be shown to allow the development?

This petition is brought under the Land Use Petition Act ("LUPA"), RCW 36.70. Standards for granting relief are set forth in RCW 36.70C.130. Petitioner claims that the decision in this case by Respondent City of Yelm ("the City") should be reversed because (1) it is an erroneous interpretation of the law; (2) the City's determination of water availability is not supported by substantial evidence; and (3) the City's determination of water availability is a clearly erroneous application of the law to the facts.

The hearing examiner in this case had granted preliminary approval to five proposed subdivisions with the following condition:

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

At hearing, the City agreed to amend the language of this condition to remove "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and not as late as issuance of a building permit. Although Petitioner had earlier argued for proof at time of preliminary plat approval, she had withdrawn this request at hearing. The other parties appear to be in agreement with the City's position on this issue.

This resolution is consistent with the law. 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, all requirements must be met and confirmed in written findings before final approval. RCW 58.17.110. It is of course possible for the applicant to provide a bond or other assurance of meeting the final conditions. RCW 58.17.130. The law is clear that these conditions must be met before the building permit stage. The condition as written is an erroneous interpretation of the law. RCW 36.70C.130. The Court, therefore, will sign an order reversing the City on this issue and remanding it to the City to amend the condition accordingly.

The second issue, however, is still in dispute. Petitioner has presented evidence in the hearing below to support its position that the City has been issuing building permits since 2001 that committed it to the supply of water in excess of its water

rights. *Amicus* Department of Ecology indicates that at the time of the hearing in this case, the City held primary (additive) water rights authorizing use of a total of 719.66 ac-ft/yr. Ecology agrees with Petitioner that the City's usage records show that the amount of water used by the City in recent years exceeds its 719.66 ac-ft./yr primary water right allocation. After the record was closed, the City acquired and Ecology approved for municipal supply 77 ac-ft/yr of additional primary water rights. This brings the City's total primary water rights to 796.66 ac-ft/yr. Ecology calculates the resulting demand on the City following final approval of the subdivisions at issue in this case would be 910.53 ac-ft/yr. At present, therefore, the City does not have "a potable water supply adequate to serve the development ..."

The question, then, is what should the applicant-Respondents need to show at final plat approval regarding supply of potable water? The City asserts that it has a good record of developing additional water rights in time to service new customers. It also notes that many approved subdivisions have not been fully built and therefore are not drawing on the City's supply. Given the length of time necessary to plan, permit, approve, and build homes, the City argues it is unreasonable to require proof of available water rights for all approved (built and unbuilt) subdivisions at time of final approval. Petitioner, who holds her own water rights, argues that to allow the City to continue to provide final approval without committed water rights will lead to diminution of her own water rights.

Ecology, though not a party in this case, is the administrator of water resources in the State of Washington. RCW 43.21A, RCW 90.03, RCW 90.14, RCW 90.44, and RCW 90.54. The Washington Water Code requires that Ecology determine whether water sought is physically and legally available for use. The Nisqually River Basin is the subject of rules and restrictions regarding water appropriation because of the importance of stream flow in the basin. The City is in that watershed.

Respondent TTPH 3-8 (Tahoma Terra) has obtained water rights for transfer to the City to assist the City in meeting its obligation to ensure adequate potable water. Tahoma Terra argues that those transfers should be considered in determining whether the condition in the preliminary plat approval has been met in its case. The City argues that unbuilt subdivisions should not be considered in calculating the ability of the City to deliver potable water. In addition, the City argues it has a good record in developing additional capacity for potable water and it should not be subject to a limitation because of its present level of water rights when it will most likely have sufficient potable water when these subdivisions go online.

The City also argues that the question of what proof of ability to provide a potable water supply adequate to serve the development at final plat approval is not ripe for adjudication. Petitioner counters that it is not entitled to notice of final plat approval and that there may not be another clear opportunity for this issue to be considered by a court.

RCW 58.17.110 provides, inter alia, that

> (2) A proposed subdivision ... shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies ...; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

The Yelm Municipal Code (YMC) provides:

> A proposed subdivision and any dedication shall not be approved unless the decision-maker makes written findings that:
> A. Appropriate provisions are made for the public health, safety, and general welfare and for ... potable water supplies.
> 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.

So it is clear that the City must make findings of "appropriate provisions" for potable water supplies in this case by the time of final plat approval. The question of whether such a finding must be based on water rights held by the City at the time of final plat approval is apparently a case of first impression. Since final plat approval is expected at some time in the future and since a reviewing city or other governmental agency might be faced with a situation different than the apparent present circumstances of the City in this case, it seems appropriate to defer the determination of "appropriate provision" until the time of final plat approval. If the determination were to be made today on this record, this Court would conclude the City would have to require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. The City's suggested finding of a "reasonable expectation" based on historical provision of potable water would be considered insufficient to satisfy this condition.

This Court will remand the case to the City of Yelm for the amendment of the condition as described above, deleting the "/or" to make clear that the finding of adequacy must be made no later than final plat approval; and for further consideration of the applications consistent with this decision. Petitioner is entitled to notice of the entry of findings by the City on the issue of "appropriate provisions ... for potable water supplies" at such time as they are made on each application and may then seek appropriate court review, if necessary.

Counsel may present a revised proposed order consistent with this decision with notice to opposing parties on any civil motion calendar.

Sincerely,

Chris Wickham
Superior Court Judge

CC Clerk, for filing
Maia Bellon, Assistant Attorney General, *Amicus* Department of Ecology