

**TO:** Whatcom County Council Planning & Development Committee

**FROM:** City of Lynden  
Amy Harksell, Lynden Planning Director  
Bob Carmichael, Lynden City Attorney *R.C.*

**DATE:** October 27, 2009

**RE:** Lynden's Response to Questions from Council Planning & Development Committee

DISTRIBUTED TO  
OCT 27 2009  
ALL COUNCIL MEMBERS  
WHATCOM COUNTY COUNCIL

---

**Question 1.a:** What measures does the City have in place to ensure that the UGA expansion is compatible with adjacent agricultural use?

***Response to Question 1.a:***

The City has the following policies in its adopted Comprehensive Plan:

*From the Vision Policies (page 20-21) of Lynden's Comprehensive Plan*

4. The City of Lynden will advocate the preservation of agricultural land and will work to encourage agricultural resource, research, and service industries to locate within the City, as well as agricultural related "value added" industries.
5. The City of Lynden will help to support and maintain the viability of agriculture in Whatcom County by adopting a "Right-to-Farm" ordinance for those areas abutting agricultural lands. Included in this ordinance will be elements encouraging farmers to continue responsible farming techniques and the requirement of a buffer zone between residential and agricultural land uses.
6. The City of Lynden will support the efforts of farmers to gain sufficient water rights from the Washington Department of Ecology.

*From Growth Management Goals and Policies*

- 1.D The City will work to conserve rural and agricultural amenities by coordinating with Whatcom County to limit development outside of the designated urban growth areas. The City will encourage Whatcom County to deny conditional use permits or other approvals for uses outside an approved urban growth area that require urban service levels such as fire flow, sanitary sewer and police protection. (pg. 22).
- 2E. The City of Lynden will maintain a lot inventory, or land supply, sufficient for five years of growth, at the densities designated through the Comprehensive Plan. The City will also focus on the Boundary Review Board criteria for the recommendation of future annexations as well as the issues of capital improvements and financing. Where the establishment of a logical boundary for an annexation may cause the City to exceed the necessary acreage for the adopted land supply, the City will phase the zoning for development in order to maintain the five year supply of land zoned

appropriately for development. (pg. 23)

ANNEX 1. The City of Lynden will encourage the residential annexation of lands zoned UR-4, R5-A, and R2-A under Whatcom County zoning prior to the annexation of lands designated as AG, except where public health and safety requires the urban services provided by the City (i.e. sanitary sewer). (pg. 29)

The City of Lynden takes the policies it adopts seriously. During the last planning period, every subdivision near the fringe of the City was required to include a right-to-farm covenant – forcing new homeowners to recognize that while they were located within the City, the adjacent farming practices were supported. Where fencing or landscaping are appropriate buffers, those are included in the plat requirements.

In recent years a number of ag-related businesses have bumped against their boundaries and have looked outside the city for expansion. Since 1993, Lynden has taken an active role in keeping these businesses off the five acre parcels that abound in the County and finding them an appropriate location within the City, where services are available. Businesses like DariTech, Bogaard Hay, Whatcom Farmer's Co-Op Fertilizer plant, and Brim Tractor continue to be strong components of the business landscape within Lynden's city limits.

The City has also invested funds based on the policies listed above. In recent years, the City of Lynden partnered with the Bertrand Watershed Improvement District and the Public Utility District No. 1 to explore ways to improve flow in the Bertrand Creek and provide more water for irrigation. The price tag for that partnership was approximately \$45,000. In addition to funding this study, the City provides staff at WID meetings, is a member of the Whatcom Water Alliance (a group dedicated to promoting water conservation), participates in a newly formed regional water supply group, and continues efforts to secure regional water solutions rather than a singular solution for the City itself.

**Question 1.b: Does the City agree to work with the County on cooperative strategies to ensure protection of at least 100,000 acres of agricultural lands? If so, how does the City propose to accomplish this effort?**

***Response Question 1.b:***

First and foremost, the policies listed above show Lynden's dedication to protecting agricultural lands. The City would certainly be willing to work with Whatcom County on strategies to implement their stated goal of preserving 100,000 acres, but the City must have a seat at the table. The City will not participate in programs that it has not played a role in developing. The following actions are ways that the City of Lynden can assist Whatcom County in its preservation efforts.

- a. In the 2011 Comprehensive Plan Update, Lynden will provide land use and utility extension information for both the UGA expansion and urban reserve areas, showing the average planned density of the area at 7 dwelling units per net acre.

- b. In the 2011 Comprehensive Plan Update, Lynden will establish a TDR receiving zone to accept density transferred from agricultural lands and will establish a minimum density requirement in the single family zoning designations.
- c. If Whatcom County does not establish a transfer of development rights program to transfer density out of the agricultural lands and into the urban areas in conjunction with the 2011 update, the urban reserve area will be transferred to urban growth area with no further restrictions.

**Question 2.a:** Does the City agree that the County must show that the City has plans to, and the ability to, provide urban levels of service in the proposed UGA to the allocated population over the planning horizon?

***Response to Question 2.a:***

The City agrees that it must have completed capital facility planning for a water system with sufficient capacity to serve the population projected to be accommodated in the new UGA. The City has accomplished this with its 2008 water system plan.

- (i) City does not agree that specific line and appurtenance locations must be determined in advance.

The City need not, nor does GMA require, that the City map the precise locations of water and sewer lines and appurtenances in the proposed UGA prior to approval. Such an exercise would be pointless prior to specific development plans being brought forward and is not required for the capital facilities element. RCW 36.70A.070(3), mandates:

A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent.

Lynden's current Water System Plan and Sewer Plan are consistent with the above elements. If there is a change to Lynden's water or sewer service area, then it would be appropriate to amend these plans. For instance, In *Heikkila et al v City of Winlock*, Case No. 04-2-0020c, WWGMHB, FDO (April 15, 2005), the Petitioners argued that the City did not include options for extension of water service to a new major industrial development in its forecast for future needs and proposed locations and capacities for expanded or new capital facilities. *Heikkila et al* FDO at 28. The City indicated

that when an option is chosen by the major industrial development the City will need to amend its water system plan and also determine whether this change will require an amendment to its comprehensive plan. *Id.* at 29. The Board stated:

We agree with the City. There is nothing in the GMA indicating at what stage in the analysis of options for a change or addition to the City's capital facilities element it must be incorporated into the comprehensive plan itself. Under the circumstances here, the analysis of the options did not rise to the level of proposing a particular change to the City's capital facilities plan. When the option is chosen, the City may have to revise its comprehensive plan to account for what is actually proposed for future expansion. Until the policy choice is made concerning the option to pursue, however, it would be a needless exercise to incorporate possible options into the comprehensive plan only to have to go through another comprehensive plan amendment process to delete some of them when the final proposal is chosen.

*Conclusion:* The failure to include the options for extension of water service to the Cardinal MID in the capital facilities and/or utilities element of the City's comprehensive plan does not violate RCW 36.70A.040 or 36.70A.070."

*Id.* at 29-30. The important point is that GMA requires the existence of system capacity and the planning for system capacity (including funding) for the projected population in the proposed UGA. It does not require project specific infrastructure planning within the proposed UGA. Because Lynden's 2008 water system plan details a system with sufficient capacity to meet the projected population growth for Lynden's proposed UGA, Lynden's proposal is compliant with GMA.

- (ii) The County is not required to prove that the City currently has sufficient water rights to serve the projected population of the proposed UGA.

The GMA does not require the County to prove that the City currently has sufficient water rights to serve the projected population in the proposed UGA. Therefore, to the extent the above question is focused solely on water rights, the City does not agree that the County must show that the City presently has sufficient water rights to serve the projected population for the proposed UGA.

No GMA provision exists authorizing, much less requiring, that a County demonstrate sufficient water rights exist to serve a projected UGA population. Nor does Whatcom County have in place such a requirement. Nor does Whatcom County have in place any criteria or standards for making a determination on adequacy of water rights. If Whatcom County intended to accept a letter from Ecology as determinative of the adequacy of municipal water rights for purposes of UGA review, it should have a standard so stating in its comprehensive plan. Because Whatcom County has no such standard(s) in place, it may not deny Lynden's proposed UGA based on an Ecology letter.

There is good reason, however, that neither the GMA nor the Whatcom County Code contain any criteria or standards for determining water rights; and good reason that a letter from Ecology by itself should not be determinative. Only a superior court of the state of Washington may lawfully determine water rights. *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993).

There is no precedent in the State of Washington authorizing a County to deny a City's proposed UGA based on insufficient or uncertain water rights. Such a denial is particularly insupportable where the water rights are disputed by the City and unadjudicated. If the Whatcom County Council chooses this path, it will become the first to do so.

The only GMA context in which water right limitations have been raised as a means of affecting a designation is in the context of agricultural lands. Water right limitations were raised as means of limiting agricultural land designations in Kittitas County, where irrigation is necessary and where water rights have been adjudicated. In *Kittitas County Conservation et al, v. Kittitas County, et al.* (Case No. 07-1-0004c – August 2007), one of the County's four criteria for designation of agricultural land was: "The availability of adequate and dependable water supply." *Id.* at 47. Petitioner's argued against application of this criterion to exclude agricultural land:

The availability of water should not be a factor that limits the designation of agricultural land of long-term commercial significance, since "today's lack of water does not necessarily permanently exclude the possibility of water being available in the future," and "although water usage is tightly limited by historical water rights in the Yakima Basin, Washington's Water Code at RCW 90.03.380 allows for the transfer of water rights and water permits to allow water to be used on differing parcels of property." . . . The Petitioners cite the example in Kittitas County where fourteen separate water rights were transferred to enable the development of the Suncadia (MPR) Resort. Therefore, a parcel of land today that might not have legal right to water might be able to acquire water rights in the future.

*Id.* at 45. The Kittitas Board agreed with the above analysis:

This Board has already held that water or the lack thereof cannot be an excluding criteria. *Mike Williams et al. v. Kittitas County*, 95-1-0009 EWGMHB and Order finding Noncompliance. The fact the land does not have a water right or the water right is secondary should not be an excluding factor.

*Id.* at 48. While there are no cases in which a proposed UGA is determined based on water rights, one part of the analysis of the Board in *Kittitas* pertaining to irrigation dependant agriculture is quite analogous to water rights for a proposed UGA. Because water rights can change over time through transfer and acquisition of permits, they must not be held out as a basis for excluding a designation.

Moreover, it is important to remember that in the above *Kittitas County* case the County had a water related criterion (among four) in its comprehensive plan for determining agricultural lands of long-term commercial significance: to wit; "The availability of adequate and dependable water supply." The Board, however, ruled that the four criteria were noncompliant because the County failed to include how the criteria would be considered or the weight that would be given to the criteria. *Id.* at 47-50.

Here in Whatcom County, there are no water right related standards or criteria for designating a proposed UGA. To deny a proposed UGA on the grounds of insufficient water rights when there are no established standards or criteria for doing so would be noncompliant with GMA.

Moreover, there is a recent Superior Court decision out of Thurston County, presently on appeal to the Court of Appeals, which determined that the question of whether sufficient water rights for a development exist must be left open for final determination until the approval of the final plat. *Attachment A*. In light of this decision, it is hard to seriously argue that water rights must be defined and agreed upon before a UGA may be established.

The County has pointed to the existence of a disagreement over Lynden's water rights with the "state," presumably referring to correspondence from Mr. Dick Grout. Lynden is not aware that Department of Ecology has officially commented in this record. *Assuming arguendo*, that Mr. Grout's letter is an official comment from the Department from Ecology, it is important to understand the context of the disagreement. Department of Ecology administers water rights for the State, but it is not the arbiter of water rights. When the State Department of Health reviews and approves a municipal water system plan pursuant to its statutory authority to do so (Chapter 43.20 RCW), Ecology provides its opinion of the municipality's water rights. Ecology's opinion is not, however, sufficient to deny approval of the municipal water system plan. *Zender Thurston Letter to Stalheim dated September 9, 2009, Attachment C, Departments of Health and Ecology Joint Review Procedures for Planning and Engineering Documents, dated April 2007*.

According to the Health and Ecology Joint Review Procedures, if Ecology determines water rights are a limiting factor and the water system disagrees, Ecology may (1) seek voluntary compliance; (2) assess the need for additional enforcement actions; and (3) issue a regulatory order. *Id.* at 12. In Lynden's case, Ecology has done none of these things. Instead, Ecology entered into an agreement with Lynden in which they said they would "agree to disagree" about the City's water rights. *Zender Thurston Letter to Stalheim dated September 9, 2009, Attachment D, Memorandum of Agreement ("MOA")*.

Municipal water system plans establish the foundation for planning, funding, development and maintenance of municipal water systems. Chapter 43.20 RCW. These water system plans are completed consistent with GMA and should be the touchstone for determining whether sufficient municipal capital facility planning has been accomplished. *Id.* Health, not Ecology, approve municipal water system plans. Health will not reject a water system plan simply because Ecology opines that the municipality has insufficient water rights. Rather, Ecology is left with the enforcement authority described above, should it choose to exercise it. Ecology's view on a municipality's water rights cannot reasonably be held to thwart that municipalities proposed UGA when the associated population projection is supported by the City's adopted water system plan. Ecology simply does not play that type of role in the process and there is no statutory support for it having such a role.

- (iii) Lynden has sufficient water rights to serve the projected population for its proposed UGA.

*Assuming arguendo* that Whatcom County or the state legislature granted special authority to Ecology to make water right determinations in county comprehensive planning processes (which it has not), and also *assuming arguendo* that some meaningful standards or criteria were developed to

govern the process (no such standards or criteria exist), Ecology has still not provided any response to the detailed legal analysis and documentation provided by the City of Lynden in support of its water rights. *Zender Thurston Letter to Stalheim dated September 9, 2009, Attachment A, Abridged Legal Analysis of Lynden's Water Rights*. The County cannot say that the adequacy of water rights must be considered in determining a proposed UGA and then simply ignore the City's analysis offered to demonstrate the adequacy of such right. If the County decides municipal water rights will be grounds for determining whether services and facilities are sufficient to serve its proposed UGA, then the County has an obligation to consider the points and authorities raised by the municipality on the subject. So far as Lynden can tell, the County has yet to undertake any such analysis.

**Question 2.b.**

**Knowing:**

- 1) **that any shortage of land to accommodate growth would occur well into the planning horizon;**
- 2) **with growth monitoring, regular plan updates and UGA reviews providing for review and potential expansion of the UGA before the 20 years are up; and**
- 3) **that those intervening years will provide time for resolution of the disagreement over the extent of Lynden's water rights, either through acquisition or transfer of new rights, or through adjudication or settlement of existing claims, why should the County significantly expand the UGA into agricultural lands and allocate the population requested by the City now instead of allowing the questions to be resolved in the time between now and when a developable land shortage might occur?**

***Response to Question 2.b:***

- (i) GMA does not authorize the County to wait until "a developable land shortage might occur."

Unfortunately, Question 2.b. is based upon a fundamentally false premise. Whatcom County is mandated, in consultation with cities, to provide areas sufficient to accommodate urban growth that is projected to occur in the succeeding twenty-year planning period. RCW 36.70A.110(2); *See also, Countywide Planning Policies ("CPP's")*. Based upon the County's own land capacity analysis and detailed historical growth information provided by the City of Lynden, it is clear that additional UGA is necessary for Lynden to accommodate its population projection for the twenty year planning period. *See Zender Thurston Memorandum to Planning Commission and Council, September 9, 2009.*

Question 2.b. is premised on a false assumption that Whatcom County can disregard its legal obligation to plan for the projected population in 20 years as part of this mandated UGA update. GMA does not authorize the County to "wait until a developable land shortage might occur" before it designates a sufficiently sized UGA. In fact, waiting "until a developable land shortage might occur" is inconsistent with the County's GMA obligation to plan ahead for 20 years of population growth in

UGA's.<sup>1</sup> Waiting until a developable land shortage might occur is also inconsistent with the County's own CPP's, particularly those governing establishment of urban growth areas. Should the County take this path, it will remain in noncompliance.

- (ii) The Memorandum of Agreement ("MOA") entered into between the Department of Ecology and the City of Lynden is the "resolution of the disagreement over the extent of Lynden's water rights."

For several years the City of Lynden and the Department of Ecology sparred over the adequacy of Lynden's water rights. Lynden and Ecology eventually decided to negotiate a resolution. Several months of discussions produced the MOA. *Zender Thurston Letter to Stalheim dated September 9, 2009, Attachment D, Memorandum of Agreement ("MOA")*.

The question posed suggests that UGA designations await a resolution of differences concerning Lynden's water rights. The question misses the point that the MOA itself is the current resolution of differences, which has been characterized as an "agreement to disagree" and a commitment to work together. *Id.* While we understand that Lynden's water rights have not been adjudicated, that is also true of every other municipal purveyor in Whatcom County.

Pending final adjudication of water rights, further agreement(s), or termination of the MOA, the MOA remains the resolution on water rights reached between Lynden and Ecology. Lynden has continued to do its part with conservation and in working toward cooperative solutions. The MOA does not place limits on Lynden's ability to issue new building permits, plat approvals, or obtaining additional UGA designations as necessary to meet projected population. The MOA does prohibit Ecology from recommending denial of Lynden's water system plan, which includes its GMA-consistent population projections, based on insufficient water rights. *MOA, Section 7.1*. This MOA and all of its terms is indeed the "resolution of the disagreement over the extent of Lynden's water rights." There is no basis to refuse to address GMA mandated UGA planning requirements until some other resolution or agreement on water rights may or may not come along.

- (iii) The City of Lynden's proposed UGA does not "significantly expand the UGA into agricultural lands."

The City does not agree that the proposed UGA is a significant expansion for two reasons: (1) the record shows the area is necessary to satisfy reasonable 20 year growth projections; and (2) the proposed expansion is well within the area previously identified by the County for the City to grow (south of Badger, east of Guide Meridian).

The City also does not agree that the proposed UGA is agricultural land as that term is defined under

---

<sup>1</sup> In addition to violating the GMA requirement to size UGA's to accommodate 20 years of projected population growth, such a waiting policy is also sure to frustrate the GMA goals of encouraging development in urban areas and reducing sprawl. RCW 36.70A.020 (1) and (2). A "wait until a land development shortage occurs" will lead to higher land prices in the City and thereby encourage more rural development outside of the City of Lynden.

the GMA. To meet the GMA definition of agricultural lands, the land must have “long-term commercial significance for agricultural production.” *Lewis County v. Western Washington Growth Management Hearings Board, et al*, 157 Wn.2d 488, 502, 139 P.3<sup>rd</sup> 1096 (2006). As previously submitted materials demonstrate, the land in Lynden’s proposed UGA no longer meets the test for land of “long-term commercial significance for agricultural production.” *Zender Thurston Memorandum to Whatcom County Planning Commission and Whatcom County Council dated September 17, 2009 “Agricultural Land and UGA Issue.”*

(iv) Consequences of failing to meet needs of Lynden’s 20 year population projections.

The City of Lynden has expended millions of dollars in planning and actual construction of water and sewer capacity to accommodate the needs of its 20-year projected population. Failure to establish a sufficiently sized UGA to meet this projected population will drive up utility infrastructure costs for city residents and lead to a shortage of developable land in the city. The City learned from a subdivision moratorium it adopted in the late 1990’s that fewer available city building lots and higher associated development costs will skew the housing market, inflating lot prices in Lynden and encouraging residential development outside Lynden (in agricultural land) on 10 and 20 acre lots. The truth is that if the County neglects its legal obligation to establish a sufficiently sized UGA for Lynden, it will have the perverse effect of leading to more residential development on agricultural acreage outside the City and to the loss of even more farm land.

**Question 3.a: Why can’t the City accommodate the additional growth through increased density or infill options?**

***Response to Question 3.a:***

*The City’s primary disagreement with Executive Kremen’s population allocation is based on the assumptions used to calculate that allocation. The City has submitted information about using assumptions that are consistent with the City’s Comprehensive Plan and with the methodology developed by Whatcom County and agreed to by the City. The City would accept the population allocation recommended by Planning Director Stalheim in the tables using the revised assumptions. This results in a 2029 population of 16,788 plus an additional 1,517 in reserve.*

In the City’s opinion, the Planning Commission’s recommendation did not adequately address the future growth of the Lynden community. The record shows they did not consider the land capacity analysis, or statistical data provided to them regarding Lynden’s past growth and future estimates of growth. However, the most significant problem with the Planning Commission’s recommendation is that it results in a population that is outside the scope of the draft Environmental Impact Statement. The cities were provided a range of population to use in their work and the Lynden’s estimate falls squarely within that range. All the cities in Whatcom County have been chided for discussing planning options outside the “bookends” of the EIS, but the Planning Commission’s recommendation is clearly in violation of that document. Following that recommendation will result in Whatcom County needing to expend additional tax dollars to study the lower population

projection and its impacts on the surrounding resource areas.

The City has been very aggressive with infill over the past twenty years, creating more than 200 lots through the short plat process, revising development requirements for these short plats to make them easier to achieve. The City has also been very diligent in working to almost double the average residential density during this planning period. The proposed expansion of the urban growth area is based on even higher density assumptions. The Growth Management Act, the County's own Comprehensive Plan and the County-wide Planning Policies all provide opportunities for communities to continue to grow while maintaining their unique character. Shifting to a significantly higher proportion of multi-family housing or increasing the single family housing densities would have an impact on Lynden's character. The City will continue to pursue options of mixed use development and the creation of more accessory dwelling units, but will not accept a wholesale change in the face of our community.

**Question 3.b: Does the city believe the county has the responsibility to allocate urban growth to Lynden versus encouraging growth in other areas? If so, why?**

*Response to Question 3.b:*

Lynden believes that Whatcom County has the responsibility to plan for population in the areas likely to experience growth. Population isn't a "prize" to be won or fought over. More people moving to Whatcom County will still choose to live in Bellingham versus Lynden; but it IS the County's responsibility to allow Lynden to plan appropriately for those who will make the choice to live outside of the Bellingham urban center. If the Whatcom County Council alters population allocations, Lynden's Comprehensive Plan will be affected, as will the utility plans adopted based on past Whatcom County actions.

**Question 3.c: After the City's has grown into the area it has currently requested, what are the City's long term plans for growth given the challenges posed by being surrounded by designated agricultural resource lands? If those plans include redevelopment and infill within the city limits, can some of those plans be implemented sooner, so as to extend the period of growth that the land between the existing UGA and the Guide can accommodate?**

*Response to Question 3.c:*

The question of what happens next is one that is rightfully asked at this time, but may not have a satisfactory answer. As the City proposed several years ago during the process establishing Whatcom County's purchase of development rights program, it is likely that our very long term boundary will be the intersection of the Guide Meridian and East Badger Road. The City continues to work to promote infill and the success of those efforts will help delay the time when those boundaries are reached.

Some infill and densification efforts that the City will continue to use, is the mixed density housing

October 27, 2009

Page 11

zone, the use of lot size averaging, and reducing some development standards to allow for less use of the land for public utilities. Three years ago, the City adopted the RMD zone that allows duplex and triplex buildings to mix with smaller lot single family residential uses. Revisions to the City's planned residential development ordinance allows for more intense use of land and allows the PRD's to develop on smaller parcels for infill purposes. Changes to the City's subdivision code has been another way to increase density by allowing the lot sizes to be averaged over a subdivision, so those tricky remainders become useful lots rather super-sized lots.

The government and residents of Lynden are as interested in leaving a legacy of an agrarian lifestyle to our community's children as Whatcom County is. The City has been pro-active with this issue, adopting policies and taking actions consistent with those policies from 1993. We are confident that our prior infrastructure development plans are consistent with the population projections and will work to reconcile the physical plans with the changes in boundaries established through this process. It is our community's hope that the Whatcom County Council recognizes and appreciates the role Lynden plays in the agricultural community as well as the overall culture of Whatcom County.

Attachment A

7

FILED  
SUPERIOR COURT  
THURSTON

'08 NOV -7 P2:05

<input type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing set
<input checked="" type="checkbox"/> Hearing is set
Date: November 7, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

No. 08-2-00489-6

v.

AMENDED FINDINGS AND CONCLUSIONS

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,

[PROPOSED]

Respondents.

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

FINDINGS AND CONCLUSIONS-1

**GordonDerr.**

2025 First Avenue, Suite 500  
Seattle, WA 98121-3140  
(206) 362-9540

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  
24

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.  
26



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

6 c. In relevant part, YMC 16.12.310 provides:

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

15 d. YMC 16.12.330, further provides:

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

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

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

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

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

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

20 6. Yelm has argued that final plat approvals of the subdivisions in this matter are  
21 not expected in the near future. It is therefore possible that at the time of final subdivision  
22 approvals the facts and the law that will bear upon Yelm’s ability to demonstrate the existence  
23 of “appropriate provisions” for potable water to serve these subdivisions may have changed.  
24 Accordingly, it is appropriate to defer the determination of “appropriate provision” until the  
25 time of final subdivision approval for each of the five subdivisions.  
26

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

14 DATED this 7 day of November, 2008.

15  
16   
17 JUDGE CHRIS WICKHAM

18 Presented by:

19 GORDONDERR LLP

20  
21 By: 

22 Keith E. Moxon, WSBA #15361  
23 Dale N. Johnson, WSBA #26629  
24 Attorneys for JZ Knight  
25  
26

FINDINGS AND CONCLUSIONS - 7

**GordonDerr.**

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

0-000001642

KJM  
CD TO  
as Form  
PK  
as to form

This will provide Petitioner to state  
Prior to the date the City Staff report is submitted  
to the City Council.

on any of the five final  
subdivisions.

3

FILED  
SUPERIOR COURT  
THURSTON

'08 NOV -7 P2:05

BY \_\_\_\_\_ DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

*ru*

1 The Court received the evidence contained in the record, considered the pleadings  
2 filed in the action and heard the oral argument of the parties' counsel at a hearing on  
3 October 1, 2008. On October 7, 2008, the court rendered a letter opinion in favor of the  
4 Petitioner JZ Knight, granting her land use petition. The Court made findings of fact and  
5 conclusions of law on November 7, 2008, which were entered on the same date. A copy  
6 of the findings of fact and conclusions of law are attached as Exhibit A.

7 Consistent with the Court's findings of fact and conclusions of law, final judgment  
8 is entered in this matter as follows:

9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

- 10 1. Petitioner's LUPA petition is GRANTED.  
11 2. The decision by the Yelm City Council on February 12, 2008, is reversed  
12 and this matter is remanded to the Yelm City Council with instruction that each of  
13 the five preliminary subdivision approvals issued by the City of Yelm on February  
14 12, 2008, shall be modified as follows:

15 The condition of preliminary plat approval contained in the Hearing  
16 Examiner's Decisions on Reconsideration dated December 7, 2007, and  
17 incorporated into the Yelm City Council's decision dated February 12, 2008, shall  
18 be modified by striking the word "/or" and inserting the word "also" as follows:

19 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:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

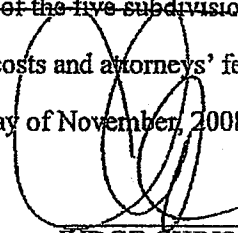
a. Yelm shall provide written notice to Petitioner of any application for final subdivision approval of any of the five subdivisions within five <sup>business</sup> days of Yelm's receipt of such application.

b. Yelm shall provide Petitioner <sup>seven calendar</sup> ~~thirty~~ days written notice <sup>and an</sup> ~~and~~ 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.

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~~ is held on any of the five final subdivisions. ~~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.~~

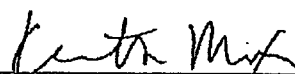
4. All parties shall bear their own costs and attorneys' fees.

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

*KEM*  
*CDJ*  
*as to Town*  
*PR*  
*as to form*

*business*  
*This will provide*  
*Petitioner*  
*A prior to the date the*  
*city staff*  
*report is*  
*submitted to*  
*the city*  
*Council.*