

City of Yelm

Community Development Department
105 Yelm Avenue West
P.O. Box 479
Yelm, WA 98597

November 12, 2020

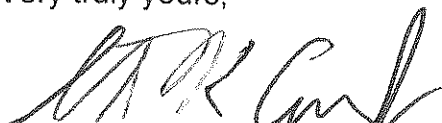
Tahoma Terra Holdings, LLC
P.O. Box 73790
Puyallup, WA 98373

**RE: TAHOMA TERRA PHASE II, DIVISION II
SUBDIVISION AMENDMENT**

Dear Applicant:

Transmitted herewith is the Report and Decision of the City of Yelm Hearing Examiner relating to the above-entitled matter.

Very truly yours,



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/jjp

cc: Parties of Record
CITY OF YELM

OFFICE OF THE HEARING EXAMINER

CITY OF YELM

REPORT AND DECISION

CASE NO.: TAHOMA TERRA PHASE II, DIVISION II
SUBDIVISION AMENDMENT

APPLICANT: Tahoma Terra Holdings, LLC
P.O. Box 73790
Puyallup, WA 98373

PLANNER: Tami Merriman

SUMMARY OF REQUEST:

The applicant requests to amend the language of mitigation measure 5 of the May 24, 2005 SEPA Mitigated Determination of Non-Significance for the Tahoma Terra Master Planned Community, incorporated through Conclusions 4, 6.1, and 6.2 of the August 4, 2016 Hearing Examiner Decision approving Tahoma Terra Phase II, Division II, Phase I & II preliminary subdivision.

SUMMARY OF DECISION: See Decision.

PUBLIC HEARING:

After reviewing Community Development Department Staff Report and examining available information on file with the application, the Examiner conducted a virtual public hearing on the request as follows:

The hearing was opened on October 26, 2020, at 9:00 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT 1** - **Community Development Department Staff Report**
- EXHIBIT A** - **Soundbuilt Homes Amendment Request**
- EXHIBIT B** - **September 11, 2020 Notice of Application**
- EXHIBIT C** - **October 15, 2020 Notice of Public Hearing**
- EXHIBIT D** - **May 24, 2005 SEPA Mitigated Determination of Non-Significance**
- EXHIBIT E** - **August 4, 2016 Hearing Examiner Decision**
- EXHIBIT F** - **December 23, 2019 Laing to Dille Email**
- EXHIBIT G** - **October 23, 2020 Letter from Cascadia Law Group**
- EXHIBIT H** - **October 25, 2020 Letter from The Brink Law Firm**
- EXHIBIT I** - **October 26, 2020 Letter from Schwabe Williamson & Wyatt**

The Minutes of the Public Hearing set forth below are not the official record and are provided for the convenience of the parties. The official record is the recording of the hearing that can be transcribed for purposes of appeal.

TAMI MERRIMAN appeared, presented the City Staff Report, and testified that the request is to amend a condition of approval imposed by the Examiner in his August 4, 2016, Report and Decision approving the Tahoma Terra, Phase II, Division II subdivision. The City provided proper notice in accordance with the code. She received comments from Cascadia Law Group and the Brink Law Firm and added both documents to the record as exhibits. The subdivision is within the Tahoma Terra Master Planned Community and is the final project located west of Thompson Creek. Tahoma Terra consists of a 220 acre, planned community that underwent environmental review pursuant to an EIS and MDNS. The need for the overall MPC to provide additional water rights led to Mitigating Measure 5 of the MDNS. Over the past 15 years the City has approved a number of projects in Tahoma Terra. In 2019 the Examiner approved The Hutch subdivision, but provided that while development could occur, the City would make no guarantees of the availability of water at the building permit stage. The present applicant wants to do the same thing. It wants to construct its infrastructure at its own risk. In 2019 the applicant proposed language that included proceeding at its own risk. However, the applicant also needed to amend conditions of approval imposed in 2016. It does not need to amend the MDNS, but does need to amend conditions of subdivision approval. The applicant is not looking at amending the water provision requirement of Mitigating Measure 5, but to modify the condition to allow infrastructure development. They have submitted better language in writing that requires submittal of the change to DOE. The plat must have water available prior to final plat approval. They do not propose to change Condition 2.

AARON LAING, attorney at law representing the applicant, appeared and testified that the correct language they propose is in his document. He created a strike through/underlined condition and will email the condition in letter form. He only recently

reviewed the comments from Mr. Brink and Cascadia. They are not proposing to change SEPA. We must recognize the difference between a mitigating measure and a plat condition. We don't need to do another threshold determination as the MDNS mitigating measures were merged into the plat conditions. He then discussed the difference between a SEPA threshold determination and a SEPA condition. They are tweaking the language in the plat condition to allow site development during the time that DOE reviews the City's recently submitted application. The commenting parties have misconstrued his letter. They are not making any type of application for water rights. The City has the water rights, but only it can use them. The City has the water rights needed to provide water to the proposed plat from the golf course. The City condemned the golf course water rights and transferred them to its water supply. He wants to clarify the misconception. They are tying the provision of water to final plat approval. They need to clarify their request to be consistent with the Washington Supreme Court decision. They propose no final plat or building permit or other permit deemed a draw on the City water system. They will not ask for water until the DOE review is complete. DOE will have the review completed several months before they will be ready for final plat approval. They will proceed with their site development improvements at their own risk.

KURT WILSON appeared and testified that they definitely will move forward at the owners' risk. They are trying to use the time productively while DOE is evaluating the application. To move forward they need to keep the time period moving as quickly as possible.

MR. LAING reappeared and testified that their subdivision is not in competition with The Hutch. He referred to City of Olympia v. Thurston County Board of Commissioners, a 2005 Court of Appeals Decision that addresses SEPA conditions. The responsible official may withdraw the threshold determination before it becomes final, but it becomes final beyond the appeal period. Once the appeal period has run, the mitigating measures merge into plat conditions. The conditions themselves are not threshold determinations. They are mitigating measures that become enforceable through preliminary plat conditions.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 10:00 a.m.

NOTE: A complete record of this hearing is available in the City of Yelm Community Development Department.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. Proper notice was provided pursuant to the Yelm Municipal Code (YMC).
3. In 1993 the City of Yelm annexed a large area located southwest of the City known as the Southwest Yelm Annexation. Prior to the annexation the City prepared an Environmental Impact Statement (EIS) that among other documents identified the need for additional water rights to serve the area proposed for annexation. The environmental documents set forth on page 2 of the Staff Report show that the City was aware that additional water rights would be necessary to serve the annexation area. The City therefore required future development projects in said area to acquire necessary water rights and dedicate them to the City. The City would then provide water to serve said development. The 220 acre Tahoma Terra Master Planned Community (MPC) is within the annexation area.
4. In 2005 Tahoma Terra submitted an application for its 220 acre MPC that proposed between 880 and 1,200 dwelling units along with a neighborhood commercial area. The City responsible official issued a threshold Mitigated Determination of Non-Significance (MDNS) following review of the MPC pursuant to the State Environmental Policy Act (SEPA) (Exhibit D). Relevant MDNS findings of fact read as follows:
 15. The City of Yelm has adopted comprehensive Water and Sewer System Plans... to guide orderly extension of the City's infrastructure improvements. These system plans anticipated the build out of the southwest Yelm annexation area [including Tahoma Terra]. Upgrades and extension of these utilities...will be necessary to provide adequate levels of water...to the subject site [Tahoma Terra].
 16. The Environmental Impact Statement for the southwest Yelm annexation indicated that development within the annexation area, including the subject property [Tahoma Terra], would be required to provide water rights to the City sufficient to serve the subsequent development of the properties. The property has recorded water rights that the applicant intends to transfer to the City of Yelm to provide for the development of the property.

The property has been assessed through the City's sewer local improvement district, which includes a commitment by the City to

provide water and sewer service for no more than 89 single family residential units prior to any water rights transfer.

If the Washington Department of Ecology does not approve a transfer of water rights, or the transfer does not include sufficient water to serve the proposed development, final subdivision approval of any phase beyond the 89 lots could not be approved.

Based upon the above findings the responsible official imposed the following mitigation measure:

5. Prior to the approval of any development permit (including a final subdivision) beyond the 89th lot, the applicant shall convey water rights to the City of Yelm sufficient to serve the proposed use within that area of the final master site plan and the first 89 lots...This condition is not applicable if the City obtains water rights through the Department of Ecology which are sufficient to serve the projected density of the City, its urban growth area, and the subject property.

Tahoma Terra transferred water from the Draught Farm and proceeded with development beyond the 89th lot.

5. On August 4, 2016, the Examiner issued a Report and Decision conditionally approving the Tahoma Terra Phase II, Division II subdivision that authorized 198 residential parcels in two phases. Approval was subject to compliance with 14 conditions, the first two of which read as follows:
 1. The conditions of the Mitigated Determination of Non-Significance are hereby referenced and are considered conditions of this approval.
 2. In accordance with the requirements of Mitigating Measure 5 of the MDNS issued for the Tahoma Terra master planned community, the construction of Phase II of this subdivision shall not be allowed until the applicant provides water rights sufficient to serve the remaining Master Plan, or the City obtains water rights through the Department of Ecology which are sufficient to serve the projected density of the City, its urban growth area, and the subject property.

The Decision granted approval for a Phase I subdivision consisting of 62 lots and for a second phase of 136 lots that would be constructed at a later date when water became available.

6. The original Tahoma Terra developer contemplated transferring water rights from the Draught farm and a golf course to the City that would provide more than enough water to supply the entire MPC. Tahoma Terra did transfer the water rights from the Draught farm that equaled 155.66 acre feet of water rights or 513

ERUS. Previous Tahoma Terra projects used all 513 ERUS. Due to financial difficulties caused by the recession the original owner could not transfer the water rights from the golf course to the City. The City condemned the water rights and transferred said rights to its general municipal system. Therefore, Tahoma Terra has no additional water rights within its ownership that it can transfer to the City. Tahoma Terra is limited to acquiring water for future development from the City's municipal system.

7. The applicant for Tahoma Terra Phase II, Division II desires to construct site development improvements for its approved preliminary plat. However, the applicant does not propose to make application for final plat approval or for building permit approval. The applicant likewise does not propose to apply for water from the City's existing "water bank" until such time as the State Department of Ecology (ECY) approves the City's application and makes sufficient water available to the City to serve the City's projected density, its urban growth area, and Tahoma Terra.
8. The above findings and the modifications to Condition 2 set forth hereinafter ensure compliance with the intent of the original water mitigating measures but also allow site development work to occur. Thus, the City must have an adequate water supply to serve the entire City and its urban growth area prior to final plat approval and building permit issuance. The conditions do allow the applicant to construct site development work at its own risk, the same as The Hutch subdivision.
9. The Examiner would normally leave the record open for further discussions among Terry L. Brink, attorney at law representing The Hutch, Mr. Laing, and the City to resolve any issues. However, based upon the findings and revised condition, no disputes exist.
10. JZK, Inc, and J.Z. Knight by and through their attorney Joseph A. Rehberger argue that the City needs to reevaluate the subdivision through the SEPA process due to the changes in the MDNS. However, this Decision does not affect the requirements of Mitigating Measure 5 that includes an alternative of water supply services through the City's municipal system. Furthermore, our Washington Court of Appeals in City of Olympia v. Thurston County Board of Commissioners, et. al., 131 Wn. App. 85 (2005), held that mitigating measures create an enforcement scheme for substantive conditions of plat approval. In the present case, conditions of preliminary plat approval adopted all mitigation measures set forth in the MDNS.


CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The request to amend Mitigating Measure 5/Condition (2) of the Examiner's August 4, 2016, Report and Decision approving the Tahoma Terra Phase II, Division II subdivision is hereby replaced by the following conditions:
 - 2A. On September 21, 2020, the City submitted its water rights package application to the Washington State Department of Ecology (ECY) to address the Foster v. Ecology, Washington Supreme Court Decision. The application, if approved will provide sufficient water to serve the projected density of the City, its urban growth area, and the Tahoma Terra MPC. During ECY's review and processing of the City's application, the applicant may engage in site development construction only (no building permits), if and only if, the Community Development Department administrator determines that water will be available at the time demand for water for the subdivision occurs (i.e., at final plat approval). The administrator's decision may be reviewed by the Hearing Examiner at the request of the applicant; provided, the applicant shall be responsible for any cost of the Examiner's review. Upon ECY's approval of the City's application for additional water rights sufficient to serve the projected density of the City, its urban growth area, and the Tahoma Terra MPC (or receipt of such water rights from the applicant), Mitigating Measure 5 of the MDNS for the overall Tahoma Terra MPC is not longer applicable. This condition does not authorize or permit the applicant to apply for or receive water from the City's present "water bank". Water to serve Tahoma Terra must be supplied either by Tahoma Terra water rights or from water made available to the City as a result of ECY's approval of the City's application. The applicant's decision to proceed with site development is solely and completely at the applicant's risk (See Section 18.16.060 of the Yelm Municipal Code).
 - 2B. The administrator's determination that site development construction may proceed during ECY's review of the mitigation application does not limit any person with standing from challenging final plat approval on the basis that sufficient water is not available to serve the homes therein or that ECY did not approve sufficient water to serve the projected density of the City, its urban growth area, and the Tahoma Terra MPC.
3. The above conditions allow site development of an already approved preliminary plat, and the avoidance of significant and unnecessary costs associated with demobilizing and remobilizing contractors.

DECISION:

The request to modify Condition 2 of the August 4, 2016, Hearing Examiner's Decision approving the preliminary plat of Tahoma Terra, Phase II, Division II is hereby granted as set forth in the Conclusions above.

ORDERED this 12th day of November, 2020.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 12th day of November, 2020, to the following:

APPLICANT: Tahoma Terra Holdings, LLC
P.O. Box 73790
Puyallup, WA 98373

OTHERS:

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CITY OF YELM

**CASE NO.: TAHOMA TERRA PHASE II, DIVISION II
SUBDIVISION AMENDMENT**

NOTICE

All final decisions of the hearing Examiner may be appealed to the City Council at a closed record appeal hearing, initiated by a person who has standing to appeal. All appeals must be filed within 21 days from the date of the decision being appealed in accordance with Section 18.10.100 Yelm Municipal Code.