CITY OF Yelm HEARING EXAMINER

299 N.W. CENTER STREET
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January 21, 2022

VIA EMAIL

Ms. Sara Williams, Assistant Planner
City of Yelm
106 Second Avenue S.E.
Yelm, Washington 98597

Mr. David Johnstone
McKenzie Meadows Homeowners' Association
P. O. Box 466
Yelm, Washington 98597

Re: McKenzie Meadows Appeal

Dear Ms. Williams and Mr. Johnstone:

After careful consideration, I have concluded that the City's Motion to Dismiss is well taken. My decision is set forth in the enclosed Order.

As the City's Motion is dispositive, it results in the dismissal of the pending appeal.

Pursuant to the Yelm Municipal Code, all final decisions of the Hearing Examiner may be appealed to the City Council at a closed record appeal hearing. The time limits and procedures for any such appeal are set forth in YMC 18.10.100.

Thank you.

Mark C. Scheibmeir
City of Yelm Hearing Examiner

MCS:klf
Encl.

cc: Mr. Landon Hawes, w/encl.
Mr. Cody Colt, w/encl.

BEFORE THE CITY OF YELM HEARING EXAMINER

IN RE THE APPEAL OF: McKenzie Meadows HOA Appellant, C & E DEVELOPMENTS, LLC, Applicant.	HEARING NO. 2021-0047 ORDER GRANTING CITY'S MOTION TO DISMISS

On June 1, 2021, the City of Yelm (the "City") issued its Notice of Decision approving the further subdivision of "Tract B" within the McKenzie Meadows Subdivision ("McKenzie Meadows" or the "Subdivision") into three residential lots. The McKenzie Meadows Homeowners Association (the "HOA") timely appealed the Notice of Decision. Following the HOA's appeal, the City moved for an Order dismissing the appeal, asserting that the HOA has failed to identify a sufficient basis for its appeal and/or that it lacks standing. The HOA submitted its Response to the Motion on January 10, 2022, and the City followed with its Reply on January 13, 2022. After review of the pleadings, I concur with the City that the HOA has either failed to identify a sufficient basis for its appeal and/or it lacks standing. Accordingly, the City's Motion to Dismiss is **granted**.

BACKGROUND

There are no material facts in dispute.

In 2006, Honeysett Development requested preliminary plat approval for McKenzie Meadows. The application called for the subdivision of 6.96 acres into 24 single-family lots.

The proposed Subdivision was a rectangular area with the exception of an existing single-family residential lot carved out of the Subdivision's southeast corner (the "Excepted Lot"). The Excepted Lot contained a residence served by an existing private well located within the

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Subdivision. The proposed plat called for the creation of a "Tract B" north and west of the Excepted Lot where the well is located. The application proposed that Tract B initially would remain undeveloped as a means of protecting the private well for the benefit of the Excepted Lot.

Although the well is located within Tract B of the Subdivision, it only serves the Excepted Lot.

The subdivision application came before the then City Hearing Examiner, Stephen Causseaux ("Mr. Causseaux"), in 2006. After careful consideration, Mr. Causseaux approved the subdivision subject to a number of conditions. The status of Tract B was addressed in two Findings of Fact:

> "5. The preliminary plat map shows access provided to the site via single, internal plat road extending west from Cullens Road near the north property line and then turning south were it dead-ends at the south property line in the western portion of the plat. A second internal road extends east from the main road and terminates in a cul-de-sac. A 15,385 square foot open space area and 15,389 square foot storm drainage facility are located between the two internal plat roads. *A 38,720 square foot Tract B extending from the storm drainage tract and cul-de-sac to Cullens Road will remain in open space to protect a drinking water well serving the house in the excepted lot in the southeast corner. . . .*
>
> 6. . . . The proposal of 24 dwelling units on 6.96 acres calculates to a density of 3.45 dwelling units per acre. *The applicant will increase the density by developing Tract B at such time as it can abandon the drinking water well . . . ."*

Tract B was again addressed in Mr. Causseaux's Conclusions of Law at No. 4:

> "The developer shall provide and record a "protective well covenant" meeting the standards of the Thurston County Health Department restricting any contaminate sources within the 100-foot well radius of the well located on the property to the east of this site. *Tract B will be held for future residential development upon abandonment of the well head protection covenant."*

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Despite preliminary plat approval, the development did not go forward immediately. At some point the project may have been foreclosed as, by 2013, the property was held by Washington Federal Savings. Under Washington Federal's ownership, the project resumed with the final plat and plat map recorded in 2013. The final plat again recognizes that "Tract B [is] hereby reserved for the declarant for future residential development purposes." The plat map also declares that "Tract B to be reserved for future residential development". The plat map contains a dotted line indicating the outer radius of the well head protective covenant encompassing a portion of Tract B. This protective radius extends across much of the easterly half of Tract B, leaving the westerly half of Tract B outside of the protective covenant.

Concurrently with the recording of the final plat and plat map, Washington Federal also recorded a "Declaration of Covenants, Conditions and Restrictions of McKenzie Meadows Homeowners' Association" (the "CC&Rs"). The CC&Rs establish a homeowners' association, provide for the regulation of residential lots, and allow for transition of management of the HOA to the homeowners.

Notably, the CC&Rs do not contain any restriction on the future development of Tract B. The CC&Rs conclude with a Waiver of Opposition to Continued Development, found in Article 16 at Section 11:

> "Each Owner of a Lot 1 through 24, their heirs, successors and assigns, shall consent to the continued development of McKenzie Meadows, according to the approved Master Plan on file in the City of Yelm by Declarant or Declarant's successor. This waiver of opposition shall extend to all construction activity and land-use-related approvals necessary to accomplish the full development and completion of the McKenzie Meadows community so long a such construction and development is consistent with municipal requirements of the City of Yelm. This section shall also apply to the development of any property incorporated into

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the McKenzie Meadows Homeowners' Association, as provided for in Article 3, Section 7, articulated in this Declaration."[1]

Following final plat approval, the sale of lots got underway and ownership of the Subdivision soon transitioned to private lot owners who eventually gained management control of the HOA.

By 2019 an unidentified third party obtained ownership of Tract B and asked the City whether some or all of Tract B might be subdivided and developed despite the continued existence of the well head protective covenant for the benefit of the Excepted Lot. To answer this question, City Staff contacted Mr. Causseaux, who remained the City's Hearing Examiner, and asked for his guidance. Mr. Causseaux responded by letter dated November 26, 2019. In his written response, Mr. Causseaux initially notes that our courts have required plats to be developed in accordance with their conditions of approval and any special notes found on the plat (citing to an unpublished opinion, *Olson v. Pierce County,* for this general proposition). But Mr. Causseaux then advises City Staff that some development of Tract B could occur despite the continuing well head protective covenant:

> "In the present case the applicant could either wait for abandonment of the drinking water well *or possibly process a plat alteration that would allow development of the portion of Tract B not encompassed by the well head protective covenant.*".

For whatever reason, this suggested subdivision was not pursued.

Some time thereafter the current Applicant, C & E Developments, LLC, acquired ownership of Tract B and applied for its further subdivision into three residential lots. On

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[1] This last sentence contains a scrivener's error as there is no Section 7 to Article 3.

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March 12, 2021, the City mailed a Notice of Application to surrounding property owners and also published the Notice on the City's website as well as in the Nisqually Valley News. Comments were received from the HOA and others expressing concerns regarding the recorded well head protection covenant.

On February 20, 2021, approximately one month before notice of the application was given, the HOA enacted a series of six resolutions identified as "Board Resolutions No. 210216-01-06". The collective effect of these resolutions was a declaration that the HOA would not approve the subdivision or development of Tract B. Copies of these resolutions and other materials were provided to the City by the HOA in response to the Notice of Application.

On June 1, 2021, the City issued its Notice of Decision approving the subdivision of Tract B into three single-family residential lots. The City's Decision acknowledges the materials received from the HOA but concludes that the proposed Subdivision is permissible if it complies with Mr. Causseaux's 2019 letter and precludes any development within the well head protective radius. The Decision specifically prohibits development within the protective radius and retains the well head covenant.

THE HOA'S APPEAL

The HOA timely appealed the Notice of Decision. In its appeal the HOA challenges the City's Findings of Fact Nos. 2, 3, 5 and 6. Unfortunately, the HOA's challenges are not always easily understood, making review of its appeal more difficult. The following are the challenged Findings and the Hearing Examiner's understanding of the HOA's challenges to these Findings:

Finding of Fact No. 2.

> McKenzie Meadows subdivision was recorded May 2013 and identifies Tract B as a "Future Development Area". This tract was designated for future

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development subject to a future street connection requirement, and due to the location of a single-family exempt well serving an adjoining property. Surrounding properties are all developed residentially. The parcel is approximately 0.73 acres.

In its Notice of Decision, the City identifies Tract B as a "Future Development Area" when the HOA believes it should be identified as "Tract B to be reserved for future residential development" as stated on the plat map. The HOA may also be arguing that the reserved right for further development was personal to the original applicant and has since been lost.

Finding of Fact No. 3.

The Hearing Examiner provided clarification in November 2019 regarding the preliminary subdivision of McKenzie Meadows. The clarification mandated that Tract B could only be developed if the well head protection covenant is abandoned or if the plat is altered to allow development of the portion of Tract B not encompassed by the well head protective covenant. A well is located at this property and has not been decommissioned. The approval of this project requires that development within the well protection area meets Department of Health and covenant requirements. Any development on the parcel is subject to the protection requirements of the recorded well radius.

The HOA argues that Mr. Causseaux's letter constitutes an "overruling" of his earlier Decision, not a clarification; that it is wrongly supported by an unpublished decision; that it is illogical in its analysis; and that it is made without an opportunity for appeal. Separately, the HOA appears to argue that the well head protective covenant may have impacts to the portion of Tract B outside the covenant's radius.

Finding of Fact No. 5.

As required by Section 18.10.050 YMC, the Yelm Community Development Department mailed a Notice of Application to local and state agencies and surrounding property owners on March 12, 2021. In addition, the notice was published on the City's website on March 12, 2021 and published in the Nisqually Valley News on March 25, 2021.

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Comments were received from property owners within the McKenzie Meadows subdivision, as well as an adjoining property owner, expressing concerns regarding the recorded well covenant, the CC&Rs for the McKenzie Meadows subdivision, and confusion regarding a previous land use application. Additional comments concerned potential tree removal and disrepair of existing fencing.

As established by the City of Yelm Hearing Examiner, development of Tract B must occur outside of the well protection radius. As clarified in number 6 below, the McKenzie Meadows CC&Rs provide a waiver of opposition to continued development within this subdivision. No application has been received for development on this parcel, however the City has discussed development in presubmission meetings. Further analysis regarding these comments is provided below.

The HOA challenges this Finding on the basis that:

(1) No public hearing was held in violation of YMC 18.10.050.

(2) The Notice was not conspicuously posted on site and did not include a statement that there would be no public hearing unless requested within 21 days, in violation of YMC 18.10.050.

(3) Pursuant to RCW 58.17.095, administrative approval can only occur without a public hearing if:

(a) The Notice is conspicuously posted;

(b) Declares that there will be no public hearing; and

(c) Includes procedures and time limitations for submitting comment.

(4) Similarly under RCW 58.17.215, the City must again provide notice that a hearing may be requested by person receiving notice within 14 days of receipt.

Finding of Fact No. 6

Pursuant to Section 58.17.215 RCW, the alteration of any subdivision in Washington requires an application containing the signatures of the majority of all persons having an ownership interest in lots, parcels, sites, or divisions in the subject subdivision to be altered.

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> The McKenzie Meadows Homeowners' Association includes in Article 16 Section 11 of their Declaration of Covenants, Conditions, & Restrictions (CC&R's) a Waiver of Opposition to Continued Development of McKenzie Meadows. The City finds that this covenant satisfies the requirements of Section 58.17.215 RCW.

The HOA argues that (a) the homeowners' signatures should have been required; (b) that the Waiver is invalid and/or no longer effective; (c) that it is erroneous and incomplete and contains scrivener's errors; (d) that the current HOA does not approve the further Subdivision; and (e) that the proposed development would violate the HOA's "Revised Covenants" as reflected by the HOA's collective Resolutions 210216.

Following receipt of the HOA's appeal, the City submitted its Motion to Dismiss on December 9, 2021. The City's Motion argues that the HOA has failed to show how a reversal of the City's Decision would rectify harms claimed by the HOA. The City separately argues that the HOA lacks standing to appeal. The HOA's response to the City's Motion, submitted January 10, 2022, is quite brief and merely expresses the HOA's continued disagreement with the City's position without submitting any additional evidence or argument.

ANALYSIS

Both parties have, somewhat unfortunately, chosen to proceed without the assistance of legal counsel. Thus, while both parties have presented intelligent and articulate arguments, they have not always done so in a manner that is legally artful and, more importantly, have generally not provided legal authority in support of their positions. As a result, it is sometimes difficult to understand the arguments being made or their legal basis.

With these difficulties in mind, the following is an analysis of the Appellant's appeal of the City's Findings No. 2, 3, 5 and 6 and the Decision to approve the subdivision of Tract B into three residential lots.

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HOA's Challenge to Findings of Fact No. 2

The HOA challenges the City's Finding of Fact No. 2 on the basis that the Finding identifies Tract B as a "Future Development Area" when the plat map actually identifies it as "Tract B to be reserved for future residential development".

This slight difference in terminology is without consequence. Whether Tract B is identified as a "Future Development Area" or as an area "to be reserved for future residential development" is a distinction without importance. The HOA has not offered any evidence of adverse consequences arising from this difference in terminology. The City correctly argues that, even if the terminology was changed, it would have not have any bearing on the Decision to grant the application. The City's Motion to Dismiss this challenge is well founded.

The HOA may be making an additional challenge to Finding No. 2, arguing that the right to develop Tract B was reserved solely to the Declarant - an entity that no longer exists - and therefore the right to develop has expired. But the HOA offers no legal authority for its argument that the Declarant's rights have failed to "run with the land". This is a most unusual argument and is inconsistent with well-recognized property notions. Our courts have long held to the "bundle of sticks" theory of property ownership in which the transfer of title includes the transfer of all rights associated with it. It is this legal notion that allowed the successor owner, Washington Federal, to complete the plat and sell individual lots to the current homeowners. Thus, to the extent that the HOA is arguing that the current owner of Tract B does not enjoy the same property rights as the original Declarant, this argument is without legal authority.

HOA's Challenge to Findings of Fact No. 3

The HOA challenges the right of the former Hearing Examiner, Mr. Causseaux, to issue his November 2019 letter clarifying the Findings/Conclusions in his 2006 Decision. The HOA

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further questions the scope of the well head radius protections and argues that even development outside of the protected area might have negative impacts on the well.

Once again, the HOA does not cite to any legal authority as to why Mr. Causseaux would be prohibited from clarifying his earlier Decision. To the contrary, and to the extent that the 2006 Decision was ambiguous, resolution of any ambiguity is best done by the original decision maker.

The HOA complains that Mr. Causseaux cites to an unpublished opinion as part of his letter, but Mr. Causseaux is not citing to this opinion to support his Decision but rather for the accepted proposition that all conditions and special notes found on the face of a plat are to be strictly interpreted. As such, it has no bearing on Mr. Causseaux's decision to clarify any ambiguity in his earlier Findings. The HOA's objection to this citation is misplaced.

The HOA separately argues that the well head protective covenant may have implications to Tract B beyond the area of the protective radius, but the HOA offers no evidence of any such impacts. Perhaps more importantly, and as argued by the City, the HOA lacks standing to argue these impacts. YMC 18.10.110(E) establishes standing for appeals. To have standing, an appellant must present evidence that:

a. The land use decision has prejudiced or is likely to prejudice that person;
b. That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
c. A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
d. The petitioner has exhausted his/her administrative remedies to the extent required by law.

It is important to remember that the well head protective radius and covenants are *solely* for the benefit of the owner of the Excepted Lot. The Subdivision does not rely on this well and

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its protection is not its concern. The HOA has therefore not established standing to challenge the adequacy of the City's continued protection of that well.

To summarize, it was within Mr. Causseaux's authority as Hearing Examiner to clarify any ambiguity in his original Decision. It is then reasonable for City Staff to rely on this clarification. The Appellant has not offered any compelling argument or legal authority as to why Mr. Causseaux's clarification is inappropriate. In addition, the Appellant lacks standing to challenge additional aspects of this Finding relating to the well head protective covenant, as the HOA is not a beneficiary of this covenant and has not satisfied the requirements for standing found in YMC 18.10.110.

HOA's Challenge to Findings of Fact No. 5

Pursuant to YMC 18.10.050, the City mailed a Notice of Application to local and state agencies and all surrounding property owners. It also published the Notice on the City's website and in the Nisqually Valley News. But the City did not post the Notice on or around the land in at least 5 conspicuous places; did not include notification in the Notice that no public hearing was going to be held unless requested within 21 days; and did not include the procedures and time limitations to request a public hearing. The HOA therefore challenges the City's Finding No. 5 that notice was adequate.

There is little question that the City failed to strictly comply with the notice provisions of either its own ordinance, YMC 18.10.050, or with the state's subdivision statute, RCW 58.17.095 and .215. The issue, then, is whether the City's failure to either conduct a public hearing or to give notice that a public hearing would not be held unless requested, is fatal to the City's Decision.

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The HOA's appeal of Finding No. 3 is, arguably, its most significant challenge to the Decision. Procedural due process and the opportunity to be heard are the fundamental tenets of our legal system. If a decision-making process lacks due process and the opportunity to be heard it must be reversed in order to provide that opportunity.

But procedural defects in notices can be overcome by *actual* notice and a full opportunity to be heard. Stated slightly differently, if improved notice would not have resulted in any greater or better opportunity to be heard, there is no need to remedy the defect.

The HOA was aware of and fully participated in the City's decision-making process. It submitted all of its available information and materials in opposition to the subdivision - the same materials it has attached to its appeal. The HOA has not argued that it had additional materials it would have presented had it been given the opportunity.

The City's Decision acknowledges receipt of all of the HOA's materials but, having considered them, concludes that they did not provide a sufficient basis to deny the application.

As a result, I concur that the Appellant had a full opportunity to be heard and, therefore, that any procedural defects in notice were harmless with respect to the Appellant.

HOA's Challenge to Findings of Fact No. 6

RCW 58.17.215 contains the following:

> "When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain

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> an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof."

The City finds that any requirement for obtaining the signatures of a majority of lot owners has been satisfied by the standing Waiver/Consent found in Article 16, Section 11 of the CC&Rs (cited to earlier). As stated in this Waiver, each lot owner (and their successors) consents to the continued development of the Subdivision according to the approved Master Plan, and waives opposition to all construction and land use approvals necessary to accomplish its full development.

The future development of Tract B was expressly recognized in the approved plat. I therefore concur with the City that this Waiver satisfies the requirements of RCW 58.17.215. It may be worth adding that the very purpose of such waivers is the recognition that development of planned-for but as-yet-developed tracts within the subdivision should not require the approval of a majority of lot owners in order to be accomplished. The CC&Rs correctly recognize that this right is retained by the developer.

I also conclude that the scrivener's error in the final sentence of Article 16, Section 11 has no bearing on the outcome of this decision.

Separately, and additionally, I conclude that the proposed Subdivision of Tract B does not require the signatures of a majority of other lot owners for the reason that the alteration to the Subdivision only affects Tract B and, therefore, only requires the signatures of the owners of Tract B. As cited above, RCW 58.17.215 requires the "signatures of the majority of those persons having an ownership interest . . . in the portion to be altered." The only portion being altered is Tract B and, thus, only its owners need sign.

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For both reasons, the Appellant's listed challenges 1 through 8 to Finding No. 6 are not supported. To repeat, the Waiver found in Article 16, Section 11 was intended for the very purpose of allowing planned-for future development to be accomplished without the need for homeowners' signatures and, separately, as the proposed alteration is limited in its impact to Tract B, only the signatures of the owners of Tract B are required.

The HOA separately argues that the Decision violates that portion of RCW 58.17.215 requiring that "if the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration . . . ." But the HOA has not identified any violation of a covenant "filed at the time of the approval of the subdivision" and my reading of the CC&Rs finds no such violation. The City correctly argues that it does not need to take into consideration later amendments to the covenants when deciding whether to approve the requested development. As a result, any attempts by the HOA to later amend its covenants have no bearing on the City's review process.

It is perhaps worth adding (for the benefit of the HOA) that what it appears to claim as amendments to the CC&Rs are not lawful amendments, that is, the HOA's Resolutions 210216-01-06 do not amend the CC&Rs for several reasons. Firstly, any amendments to the CC&Rs must comply with the Statute of Frauds. This requires the recording of an amendment bearing the acknowledged (notarized) signatures of the owners (including spouses) of at least 75% of the

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lots. No such document has been presented and, again, the HOA's resolutions alone are not legally sufficient. Secondly, the CC&Rs declare that their purpose is for the common benefit of *all* the Subdivision and, therefore, cannot be used by some lot owners to restrict the rights of other lot owners in a manner that is discriminatory, especially with respect to the right to develop. A proposed amendment that attempts to restrict the right to develop a single lot in a manner to which the other lots are not restricted is a clear violation of the CC&Rs declaration that they are for the benefit of the entire Subdivision. Thirdly, any attempt to amend/restrict the Waiver/Consent found in Article 16, Section 11 would be in violation of the conditions of plat approval and, therefore, invalid.

Based upon the above the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the parties hereto and the subject matter herein.

2 Any Conclusions of Law contained in the previous sections are incorporated herein as Conclusions of Law.

3. Granting summary judgment is appropriate when the record does not involve disputed facts and the motion turns primarily on questions of law.

4. The Appellant's challenges to the City's Findings of Fact No. 2 are not well founded for the reasons set forth in the Analysis Section.

5. The reserved right to develop Tract B is a property right which runs with the land and transfers with any transfer of ownership of the land. This right therefore belongs to the Applicant as current owner of Tract B.

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6. The Appellant's challenges to the City's Findings of Fact No. 3 are not well founded for the reasons set forth in the Analysis Section.

7. The Appellant lacks standing to raise objections relating to impacts of development on the well head protection covenant as the Appellant has not been prejudiced or likely to be prejudiced by decisions relating to this covenant. YMC 18.10.110(E)

8. The Appellant's challenges to the City's Findings of Fact No. 5 are insufficient for the reasons set forth in the Analysis Section.

9. Although the Appellant has demonstrated procedural defects in the Notice of Application, these defects are harmless due to the Appellant's full and fair opportunity to be heard.

10. The Appellant's challenges to the City's Findings of Fact No. 6 is not legally sufficient for the reasons set forth in the Analysis Section.

11. The Waiver/Consent contained in Article 16, Section 11 of the CC&Rs satisfies the requirements of RCW 58.17.215 for approval by other homeowners.

12. Separately, as the alteration only affects Tract B the application only requires the signatures of the owners of Tract B.

13. The HOA's claimed amendments to the CC&Rs are invalid for the reasons set forth in the Analysis Section.

14. Even if the proposed amendments to the CC&Rs were deemed valid, the City was not required to consider them as they did not exist at the time of the approval of the Subdivision. RCW 58.17.215

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DECISION

The Hearing Examiner having reviewed the City's Motion to Dismiss and the Appellant's Response, and having entered Conclusions of Law as to why the City's Motion to Dismiss is appropriate, now, therefore,

The City's Motion to Dismiss is **granted** and the appeal is **dismissed**.

DATED this 20 day of January, 2022.

Mark C. Scheibmeir
City of Yelm Hearing Examiner

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