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**BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA**

In Re:

ABS INVESTMENTS, LLC,

Applicant,

Re: Wellington Heights

File No. 18-1315

**APPLICANT'S HEARING EXAMINER
MEMORANDUM**

COMES NOW the Applicant, ABS Investments, LLC, by and through its attorney, Thomas J. Westbrook of Rodgers Kee Card & Strophy, and submits the following memorandum in support of its application for the subdivision project referenced above.

I. ISSUE PRESENTED

Can the Hearing Examiner approve the modifications to SEPA Mitigation for Off-Site Stormwater Impacts to this project as recommended by the City of Olympia in its December 10, 2018 Memorandum and presented at the public hearing on December 10, 2018 without providing opponents an opportunity to respond or appeal?

II. MATERIAL FACTS

After review of the Applicant's Preliminary Drainage and Erosion Control Report dated July 23, 2018 and revised Preliminary Civil Plans prepared by Olympic Engineering, the City

1 of Olympia Water Resources Engineer (Storm & Surface Water Public Works) prepared a
2 written Memorandum dated October 2, 2018 to Jeff Fant, Engineering Plans Examiner
3 (Community Planning & Development) regarding Stormwater Review of the Applicant's
4 Wellington Heights project CPD# 18-1315.¹ That Memorandum found the overall Stormwater
5 design concept was acceptable but required some changes to meet City of Olympia code.
6 Those changes related to "the downstream conveyance system at the Bruce Titus auto
7 dealership" which was determined to have "insufficient capacity to handle current flows".
8

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10 The Memorandum was presented to the Applicant's civil engineer, Chris Merritt, of
11 Olympic Engineering. As stated in the Memorandum: "The City of Olympia is expecting the
12 Wellington Heights project to improve the downstream conveyance, including design,
13 acquisition of drainage and temporary construction easements, and construction."
14

15 In response to the City's new requirement, Olympic Engineering presented an
16 amended drainage plan received by the City on October 11, 2018 that remediated the City's
17 concerns in total. The amended plan totally removed the offsite impact upon the downstream
18 conveyance systems at the Bruce Title auto dealership by substituting an onsite downstream
19 conveyance system. The onsite system creates no negative offsite impact to the Bruce Titus
20 auto dealership while at the same time installing a 36" diameter storm pipe within the
21 Wellington Heights project that would convey up to 100-cfs.² In his hearing testimony, Chris
22 Merritt stated that flow capacity is around 60% more than the 100-year flow rate projected to
23 be sufficient by the City of Olympia.
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¹ Attachment 19 to Hearing Examiner Staff Report
² Attachment 12 to Hearing Examiner Staff Report

1 The MDNS was issued by the City 15 days later on October 26, 2018 without updating
2 the SEPA-BASED CONDITIONS and MITIGATING MEASURES at Condition No. 3 to
3 include the amended stormwater drainage flow plan presented by the Applicant. By
4 Memorandum dated December 10, 2018 to the Hearing Examiner, the City of Olympia
5 Stormwater Engineering Division made a recommendation that the Hearing Examiner
6 approve the amended stormwater drainage flow plan and strike the two mitigation measures
7 related to the Bruce Titus stormwater swale and buffer screening restoration as those
8 measures would not be required under the amended plan requested by the City and
9 proposed by the Applicant.
10
11

12 Without prior notice, at the hearing on December 10, 2018, a motion for continuance
13 was presented to the Staff and Hearing Examiner by attorney, Allen Miller, on behalf of Mauri
14 Shuler, a resident of 1532 Fern Street SW, Olympia, Washington, located northerly of the
15 Wellington Heights project. Her motion also requested that “the project’s Mitigation
16 Determination of Non-Significance (MDNS) be returned to the City’s SEPA Officer for
17 issuance of a revised SEPA determination.
18

19 The hearing was not continued. After the hearing this Memorandum by Applicant was
20 requested by the Hearing Examiner as to the Issue Presented above. An order on Motion to
21 Continue was issued by the Hearing Examiner on December 13, 2018.
22

23 III. LEGAL ANALYSIS

24 The City of Olympia has express statutory authority to “adopt rules, ordinances, or
25 resolutions pertaining to the integration of the policies and procedures” of the State
26 Environmental Policy Act (SEPA) “into the various programs under their jurisdiction for

1 implementation”.³ Further, the City of Olympia is required “to adopt its own rules and
2 procedures for implementing SEPA” and “to revise or add to their SEPA procedures at
3 any time” including “public notice and opportunity for public comment.”⁴
4

5 The City of Olympia provides in its Code (OMC) that “[i]n addition to the authority and
6 power to modify mitigation measures pursuant to appeal” the Hearing Examiner is
7 “authorized to modify such mitigating conditions or measures as appropriate” whether there is
8 an appeal opportunity or not or “when deemed necessary by the Examiner to ensure
9 consistency with any decision rendered by the Examiner on the underlying application or
10 permit.”⁵
11

12 Under this provision of the OMC, the Hearing Examiner in this matter can review the
13 hearing record and has legal authority in this case to approve the request by the City of
14 Olympia in its December 10, 2018 Memorandum to the Hearing Examiner to modify the
15 mitigation measures outlined in the MDNS published on October 26, 2018 or to make such
16 other mitigation the Hearing Examiner deems necessary to ensure consistency with any
17 decision he renders.
18

19 The amendment to the Applicant’s stormwater drainage plan was presented to the
20 City prior to the issuance of the MDNS and was available during the comment period for the
21 public to appeal; no appeal was made. Ms. Shuler’s motion is an attempt to appeal the
22 MDNS after the time for appeal has run. The Hearing Examiner has kept the record open for
23 Ms. Shuler or any other aggrieved party to respond to the City’s request.
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³ RCW 43.21C.120(3)

⁴ WAC 197-11-904(1)&(3)

⁵ OMC 14.04.155

1 There is no prejudice to Ms. Shuler or any other aggrieved party for the Hearing
2 Examiner to strike the 2 mitigating factors as requested by the City or as to any other
3 additions to or removal of mitigating factors outlined in the MDNS in reaching his decision on
4 the Applicant's Preliminary Plat submission. That is all within the authority of the Hearing
5 Examiner under the law and should any aggrieved party want to appeal the final decision of
6 the Hearing Examiner they have a procedural process of appeal that remains.
7

8 IV. CONCLUSION

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10 The Hearing Examiner is authorized under the law to approve the modifications to
11 SEPA Mitigation for Off-Site Stormwater Impacts to this project as recommended by the
12 City of Olympia in its December 10, 2018 Memorandum and as presented at the public
13 hearing on December 10, 2018. Any opponents have had an opportunity to respond and
14 the Hearing Examiner is allowed to keep the hearing record open for additional responses
15 prior to rendering his final decision. Any aggrieved party has the right of appeal thereafter.
16

17 There is no prejudice to any party's right of due process by extending the time for
18 response and in any case such party has the remaining right of appeal as to the Hearing
19 Examiner's final land use decision.
20

21 DATED this 13th day of December, 2018.

22 RODGERS KEE & CARD STROPHY, P.S.
23 Attorneys for Applicant

24 

25 By: THOMAS J. WESTBROOK, WSBA #4986
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Paula Smith *via email*
Associate Planner, City of Olympia
P.O. Box 1967
Olympia, WA 98507
psmith@ci.olympia.wa.us
tsmith@ci.olympia.wa.us
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Allen T. Miller *via email*
The Law Office of Allen T. Miller, PLLC
1801 West Bay Drive NW, #205
Olympia, WA 98502
allen@atmlawoffice.com

Hearing Examiner, Mark Scheibmeir *via email*
mscheibmeir@localaccess.com
kfriend@localaccess.com

DATED at Olympia, Washington, this 13th day of December, 2018.

Catherine Hitchman
Catherine Hitchman