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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 AMENDED 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 amended memorandum in support of its application for the subdivision project referenced above. This amendment is only to the Statement of Material Facts.

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?

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II. MATERIAL FACTS

On October, 2, 2018, Steve Thompson (City of Olympia Water Resource Engineer) sent a memorandum to Jeff Fant (City of Olympia Engineering Plans Examiner) regarding Stormwater Review of the Applicant's Preliminary Drainage and Erosion Control Plan, dated July 23, 2018.¹ Mr. Thompson found the overall stormwater design concept to be acceptable but required some changes to meet City of Olympia Code. A portion of the existing off-site conveyance system located on Mr. Titus' parcel was determined by city staff to have "insufficient capacity to handle current flows". Specifically, the east-west ditch along the northern portion of Mr. Titus' parcel does not have adequate capacity.²

Between October 2, 2018 and October 11, 2018, the Applicant's civil engineer, Chris Merritt of Olympic Engineering, worked with city staff on resolving the issue by proposing to re-route the on-site conveyance system to discharge at the northwest corner of Mr. Titus' parcel at which point the existing off-site conveyance system has adequate capacity to accommodate the expected stormwater flows. The existing ditch that was determined to have insufficient capacity is being bypassed entirely as reflected on the amended drainage plan dated October 11, 2018.³ Additionally, the re-located discharge point is located entirely within an existing City of Olympia easement on Mr. Titus' parcel. The revised and city accepted drainage proposal creates no negative impact to Mr. Titus' parcel.⁴

On October 26, 2018, the city issued the SEPA MDNS, 15-days after the revised drainage plan was received and accepted by city staff. However, the SEPA-BASED

¹ Attachment 19 to Hearing Examiner Staff Report

² Declaration of Chris Merritt

³ Attachment 12 to Hearing Examiner Staff Report

⁴ Declaration of Chris Merritt

1 CONDITIONS and MITIGATING MEASURES in the MDNS do not reflect the amended
2 drainage plan accepted by city staff on October 11, 2018 (specifically bullet points 3 & 4
3 under Condition 3).⁵
4

5 On December 10, 2018, the city provided a memorandum to the Hearing Examiner
6 requesting the last two bullet points under Condition/Mitigation #3 be stricken as they are
7 no longer applicable.

8 The proposed Wellington Heights project will be infiltrating all the stormwater runoff
9 generated by the proposed roadway areas along with the roof areas from Lots 38-56 into a
10 desirable sand layer that was found just below the till layer in proposed Open Space &
11 Storm Tract E. The infiltration facility has been preliminary sized to exceed minimum city
12 requirements. The infiltration facility will be monitored through at least one full wet season
13 to evaluate the performance and, in the event the facility is not performing as designed,
14 there is adequate space available to increase the size of the infiltration facility by
15 approximately 33%.⁶
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18 Without prior notice, at the hearing on December 10, 2018, a motion for continuance
19 was presented to the Staff and Hearing Examiner by attorney, Allen Miller, on behalf of
20 Mauri Shuler, a resident of 1532 Fern Street SW, Olympia, Washington, located northerly
21 of the Wellington Heights project. Her motion also requested that "the project's Mitigation
22 Determination of Non-Significance (MDNS) be returned to the City's SEPA Officer for
23 issuance of a revised SEPA determination.
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⁵ Declaration of Chris Merritt

⁶ Declaration of Chris Merritt

1 The hearing was not continued. After the hearing this Memorandum by Applicant was
2 requested by the Hearing Examiner as to the Issue Presented above. An order on Motion to
3 Continue was issued by the Hearing Examiner on December 13, 2018.
4

5 III. LEGAL ANALYSIS

6 The City of Olympia has express statutory authority to “adopt rules, ordinances, or
7 resolutions pertaining to the integration of the policies and procedures” of the State
8 Environmental Policy Act (SEPA) “into the various programs under their jurisdiction for
9 implementation”.⁷ Further, the City of Olympia is required “to adopt its own rules and
10 procedures for implementing SEPA” and “to revise or add to their SEPA procedures at
11 any time” including “public notice and opportunity for public comment.”⁸
12

13 The City of Olympia provides in its Code (OMC) that “[i]n addition to the authority and
14 power to modify mitigation measures pursuant to appeal” the Hearing Examiner is
15 “authorized to modify such mitigating conditions or measures as appropriate” whether there is
16 an appeal opportunity or not or “when deemed necessary by the Examiner to ensure
17 consistency with any decision rendered by the Examiner on the underlying application or
18 permit.”⁹
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21 Under this provision of the OMC, the Hearing Examiner in this matter can review the
22 hearing record and has legal authority in this case to approve the request by the City of
23 Olympia in its December 10, 2018 Memorandum to the Hearing Examiner to modify the
24 mitigation measures outlined in the MDNS published on October 26, 2018 or to make such
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⁷ RCW 43.21C.120(3)

⁸ WAC 197-11-904(1)&(3)

⁹ OMC 14.04.155

1 other mitigation the Hearing Examiner deems necessary to ensure consistency with any
2 decision he renders.

3
4 The amendment to the Applicant's stormwater drainage plan was presented to the
5 City prior to the issuance of the MDNS and was available during the comment period for the
6 public to appeal; no appeal was made. Ms. Shuler's motion is an attempt to appeal the
7 MDNS after the time for appeal has run. The Hearing Examiner has kept the record open for
8 Ms. Shuler or any other aggrieved party to respond to the City's request.

9
10 There is no prejudice to Ms. Shuler or any other aggrieved party for the Hearing
11 Examiner to strike the 2 mitigating factors as requested by the City or as to any other
12 additions to or removal of mitigating factors outlined in the MDNS in reaching his decision on
13 the Applicant's Preliminary Plat submission. That is all within the authority of the Hearing
14 Examiner under the law and should any aggrieved party want to appeal the final decision of
15 the Hearing Examiner, they have a procedural process of appeal that remains.

17 IV. CONCLUSION

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

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

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DATED this 17th day of December, 2018.

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



By: THOMAS J. WESTBROOK, WSBA #4986

DECLARATION OF SERVICE

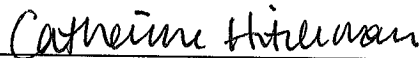
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Paula Smith *via email*
Associate Planner, City of Olympia
P.O. Box 1967
Olympia, WA 98507
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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 17th day of December, 2018.



Catherine Hitchman