

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **GRAHAM AND JULIE TASH,**

4 **Appellants,**

5 **v.**

6 **CITY OF TACOMA**, a Washington
7 municipal corporation, through its
8 Planning and Development Services
9 Department,

9 **Respondent,**

10 **APEX EXPRESS CORP.,**

11 **Applicant/Respondent.**

FILE NO.: HEX 2019-020
(LU17-0009 & LU17-0069)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

12 **THIS MATTER** came before JEFF H. CAPELL, the Hearing Examiner for the City
13 of Tacoma, Washington, for hearing initially on September 26, 2019. Appellants Graham and
14 Julie Tash (hereafter collectively the “Tashes” or “Appellants”), were represented by attorney
15 Mark A. Hood of Vandenberg Johnson & Gandara, LLP. Respondent City of Tacoma (the
16 “City”) was represented by Deputy City Attorney Steve Victor, and Applicant/Respondent
17 Apex Express Corp./Alexey Shvets (“Shvets” or the “Applicant”)¹ appeared without legal
18 counsel. During the course of the proceedings on September 26, 2019, the Tashes and the
19 City made a request to continue the hearing to afford them an opportunity to further review
20 an exhibit offered for the first time at the hearing by the Applicant (*Ex. RA-1*).

21
¹ Apex Express Corp., a Washington corporation (separately “Apex”), is the record owner of the real property addressed as 4203 Forest Street, which is the subject of the permit being appealed, making Apex the formal Applicant. Shvets is a listed governor of Apex.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402

- 1 -
ORIGINAL

1 By agreement of the parties, the Hearing Examiner recessed the hearing until
2 November 14, 2019. When the hearing reconvened on that date, there were no changes to the
3 representation of the parties. Throughout the course of the hearing, the following witnesses
4 were placed under oath and testified:

5 **For the Appellants:** Graham Tash and David H. McCormack, LEG, LHG.

6 **For the Applicant:** Alexey Shvets, Dana C. Biggerstaff, P.E., and William
7 Dunning, P.E.

8 **For the City:** Karla Kluge, Senior Environmental Specialist and Craig Kuntz,
9 Residential Review Supervisor.

10 Exhibits were admitted and reviewed. Based upon the evidence submitted, the
11 Hearing Examiner makes the following:

12 FINDINGS OF FACT

13 1. Applicant/Respondent Apex is the record owner of that certain real property
14 assigned the street address of 4203 Forest Street,² Tacoma, Washington (Pierce County Tax
15 Parcel No. 5565000291—hereafter, the “Subject Property”). *Shvets Testimony; Ex. RC-1.*
16 Shvets, as a governor of Apex, intends to improve the Subject Property with a single-family
17 residence that he and his family intend to occupy as their home. *Id.* The Subject Property is
18 appropriately zoned for this purpose being located within an R-2 Single-Family Dwelling
19 District. *Ex. RC-1.*

20 2. As part of the process toward building that home, due to the presence of critical
21 areas on the Subject Property, Shvets applied to the City for a Critical Areas Development
Permit which was reviewed under City Planning and Development Services (“PDS”) file no.

² At this location in the City of Tacoma, Forest Street is an unopened, unimproved right-of-way. Access to the Subject Property is obtained from North Waterview Street across an easement.

1 LU17-0009 (the “CADP”).³ The PDS Director approved the CADP by written Decision dated
2 July 17, 2019 (the “Director’s Decision”) *Ex. RC-1*. The Director’s Decision is the initial
3 analysis of critical areas, impacts and mitigation specific to the Applicant’s intention “[t]o
4 construct a new single-family residence within a Category IV wetland and buffer located on a
5 steep slope” on the Subject Property, but the CADP does not allow for any actual
6 construction on the Subject Property. It is a land use permit, not a development permit in the
7 parlance of PDS. *Shvets Testimony, Kluge Testimony, Kuntz Testimony; Ex. RC-1*.

8 3. The Director’s Decision contains a detailed analysis of the Category IV wetland
9 and buffer located on the Subject Property. *Ex. RC-1*. Airtime and analysis given to slope
10 stability issues is significantly less. *Id.*

11 4. The Tashes appealed the Director’s Decision by written notice dated July 31,
12 2019. By letter dated September 18, 2019 (hereafter the “A-2 Letter”), the Tashes listed the
13 following as flaws with the Applicant’s slope stability study:

- 14 a. Applicant’s analysis uses incorrect cohesion values for slope stability
- 15 b. applicant’s analysis overstates slope stability in earthquake situations
- 16 c. applicant’s analysis fails to analyze surface saturation
- 17 d. applicant’s analysis uses incorrect topographic slope shape than existing
18 conditions
- 19 e. applicant’s analysis overstates layer of glacial till and resulting slope
20 stability
- 21 f. applicant’s water table analysis is not consistent between pre and post
development
- g. applicant’s analysis uses unrealistic friction values and cohesion values for
the site

³ The Planning and Development Service Director’s Decision dated July 17, 2019, lists permit application File Nos. LU17-0009 and LU17-0069. At hearing on September 26, 2019, the City clarified that File No. LU17-0009 is associated with the Critical Areas Development Permit application and File No. LU17-0069 is associated with the State Environmental Policy Act (“SEPA”) determination and therefore, both permit numbers appear in the Director’s Decision. The parties agreed the appeal before the Hearing Examiner focuses solely on permit application File No. LU17-0009 with regard to slope stability and not the SEPA determination.

1 h. applicant's wing wall/debris barrier wall height is not supported, design is
2 flawed [sic] *Ex. A-2*.

3 Distilling the above into a single issue statement, the Tashes challenge the City's approval of
4 the CADP because they believe there are flaws with the Applicant's slope stability study
5 ("SSS") such that "[t]he [Director's] Decision was issued in error and should be reversed and
6 denied." *Id.* At the hearing, through legal counsel, Appellants confirmed that they were not
7 challenging other findings or conclusions from the Director's Decision,⁴ only the findings
8 and/or conclusions regarding slope stability, specifically Conclusion 7, which states regarding
9 slopes:

10 "The steeply sloped areas have been reviewed and analyzed through engineered
11 design and slope stability has been demonstrated by the Geotechnical engineer of
12 record provided the applicant comply with the specifications and
13 recommendations in the report and comments provided by all review parties."
14 *Ex. RC-1*.⁵

15 The Appellants' above referenced request to reverse and deny the CADP notwithstanding, in
16 other exhibits (i.e., *Ex. A-3 and Ex. A-4*), and abundantly in hearing testimony, Appellants'
17 hydrogeologist appeared to be calling instead for additional or revised slope stability analysis,
18 which is not necessarily the same as requiring reversal or denial of the CADP as will be
19 addressed below. As specific examples of this, Appellants presented exhibits in which are
20 found all of the following statements:

- 21 ● Based on our assessment, it is Aspect's opinion that the slope stability analyses
completed for design do not accurately represent Site conditions and should be
revised. *Ex. A-3*.

⁴ Through legal counsel, Appellants acknowledged that the City performed a very detailed wetland analysis, and confirmed that nothing regarding the wetland(s) on the Subject Property is at issue here.

⁵ The A-2 Letter (*Ex. A-2*) erroneously refers to Conclusion 7 as "Finding No. 7." Finding 7 actually refers to the current zoning and neighborhood district of the Subject Property and not to slope stability. *Ex. RC-1*.

- 1 ● If the landslide hazards are reassessed using standard practices and
2 conservative parameters, and the risks mitigated with a well-designed and
3 constructed slope shoring wall and house foundations, or other slope
4 stabilization measures, it is our opinion that the landslide hazards for the Site
5 can be reduced below the current condition and could result in improved safety
6 for those properties above and below the Site. *Ex. A-3.*
- 7 ● It remains Aspect's opinion that the Georesources (2019a) hazards assessment,
8 including numerical slope stability analyses completed for their submittal, does
9 not accurately represent the Site conditions and does not accurately characterize
10 the Site slope hazards, and ***therefore should be revised*** using industry standard
11 methods and engineering values based on current Best Available Science.
12 [Emphasis added] *Ex. A-4.*

13 5. Appellants' A-2 Letter makes reference to setbacks (*Ex. A-2*) with the following
14 contention:

15 "Waiver of setback requirements can only be granted where it can be
16 demonstrated through a geotechnical analysis prepared by a geologic hazards
17 specialist that there is no significant risk to the development proposal or adjacent
18 properties, or that the proposal can be designed so that any landslide hazard is
19 significantly eliminated. *See, e.g., TMC Sections 13.11.700 A1(l), B1(o).*"⁶

20 The Appellants presented no specific evidence regarding the Applicant's compliance with
21 City setback requirements within the context of the CADP's approval except insofar as the
above incorrectly cited contention ties into Appellants' main issue challenging the sufficiency
of the Applicant's SSS. The same is true regarding any challenge to the City's determination
that the Reasonable Use Test of Tacoma Municipal Code ("TMC") 13.11.240 has been met
for purposes of issuing the CADP—no evidence specific to whether this test is met was
presented except insofar as the challenge to the sufficiency of the SSS would tie in.

⁶ It is unclear what these apparent citations to the Tacoma Municipal Code ("TMC") are actually referencing. There are no subsections "*A1(l), [and] B1(o)*" in TMC 13.11.700. In all fairness however, at least one City witness referred to "TMC 13.11.700" in what seemed to be an all-inclusive sense that would have to include a reference to the ensuing sections (§§.710~.730) that have actual regulatory content in them and have meaning.

1 6. The Appellants did accurately cite to sections within the City’s *One Tacoma:*
2 *Comprehensive Plan* (The “Comp Plan”) as authority for their position that the SSS was not
3 sufficient to approve the CADP. These come from the “Environment + Watershed Health”
4 component of the Comp Plan and include the following:

5 Policy EN–2.1 Minimize the risk of damage to life and property by establishing
6 robust development standards that ensure avoidance and/or minimization of
7 potential geologic hazards.

8 Policy EN–2.2 Require appropriate levels of study, technical analysis, best
9 available science and all known available and reasonable methods of prevention
10 control and treatment (AKART) as a condition to permitting construction within
11 geologically hazardous areas, ensure sound engineering principles are used based
12 on the associated risk in these areas and limit land uses within or near geologically
13 hazardous areas.

14 Policy EN–3.5 Discourage development on lands where such development would
15 pose hazards to life, property or infrastructure, or where important ecological
16 functions or environmental quality would be adversely affected:...

17 b. Geologic hazard areas...

18 7. All parties are in agreement that the Subject Property is steeply sloped.

19 *McCormack Testimony, Biggerstaff Testimony, Dunning Testimony, Kluge Testimony, Kuntz*
20 *Testimony; Ex. RC-1, Ex. RA-1, Exs. A-1~A-4.* All parties are in agreement that there have
21 been slides in the vicinity of the Subject Property. *McCormack Testimony, Biggerstaff*
Testimony, Dunning Testimony, Kluge Testimony, Kuntz Testimony. By the end of the
hearing, the parties were in agreement that the slide specifically referenced during the hearing
(that happened on or around June 19, 2002) was caused by faulty construction
methods/practices and not because of any apparent fault in design. *McCormack Testimony,*
Biggerstaff Testimony, Dunning Testimony, Ex. RA-2.

1 8. Likewise, by the end of the hearing, the parties were in agreement that a single-
2 family residence could be built safely on the Subject Property, provided that slope stability
3 has been adequately assessed, leading to a house designed in sound enough fashion that it
4 will not compromise, and may even shore up the slope.⁷ *McCormack Testimony, Biggerstaff*
5 *Testimony, Dunning Testimony.*

6 9. Again, the issue on appeal and the material point of disagreement between the
7 Appellants and the Respondents is whether the Applicant's SSS (*Exhibit "E" to Ex. RC-1* as
8 supplemented by *Ex. RA-1*) is sufficient for the City to have issued/approved the CADP. Both
9 the Appellants and the Applicant made diligent presentations, through their exhibits and their
10 hearing testimony supporting their positions, essentially creating a battle of the experts.
11 *McCormack Testimony, Biggerstaff Testimony, Dunning Testimony; Ex. A-3, Ex. A-4, Ex.*
12 *RC-1 [at Exhibit "E"], Ex. RA-1.* Biggerstaff and Dunning are both licensed engineers with
13 experience in hydrogeology. *Biggerstaff Testimony, Dunning Testimony.* McCormack is also
14 a highly experienced hydrogeologist and licensed engineer. *McCormack Testimony.*⁸

15 10. Disagreement among witnesses in technical legal proceedings such as this
16 appeal is not uncommon. That the Applicant's consultants and the Appellants' consultants
17 disagree is not terribly surprising given the issues here. McCormack's own reports
18 acknowledge that:

19 **"Geoscience is Not Exact.** The geoscience practices (geotechnical engineering,
20 geology, and environmental science) are far less exact than other engineering and
21 natural science disciplines. It is important to recognize this limitation in
evaluating the content of the report." *Ex. A-3, Ex. A-4.*

⁷ McCormack speculated that making the project safe might turn out to be very expensive.

⁸ McCormack pointed out, in response to questioning from the City, that he is an "engineering geologist," while the "Applicant's expert" (not identified by name) is a "geotechnical engineer," and that the two are different, but he did not explain what the difference is.

1 Given their disagreement, the Appellants proposed a third-party review of the competing
2 slope stability contentions as a “tie-breaker.” *McCormack Testimony*. The Examiner finds
3 such to be unnecessary given the decision contained herein below.

4 11. The City testified that it reviewed the Applicant’s SSS for compliance with the
5 TMC, and that it relied heavily on the professional engineers who had performed the SSS and
6 certified it with their stamp. *Kluge Testimony, Kuntz Testimony*. The City provided that after
7 final determination on the CADP, the Applicant will still need to obtain a Site Development
8 Permit and a Building Permit before the intended house can be constructed, and that the
9 house design and related slope stability will be further scrutinized under the review for those
10 permits. *Id.* Biggerstaff and Dunning both testified that much of the additional, more detailed
11 analysis that is in contention in this appeal will be done as part of the upcoming permit
12 review process, and that doing so at that stage is commonplace.

13 12. McCormack testified that the flaws he found in the Applicant’s SSS must be
14 addressed during the CADP process and that waiting until the next stage permits are
15 reviewed, or as the house is being designed, is too late. Questioning from the Examiner on
16 this point did not produce a clear answer as to why making these assessments as part of the
17 next stage(s) of permit review would be too late. McCormack did state that, if left until later,
18 there might be undesirable consequences specifically regarding off-site impacts. This
19 contention was not compelling because those impacts would not occur unless construction is
20 approved and takes place, and construction cannot occur unless and until the Applicant
21 obtains a Site Development Permit and a Building Permit, which is where the Applicant and

1 the City indicated all remaining necessary analysis will be completed. *McCormack*
2 *Testimony, Biggerstaff Testimony, Dunning Testimony, Kuntz Testimony.*

3 13. Kuntz testified that, now that it has been brought to light, the additional analysis
4 and information championed by McCormack would be useful, and that it is ideal for the City
5 to have that type of information at the CADP assessment stage (“pre-development” meaning
6 prior to reviewing actual development permits, and of course, prior to actual
7 development/construction activity), but that obtaining it later is not unusual, nor is it
8 necessarily detrimental to the development process. Kuntz further testified that his review of
9 the SSS did not identify any of the flaws alleged by the Appellants here, and that these types
10 of concerns can also be addressed at the time of development permit review. Finally, Kuntz
11 indicated that when questions over matter such as cohesion values etc. come up, the City will
12 often ask for more information.

13 14. In Exhibit A-4, McCormack seems to acknowledge, in some degree, the timing
14 elasticity which Biggerstaff and Dunning espoused in a passage on the first page which states,
15 “Final design for the Project has not been completed, and at this stage, final hazards
16 mitigation design and other geotechnical design need not be complete.” This statement
17 seems, at least partially, to agree with Biggerstaff and Dunning’s contentions regarding
18 additional analysis being a routine part of the more rigorous design activity that happens in
19 the next phase permits. This passage from Exhibit A-4 continues by stating, “However, we
20 note that the City's *land use decisions* for this steep slope and landslide hazard environmental
21 critical areas must be based on a complete and accurate assessment of Site slope hazards.”

1 [Emphasis added] As pointed out above, a land use permit/decision such as the CADP, does
2 not allow any actual construction to take place and is preliminary in nature.

3 15. In response to McCormack’s testimony, Dunning stated that achieving the goals
4 set forth in Comp Plan Policies EN 2.1 and 2.2 “culminate[s] in permitting construction, not
5 necessarily in land use approval.” He then went through the Appellants’ eight listed SSS
6 alleged flaws (*Finding 4 above, taken from Ex. A-2*) one at a time in his testimony. In regard
7 to the Appellants’ alleged flaws, Dunning testified as follows (using the flaws list as a guide):

8 a. applicant’s analysis uses incorrect cohesion values for slope stability

9 *Response—Applicant used industry standards. This concern will be*
10 *addressed further in later permits, but the Applicant is willing to do an*
additional boring now based on Appellants’ recommendation.

11 b. applicant’s analysis overstates slope stability in earthquake situations

12 *Response—The ASCE 7-10 test recommended by the Appellant would be*
13 *performed during later permitting.*

14 c. applicant’s analysis fails to analyze surface saturation

15 *Response—Surface saturation will be further analyzed at the Building*
Permit stage.

16 d. applicant’s analysis uses incorrect topographic slope shape than existing
17 conditions

18 *Response—Applicant included an old exhibit, but this was not used as the*
basis for design at this point. The problem is corrected by addressing the
19 *actual design.*

20 e. applicant’s analysis overstates layer of glacial till and resulting slope stability

21 *Response—This is a statement calling for additional investigation on the*
upper slope. The Applicant is willing to do that if the City requires.

1 f. applicant's water table analysis is not consistent between pre and post
2 development

3 *Response—Each of the existing borings has a different water surface*
4 *elevation. Once the final location of the house is determined, final water*
5 *table analysis can be performed in the Building Permit phase.*

6 g. applicant's analysis uses unrealistic friction values and cohesion values for
7 the site

8 *Response—This too is a statement calling for additional investigation on the*
9 *upper slope. The Applicant is willing to do that if the City requires.*

10 h. applicant's wing wall/debris barrier wall height is not supported, design is
11 flawed [sic] Ex. A-2.

12 *Response—A minimum design height of five feet (5') was used for*
13 *illustration. Actual/necessary wall height and design will be addressed in*
14 *designs at the Building Permit stage.*

15 16. Any conclusion of law below which may be more properly deemed or
16 considered a finding of fact is hereby adopted as such.

17 CONCLUSIONS OF LAW

18 1. The Hearing Examiner has jurisdiction over appeals of PDS Director decisions
19 pursuant to TMC 1.23.050.B.2 and TMC 13.05.050. Hearings on such decisions are
20 conducted *de novo* in accordance with TMC 1.23.060. Appellants in land use appeals have
21 the burden to show by a preponderance of the evidence that the Director's Decision should be
reversed or modified. *TMC 1.23.070.C*. In this appeal, that burden of proof falls to the Tashes
to show that the Director's Decision was incorrectly decided and that the TMC's applicable
critical areas development criteria were not met such that the CADP should be "reversed and
denied" as the Appellants requested in their appeal notice and in the A-2 Letter (*Ex. A-2*).

1 2. The law requires that decisions from adjudicative tribunals rest upon evidence.⁹
2 Evidence is used to establish facts. “Proof of the fact to be established may be by direct or
3 circumstantial evidence.”¹⁰ Argument, however, is not evidence.¹¹ Evidence is then compared
4 or aligned against controlling law in order to render a decision.

5 3. Neither side presented *controlling authority* from the TMC or elsewhere on the
6 issue of whether the Applicant’s SSS was sufficient at the CADP issuance stage. The City
7 indicated it had reviewed the SSS for compliance with the TMC, and indicated that it did not
8 identify any of the Appellants’ alleged flaws during that review. The Applicant refuted the
9 Appellants’ contention that the SSS is flawed, and offered that regardless, slope stability will
10 be addressed in further detail as the entitlements process moves from land use to
11 development, but offered along the way, to do some additional analysis if required. In the
12 absence of detailed analysis and application of the TMC, Appellants most appealed to
13 authority were their references to the above Comp Plan goals/policies (*FoF 6*), which do at
14 least tie in to language in TMC 13.11.110¹² which reads in pertinent part:

15 The purpose of this chapter is to protect the public health, safety, and welfare by
16 establishing a regulatory scheme based on Best Available Science that classifies,
17 protects, and preserves Tacoma’s critical areas; by providing standards to manage
18 development in association with these areas; and by designating some of these
19 areas as environmentally sensitive in accordance with the State Environmental
20 Policy Act (SEPA).

21 TMC 13.11.900 defines “Best available science” as follows:

⁹ *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-357, 493 P.2d 1018, 1022-1023 (1972).

¹⁰ *Lamphiear*, 6 Wn. App. at 356, citing *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953); see also *GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 563, 307 P.3d 744, 752-753 (2013).

¹¹ *Jones v. Hogan*, 56 Wn.2d 23, 31-32, 351 P.2d 153, 159 (1960); *Hollins v. Zbaraschuk*, 200 Wn. App. 578, 594, 402 P.3d 907, 915 (2017); *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361, 370 (2007).

¹² Neither side presented TMC 13.11.110 as controlling authority.

1 The current science information used in the process to designate, protect, or
2 restore critical areas, that is derived from a valid scientific process as defined by
3 WAC 365-195-900 through 925. Sources of best available science are included in
4 “Citations of Recommended Sources of the Best Available Science for
5 Designating and Protecting Critical Areas” published by the Washington State
6 Office of Community, Trade and Economic Development.

7 Neither side in this appeal established through evidence that their espoused approach to the
8 slope stability issues presented in this appeal met this definition. In fact, the definition was
9 not addressed by either side at all.¹³

10 4. The Appellants did reference TMC 13.11.700 generally as controlling authority,
11 but TMC 13.11.700 itself has no substantive content that gives guidance to resolving the
12 issue of whether the Applicant’s SSS was sufficient to approve the CADP; TMC 13.11.700 is
13 merely a roadmap or index to what follows in subsequent sections (TMC 13.11.710~.730).

14 As referenced above, Appellants’ attempts at more specific citation seemingly within TMC
15 13.11.700 were to sections that do not exist in TMC 13.11.700 itself and were unidentifiable
16 as cited. *FoF 5 and FN 6*. The Examiner is not required to search out authorities in support of
17 a party’s contentions. Washington courts have routinely stated that a party’s failure to cite
18 any authority for a position is a concession that the argument lacks merit.¹⁴ It would appear
19 that Appellants’ specific subsection citations should have been to TMC 13.11.730.

20 5. As referenced above (*FoF 5*), because of the evidence in the record focusing
21 entirely on sufficiency off the SSS, Appellants’ setback argument rests entirely on

¹³ Referencing “either side” includes the Appellants and both Respondents—the Applicant and the City.

¹⁴ *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *State v. McNeair*, 88 Wn. App. 331, 339-340, 944 P.2d 1099, 1103 (1997); *Canal Station N. Condo. Ass’n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 322 P.3d 1229 (2013); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779, 794 (2013); *In re Disciplinary Proceeding Against Cottingham*, 191 Wn.2d 450, 465, 423 P.3d 818, 825 (2018).

1 Appellants' contention that the SSS is deficient. The same is true of any challenge by the
2 Appellants' to the City's determination regarding the Reasonable Use Test of TMC
3 13.11.240. The bottom line issue then is whether the Appellants showed the Applicant's SSS
4 to be deficient against requirements in the TMC or some other applicable controlling law(s).
5 This is where the Appellants might have presented evidence against the backdrop of TMC
6 13.11.730 subsections A.1.1¹⁵ and B.1.o. Rather than engage in that TMC specific analysis,
7 Appellants spent their time attacking the SSS from a standpoint of whether it included the
8 "best available science," and arguing that the SSS does not comply with Comp Plan Policies
9 EN-2.1, 2.2 and 3.5.

10 6. "[A] comprehensive plan is no more than a general policy guide to the later
11 adoption of official controls which is subordinate to specific zoning regulations."¹⁶ "A
12 comprehensive plan does not directly regulate site-specific land use decisions. Instead, local
13 development regulations, including zoning regulations, directly constrain individual land use
14 decisions."¹⁷ In other words, the specific development regulations in the TMC control here
15 over the more general policy statements found in the Comp Plan, especially in the event of
16 any conflicts. That said, as a general rule that makes for a bit of circular fun, development
17 "[r]egulations must be consistent with the comprehensive plan and be sufficient in scope to
18 carry out the goals set forth in the comprehensive plan."¹⁸ Regardless of the foregoing, there
19
20

21 ¹⁵ This is a lower case L. The font makes discerning that difficult.

¹⁶ *Cougar Mt. Assoc. v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988), citing *Carlson v. Beaux Arts Village*, 41 Wn. App. 402, 408, 704 P.2d 663, review denied, 104 Wn.2d 1020 (1985).

¹⁷ *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007) internal cites omitted.

¹⁸ *Id.*

1 is no conflict presented here between the Comp Plan and TMC 13.11, and the parties did not
2 contend otherwise.

3 7. The reason that there is no conflict between Appellants' Comp Plan based "best
4 available science" argument and the City's Critical Areas Code (TMC 13.11) is because
5 TMC 13.11.110 sets as one of the purposes of the entirety of TMC 13.11 "[p]rotect[ing] the
6 public health, safety, and welfare by establishing a regulatory scheme based on Best
7 Available Science that classifies, protects, and preserves Tacoma's critical areas..." In other
8 words, best available science should generally be employed/engaged in critical areas analysis
9 to protect the public health, safety, and welfare as the Appellants have argued.

10 8. The City and the Applicant are correct, however, that a CADP is a very
11 preliminary "land use" permit that does not allow anything to be built on the Subject
12 Property. Until such time as any construction activity takes place on the Subject Property,
13 there are no concrete threats to the public health, safety, and welfare, or to the critical area
14 itself.

15 9. As referenced above (*FoF 12*), Appellants' evidence on the criticalness of
16 timing was unconvincing and did not meet the burden of proof as to this issue (i.e., whether
17 Appellants' championed additional analysis must be performed at the CADP phase otherwise
18 the CADP must be denied), at least insofar as the present timing requiring reversal or denial
19 of the CADP is concerned. Kuntz did state, on questioning, that having the type of additional
20 information championed by the Appellants at the CADP assessment stage would be ideal
21 (*FoF 13*), but that after approval of a land use permit such as the CADP here, a whole new

1 round of review is engaged at the actual development stage, and that the City often does not
2 have the level of analysis the Appellants' deem necessary until the development stage. The
3 Applicant testified at some length that any perceived deficiencies in the SSS could be
4 rectified during later permit review, and the City did not disagree, but did add that when
5 questions arise, additional information is often requested by City reviewers. *FoF 13*.

6 10. Based on the foregoing, the Examiner concludes that the Appellants did not
7 show by a preponderance of the evidence that the Applicant's SSS was out of compliance
8 with the specific development regulations embodied in TMC 13.11 at the time the CADP was
9 issued. The Appellants' abundant testimony and evidence regarding flaws in the SSS
10 notwithstanding, there was no analysis of what TMC 13.11.730 (or any other provision of
11 TMC 13.11) requires for a CADP to be approved (or that would require denial). At best, the
12 conflicting testimony of McCormack (Appellants) versus Biggerstaff and Dunning
13 (Applicant) is a wash. Something must tip the scales for the status quo to be upended.

14 11. Once those alleged flaws are pointed out, however, if they have validity toward
15 the overall analysis, regardless of timing requirements, it becomes *advantageous* at this
16 stage, even if not *required*, to address them on the way to upholding issuance of the CADP
17 and achieving the overarching purposes of TMC 13.11.110 regarding protecting the public
18 health, safety and welfare through incorporating Best Available Science. In isolation, neither
19 the Appellants' nor the Applicant were so convincing in their presentations and evidence as
20 to declare a clear winner as to who's science is best. The burden of proof is on the
21 Appellants, however. The Respondents, perhaps unwittingly, tipped the scales for the

1 Appellant ever so slightly when (a) the City testified that the kind of information and analysis
2 championed by the Appellants would be helpful at the predevelopment stage even though not
3 required, and (b) the Applicant testified that it was willing to do some of the additional
4 analysis now, with the rest being done as the permit process moved forward to the
5 design/development phase. Given the whole of the testimony and evidence from the parties
6 weighed against the backdrop of controlling authority, the Appellants have somewhat
7 fortuitously shown by a preponderance that additional analysis *would be helpful*, but not that
8 such is *required*, and not that the additional analysis is required in order for the CADP to be
9 upheld. Similarly, the Appellants failed to support their contention regarding timing of the
10 additional analysis, i.e., that it must be done upfront in the CADP process. As a result, the
11 Appellants have not shown by a preponderance that the CADP is so defective as to require
12 reversal/denial. Appellants did show, through the whole of testimony, that supplementation
13 may have some benefits.

14 12. TMC 1.23.130 gives the Hearing Examiner the following authority:

15 When acting on any land use matter, the Hearing Examiner may attach...any
16 reasonable conditions found necessary to make the project compatible with its
17 environment, *to carry out the goals and policies of the City's Comprehensive
Plan*,... or to provide compliance with applicable criteria or standards set forth in
the City's land use regulatory codes. [Emphasis added]

18 Appellants' cited Comp Plan policies, although not controlling site specific development
19 regulations, when read in conjunction with TMC 13.11.110's purpose statement, and taken
20 against the backdrop of (a) the City's testimony that additional analysis would be helpful
21

1 sooner rather later, and (b) Applicant's testimony agreeing to perform certain parts of the
2 Appellants' requested additional analysis now, provide justification for the attachment of
3 some additional conditions as set forth below in the Order and Decision section.

4 13. Any finding herein which may be more properly deemed or considered a
5 conclusion is hereby adopted as such.

6 Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing
7 Examiner makes the following:

8 **ORDER and DECISION**

9 **Decision on Appeal**

10 Insofar as the Appellants requested in their appeal that the CADP be "reversed and
11 denied," (*Ex. A-2*) the appeal is DENIED because the Appellants did not show by a
12 preponderance of the evidence that the CADP failed to comply with applicable laws when
13 issued. At best, the Appellants showed that additional analysis of slope stability at the Subject
14 Property would be helpful and perhaps add to the overall mix of applying the best available
15 science to the proposed project, but they failed to show that the additional analysis, of
16 necessity, had to be performed by starting the CADP process over after reversing/denying the
17 present CADP.

18 The combination of (a) the Appellants' evidence for additional analysis, and (b) the
19 City's statement that additional analysis might be beneficial and would be better to have
20 sooner rather than later, and (c) the Applicant's testimony regarding its willingness to do
21 some additional analysis now, and that most of the Appellants' additional analysis will be

1 performed sooner or later in the permitting process in any event, together with (d) the
2 Hearing Examiner's authority to attach additional reasonable conditions, leads to the
3 Appellants' appeal being GRANTED IN PART, insofar as the appeal was requesting
4 additional slope stability analysis at the Subject Property. To that end, the Examiner hereby
5 ORDERS as follows:

6 **Order**

7 IT IS HEREBY ORDERED that the CADP is conditionally upheld, subject to the
8 following conditions being met at the time(s) specified:

9 1. The Applicant is hereby ordered to conduct an additional visual survey of
10 the Subject Property to see if anything in the currently existing slope stability
11 analysis should change (i.e. topographic slope shape) in light of the additional
12 critique and information obtained from the Appellants' review;

13 2. The Applicant is hereby ordered to (a) take an additional boring of the upper
14 slope and conduct additional upper slope investigation, as the Applicant proposed
15 in testimony, (b) analyze the sample(s) taken from the boring and (c) add all
16 additional data to the mix as the project moves forward to the more detailed
17 design that will be part of the Site Development Permit stage and Building Permit
18 stage;

19 3. The Applicant is hereby ordered to reanalyze the slope stability of the Subject
20 Property for seismic stability using the more conservative value suggested by the
21 Appellant (.028) and conduct the ASCE 7-10 test to see if the different value and

1 additional testing produces any material change that should be addressed in
2 design; and

3 4. The Applicant is hereby ordered to reanalyze slope cohesion, surface
4 saturation, geological layer data, and soil density using the same pre and post
5 construction data as suggested by the Appellants.

6 All the above analysis should be performed within one year's time from the date of this
7 Decision or prior to submitting for a Site Development Permit, whichever is earlier. The
8 results of the above analysis must be submitted to the City's Planning and Development
9 Services Department. Completion of the above shall maintain the CADP on appeal here as
10 validly issued and effective.

11 **DATED** this 18th day of December, 2019.

12 

13 **JEFF H. CAPELL, Hearing Examiner**

14
15
16
17
18
19
20
21
**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION**

- 20 -
ORIGINAL

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402

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

NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision may be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner will likely need to be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.