

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
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,
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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.