

MICHAEL F. CONNELLY
SPECIAL MASTER

IN RE: ARBITRATION
JUDICIAL DISPUTE RESOLUTION, LLC

CITY HEIGHTS HOLDINGS, LLC,

Claimant,

v.

CITY OF CLE ELUM,

Respondent.

SPECIAL MASTER OPINION

This matter having come before the Special Master pursuant to the Arbitrator's Order Appointing Special Master, and the Special Master having reviewed the records and files herein, and specifically:

1. City Heights' March 10, 2023 letter;
2. City of Cle Elum's March 17, 2023 response letter;
3. City Heights' March 20, 2023 reply letter;
4. The parties' Development Agreement;
5. Memorandum from Benjamin A. Annen, PE dated March 14, 2023
6. The parties' Memorandum of Understanding; and

7. The attachments accompanying the above, and the Special Master, being fully advised on the premises, now sets forth the following opinion.

I. Background and Procedural Facts

City Heights Holdings, LLC (“City Heights”) and the City of Cle Elum (“the City”), collectively referred to as “the parties”) entered into a Development Agreement (“DA”), which was approved in November 2011. Subsequently, on June 1, 2022, the parties entered into a Memorandum of Understanding (“MOU”), the purpose of which was to guide the performance under and fulfillment of the DA. The MOU refers to infrastructure plans for “the ‘Zone 3’ extension of water service, and the extension of an interim access road to the plat,” referred to as “Offsite Scope.” (MOU at 5, ¶ 4.) Compliance with the preliminary plat requirements concerning the Offsite Scope water utilities and secondary road access for Phase 2, and the timing of final plat approval are at issue.

City Heights requests an order compelling the City to complete a final plat review of Phase 2 and proceed to place the matter before the Cle Elum City Council for approval. City Heights further asks that the Special Master recommend two notes be included on the face of the final plat. These notes would state that the Offsite Scope water main design shall be consistent with Bonneville Power Administration (“BPA”) and Puget Sound Electric (“PSE”) easements and completion of secondary road access is required “prior to issuance of the first certificate of occupancy.” The City maintains that final plat approval of Phase 2 should not occur until City Heights obtains the necessary, legal entitlements for both water utilities and road access and that

the final plat be placed before the City Council with a recommendation for denial. This opinion assumes that private easements necessary for the extension of water utilities, other than the BPA and PSE, exist and are not at issue.

II. Discussion and Decision

City Heights asks the Special Master to order the City to make a finding, required by RCW 58.17.110, .150-.165, and .170, that water utility access and secondary road access has been provided either through construction of the same or by providing adequate financial guarantees. The record before this Special Master, however, does not support such a finding. Easements for offsite improvements for water utilities have not been secured and questions of ownership have been raised in a companion lawsuit with respect to the secondary access. While the easements necessary to pass through property controlled by the BPA and PSE may be a matter of design alone, City Heights identifies no grant of authority or permission by either entity. The secondary road, which follows to some degree the existing interim roadway, has not been defined and portions have been challenged.

Under the current circumstances, if the final plat is approved, the plat could be built out and the lot owners, the City, or, for that matter, City Heights, may not have the legal authority to establish these necessary easements.

The improvements at issue are clearly required by the preliminary plat and were discussed, at least in part, by both the DA and MOU. While City Heights argues Section 7 “Phasing” in the DA contains general language concerning final plat approval that only requires a “collector road

sufficient to access the Development Pod from outside the project” be constructed or funded, the MOU specifically discusses these offsite improvement. (See MOU at 5, ¶ 4.) The MOU, read together with RCW 58.17.070 (requiring conformation with all provisions of a preliminary plat) supports the conclusion that this access road be constructed or bonded, prior to final plat approval.

It is also clear in all pertinent documents, as well as pertinent statutory provisions, that financial guarantees are meant to replace construction costs to ensure that the improvements are built. It is not contemplated that the actual acquisition of property rights, either by ownership or easement, be a part of those financial guarantees.

I agree that certain improvements are tied to certificates of occupancy, as set forth in the controlling documents, however, City Heights has not reached the stage at which the improvements could be constructed or bonded and this is not at issue at this time. (See DA at 19, ¶ 7.) I am also cognizant of City Heights’ assertions concerning prior locations for water utilities, but this alternative routing does not appear to be a part of the preliminary or final plat, or the DA or MOU, and are not germane to determining the issues before the Special Master.

A threshold question is the character of evidence required to determine if a condition for final platting is satisfied. As pointed out by counsel, there is sparse guidance by the courts. Cases cited by City Heights are distinguishable. In *Halverson v. City of Bellevue*, 41 Wn. App. 457 (1985), the court found that the City wrongfully approved a final plat when it was put on notice that a portion of the plat was located on property challenged by a claim of adverse possession. After the claim for adverse possession was successful, the court set aside the plat. Language from

this decision is instructive here. The court stated:

Because the merit of an adverse possession claim cannot be determined by the city prior to adjudication, caution in approving plats in such cases is warranted.

Id. at 460.

Also cited was *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 130 (2005), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682 (2019), where, in a declaratory judgment action, the court considered the existence of a clearly illegal racial restriction and its severability from a density restriction, which the court upheld. This case had little bearing on the issues under consideration.

The City correctly cited *HJS Dev., Inc. v. Pierce County ex rel. Department of Planning and Land Services*, 148 Wn.2d 451, 483 (2003) concerning the revocation of a preliminary plat.

A final decision that may provide some guidance is found in *Whatcom Cnty. v. Hirst*, 186 Wn.2d 648, 674-75 (2016). In this decision, the court considered an appeal of the Growth Managements Hearing Board's final decision finding non-compliance of Whatcom County's rural element of the comprehensive plan. In its decision, the court discusses the requirements set forth in RCW 58.17.110(2) in conjunction with RCW 19.27.097(1) (concerning the approval of building permits.) The court stated:

Through these statutes, the GMA requires counties to assure that water is both factually and legally available.

Id. (referencing *Kittitas County v. Eastern Wash. Growth Mgmt. Hrg. Bd.*, 172 Wn.2d 144, 179-80 (2011)).

In the matter at issue here, City Heights is asking the City to presume they are available. *See Hirst*, 18 Wn.2d at 687-88 (holding that presuming water availability is insufficient to comply with the Growth Management Act). Such a presumption is not sufficient to mandate approval of this final plat.

III. Order

City Heights is unable, at this time, to establish the legal availability of the requisite water utility access and secondary road access. Accordingly, and for the reasons set forth in detail above, the request of City Heights is **DENIED**. I make no finding as to the placement of this matter before the City Council, and leave it to the City's discretion to act in accordance with the DA, MOU, and the City's applicable ordinances.

SO ORDERED this 11th day of April, 2023.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.



MICHAEL F. CONNELLY
Special Master