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Klickitat County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KLICKITAT

KLICKITAT LAND PRESERVATION  
FUND, and DENNIS AND BONNIE  
WHITE,

Petitioners,

v.

KLICKITAT COUNTY, UNDER  
CANVAS, INC., and LONGVIEW  
TIMBERLANDS LLC,

Respondents.

UNDER CANVAS, INC.,

Petitioner,

v.

KLICKITAT COUNTY, a political  
subdivision of the State of Washington,  
KLICKITAT LAND PRESERVATION  
FUND, DENNIS AND BONNIE WHITE,  
and WEYERHAEUSER COMPANY,

Respondents.

Case No. 21-2-00183-20

**COURT'S RULING ON LAND USE  
PETITION ACT (LUPA) APPEAL**

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## I. INTRODUCTION

This decision is based upon a consolidated appeal brought under the Land Use Petition Act (LUPA) by Petitioners, Klickitat Land Preservation Fund (hereinafter "KLPF") and Dennis and Bonnie White (hereinafter "White") and by Petitioner, Under Canvas, LLC (hereinafter "Under Canvas"). Petitioners KLPF and White are challenging two decisions made by Klickitat County Hearing Examiner in approving an outdoor luxury camping facility in rural Klickitat County: (1) Hearing Examiner's decision to uphold county's Mitigated Determination of Non-Significance ("MDNS") under the State Environmental Policy Act ("SEPA") related to the camping facility, and (2) Hearing Examiner's decision to issue a conditional use permit ("CUP") and a recreational park permit for the facility.

Petitioner Under Canvas is challenging the Hearing Examiner's decision to impose a number of conditions for the approval the CUP and recreational park permit for the facility.

## II. HEARING EXAMINER JURISDICTION

KLPF and White<sup>1</sup> argue that the Hearing Examiner was without authority to hear both (a) the appeal as it relates to the MDNS determination under the SEPA challenge and (b) the appeal as it relates to the granting of the CUP and recreational park permit. KLPF argues that RCW 43.21C.060 requires that when a permit is conditioned by a non-elected official that decision shall be appealable to the legislative authority of the local government. In the present case, KLPF argues that the decision by the hearing officer, who was an unelected official, in granting of the outdoor luxury camping project subject to conditions could only be reviewed by the Klickitat County Board of

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<sup>1</sup> KLPF and White shall be referred to as KLPF throughout the opinion.

1 Commissioners for the SEPA appeal. As it relates to the CUP appeal, KLPP  
2 argues that only the Board of Adjustment could hear that appeal.

3 In the present case, the mitigation measures imposed were with the  
4 consent of Under Canvas. Since the conditions were imposed with the consent  
5 of Under Canvas, the county did not exercise any substantive authority that  
6 would invoke the requirement of RCW 43.21C.060 that a legislative body hear  
7 the appeal of the conditions imposed by the non-elected hearing officer.

8 Furthermore, Klickitat County has adopted a procedure to address SEPA  
9 appeals. WAC 197-11-680(2) authorizes local legislative bodies to establish  
10 procedures for appeals under RCW 43.21C.060 or to eliminate them altogether.  
11 Klickitat County has provided that threshold determinations made by planning  
12 director to the Board of County Commissioners by filing appeal with county  
13 auditor within 15 days. KCC 20.08.070.F.1. Klickitat County has gone further  
14 and authorized the Board of County Commissioners to appoint a hearing  
15 examiner for "quasi-judicial hearings" that are to be heard by the board of  
16 county commissioners. KCC 19.60.125. Furthermore, RCW 36.70.970  
17 empowers the legislative authority to "vest in a hearing examiner the power to  
18 hear and decide those issues it believes should be reviewed and decided by a  
19 hearing examiner, including, but not limited to: ... (c) appeals of administrative  
20 decisions or determinations pursuant to RCW 43.21C."

21 Klickitat County Code states that CUP determinations are to be  
22 authorized by the board of adjustment, a non-legislative body. KCC 19.04.160,  
23 KCC 19.60.050 and RCW 36.70.810. Since the board of adjustment is not a  
24 legislative body it could not hear the SEPA appeal, pursuant to RCW  
25 43.21C.060. RCW 43.21C.075(2)(a) and (3)(b) and KCC 20.28.030 requires  
26 SEPA appeals to be linked with accompanying environmental determinations in

1 a single simultaneous hearing before one hearing officer. The only entity with  
2 the power to hear the combined appeal was the Board of County  
3 Commissioners who had the authority to delegate the combined appeal to a  
4 hearing examiner.

5 The hearing examiner delegated by the Klickitat County Board of  
6 Commissioners had the authority to hear the combined SEPA appeal and the  
7 CUP determination.

### 8 III. KLPF & WHITE LUPA CHALLENGE

9 KLPF contends that the hearing examiner erred in upholding the  
10 County's Mitigated Determination of Non-Significance (MDNS). KLPF opines  
11 that the MDNS failed to adequately address concerns KLPF has related to  
12 traffic and safety hazard, fire and evacuation, and impacts to the Western Gray  
13 Squirrel and other wildlife. Additionally, KLPF maintains that a number of the  
14 mitigation measures imposed are not specific enough to satisfy KCC  
15 20.12.040.E.3. Finally, KLPF claims that Under Canvas failed to meet its  
16 burden of proof for issuance of the conditional use and recreational park permit.

17 In a nutshell, KLPF asserts that the resort would result in a dramatic  
18 increase of traffic on the Oak Ridge Road leading to and from the resort and the  
19 county failed to adequately investigate issues related to dust impact on those  
20 living along the roadway, impacts to cattle usage as it relates to Oak Ridge  
21 Road and general traffic safety issues related to the contours of the roadway.

22 As to the related issue of traffic concerns, KLPF argues that county failed  
23 to sufficiently evaluate the true risk of wildfire, local fire districts ability to  
24 effectively respond to fight wildfires, and ability to safely evacuate from the area  
25 in the event of a wildfire.

1 Finally KLPF asserts that the County failed to properly address the  
2 impact on the Western Gray Squirrel and other wildlife by relying upon outdated  
3 surveys as they relate to the Western Gray Squirrel and failed to address at all  
4 any issues related to other wildlife in the area, particularly elk.

5 A. Standard of Review

6 In reviewing a local jurisdiction's SEPA threshold determination, the court  
7 shall apply a "clearly erroneous standard," which warrants the determination  
8 being overturned only if the court is "left with the definite and firm conviction that  
9 a mistake has been made." *Moss v. City of Bellingham*, 109 Wn.App 6, 13  
10 (2001). The court should grant "substantial weight" to decision-making body's  
11 decision and should not substitute its "judgment for that of the decision-making  
12 body." *Id.* at 13. The court should give substantial deference to the hearing  
13 examiner, *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wash.App.  
14 408, 415–16, 225 P.3d 448 (2010), rev. denied, 169 Wash.2d 1014 (2010), and  
15 in reviewing challenges to sufficiency of the evidence the reviewing court shall  
16 view the evidence in the light most favorable to party that prevailed in the  
17 highest forum exercising fact-finding authority. *Phoenix Development, Inc., v.*  
18 *City of Woodinville*, 171 Wash.2d 820, 828-29 (2011). The burden in on the  
19 party challenging the land use decision to establish one of the standards in  
20 RCW 46.70C.130 has been violated.<sup>2</sup> Prima facie compliance with SEPA is

22 <sup>2</sup>RCW 36.70C.130(1) (a) The body or officer that made the land use decision engaged in unlawful  
23 procedure or failed to follow a prescribed process, unless the error was harmless;

24 (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is  
25 due the construction of a law by a local jurisdiction with expertise;

25 (c) The land use decision is not supported by evidence that is substantial when viewed in light of the  
26 whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

1 satisfied if the lead agency “reviews comments from state agencies”, “works  
2 cooperatively to reduce project’s significant environmental effects” and  
3 develops “substantial mitigation measures.” *Anderson v. Pierce County*, 86  
4 Wn.App. 290, 304-05 (1997). If decision to issue MDNS was based upon  
5 sufficient information to evaluate proposal’s environmental impacts, the fact that  
6 every conceivable environmental impact was not considered does not negate  
7 finding of threshold determination. *See Wild Fish Conservancy v. Washington*  
8 *Dep’t of Fish and Wildlife*, 198 Wash.2d 846 (2022). A determination must be  
9 made on likely impacts and not those that are speculative. *See WAC 197-11-*  
10 *060(4)(a)*.

11 **B. Traffic and Safety Hazard**

12 KLPF argues that the County and the Hearing Examiner failed to  
13 address issues related to dust accumulation from passing vehicles causing  
14 respiratory problems and potential accident danger from visibility limitations.  
15 The dust related concerns were raised by the challengers as a result of an  
16 experiment conducted by a neighbor. No evidence was presented to show  
17 whether the conditions of the experiment were likely consistent with typical  
18 conditions or by a reliable method. This is clearly speculative evidence that  
19 does not overcome the required deference the court is to give to the lead  
20 agency conducting the SEPA evaluation. Furthermore, the issue regarding dust  
21 was addressed during comments to the county and the SEPA official indicated  
22 consideration of the dust issue and determined that mitigations put in place in  
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24  
25 (e) The land use decision is outside the authority or jurisdiction of the body or officer making the  
decision; or

26 (f) The land use decision violates the constitutional rights of the party seeking relief.

1 the SEPA MDNS satisfied those concerns. The County demonstrates prima  
2 facie compliance.

3 Furthermore, KLPP's claim that cattle present a probable significant  
4 impact is speculative and without sufficient evidence to support such claim.  
5 The evidence shows that the cattle drives are very infrequent and no evidence  
6 to show that cattle / motor vehicle accidents are likely to occur. If basis for  
7 determination of cattle / motor vehicle accidents are more likely to occur now  
8 because patrons of the resort are less likely to follow traffic rules, such a basis  
9 is speculative as well. In granting the appropriate deference, the court finds  
10 these impacts are speculative.

11 Finally, in addressing the general traffic and traffic safety impacts along  
12 Oak Ridge Road, KLPP argues that the SEPA process failed to conduct a  
13 detailed, searching, well-documented review of the environmental impacts.  
14 Specifically, KLPP alleges that failure to even comply with the Klickitat County  
15 Transportation Standards and the completion of a Traffic Impact Study (TIS)  
16 under the code shows the dearth of a searching review contemplated under  
17 SEPA.

18 Under Canvas prepared three traffic impact studies by DKS Associates  
19 dated June 8, 2020, October 29, 2020 and December 10, 2020. Additionally,  
20 the county conducted a third party review of the October 29, 2020 DKS study.  
21 KLPP presented the reports of its two traffic consultants, Ross Tilghman and  
22 Gary Norris. Much of the discussion regarding traffic concerns related to Oak  
23 Ridge Road involved the issue of width and line of sight.

24 The issue regarding width of the roadway was addressed by Condition  
25 17, which requires that "[a]ll roads that are accessing the facility shall meet...  
26

1 Title 12 standards for fire access road... shall have a running surface that is no  
2 less than 20 feet in width." Much discussion ensued regarding the issue of  
3 safety as it related to a 20 foot wide road. A determination was made that a  
4 road that was 20 feet wide would mitigate any significant environmental effect.  
5 The court is to grant great deference and not to substitute its judgment for that  
6 of the decision-making body.

7           Furthermore, as it relates to line of sight. This issue was also  
8 exhaustively reviewed by the County and the hearing examiner. A number of  
9 conditions have been imposed as they relate to signage and road expansion.  
10 The hearing examiner based his determination of no probable significant  
11 environmental impacts related to traffic with the proposed resort by finding that  
12 the "opinions of expert witnesses Reah Flisakowski, Lacy Brown, Liza Bornasl,  
13 Patrick Skillings and comments and testimony from Jeff Hunter, Klickitat County  
14 Public Works Deputy Director, to be more convincing than those of Gary Norris  
15 and Ross Tilghman." While the community may not be happy with the decision  
16 of the County and the hearing examiner and believe these mitigation measures  
17 do not adequately solve their concerns, the court again should grant great  
18 deference to its decisions and should not substitute its judgment for the  
19 decision-maker. Again prima facie compliance has been shown.

21           C. Fire and Evacuation

22           KLPPF claims that the County never completed a searching, detailed, well  
23 documented review of the true risk of wildfire. This claim is refuted by the  
24 thoroughly exhaustive record related to the wildfire risks of the project. Under  
25 Canvas provided a Wildfire Mitigation Plan by Galen Wright, which analyzed the  
26 risk and provided measures to reduce the risk. Fire Chief Long affirmed this



1 contention of a reduction of wildfire risk in his letter and testimony stating that  
2 the plan would dramatically reduce the risk of wildfire by implementing the plan.  
3 Additionally the Revised SEPA checklist and conditons of MDNS detail specific  
4 actions to be undertaken to reduce the risk of wildfire. It is clear that a  
5 searching, detailed, well documented review of this potential environmental  
6 impact was undertaken.

7           KLFP goes on to allege that the County never evaluated the capacity of  
8 the local fire district to effectively fight a wildfire. Condition 29 of the final MDNS  
9 stated that Under Canvas was to produce in the future a "firefighting plan" that  
10 includes an "assessment of fire district's capabilities to resond to fire  
11 emergencies." The area where the proposed resort is to be located is in a dual  
12 protection area, which would mean that both the local fire district and the DNR  
13 would respond to fight fires in that locale. Both the fire district and DNR  
14 conducted site visits to the property and reviewed the applicable environmental  
15 documents. Both concluded with testimony that they did not have any issues  
16 related to wildfire fighting. It is clear that a searching, detailed, well  
17 documented review of this potential environmental impact was undertaken.

18           Finally as it relates to wildfire and evacuations in the event a wildfire  
19 breaks out in the area, KLPF again contends that this issue was not addressed  
20 by the County. KLPF is rightly concerned that an uptick of traffic on the  
21 roadway could slow the ability of resort guests and locals to evacuate the area if  
22 firefighting personnel were trying to enter the area to fight a wildfire. MDNS  
23 Condition 30 requires that Under Canvas "provide an evacuation plan in case of  
24 emergency that anticipates the need to evacuate guests quickly."  
25  
26

1           Again this misstates the evidence that was presented regarding this  
2 issue. As stated earlier, Galen Wright completed a Wildfire Mitigation Plan,  
3 which contained a template emergency action plan. Albeit for a different facility  
4 with a different layout of property and roadways. If this was all that was done,  
5 KLPPF may be correct in determining that a thorough examination of this issue  
6 was not conduct. Additionally, Fire Chief Long provided testimony that he had  
7 reviewed the proposal and was confident a proper plan could be achieved.  
8 Further it is important to note that issues related to the roadway are and were  
9 addressed in Condition 17 which required roadways to be expanded to meet  
10 the requirements to support fire trucks and support personnel by meeting  
11 standards for fire access road. Again Chief Long and DNR both assessed the  
12 site to conduct an analysis as it relates to wildfire and firefighting needs and  
13 determined no concerns were raised. Finally, a determination was made that  
14 Oak Ridge Road could handle the traffic that was anticipated by the opening of  
15 this resort. Again giving great deference to the legal and factual determinations  
16 as the local authority with expertise in land use regulations, the court is not left  
17 with a "definite and firm conviction that a mistake has been committed." Again  
18 the court is not to substitute its judgment for that of the hearing officer.  
19

20           The requirement to complete said evacuation plan at a later date and  
21 time, does not violate SEPA. SEPA allows for later studies, including later  
22 agency review. WAC 197-11-055. SEPA simply requires that "mitigation  
23 measures only be reasonable and capable of being accomplished." *Quinault*  
24 *Indian Nation v. Imperium Terminal Servs., LLC*, 190 Wn.App. 696, 708 (2015)  
25 (quoting RCW 43.21C.060). The mitigation measure to prepare fire evacuation  
26

1 plan prior operating the resort is reasonable and capable of being  
2 accomplished.

3 D. Western Gray Squirrel

4 KLPF asserts since Under Canvas failed to submit current occupancy data  
5 for the Western Gray Squirrel (WGS) and did not complete any actual analysis  
6 of how the Western Gray Squirrel would be impacted by the project that the  
7 MDNS was improperly issued by the County. KLPF contends that Under  
8 Canvas reliance on nest survey data collected by Longview Timberlands, LLC  
9 in 2014 was outdated and not appropriate to rely upon. In addition to this study,  
10 Under Canvas communicated with Washington Department of Fish and Wildlife,  
11 assumed all prior nests were still active and agreed to complete a nesting  
12 survey prior to land disturbing activities. An analysis of the WGS Recovery  
13 Plan showed that the proposed resort site is only 1/10<sup>th</sup> of one percent of  
14 suitable WGS habitat in the County and not part of the core habitat. The  
15 analysis of these information sources satisfies the standard of "reasonably  
16 sufficient" information to evaluate the environmental impacts required by SEPA.  
17 WAS 197-11-335.  
18

19 KLPF further claimed that Under Canvas and the County failed to assess  
20 how traffic, humans, wildfire and habitat fragmentation would impact the  
21 Western Gray Squirrel.

22 KLPF's claim that traffic could kill WGS are speculative and lack  
23 evidence. Evidence is that WGS are secretive, often in trees, avoid large  
24 openings and, therefore, would likely avoid roads. Every conceivable  
25 environmental impact does not need to be evaluated, as long as agency  
26 determines if proposal as a whole would likely have a probable, significant

1 impact. WAC 119-11-330(b). Traffic claim does not rise to likely causing a  
2 probable, significant impact.

3 Human activity is properly mitigated by Condition 33, Condition 34.1 and  
4 Condition 53. Condition 33 requires identification of new nests survey prior to  
5 land disturbing activities. Condition 34.1 requires Under Canvas to limit noisy  
6 activities and provide a 400 foot buffer from squirrel habitat from March through  
7 August. Condition 53 requires dogs to be leashed and pet bathrooms located  
8 away from WGS nests. Furthermore, forestry activities of thinning trees would  
9 be beneficial in the long run to the WGS. The hearing examiner clearly based  
10 their decision on consideration of evidence provided and determined that the  
11 mitigation measures imposed would mitigate impacts to the WGS. Again in  
12 giving the appropriate deference to the hearing officer, the court cannot find that  
13 this determination was clearly erroneous.  
14

15 KLPF contends that wildfires pose a major threat to the Western Gray  
16 Squirrel. As to the issue of wildfires generally impacting WGS due KLPF's  
17 claim that the issue was not fully evaluated, the court has addressed this issue  
18 and determined that the issue was thoroughly reviewed. As wildfires relate to  
19 impacting the WGS habitat, KLPF speculates that habitats might be impacted  
20 by wildfire mitigation measures through thinning and vegetation removal.  
21 Testimony was provided that the WGS habitat actually would improve from  
22 certain thinning methods. Mitigation measures were put in place to address  
23 canopy loss and nest surveys prior to thinning. See Conditions 34 and 33. The  
24 hearing examiner clearly based their decision on consideration of evidence  
25 provided and determined that the mitigation measures imposed would mitigate  
26

1 impacts to the WGS. Again in giving the appropriate deference to the hearing  
2 officer, the court cannot find that this determination was clearly erroneous.

3 Addressing the habitat degradation issue, KLPF's claims are speculative  
4 and properly addressed by mitigation measures imposed by the hearing officer.

5 The court finds that County has considered relevant environmental  
6 factors before concluding that the project as mitigated would not cause  
7 significant adverse impacts to the the Western Gray Squirrel. The County has  
8 prima facially complied with procedural dictates of SEPA. The findings of the  
9 hearing officer were based on substantial evidence and his ruling was clearly  
10 not an erroneous interpretation of the law. The SEPA decision is upheld as it  
11 relates to the Western Gray Squirrel.

12 As to the issue of other wildlife, particularly elk. The court finds that  
13 KLPF's claims are wholly speculative. Furthermore, while KLPF never raised  
14 the issue regarding elk at the hearing, it is clear that the issue was adequately  
15 addressed during the SEPA process. Elk and other wildlife were addressed in  
16 the Revised SEPA checklist in the Critical Area Ordinance (CAO). WDFW  
17 indicated no regulatory requirements would apply to proposed project since  
18 population objectives were being met. County's determination that no  
19 significant impact requiring further evaluation is to be afforded "substantial  
20 weight" and the court's deference to those decisions results in a determination  
21 that KLPF's arguments are speculative and unfounded.

22  
23 E. Mitigation Measures

24 KLPF contends that numerous mitigation measures put in place by the  
25 hearing officer were deficient as they did not meet the specificity requirement of  
26 KCC 20.12.040.E.3. The mitigation measures objected to include Condition 5

1 related to stormwater plan; Condition 10 related to number of connections  
2 public water system can support; Condition 11 related to continuing discussions  
3 with Washington State Licensed Septic Designer and Environmental Health;  
4 Condition 21 related consulting with WDFW regarding existing culvert sizes;  
5 Condition 22 related to reducing traffic impacts during construction; Condition  
6 25 related to vegetation management plan; and Condition 26 related to  
7 maintaining offsite drainage that flows through project site.

8           In the present case, the SEPA official concluded mitigation measures  
9 were consistent with existing rules and regulations and the hearing examiner  
10 agreed. The court should grant deference to the construction of a law by local  
11 jurisdiction with expertise. RCW 36.70C.130(1)(b). Many of the measures  
12 were based upon the standard language of the existing rules and regulations.  
13 SEPA officials should rely "as much as possible on existing plans, rules and  
14 regulations, filling the gaps where need by imposing mitigation measures under  
15 SEPA." *Moss v. City of Bellingham*, 109 Wn.App. at 14. As to Condition 5, 10,  
16 11, 21 and 22, the Court concurs that these fall within the gambit of existing  
17 rules and regulations and are appropriate. Furthermore, in granting the  
18 appropriate deference to the local jurisdiction with expertise in this area it is  
19 appropriate to uphold these mitigation measures sufficiently specific as written.  
20 The court finds Condition 25 and 26 to be sufficiently specific.

22           F. Burder of Proof - Conditional Use Permit and Recreational Park  
23           Permit

24           KLPF maintains that the hearing examiner's failure to address portions of  
25 KCC 19.53.130A in approving the conditional use permit should invalidate the  
26 conditional use permit. Specifically, KLPF contends that the hearing examiners

1 failed to make findings related to (a) "property is suitable for the proposed use"  
2 and (b) "public facilities and services to serve the use are adequate for the  
3 proposed use." KCC 19.53.130.A.3, -.4. It is clear that voluminous records  
4 were reviewed including facts and arguments supporting these criteria  
5 considered by the hearing examiner, who concluded that the project as  
6 conditioned would "not be detrimental to the natural environment," would not  
7 have an adverse impact on public health, safety, or welfare," and "would not  
8 result in county facilities being reduced below adopted levels of service."  
9 Hearing examiner also issued lengthy decision, including findings of fact and  
10 conclusions of law regarding criteria.

11 RCW 36.70C.130(1)(a) states that failure to follow a prescribed process  
12 is not fatal to a land use decision if the error was harmless. The failure to  
13 articulate these two findings on the record are a harmless procedural error  
14 when considering the plethora of evidence supporting those two criteria.  
15 Therefore, the request to reverse the issuance of the CUP for failing to address  
16 KCC 19.53.130.A.3, -.4 is denied.  
17

18 The recreational park permit was properly issued. The recreational park  
19 permit properly complies with KCC 22.08.070 in identifying the location of the  
20 proposed park and the record owners of the land. Interpreting KCC 22.08.040  
21 defining a recreational park as "any tract of land" to be contained in a single lot  
22 is an absurd result and does not advance any appropriate policy consideration.  
23 The request to reverse the issuance of the recreational park permit is denied.

#### 24 **IV. UNDER CANVAS LUPA CHALLENGE**

25 Under Canvas challenges five conditions imposed by the Hearing  
26 Examiner in approving the Conditional Use Permit (CUP) and the recreational

1 park permit. The five conditions are number 59 (related to future permit  
2 modification), number 54 (related to special events and amplified sound),  
3 number 55 (related to RV parking), and conditions number 60 and 9 (related to  
4 water use reporting). Under Canvas had initially challenged the imposition of  
5 conditions 50, 51, and 52, but have withdrawn their challenge to those  
6 conditions.

7 A. CONDITION 59

8 Under Canvas contends that condition number 59 exceeds the Hearing  
9 Examiner's authority by providing a permit reopener provision and not ensuring  
10 the decision was final. Condition 59 provided that the County could modify  
11 conditions or add new conditions to the existing conditions and granted Hearing  
12 Examiner authority to retain jurisdiction with the ability to impose additional  
13 actions, sanctions and/or conditions.  
14

15 The purpose behind land use decisions is the "nearly universal rule" to  
16 provide finality so that land owners may proceed with a sense of certainty and  
17 confidence in proceeding with projects as approved. *See Skamania County v.*  
18 *Columbia River Gorge Comm'n*, 144 Wn.2d 30, 48-49 (2001). Klickitat County  
19 Code also provides that CUP decisions by Hearing Examiner "shall be final and  
20 conclusive." KCC 19.60.100 and KCC 19.60.125.

21 By allowing for continued authority to modify the conditions on the  
22 project, Condition 59 violates the "nearly universal rule" for finality in land use  
23 decisions. The Hearing Examiner exceeded his authority in imposing Condition  
24 59. Condition 59 is stricken.

25 /// /// ///

26 /// /// ///



1           B. CONDITION 54

2           Under Canvas argues that Condition 54, which prohibits “weddings,  
3 concerts, or other public or private gathering’s amplified music or sounds,”  
4 impermissibly restricts business conduct rather than address land-use  
5 objectives. The condition as written is ambiguous and unclear. It is unclear  
6 whether the restriction was initially intended to restrict only weddings, concerts  
7 and other gatherings which used amplified sound or intended to restrict  
8 weddings, concerts and other gatherings irregardless of whether any amplified  
9 sound was used at all. It is interesting to note that even the County, as the  
10 permitting agency, indicated it was left “guessing as to what is and what is not  
11 permitted.”

12           As the condition relates to restrictions on amplified noise, it is addressed  
13 by Condition 13, which states that “[t]o minimize noise impacts ... [n]oise levels  
14 shall not exceed those levels established by the Washington State Department of  
15 Ecology under WAC 173-60.”

16           As the condition relates to restricting any wedding, concert or other  
17 gathering, Condition 54 is not “reasonably calculated to achieve some  
18 legitimate objective” as it restricts weddings, concerts or other gatherings of any  
19 size. As such the condition intends to restrict business conduct rather than  
20 impose zoning limitations on the land. A condition that regulates business  
21 conditions may be annulled because it is not the function of land use controls.  
22 *See Woodinville Water Dist. V. King County*, 105 Wn.App. 897, 906 (2001)  
23 (citing 3 Anderson’s American Law of Zoning (4<sup>th</sup> ed. 1996) section 20.71, at  
24 652). The complete restriction on weddings, concerts, and other gatherings is  
25 inappropriate and shall be annulled.  
26

1           It is clear that if the restriction was related to weddings, concerts or other  
2 gatherings in excess of the size of the current occupancy levels of the facility,  
3 the Hearing Examiner would have been justified in imposing a condition of  
4 requiring a new conditional use permit be applied for before allowing such  
5 weddings, concerts or other gatherings. Such requirement would allow for a  
6 determination of the impact on the facility or surrounding areas and an  
7 opportunity to mitigate in advance of such potential impact.

8           Condition 54 shall be annulled.

9           C. CONDITION 55

10           Under Canvas alleges that Condition 55, which precludes "parking" of  
11 recreational vehicles (RV) at the facility is overly broad and not related to any  
12 legitimate land use or zoning control. KLPF contends that Condition 55 should  
13 be upheld because Under Canvas plan failed to specifically provide for parking  
14 spaces for RVs in addition to other parking spots. The County takes the  
15 position that a blanket prohibition for simply parking an RV at the site is  
16 improper and unsupported by the County Code.

17           While a prohibition from occupancy of a RV at the site would appear to  
18 fall within a legitimate land use or zoning control issue, the preclusion of a class  
19 of vehicles, i.e., RV, from parking at the site does is not. The issue of  
20 occupancy of RVs at the site was addressed. While the issue may be a closer  
21 call if it was based upon traffic concerns for vehicles traveling to and from the  
22 site on the road, the prohibition relates to parking at the site. The traffic issues  
23 related to traveling on the roadway to and from the site were addressed through  
24 the traffic studies that were presented. The issue here of prohibiting a vehicle,  
25 even a RV, from simply parking is improper and shall be stricken from Condition  
26

1 55. The word parking shall be stricken from Condition 55. The remainder of  
2 Condition 55 shall remain as entered by the Hearing Officer and remain in  
3 effect.

4 D. CONDITIONS 9 and 60

5 Under Canvas contends that Conditions 9 and 60 place undue burden on  
6 them to monitor daily water usage and monthly reporting requirement.

7 Condition 9 requires Under Canvas to immediately cease operations and  
8 contact Washington State Department of Ecology if it uses more than 5,000  
9 gallons of water per day. The restriction of 5,000 gallons of water use per day  
10 is a legitimate land use or zoning control issue for a hearing examiner to  
11 impose. The requirement to immediately cease operations if Under Canvas is  
12 unable to comply with this requirement is an appropriate condition to ensure the  
13 surrounding area is not harmed. Furthermore, it essentially states existing law  
14 on this topic. See RCW 90.44.050. In giving the appropriate deference to the  
15 hearing examiner on this issue, Condition 9 is supported by substantial  
16 evidence and consistent with the law and shall be upheld as written.  
17

18 As to Condition 60, Under Canvas contends that the sole authority for  
19 monitoring reporting obligations as they relate to water usage is the Washington  
20 State Department of Ecology. The court cannot find any authority that would  
21 preclude a hearing officer from ordering that reporting requirements preempt  
22 local regulation on this issue as well. In the giving the appropriate deference to  
23 the hearing officer, Condition 60 is supported by substantial evidence and  
24 consistent with the law and shall be upheld as written.

25 */// /// ///*

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E. CONDITIONS 50, 51 and 52

Under Canvas has withdrawn their objections to the inclusion of  
Conditions 50, 51, and 52 and accepts the conditions as written.

DATED this 25<sup>th</sup> day of April, 2022.



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SUPERIOR COURT JUDGE

Original – File

CC: Bryan Telegin, Attorney for Klickitat Land Preservation Fund  
Jennifer Calkins, Attorney for Dennis and Bonnie White  
Joseph Rehberger, Attorney for Under Canvas, LLC  
David Quesnel, Attorney for Klickitat County  
Douglas Steding, Attorney for Weyerhaeuser Company