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Kittitas County
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7 **KITTITAS COUNTY BOARD OF COUNTY COMMISSIONERS**

8 OTTO SIEBER,
9 Appellant,

10 v.

11 KITTITAS COUNTY COMMUNITY
12 DEVELOPMENT SERVICES,
Respondent.

MEMORANDUM OF
AUTHORITIES AND
ARGUMENT OF APPELLANT

13 COMES NOW JAMES T. DENISON, JR., attorney for OTTO SIEBER (“Landowner”),
14 and submits the following Memorandum of Authorities.

15 **I. FACTS**

16 On November 19, 2008, the Landowner submitted a Short Plat Application. See Index
17 #1 to the Staff Report. The public comment period on the application expired on January 26,
18 2009. On January 20, 2009, Kittitas County Community Development Services (“CDS”)
19 received a comment letter from Johnson Meninick, Yakama Nation Cultural Resources Program
20 Manager. Without setting forth any factual support, he stated: “It is our belief that the proposed
21 project is occurring within an area which has an extremely high potential for cultural sites and
22 other cultural resources.” Index #7 to the Staff Report. The Landowner sent email
23 correspondence to CDS on March 24, 2009, responding to this comment stating that the site in
24 question was developed by Larson Orchard into 20 acre lots in the 1980s, and that the precise
25 location of any building site will be on a former rock quarry that was developed at that time.

26 On April 28, 2009, Jeff Watson, on behalf of CDS granted conditional preliminary approval to the short plat. The stated condition at issue is as follows:

COPY

1 7) Archaeological resources are protected under state law (RCW (27.53.060),
2 (27.44.040), (27.44.055). In order to protect the interests of all parties concerned,
3 a cultural resource survey shall be conducted prior to final short plat approval
4 by a *professional archaeologist* as defined by (RCW 27.53.030). The survey shall
5 include background research, a pedestrian survey, and subsurface testing of the
6 project area. The results of the survey shall be submitted by the applicant in a
7 report to the County, who will then forward it to the Washington State
8 Department of Archaeology and Historic Preservation (DAHP) and the
9 Confederated Tribes and Bands of the Yakama Nation. The study and report
10 must meet the DAHP professional standards and guidelines for survey and
11 reporting. Based on the findings of the investigation, additional measures such
12 as project redesign, archaeological monitoring and/or or data recovery may be
13 required in order to protect or to mitigate damage to cultural resources if they
14 cannot be avoided during any type of ground disturbing activities on the
15 building lots that result from this short plat.

16 See Index #14 to the Staff Report.

17 This appeal was filed on May 12, 2009. Seventeen days after the Notice of Appeal was
18 filed (and four months after the deadline for public comment on the short plat application) the
19 State Department of Archaeology & Historic Preservation filed a comment letter on the
20 application. Since this letter was submitted well after the comment deadline, it should be
21 disregarded in its entirety.

22 II. ARGUMENT

23 When reviewing a short plat application, CDS is bound by the terms of KCC 16.32 *et.*
24 *seq.* KCC 16.32.030 provides as follows:

25 The director shall be vested with the responsibility of processing short plat
26 applications. The county shall review and consider the proposed short subdivision
with regard to:

- 27 A. Its conformance with all county subdivision, zoning, health and sanitation
28 regulations and with laws adopted by the state of Washington.
- 29 B. Its conformance to all standards and improvements required under this title.
- 30 C. Potential hazards created by flood potential, landslides, etc.
- 31 D. Provisions for all improvements and easements (roads, ditches, etc.) required by
32 this title.
- 33 E. Access for all proposed lots or parcels by way of a dedicated road right-of-way or
34 easement.

1 F. All other relevant facts which may determine whether the public interest will be
2 served by approval of the proposed subdivision.

3 G. Lots or parcels created by the final platting of a subdivision or short subdivision
4 may not be further divided within a five-year period without filing of a final plat;
5 except as provided for in RCW 58.17.060.

6 The staff report is not clear as to which of the above factors its condition falls under;
7 however, it appears as though factor F is the only relevant factor to this appeal. The proposed
8 short plat is simply a request to divide property without a specific development approval
9 attached. At this point, the Landowner is simply seeking to make 3 parcels of land out of two
10 parcels of land. It is unclear how the public interest would not be served by allowing this short
11 plat without condition 7.

12 Staff cites to the criminal penalties imposed on persons who “knowingly” damage deface
13 or destroy archaeological resources; however, RCW 27.53.070 provides clearly that “field
14 investigations on privately owned lands should be discouraged except in accordance with both
15 the provisions and spirit of this chapter and persons having knowledge of the location of
16 archaeological sites or resources are encouraged to communicate such information to the
17 department.”

18 Staff states that the “spirit” of RCW 27.53 referenced in RCW 27.53.070 is
19 “demonstrated in dramatic fashion by the creation of the Washington State Department of
20 Archaeology and Historic Preservation.” However, a closer look at the creation of the DAHP
21 reveals that it is as an advisory agency giving information to the public and other state agencies
22 and managing the state’s archaeological resources. This was not a dramatic move by the state
23 legislature. In fact, the legislature very specifically did not give this agency authority over
24 private land. The DAHP has authority to discover, identify, excavate and study “the state’s
25 archaeological resources....” RCW 27.53.040 states that sites and artifacts “located in, on, or
26 under the surface of any lands or waters owned by or under the possession, custody, or control of
the state of Washington or any county, city, or political subdivision of the state are hereby
declared to be archaeological resources.” (Emphasis added).

Requiring a cultural resource survey of the entire property is nothing more than a
government required “field investigation” on privately owned land. Such a requirement at the
short plat stage makes no sense. It would give access to the entire parcel of land without regard

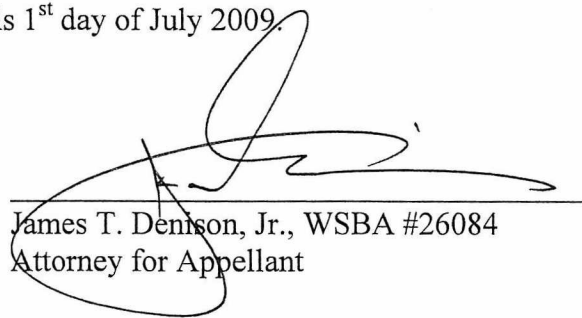
1 to whether or not there will be any ground-disturbing activities thereon. In other words, it gives
2 access to the whole property rather than just the area affected by construction. It is an overbroad
3 requirement that is unnecessary considering other state statutes already in place.

4 State statutes already require that persons obtain permits before knowingly disturbing an
5 archaeological site (RCW 27.53.060), and if artifacts are found, work must be stopped and the
6 Washington DAHP contacted. Work remains stopped until the site has been assessed.
7 Substantial criminal penalties are imposed for violations of these laws.

8 Staff recites 8 justifications for their decision at the end of their staff report. However, a
9 review of those 8 justifications shows that they are not in line with KCC 16.32.030. They talk of
10 such platitudes as “good faith” and “social conventions” rather than the hard application of the
11 law to the facts. The bottom line is that this short plat should be approved without condition
12 number 7. The public interest in this site will be no different after the subdivision as it would be
13 before the subdivision. To require an expensive cultural resource on this property would be to
14 take property rights and money from a private property with no justification or basis in law.

15 The Landowner respectfully requests that the Board remove condition number 7 (leaving
16 condition number 8) from the conditional preliminary approval of the O. Sieber Short Plat.

17 RESPECTFULLY SUBMITTED this 1st day of July 2009.

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20 James T. Denison, Jr., WSBA #26084
21 Attorney for Appellant
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