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JUN 15 2012

CITY OF OLYMPIA
CUSTOMER CARE COUNTER

Rec'd & Filed
Lewis County Superior Court
JUN 15 2012
Kathy A. Brack
Lewis County Clerk

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

INDUSTRIAL ZONING PRESERVATION
ASSOCIATION, a Washington non-profit
corporation; JOHN PERANZI, an individual;
VALLIE JO FRY, an individual; and TONY
and ISOBEL CAIRONE, husband and wife,

Petitioners,

vs.

CITY OF OLYMPIA, a municipal corporation;
THURSTON COUNTY, a Washington county;
and PANZA, a Washington non-profit
corporation,

Respondents.

NO. 12 2 00711 8

LAND USE PETITION (RCW 36.70C)

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COME NOW Petitioners, the Industrial Zoning Preservation Association ("IZPA"), a Washington non-profit corporation, John Peranzi, an individual, Vallie Jo Fry, an individual and Tony and Isobel Cairone, husband and wife, by and through their undersigned counsel, and petition the court under the Land Use Petition Act ("LUPA"), RCW 36.70C, as follows:

I. NAME AND MAILING ADDRESS OF PETITIONERS:

Industrial Zoning Preservation Association
ATTN: Mr. Carl R. Peterson, Registered Agent
Eisenhower & Carlson PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, Washington 98402

COPY

1 Tony and Isobel Cairone
 2 Post Office Box 12975
 3 Olympia, Washington 98508

4 Vallie Jo Fry
 5 Post Office Box 8426
 6 Lacey, Washington 98509

7 John Peranzi
 8 117 Tacoma Avenue North, Suite #201
 9 Tacoma, Washington 98403

10 **II. NAME AND MAILING ADDRESS OF PETITIONERS' ATTORNEYS:**

11 Heather L. Burgess
 12 Matthew R. Kernutt
 13 Phillips Wesch Burgess PLLC
 14 724 Columbia Street NW, Suite 140
 15 Olympia, Washington 98501

16 **III. NAME AND MAILING ADDRESS OF THE LOCAL JURISDICTION
 17 WHOSE LAND USE DECISION IS AT ISSUE:**

18 City of Olympia
 19 601 - 4th Avenue E
 20 Post Office Box 1967
 21 Olympia, Washington 98507

22 **IV. IDENTIFICATION OF THE DECISION-MAKING BODY OR OFFICER**

23 The decision-making officer of the decision being appealed is City of Olympia Hearing
 24 Examiner Pro Tempore (hereafter, "Hearing Examiner"), Wick Dufford.

25 The Hearing Examiner issued two decisions resulting in the final decision subject to this
 26 Land Use Petition, as follows:

(1) Findings, Conclusions and Decision of the Hearing Examiner for the City of
 Olympia, Case No. 11-0139, issued on May 2, 2011, a true and correct copy of which is attached
 hereto as **Exhibit A**.

1 (2) Order Denying Motion for Reconsideration and Motion to Supplement Record,
 2 Case No. 11-0139, issued on May 29, 2012, a true and correct copy of which is attached hereto
 3 as **Exhibit B**.

4 **V. PERSONS TO BE MADE PARTIES UNDER RCW 36.70C.040(2)(b)-(d)**

5 The following persons, not the Petitioners, are to be made parties:

6 **Project Applicant and Property Owner (RCW 36.70C.040(b)):**

7 Thurston County
 8 Donald Krupp, Chief Administrative Officer
 9 2000 Lakeridge Drive SW
 Olympia, Washington 98502-2933

10 **Project Applicant's Representative (RCW 36.70C.040(b)):**

11 Panza
 12 Ms. Jill Severn
 13 Post Office Box 2274
 Olympia, Washington 98507-2274

14 All of the above are identified by name in the written decision for which review is sought.

15 **VI. FACTS DEMONSTRATING THAT THE PETITIONERS HAVE**
 16 **STANDING TO SEEK JUDICIAL REVIEW UNDER RCW 36.70C.060:**

17 1. Petitioners have standing pursuant to RCW 36.70C.060(2) as persons aggrieved
 18 and/or adversely affected by the land use decision. With respect to standing, Petitioners Peranzi,
 19 Cairone, and Fry collectively seek review solely of the Hearing Examiner's decision approving
 20 the CUP for Quixote Village and not the Hearing Examiner's decision denying the associated
 21 SEPA appeal, to which only the IZPA was a party below.

22 2. The decision of the City of Olympia Hearing Examiner for which Petitioners seek
 23 review pursuant to LUPA denied Petitioner IZPA's appeal pursuant to the State Environmental
 24 Policy Act ("SEPA") (RCW 43.21C) and approved a Conditional Use Permit ("CUP") for a
 25 project known as "Quixote Village" within the Mottman Industrial Park in Thurston County,
 26 Washington. Quixote Village is a proposed Thurston County owned and sponsored permanent
 homeless encampment to be located on County-owned property in the midst of the existing

1 Mottman Industrial Park, in the City of Olympia's Light Industrial ("LI") zoning district. Upon
2 completion, Quixote Village would provide a permanent encampment comprised of 30 small
3 cabin-type dwellings, a 4,000 square-foot community building, an 800 square-foot restroom and
4 shop building, and a 350 square-foot picnic shelter for homeless residents.

5 3. Petitioner IZPA is a non-profit association comprised of individual property
6 owners in the Mottman Industrial Park and its members include at least one member who owns
7 property immediately adjacent to the proposed Quixote Village project. The IZPA entity was
8 specifically formed for the purpose of preserving industrial zoning and continued industrial uses
9 and development of LI zoned property with the Mottman Industrial Park.

10 4. Petitioners Cairone, Fry and Peranzi are individual property owners in the
11 Mottman Industrial Park and members of Petitioner IZPA who participated in the CUP hearing
12 below through providing written and/or oral testimony. Petitioners Cairone own industrial
13 property directly across Mottman Road SW from the proposed Quixote Village. Petitioner
14 Peranzi owns industrial property immediately adjacent to the proposed Quixote Village.
15 Petitioner Fry owns property on R.W. Johnson Road SW, also within the Mottman Industrial
16 Park.

17 5. The decision for which review is sought would allow Quixote Village, a high-
18 density residential use, to be constructed in the midst of the Mottman Industrial Park, resulting in
19 prejudice or likely prejudice to Petitioner IZPA member interests as well as those of individual
20 Petitioners Peranzi, Cairone, and Fry. With respect to the IZPA, corporations and associations
21 are "persons" under LUPA. RCW 36.70C.020(4).

22 6. The City of Olympia was required to consider the interests of the IZPA's
23 Mottman Industrial Park property-owner members in issuing the SEPA Mitigated Determination
24 of Non-Significance for Quixote Village as well as in making the challenged land use decision
25 approving the CUP for the project.
26

1 7. A judgment in favor of Petitioners would substantially eliminate or redress the
2 prejudice caused or likely to be caused to Petitioners' interests by the introduction of Quixote
3 Village, a high-density residential use, into the midst of the existing Mottman Industrial Park.

4 8. Petitioners have exhausted their administrative remedies to the extent required by
5 law.

6 **VII. STATEMENT OF ERRORS**

7 Petitioners allege the following errors:

8 1. The land use decision is not supported by substantial evidence and/or is a clearly
9 erroneous application of law to the facts pursuant to RCW 36.70C.130(1)(c) and (d) as follows:

10 a. The Hearing Examiner erred in finding that "it is highly improbable that
11 any of the users of the industrial property would be subject to a noise enforcement action flowing
12 from a complaint from Quixote Village" and that "such possibility is remote and speculative at
13 best." (Finding of Fact No. 24).

14 b. The Hearing Examiner erred in finding that the "collective experience of
15 staff" with respect to temporary homeless encampments already permitted in the City, which
16 testimony at the hearing established had been previously sited mostly in residential districts or
17 downtown locations, was adequate, without further expert study, to serve as a basis for the City
18 to issue the challenged DNS. (Finding of Fact No. 18).

19 c. The Hearing Examiner erred in denying the Petitioner IZPA's SEPA
20 appeal of the City of Olympia's Determination of Nonsignificance ("DNS") for Quixote Village.
21 (Decision at p. 11).

22 d. The Hearing Examiner erred in relying upon the equitable "coming to a
23 nuisance" doctrine with respect to introduction of Quixote Village, a high-density residential use,
24 into the midst of Mottman Industrial Park, a Light Industrial district, as a basis for denying the
25 Petitioner IZPA's SEPA appeal and approving the Conditional Use Permit for Quixote Village,
26 as (1) Washington law does not apply this doctrine to provide immunity to industrial property

1 owners from nuisance claims and, (2) Washington law does not allow application of the doctrine
2 to otherwise relieve Petitioners from complying with state and federal laws governing noise
3 generation and air quality for residential uses which will result from introduction of Quixote
4 Village into the Mottman Industrial Park. Therefore, the Hearing Examiner erred in concluding
5 on the basis of the “coming to a nuisance” doctrine that operation of a homeless village in the
6 middle of an industrial park “is not likely to interfere with present and future uses of the
7 industrial park.” (Conclusion of Law No. 4).

8 e. The Hearing Examiner erred in concluding that Petitioners would not be
9 subject to noise limitations on their business operations, either pursuant to City code or state law,
10 by the placement of Quixote Village, a high-density residential use, in the middle of the
11 Mottman Industrial Park. (Conclusion of Law No. 5).

12 f. The Hearing Examiner erred in concluding that “no noise limits will
13 apply” to industrial operations surrounding Quixote Village and that noise enforcement against
14 industrial or commercial uses in Mottman Industrial Park was not a “reasonable likelihood” and
15 therefore cannot give rise to a finding of “significant.” (Conclusions of Law Nos. 5 and 6).

16 g. The Hearing Examiner erred in giving the City deference to administrative
17 interpretation of its own noise standards where such standards are in direct conflict with state law
18 (WAC 173-60) and concluding that the Hearing Examiner was without authority to adjudicate
19 the conflict between the City’s noise regulation and state law. (Conclusions of Law Nos. 6 and
20 7).

21 h. The Hearing Examiner erred in concluding that, as to the noise issue, there
22 was sufficient information in the record to support the City’s SEPA threshold determination and
23 that Petitioner IZPA failed to prove that there is a reasonable likelihood for significant adverse
24 impacts resulting from noise. (Conclusion of Law No. 8).

25 i. The Hearing Examiner erred in finding and/or concluding that the City’s
26 proposed condition of approval, which the Hearing Examiner adopted and imposed (Condition
No. 3), requiring the Applicant to install a widened asphalt shoulder separated from the main

1 roadway by rumble strips along Mottman Road between R.W. Johnson and Quixote Village
2 would “effectively meet the intent of the improvements suggested by appellant” and was
3 adequate to provide for safe travel of Quixote Village residents to public transportation given
4 undisputed existence of substantial truck traffic in the Mottman Industrial Park, which lacks
5 sidewalks or other pedestrian/bicycle facilities. (Finding of Fact No. 27; Conclusion of Law No.
6 9).

7 j. The Hearing Examiner erred in finding that the 11 proposed parking stalls
8 on site were adequate to serve Quixote Village. (Finding of Fact No. 29).

9 k. The Hearing Examiner erred in adopting the City Staff Report in whole
10 and incorporating it by reference as to the proposal’s consistency with the permanent homeless
11 encampment ordinance. (Finding of Fact No. 31).

12 l. The Hearing Examiner erred in concluding as a matter of law that the City
13 did not have to establish prima facie compliance with SEPA, that is, that it had sufficient
14 information to evaluate the environmental impacts of Quixote Village, prior to issuing the
15 challenged DNS, and that the City could instead acquire additional information regarding the
16 project’s environmental impacts during the permit review process following issuance of the
17 DNS, and still satisfy SEPA requirements. (Conclusions of Law No. 10-12).

18 m. The Hearing Examiner erroneously concluded that, as to traffic impacts,
19 there was sufficient information in the record to support the City threshold determination and
20 that Petitioner IZPA failed to prove the likelihood of significant adverse impacts from traffic.
21 (Conclusion of Law No. 14).

22 n. The Hearing Examiner erred in concluding that the Applicant met its
23 burden of proof to show that the Quixote Village proposal is in compliance with the applicable
24 provisions of the City’s Municipal Code. (Conclusion of Law No. 15).

25 o. The Hearing Examiner erred in approving the Conditional Use Permit
26 because the plain language of Olympia Municipal Code (“OMC”) 18.02.100 precludes approval

1 of any project application that conflicts with the City's Comprehensive Plan. (Conclusions of
2 Law 15 and 17).

3 p. The Quixote Village project went forward for hearing during the pendency
4 of a timely petition for review of the underlying City ordinance authorizing the County
5 permanent homeless encampment in the City's Light Industrial zoning district to the Western
6 Washington Region Growth Management Hearings Board ("WWGMHB") in *Peranzi v. City of*
7 *Olympia*, Case No. 11-2-0011. The grounds for the petition for review to the WWGMHB
8 included that the inconsistency of the proposed homeless encampment use with the City's
9 Comprehensive Plan for the Light Industrial zoning district violated the Growth Management
10 Act, RCW 36.70A. On May 4, 2012, two days after the Hearing Examiner issued the decision
11 challenged herein (Exhibit A) the WWGMHB issued a Final Decision and Order granting the
12 petition for review and finding that the permanent homeless encampment was in fact inconsistent
13 with the City's Comprehensive Plan. The Hearing Examiner erred in denying Petitioner IZPA's
14 Motion to Supplement the Record and Motion for Reconsideration based on the newly issued
15 decision not available prior to issuance of the Hearing Examiner's decision.

16 q. The Hearing Examiner erred in concluding that the facility met the
17 requirements of the permanent homeless encampment ordinance as to adequacy of on-site
18 parking, adequacy of pedestrian/bicycle facilities, appropriate proximity to regular weekday and
19 weekend public transit, and sufficiency of the County's intent to submit, without actual
20 submission, of an operations and security plan for the completed facility. (Conclusion of Law
21 No. 18).

22 r. The Hearing Examiner erred in concluding that a condition requiring
23 notice to residents that the "encampment is within an industrially zoned property" provides
24 adequate mitigation for the impacts on surrounding industrial uses of introducing Quixote
25 Village, a high-density residential use, into the Mottman Industrial Park. (Conclusion of Law
26 No. 18).

1 s. The Hearing Examiner erred in approving the CUP because the conditions
2 of approval for Quixote Village fail to adequately protect the surrounding industrial properties
3 and failed to ensure the compatibility of the proposed residential use with existing and potential
4 surrounding industrial uses. (Conclusion of Law No. 19 and Decision at 11).

5 2. The Hearing Examiner engaged in unlawful procedure or failed to follow a
6 prescribed process pursuant to RCW 36.70C.130(a) in erroneously elevating the non-expert
7 opinions of City Staff over the only qualified expert opinions on noise and traffic, which were
8 admitted in the record. (Conclusion of Law No. 3).

9 3. The Hearing Examiner acted outside his authority or jurisdiction pursuant to
10 RCW 36.70.130(1)(e) in effectively converting the challenged City DNS to an MDNS by adding
11 a SEPA-based condition as part of the CUP approval process. (Conclusions of Law Nos. 10 and
12 11).

13 4. The Hearing Examiner's decision to approve the CUP violates the constitutional
14 rights of Petitioners Peranzi, Cairone, and Fry pursuant to RCW 36.70C.130(1)(f) under both
15 federal and state Constitutions, in that as approved, the CUP facially limits said Petitioners'
16 industrial operations due to the proximity of a newly introduced residential use and therefore
17 deprives them of due process, equal protection of laws, and effects a taking of property rights
18 without just compensation.

19 5. The Hearing Examiner's refusal to consider the decision of the WWGMHB
20 finding the development regulations authorizing the permanent County homeless encampment to
21 be out of compliance of the Growth Management Act, RCW 36.70A, deprives Petitioners
22 Peranzi, Cairone, and Fry of due process pursuant to RCW 36.70C.130(1)(f) because the Hearing
23 Examiner's decision allows the non-compliant permanent homeless encampment use, which is
24 the only one permitted pursuant to the City ordinance, to be built and remain in perpetuity
25 notwithstanding the fact that said Petitioners timely challenged the ordinance via the only legal
26 means available to them to do so.

1 **VIII. STATEMENT OF FACTS**

2 1. Petitioner IZPA is a Washington non-profit corporation whose members are
3 property owners in the Mottman Industrial Park.

4 2. Petitioners Cairone, Fry and Peranzi are individual property owners in the
5 Mottman Industrial Park and members of Petitioner IZPA. Petitioners Cairone own industrial
6 property directly across Mottman Road SW from the proposed Quixote Village. Petitioner
7 Peranzi owns industrial property immediately adjacent to the proposed Quixote Village.
8 Petitioner Fry owns property on R.W. Johnson Road SW, also within the Mottman Industrial
9 Park.

10 3. In 2011, the City of Olympia adopted text amendments to the Olympia Municipal
11 Code authorizing, as a conditional use, a single permanent homeless encampment on real
12 property owned by Thurston County within the City's LI districts. Although cast as a district-
13 wide text amendment to City regulations, the intent and effect of the City's text amendments was
14 to allow for a single permanent homeless encampment on a parcel of County-owned property
15 within the Mottman Industrial Park.

16 4. In November 2011, Petitioners Cairone, Fry, and Peranzi petitioned the Western
17 Washington Region Growth Management Hearings Board ("WWGMHB") for review of the
18 ordinance adopting the text amendments in *Peranzi et al. v. City of Olympia*, Case No. 11-2-
19 0011. The grounds for the petition for review to the WWGMHB included that the inconsistency
20 of the proposed homeless encampment use with the City's Comprehensive Plan for the LI zoning
21 district violated the Growth Management Act, RCW 36.70A.

22 5. While the petition for review to the WWGMHB of the underlying ordinance was
23 pending, Thurston County submitted a Conditional Use Permit application for the permanent
24 homeless encampment allowed under the text amendments, called "Quixote Village."
25
26

1 6. As proposed, Quixote Village consists of 30 individual 140 square-foot sleeping
2 units, a 4,000 square-foot central community building, an 800 square-foot restroom and shop
3 building, and a 350 square-foot picnic shelter.

4 7. Industrial properties surrounding the Quixote Village site and in the Mottman
5 Industrial Park as a whole are already developed with a variety of light industrial uses which
6 generate noise, dust, and truck traffic expected of such uses.

7 8. Industrial uses abutting the Quixote Village site are located within the
8 jurisdictional limits of both the City of Olympia and the City of Tumwater, with the centerline of
9 Mottman Road SW serving as the jurisdictional boundary between the two cities.

10 9. Thurston County submitted a SEPA Checklist to the City in support of its CUP
11 Application. The SEPA Checklist provided no tangible information or data regarding noise
12 impacts, traffic impacts, or other environmental impacts relating to the introduction of the
13 proposed residential land use into the midst of the existing Mottman Industrial Park, which
14 includes no other residential uses.

15 10. On October 7, 2011, the City issued a Public Notice of Land Use Application for
16 the Quixote Village project. Petitioner IZPA timely provided comments to the City in response
17 to the Notice of Land Use Application. Petitioner IZPA's comments included comments
18 identifying the absence of information in the SEPA Checklist on issues including but not limited
19 to, noise and traffic impacts.

20 11. On December 27, 2011, the City issued a SEPA DNS for the project.

21 12. On January 10, 2012, Petitioner IZPA submitted timely comments in response to
22 the DNS. Petitioner IZPA's comment on the DNS once again identified the complete absence of
23 sufficient information regarding traffic and noise impacts and associated mitigation for the project
24 and specifically requested that the DNS be withdrawn until such time as the City received and
25 considered such information for the project. By letter dated January 13, 2012, the City SEPA
26 Responsible Official informed counsel for Petitioner IZPA that the City had reviewed the IZPA
comments with project staff but had decided not to withdraw the DNS.

1 13. On January 17, 2012, Petitioner IZPA timely filed a SEPA appeal of the DNS for the
2 project. The errors alleged in the SEPA appeal were based on precisely the same absence of
3 information and associated mitigation measures for noise and traffic impacts of the project as
4 Petitioner IZPA had described in detail to the City in its earlier comment letters. The City Staff
5 Report reveals that the City sought out noise and traffic information in support of its DNS only after
6 Petitioner IZPA filed its SEPA appeal.

7 14. A single open-record public hearing on the CUP and Petitioners' SEPA appeal was
8 held before City of Olympia Hearing Examiner Pro Tempore Wick Dufford on April 2 and April 3,
9 2012. Petitioners Cairone, Fry, and Peranzi participated in the public hearing on the CUP through
10 presentation of oral and written testimony. Through counsel, Petitioner IZPA presented witnesses
11 and evidence on the SEPA appeal and participated in the public hearing on the CUP.

12 15. On May 2, 2012, the City issued the Hearing Examiner's decision challenged herein
13 denying Petitioner IZPA's SEPA appeal and approving the CUP for Quixote Village (Exhibit A).

14 16. On May 4, 2012, two days after the Hearing Examiner issued this decision, the
15 WWGMHB issued its Final Decision and Order on the separately filed Petition for Review of the
16 underlying text amendments allowing the single county homeless encampment. The WWGMHB
17 found that the text amendments to the Olympia Municipal Code authorizing a permanent homeless
18 encampment in a light industrial zone in fact failed to comply with the Growth Management Act.
19 The WWGMHB further ordered the City to bring its development regulations (the challenged text
20 amendments) into compliance with the GMA.

21 17. On May 14, 2012, counsel for Petitioner IZPA timely filed a Motion for
22 Reconsideration and a Motion to Supplement the Record seeking to include the May 4, 2012
23 WWGMHB decision in the record and requesting reconsideration of the Hearing Examiner's
24 decision in part on the basis of the decision's specific findings that the permanent homeless
25 encampment was not consistent with the City's Comprehensive Plan for the LI zoning district, as
26 required by OMC 18.02.100 for approval of development in the City of Olympia.

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 forgoing is true and correct.

3 DATED at Olympia, Washington this 15th day of June, 2012.

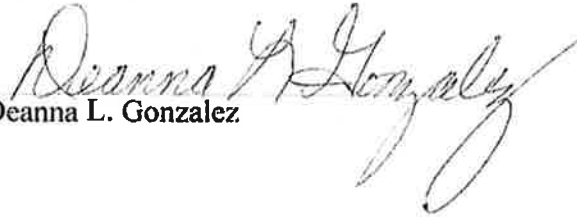
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Exhibit A